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A TABLE OF STATUTES CONSTRUED IS GIVEN IN THE INDEX.

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JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.

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[1] Became chief justice January 1, 1896.
[2] Took his seat on the bench January 1, 1896.
[3] Term expired as chief justice January 8, 1896. Re-elected judge November 5, 1895. Took his seat January 9, 1896.

COURT RULES.

CIRCUIT COURT OF MICHIGAN.

Circuit Court Rule 108. At the time of filing an information in the nature of a quo warranto, a rule shall also be filed with the clerk of the court, requiring the respondent to plead to such information within twenty days after service upon him of the summons and a copy of such information, together with a copy of such rule. The respondent shall plead to such information within twenty days after service upon him of said summons and a copy of such information, together with a copy of such rule, and in default thereof judgment by default may be entered. Within twenty days after filing and serving such plea replication shall be filed thereto and said cause shall be deemed to be at issue. The issue so framed shall be at once placed upon the calendar of the then pending term for trial, upon due notice by either party, and shall be given precedence over all civil cases. Adopted April 21, 1896.

AMENDMENT TO RULE XI. OF THE SUPREME COURT OF MINNESOTA.

RULE XI.

PAPER BOOKS AND BRIEFS—FURNISHING COPY TO ADVERSE PARTY. At least twenty days before the term of this court at which a cause is noticed for trial by the appellant or plaintiff in error, and in all cases at least twenty days before the first term of this court commencing more than sixty days after the appeal is perfected or writ of error served, the appellant or plaintiff in error shall deliver to the adverse party a copy of the paper book, and of the assignment of errors, and of his points and authorities; and on or before the first day of the term at which the cause is noticed for trial the respondent or defendant in error shall furnish the adverse party a copy of his points and authorities.

As amended April 7, 1896.

See 25 N. W. iii.

AMENDED RULES OF SUPREME COURT OF NEBRASKA.

6. [NOTICE OF MOTIONS.]—Every application for an order in any case shall be in writing, and, except as to motions for rehearing, shall be granted only upon the filing thereof at least two days before the hearing and due proof of service of notice on the adverse party, or his attorneys, at least three days before the hearing, which, in all cases, must be fixed for one of the session days provided for by rule 1. The notice herein provided for shall conform to the provisions of section 574 of the Code of Civil Procedure, and may be served by a bailiff of this court, or by any sheriff or constable in this state, or by any disinterested person; in the latter case, however, the return must be under oath. Fees for service of said notice shall be allowed and taxed as for the service of summons in proper cases.

25. [ADMISSION OF ATTORNEYS.]—The applicant shall also, with his application, deposit with the clerk the sum of five dollars. The clerk shall enter all sums so received in a book or account kept for that purpose, showing date and name of applicant, and shall pay the same out on order of the chief justice, in payment of the expenses of such examination, and for no other purpose; that is to say, the cost of necessary printing and stationery; to the clerk for each oath and certificate of admission issued to an applicant, one dollar and fifty cents; to each member of the commission conducting the examination, his necessary traveling expenses, and for personal expenses while actually engaged in the performance of his duties, not exceeding five dollars per day.

CASES REPORTED.

	Page
Abbot, McCadden v. (Wis.)	694
Abbott v. Barton (Neb.)	838
Adamek v. Plano Manuf'g Co. (Minn.)	981
Adams, Bentley v. (Wis.)	505
Adams, Michigan Trust Co. v. (Mich.)	1094
Adsit, Esler v. (Mich.)	485
Advance Thresher Co., Hilton v. (S. D.)	816
Aetna Ins. Co. v. Fowler (Mich.)	470
Aherin, State v. (Iowa)	193
Akeley v. Mississippi & R. R. Boom Co. (Minn.)	202
Albers v. Western Union Tel. Co. (Iowa)	1040
Albert, Moffitt v. (Iowa)	162
Alliance Elevator Co. v. Wells (Wis.)	796
Allsman v. Daley (Neb.)	867
Alseth, Anderson v. (S. D.)	320
Alton v. Meeuwenberg (Mich.)	571
Ambrose, State v. (Neb.)	306
American Exch. Nat. Bank of City of New York v. Crooks (Iowa)	168
American Exch. Nat. Bank of City of New York v. Dugan (Iowa)	168
American Exp. Co., Smith v. (Mich.)	479
American Tract Soc., Wheelock v. (Mich.)	955
Amos, Dupont & Co. v. (Iowa)	774
Anderson v. Alseth (S. D.)	320
Anderson v. Des Moines St. R. Co. (Iowa)	64
Anderson, Tucker v. (Iowa)	754
Anderson, Wells v. (Iowa)	102
Andres v. Kridler (Neb.)	649
Andrews, Guetzkow Bros. Co. v. (Wis.)	119
Anheuser-Busch Brewing Ass'n v. Murray (Neb.)	635
Ankeny, Basting v. (Minn.)	266
Archibald, State v. (N. D.)	234
Armstrong, Gilmore v. (Neb.)	998
Atwell v. Barnes (Mich.)	583
Auditor General v. Chandler (Mich.)	482
Auditor General, Regents of University of Michigan v. (Mich.)	956
Aultman Co. v. Ferguson (S. D.)	1081
Aurora Iron Min. Co., Petaja v. (Mich.)	951
Avenue Inv. Co., Hubbell v. (Iowa)	85
Babcock, Hazlitt v. (Minn.)	971
Backhaus v. Chicago & N. W. R. Co. (Wis.)	400
Backus, Farmers' Nat. Bank of Owatonna v. (Minn.)	5
Backus, Gill v. (Mich.)	347
Bader, Burlingim v. (Neb.)	288
Bain, Sloan v. (Neb.)	1013
Baldwin v. Hill (Iowa)	889
Baldwin v. Schiappacasse (Mich.)	1091
Bankers' Life Ass'n v. Lisco (Neb.)	412
Bank of Ada v. Gullikson (Minn.)	131
Bank of Commerce of Grand Island, Oakland Home Fire Ins. Co. v. (Neb.)	646
Bank of Volga, City of Huron v. (S. D.)	815
Banks v. Cramer (Mich.)	946
Barker v. Davies (Neb.)	11
Barker, Green v. (Neb.)	1032
Barlow, Shelden v. (Mich.)	338
Barnes v. Clement (S. D.)	810
Barnes, Atwell v. (Mich.)	583
Barnes, Wurdeman v. (Wis.)	111
Barnhard v. Village of White Cloud (Mich.)	387
Barnhart v. Chicago, M. & St. P. R. Co. (Iowa)	902
Barnhouse v. Village of Adams (Neb.)	826
Barnum v. State (Wis.)	617
Barr v. Lamaster (Neb.)	1110
Barry v. Deloughery (Neb.)	410
Barshy v. Warren (Neb.)	409
Barton, Abbott v. (Neb.)	838
Basting v. Ankeny (Minn.)	266
Bates, Shattuck v. (Wis.)	706
Baum Iron Co. v. Berg (Neb.)	8
Baxter, Gale v. (Minn.)	972
Baxter, Hoskins v. (Minn.)	969
Bay Circuit Judge, Mosher v. (Mich.)	384
Bay Circuit Judge, Mosher v. (Mich.)	478
Beatrice Rapid-Transit & Power Co., Chicago, B. & Q. R. Co. v. (Neb.)	830
Beavers v. Missouri Pac. R. Co. (Neb.)	821
Beekman v. Sylvester (Mich.)	1093
Beethe, Churchill v. (Neb.)	992
Belatti v. Pierce (S. D.)	1088
Bell, Lewis v. (Mich.)	1091
Belleheumer, Lauzon v. (Mich.)	345
Bennett v. Chicago, M. & St. P. R. Co. (S. D.)	934
Bennett, Groesbeck v. (Mich.)	664
Bentley v. Adams (Wis.)	505
Berg, Baum Iron Co. v. (Neb.)	8
Berry v. Tinsman (Mich.)	579
Berryhill, Crawford v. (Iowa)	876
Beverly, People v. (Mich.)	379
Biggs, Rohde v. (Mich.)	331
Bills, Mills v. (Iowa)	881
Bittenhaus v. Johnston (Wis.)	805
Bjelland, Wheeler & Wilson Manuf'g Co. v. (Iowa)	885
Blackburn, Welsh v. (Wis.)	528
Blum v. Van Vechten (Wis.)	507
Board of Com'rs of Douglas County, State v. (Neb.)	434
Board of Com'rs of Hennepin County v. State Bank (Minn.)	143
Board of Com'rs of Hughes County, Dewell v. (S. D.)	1079
Board of Sup'rs of Iron County, Burt v. (Mich.)	387
Board of Water Com'rs of City of Detroit, City of Detroit v. (Mich.)	377
Boasen v. State (Neb.)	303
Bollman, Norwegian Plow Co. v. (Neb.)	292
Booth, Geer v. (Wis.)	794
Bordner, Saginaw, T. & H. R. Co. v. (Mich.)	62
Botsford v. Chase (Mich.)	325
Bower, Schultz v. (Minn.)	739
Bowers v. Graves & Vinton Co. (S. D.)	931
Bowman v. Knott (S. D.)	457
Bowman v. McGilvray (S. D.)	1149
Bowman, House v. (Iowa)	165
Boyd v. City of Milwaukee (Wis.)	603
Boynton Furnace Co. v. Messner (Iowa)	65
Brack, Firth v. (Minn.)	987
Bradley, Towl v. (Mich.)	347
Brady v. Krenger (S. D.)	1083
Braun v. Wisconsin Rendering Co. (Wis.)	196
Brawley v. Mitchell (Wis.)	799
Bresler, Farrow v. (Mich.)	492
Brevig v. Chicago, St. P., M. & O. R. Co. (Minn.)	401
Brigham v. Paul (Minn.)	203
Brooks, Miller v. (Mich.)	1092
Brown v. Edmonds (S. D.)	810
Brown v. Neidhold (Mich.)	349
Brown v. Westerfield (Neb.)	439
Brown, Parsons v. (Iowa)	880
Brumder, Mahler v. (Wis.)	502
Brumfield v. Western Union Tel. Co. (Iowa)	898
Bryant, New England Furniture & Carpet Co. v. (Minn.)	974
Buckley, Hanna v. (Neb.)	1122
Buckstaff v. City of Oshkosh (Wis.)	707
Buckstaff Bros. Manuf'g Co., State Ins. Co. v. (Neb.)	27

Page

Buffalo County Nat. Bank v. Gilcrest (Neb.) 850
Building & Loan Ass'n of Dakota v. Cameron (Neb.) 1109
Bull v. Mitchell (Neb.) 632
Burdick v. Marshall (S. D.) 462
Burke v. Utah Nat. Bank (Neb.) 295
Burkhardt v. Elgee (Wis.) 525
Burkhardt v. Elgee (Wis.) 1137
Burlingim v. Bader (Neb.) 288
Burlington, C. R. & N. R. Co., Goodrich v. (Iowa) 770
Burlington, C. R. & N. R. Co., Hathaway v. (Iowa) 892
Burlington, C. R. & N. R. Co., McBride v. (Iowa) 73
Burlington, C. R. & N. R. Co., Ratzer v. (Minn.) 988
Burlington & M. R. R. Co. in Nebraska v. Gorsuch (Neb.) 831
Burlington & M. R. R. Co. in Nebraska v. Martin (Neb.) 15
Burnam v. Merchants' Exch. Bank (Wis.) 510
Burnham v. Ramge (Neb.) 277
Burris v. Court (Neb.) 1131
Burt v. Board of Sup'rs of Iron County (Mich.) 387
Bush v. Froelick (S. D.) 939
Bush v. Johnson County (Neb.) 1023
Bush v. State (Neb.) 638
Bussimus, State v. (Iowa) 193
Butler, State v. (Iowa) 193

Caledonia Fire Ins. Co., Thompson v. (Wis.) 801
Calhoun County, Holmes v. (Iowa) 145
Callen v. Rose (Neb.) 639
Cameron, Building & Loan Ass'n of Dakota v. (Neb.) 1109
Cameron, Douglas v. (Neb.) 430
Cameron, Roach v. (Iowa) 194
Campbell v. Pratt (Mich.) 473
Campbell, Herzog v. (Neb.) 424
Campbell, Ross v. (Iowa) 1064
Cannon v. Smith (Neb.) 999
Cannon, Grady v. (Wis.) 808
Capital Nat. Bank of Lincoln, Hogue v. (Neb.) 1036
Carbiener v. Montgomery (Iowa) 900
Carey v. Home Ins. Co. of New York (Iowa) 920
Carey v. Liverpool & London & Globe Ins. Co. (Wis.) 693
Carlsen, Jurgensen v. (Iowa) 877
Carmichael v. Lathrop (Mich.) 350
Carpenter v. Momsen (Wis.) 692
Carpenter, Peterson v. (Mich.) 487
Carson, Findlay v. (Iowa) 759
Carter v. Gibson (Neb.) 631
Carter, Kitchen v. (Neb.) 855
Carter White-Lead Co. v. Kinlin (Neb.) .. 536
Casgrain v. Hamilton (Wis.) 118
Cass Circuit Judge, Graham v. (Mich.) 348
Cass County, First Nat. Bank of Greenwood v. (Neb.) 300
Cathro v. Gray (Mich.) 346
Cawker v. Seamans (Wis.) 253
Chandler, Auditor General v. (Mich.) 482
Chapel, State v. (Minn.) 205
Chapin, City of Detroit v. (Mich.) 587
Chapter 6, Session Laws of 1890, In re (S. D.) 310
Chase, Botsford v. (Mich.) 325
Chesley, Menefee v. (Iowa) 1038
Chicago, B. & N. R. Co., Hinz v. (Wis.) .. 718
Chicago, B. & Q. R. Co. v. Beatrice Rapid-Transit & Power Co. (Neb.) 830
Chicago, B. & Q. R. Co. v. Hague (Neb.) 1000
Chicago, B. & Q. R. Co. v. State (Neb.) ... 624
Chicago G. W. R. Co., Thompson v. (Minn.) 265
Chicago, M. & St. P. R. Co. v. Starkweather (Iowa) 87
Chicago, M. & St. P. R. Co., Barnhart v. (Iowa) 902
Chicago, M. & St. P. R. Co., Bennett v. (S. D.) 934

Page

Chicago, M. & St. P. R. Co., Peart v. (S. D.) 814
Chicago, St. P., M. & O. R. Co., Brevig v. (Minn.) 401
Chicago, St. P., M. & O. R. Co., Shannahan v. (Minn.) 1151
Chicago, St. P. & K. C. R. Co., Kelleher v. (Iowa) 94
Chicago & G. T. R. Co., Heller v. (Mich.) 667
Chicago & G. T. R. Co., Woods v. (Mich.) 328
Chicago & N. W. R. Co., Backhaus v. (Wis.) 400
Chicago & N. W. R. Co., O'Brien v. (Wis.) 363
Chicago & N. W. R. Co., O'Connor v. (Wis.) 795
Chicago & N. W. R. Co., Wunderlich v. (Wis.) 1144
Childerson v. Childerson (Neb.) 281
Choate, Sawyer v. (Wis.) 689
Christianson v. Pioneer Furniture Co. (Wis.) 699
Churchill v. Beethe (Neb.) 992
Citizens' Nat. Bank of Madison, Dielmann v. (S. D.) 311
City of Alpena, Ruell v. (Mich.) 49
City of Des Moines, Hathaway v. (Iowa) .. 188
City of Detroit v. Board of Water Com'rs of City of Detroit (Mich.) 377
City of Detroit v. Chapin (Mich.) 587
City of Detroit v. Donovan (Mich.) 667
City of Detroit v. Lewis (Mich.) 958
City of Detroit, Leonard v. (Mich.) 488
City of Detroit, Shietart v. (Mich.) 221
City of Duluth, Kendall v. (Minn.) 1150
City of Harvard v. Crouch (Neb.) 276
City of Huron v. Bank of Volga (S. D.) ... 815
City of Huron, Freeman v. (S. D.) 928
City of Kalamazoo, Moore v. (Mich.) 1089
City of Kearney v. Smith (Neb.) 538
City of Kearney v. Themanson (Neb.) ... 996
City of Lansing v. Lansing City Electric R. Co. (Mich.) 949
City of Mauston, Sharp v. (Wis.) 803
City of Milwaukee, Boyd v. (Wis.) 603
City of Milwaukee, Yates v. (Wis.) 248
City of Newton, Farmers' Loan & Trust Co. v. (Iowa) 784
City of Omaha v. McGavock (Neb.) 415
City of Omaha, Davis v. (Neb.) 859
City of Oshkosh, Buckstaff v. (Wis.) 707
City of Rapid City, Shickle-Harrison & Howard Iron Co. v. (S. D.) 499
City of St. Paul, Meeks v. (Minn.) 966
City of St. Paul, Rundlett v. (Minn.) 967
City of Stillwater, Coles v. (Minn.) 138
City of Yankton v. Douglass (S. D.) 923
Clancy, In re (Mich.) 341
Clark v. Dillman (Mich.) 570
Clark v. Raymond (Iowa) 86
Clark, Hoyt v. (Minn.) 262
Clark, Martin v. (Neb.) 40
Cleary, State v. (Iowa) 724
Clee v. Village of Trenton (Mich.) 48
Clement, Barnes v. (S. D.) 810
Cleveland v. Koch (Mich.) 376
Cleveland Sawmill & Lumber Co., Michigan Land & Iron Co. v. (Mich.) 953
Clokus v. Holhster Min. Co. (Wis.) 398
Clough v. Mississippi & R. R. Boom Co. (Minn.) 200
Clutton v. Clutton, two cases (Mich.) 52
Coad v. Read (Neb.) 1002
Coburn, Van Etten v. (Neb.) 427
Codde v. Mahiat (Mich.) 1093
Cody, Marinette Iron Works Co. v. (Mich.) 334
Colby, Gile v. (Wis.) 802
Coles v. City of Stillwater (Minn.) 138
Collins v. Township of Grand Rapids (Mich.) 586
Collins, Gade v. (S. D.) 466
Collin & Parker Lumber Co., Gow v. (Mich.) 676
Commercial Bank v. McAuliffe (Wis.) 110
Commercial Nat. Bank of Omaha v. Merchants' Exch. Nat. Bank of New York (Neb.) 273
Connell, Doxtater v. (Wis.) 1135
Connell, Ledwich v. (Neb.) 1108
Connell, Manning v. (Neb.) 17

	Page
Conner v. Knott (S. D.)	461
Connor, Wakefield v. (Neb.)	286
Continental Nat. Bank of Chicago v. McGeoch (Wis.)	606
Cook v. Prindle (Iowa)	781
Cook, Incorporated Town of Cambridge v. (Iowa)	884
Cooley v. Kinney (Mich.)	674
Cooley, McAuley v. (Neb.)	304
Coonrod, Iowa State Sav. Bank v. (Iowa)	78
Corbett v. Fetzer (Neb.)	417
Corbin v. Winona & St. P. R. Co. (Minn.)	271
Corey, Markey v. (Mich.)	493
Cornfield v. Order of Brith Abraham (Minn.)	970
Cottrell v. Hathaway (Mich.)	596
Coughran, Turner v. (S. D.)	810
Coulter Manuf'g Co. v. Ft. Dodge Grocery Co. (Iowa)	875
Court, Burris v. (Neb.)	1131
Cramer, Banks v. (Mich.)	946
Crawford v. Berryhill (Iowa)	876
Crooker v. Smith (Neb.)	19
Crooks, American Exch. Nat. Bank of City of New York v. (Iowa)	168
Crosby v. Ritchey (Neb.)	1005
Crouch, City of Harvard v. (Neb.)	276
Crow, Omaha & R. V. R. Co. v. (Neb.)	21
Crum, Lundgren v. (Neb.)	284
Cruse, Davison v. (Neb.)	823
Culver, Travis v. (Mich.)	575
Cummins v. Cummins (Neb.)	858
Dahlquist, Veline v. (Minn.)	141
Daley v. Peters (Neb.)	862
Daley, Allsman v. (Neb.)	867
Danielson, State v. (Iowa)	193
Darling, Goldsmith v. (Wis.)	397
Davey v. First Nat. Bank of Deadwood (S. D.)	122
Davies, Barker v. (Neb.)	11
Davis v. City of Omaha (Neb.)	859
Davis v. Matthews (S. D.)	456
Davis, Swedish Nat. Bank of Minneapolis v. (Minn.)	986
Davis, Switzer v. (Iowa)	174
Davison v. Cruse (Neb.)	823
Dean v. Maher (Iowa)	182
Dean v. Town of Solon (Iowa)	182
De Goey v. Van Wyk (Iowa)	787
Deisenrieter v. Kraus-Merkel Malting Co. (Wis.)	112
De Laray, Fish v. (S. D.)	465
Delaware Ins. Co., Trustees of St. Clara Female Academy of Sinsinawa Mound v. (Wis.)	1140
Delonghery, Barry v. (Neb.)	410
Denison v. Watts (Iowa)	886
Denslow v. Dodendorf (Neb.)	409
Denzler v. Rieckhoff (Iowa)	147
De Sale v. Millard (Mich.)	481
Des Moines Brick Manuf'g Co., Farwell v. (Iowa)	176
Des Moines Loan & Trust Co. v. Des Moines Nat. Bank (Iowa)	914
Des Moines Nat. Bank v. Warren County Bank (Iowa)	154
Des Moines Nat. Bank, Des Moines Loan & Trust Co. v. (Iowa)	914
Des Moines St. R. Co., Anderson v. (Iowa)	64
Detroit, L. & N. R. Co. v. McCammon (Mich.)	471
Detroit, L. & N. R. Co., Macomber v. (Mich.)	376
Detroit Ry., Kennedy v. (Mich.)	495
Dewell v. Board of Com'rs of Hughes County (S. D.)	1079
Dewey, Issitt v. (Neb.)	288
Deyoe, State v. (Iowa)	733
Dickson v. Dryden (Iowa)	148
Dielmann v. Citizens' Nat. Bank of Madison (S. D.)	311
Dillman, Clark v. (Mich.)	570
District Tp. of Cleveland, Russell v. (Iowa)	771
D. M. Osborne & Co. v. Gullikson (Minn.)	965
Dobberstein v. Murphy (Minn.)	204
Dobbs, Neher v. (Neb.)	864
Dodendorf, Denslow v. (Neb.)	409
Donohue v. Padden (Wis.)	804
Donovan v. Sell (Minn.)	722
Donovan, City of Detroit v. (Mich.)	667
Douglas v. Cameron (Neb.)	430
Douglas County, Ryan v. (Neb.)	30
Douglass, City of Yankton v. (S. D.)	923
Dow, Riddle v. (Iowa)	1066
Dow, Thompson Nat. Bank v. (Iowa)	1066
Dowling v. Livingstone (Mich.)	225
Doxtater v. Connell (Wis.)	1135
Dryden, Dickson v. (Iowa)	148
Dugan, American Exch. Nat. Bank of City of New York v. (Iowa)	168
Duluth, S. S. & A. R. Co., Fenlon v. (Mich.)	51
Dunham, Fifth Nat. Bank v. (Mich.)	870
Dunn, Hatcher v. (Iowa)	905
Dunn, Pillard v. (Mich.)	45
Dunn, Wagg-Andersen Woolen Co. v. (Wis.)	354
Dupont & Co. v. Amos (Iowa)	774
Dwight, Howard v. (S. D.)	935
Eagle Iron Works v. Town of Guthrie Center (Iowa)	81
Eames v. Miller (Mich.)	338
Earhart v. Holmes (Iowa)	898
Eaton v. Gladwell (Mich.)	598
Edmonds, Brown v. (S. D.)	310
Edwards, Farrell v. (S. D.)	812
Edwards, Van Etten v. (Neb.)	1013
Eldridge v. Stewart (Iowa)	891
Elgee, Burkhardt v. (Wis.)	525
Elgee, Burkhardt v. (Wis.)	1137
Elm Creek Elevator Co. v. Union Pac. R. Co. (Iowa)	1059
Emery, Lewis v. (Mich.)	569
Emlaw v. Travelers' Ins. Co. (Mich.)	469
Erbacher v. Seefeld (Wis.)	252
Erickson, Goldsmith v. (Neb.)	1029
Esler v. Adsit (Mich.)	485
Estabrook v. Stevenson (Neb.)	286
Everett v. Gores (Wis.)	616
Exchange State Bank of Stuart, Hawley v. (Iowa)	152
Farmers' Co-operative Soc. of Geneva v. German Ins. Co. (Iowa)	878
Farmers' Loan & Trust Co. v. City of Newton (Iowa)	784
Farmers' Loan & Trust Co. v. Memminger (Neb.)	1014
Farmers' Mut. Live-Stock Ins. Ass'n, Gray v. (Iowa)	98
Farmers' Nat. Bank of Owatonna v. Backus (Minn.)	5
Farmers' Trust Co., Smith v. (Iowa)	84
Farmers' & Merchants' Ins. Co. v. Peterson (Neb.)	847
Farrell v. Edwards (S. D.)	812
Farrow v. Bresler (Mich.)	492
Farwell v. Des Moines Brick Manuf'g Co. (Iowa)	176
Felber v. Gooding (Neb.)	39
Fenlon v. Duluth, S. S. & A. R. Co. (Mich.)	51
Fenton's Will, In re (Iowa)	99
Ferguson, Aultman Co. v. (S. D.)	1081
Fetzer, Corbett v. (Neb.)	417
Fidelity & Casualty Co., Milwaukee Theater Co. v. (Wis.)	360
Fidelity & Casualty Co. of New York v. Lawlor (Minn.)	143
Fifth Nat. Bank v. Dunham (Mich.)	870
Fillmore v. Great Camp of the Maccabees of Michigan (Mich.)	675
Findlay v. Carson (Iowa)	759
Findlay v. Russe Wheel & Foundry Co. (Mich.)	50
Findlay, Oltmanns v. (Neb.)	425
Findley v. Taylor (Iowa)	744
Finkelstein, Storz v. (Neb.)	1020
First Nat. Bank of Chadron v. McKinney (Neb.)	280
First Nat. Bank of Deadwood, Davey v. (S. D.)	122

Page

First Nat. Bank of Devils Lake v. Manchester Fire Assur Co. (Minn.) 136
Firs. Nat. Bank of Fond du Lac v. Liverpool & London & Globe Ins. Co. (Wis.)... 693
First Nat. Bank of Greenwood v. Cass County (Neb.) 300
First Nat. Bank of Redfield v. Koechel (S. D.) 933
First Nat. Bank of Stanton, Strahle v. (Neb.) 415
First Nat. Bank of Wilber v. Ridpath (Neb.) 37
Firth v. Brack (Minn.) 987
Firth, Olmstead v. (Minn.) 988
Fish v. De Laray (S. D.) 465
Fisher, State v. (Iowa) 193
Fitzgerald v. McClay (Neb.) 828
Fitzhugh v. Rivard (Mich.) 947
Flenniken v. Liscoe (Minn.) 979
Fletcher, J. F. Seiberling & Co. v. (Neb.).. 839
Fleugel v. Lards (Mich.) 585
Flood v. Strong (Mich.) 473
Flynn, Germania Spar & Bau Verein v. (Wis.) 109
Fokken, Romberg v. (Neb.) 282
Ford v. Hill (Wis.) 115
Ft. Dodge Grocery Co., Coulter Manuf'g Co. v. (Iowa) 875
Fortsch, Teague v. (Iowa) 1056
Foster Lumber Co., Klatt v. (Wis.) 791
Foster Lumber Co., Klatt v. (Wis.) 793
Fountain v. Hutchinson (Mich.) 477
Fountaine v. Leveque (Mich.) 575
Fountain Spring Park Co. v. Roberts (Wis.) 399
Fowler, Aetna Ins. Co. v. (Mich.) 470
Fox v. Williams (Wis.) 357
Fractional School Dist. No. 1, Paw Paw and Antwerp Tps., v. Yerrington (Mich.).. 324
Frank v. Scoville (Neb.) 1113
Franke v. Wiegand (Iowa) 918
Franke's Estate, In re (Iowa) 918
Franklin v. State (Wis.) 107
Frazer, William Wright Co. v. (Mich.)... 954
Free, Lynch v. (Minn.) 973
Freeman v. City of Huron (S. D.) 928
Froelick, Bush v. (S. D.) 939
Fry v. Kaessner (Neb.) 1126
Fuldner, Merchants' Exch. Bank v. (Wis.) 691
Fuller v. Lake Shore & M. S. R. Co. (Mich.) 593
Fuller v. Pauley (Neb.) 1115
Funk, Leach v. (Iowa) 768
Furenes v. Servertson (Iowa) 918

Gade v. Collins (S. D.) 466
Gale v. Baxter (Minn.) 972
Gallager v. Serfling (Wis.) 692
Galligan, Seaman v. (S. D.) 458
Galligher v. Wolf (Neb.) 645
Gamble, Little v. (Neb.) 849
Garber v. Palmer, Blanchard & Co. (Neb.). 656
Garthwaite, Meyer v. (Wis.) 704
Garton, Unland v. (Neb.) 1130
Gates v. Parmly (Wis.) 253
Geer v. Booth (Wis.) 794
Geer v. Holcomb (Wis.) 793
Gerhold, Walter A. Wood Mowing & Reaping Mach. Co. v. (Neb.) 538
Germania Spar & Bau Verein v. Flynn (Wis.) 109
German Ins. Co., Farmers' Co-operative Soc. of Geneva v. (Iowa) 878
Gibson v. McClay (Neb.) 851
Gibson, Carter v. (Neb.) 631
Gibson, State v. (Iowa) 742
Giegling, Gumz v. (Mich.) 48
Giffen, Sharpless v. (Neb.) 285
Gilbert, Sundback v. (S. D.) 941
Gilcrest v. Macartney (Iowa) 103
Gilcrest v. Nantker (Neb.) 16
Gilcrest, Buffalo County Nat. Bank v. (Neb.) 850
Gile v. Colby (Wis.) 802
Gilfillan v. Schmidt (Minn.) 126
Gill v. Backus (Mich.) 347
Gillett v. Knowles (Mich.) 497
Gilmore v. Armstrong (Neb.) 998

Page

Gilruth, Small v. (S. D.) 452
Gladwell, Eaton v. (Mich.) 598
Glover v. Wells & Mulrooney Grain Co. (Wis.) 799
Goldsmith v Darling (Wis.) 397
Goldsmith v. Erickson (Neb.) 1029
Goldstone, Wickens v. (Iowa) 896
Goodin v. Plugge (Neb.) 407
Gooding, Felber v. (Neb.) 39
Goodman, Lessell v. (Iowa) 917
Goodrich v. Burlington, C. R. & N. R. Co. (Iowa) 770
Goodwin v. Provident Sav. Life Assur. Soc. of New York (Iowa) 157
Goos, Philadelphia Mortgage & Trust Co. v. (Neb.) 843
Gores, Everett v. (Wis.) 616
Gorsuch, Burlington & M. R. R. Co. in Nebraska v. (Neb.) 831
Gosney Live-Stock Commission Co., Paddock v. (Neb.) 1121
Gow v. Collin & Parker Lumber Co. (Mich.) 676
Grady v. Cannon (Wis.) 808
Graff, State v. (Iowa) 779
Graham v. Cass Circuit Judge (Mich.) 348
Graham, Waugh v. (Neb.) 301
Grant v. Grant (Minn.) 983
Grant, Hart v. (S. D.) 322
Graves, Springer Lithographing Co. v. (Iowa) 66
Graves & Vinton Co., Bowers v. (S. D.)... 931
Gray v. Farmers' Mut. Live-Stock Ins. Ass'n (Iowa) 98
Gray, Cathro v. (Mich.) 346
Great Camp of the Maccabees of Michigan, Fillmore v. (Mich.) 675
Great Northern R. Co., Steenerson v. (Minn.) 723
Great Northern R. Co., Warren v. (Minn.) 984
Green v. Barker (Neb.) 1032
Green v. Wilkie (Iowa) 1046
Green Bay & M. Canal Co., Patten Paper Co. v. (Wis.) 601
Grimes v. Northwestern Legion of Honor (Iowa) 183
Griswold v. Hutchinson (Neb.) 819
Groesbeck v. Bennett (Mich.) 664
Gross v Milwaukee Mechanics Ins. Co. (Wis.) 712
Gross v. Western Assur. Co. (Wis.) 712
Guetzkow Bros. Co. v. Andrews (Wis.).. 119
Gullikson, Bank of Ada v. (Minn.) 131
Gullikson, D. M. Osborne & Co. v. (Minn.) 965
Gumz v. Giegling (Mich.) 48
Guthrie v. Hester (Neb.) 853
Guyar v. Minnesota Thresher Manuf'g Co. (Iowa) 83

Haas, Sterner v. (Mich.) 348
Hague, Chicago, R. & Q. R. Co. v. (Neb.). 1000
Hall v. Hooper (Neb.) 33
Hall v. Leland (Minn.) 202
Hall, Hemstad v. (Minn.) 366
Hall, Maynard v. (Wis.) 715
Hall, State v. (Iowa) 725
Hall, State v. (Neb.) 642
Ham, State v. (Iowa) 1038
Hamill, Morse v. (Iowa) 892
Hamilton v. Thoen (Iowa) 166
Hamilton, Casgrain v. (Wis.) 118
Hamilton, Livesey v. (Neb.) 644
Hanna v. Buckley (Neb.) 1122
Hanover Fire Ins. Co. v. Parrotte (Neb.).. 636
Hanscom, Thorpe v. (Minn.) 1
Hansen, Missouri Pac. R. Co. v. (Neb.).. 1105
Hansen, Tanderup v. (S. D.) 1073
Hanson, Monroe v. (Neb.) 12
Harmon, Tecumseh Nat. Bank v. (Neb.).. 1128
Harris, State v. (Iowa) 728
Harrison v. Pusteoska (Iowa) 93
Harrison, St. Paul & M. Trust Co. v. (Minn.) 980
Hart v. Grant (S. D.) 322
Hart v. Mt. Pleasant Park Stock Co. (Iowa) 190
Hatcher v Dunn (Iowa) 905

	Page
Hathaway v. Burlington, C. R. & N. R. Co. (Iowa)	892
Hathaway v. City of Des Moines (Iowa)	188
Hathaway, Cottrell v. (Mich.)	596
Hawkeye Ins. Co., Woodcock v. (Iowa)	764
Hawley v. Exchange State Bank of Stuart (Iowa)	152
Hawley, Smith v. (S. D.)	942
Hay v. Miller (Neb.)	1115
Hay, Stephens v. (Iowa)	1048
Hazer v. Streich (Wis.)	720
Hazlitt v Babcock (Minn.)	971
Hediger, Romberg v. (Neb.)	283
Heller v. Chicago & G. T. R. Co. (Mich.)	667
Helm, State v. (Iowa)	751
Hemstad v. Hall (Minn.)	366
Henkle v. Holmes (Iowa)	910
Herold v. Pfister (Wis.)	355
Herzog v Campbell (Neb.)	424
Hester, Guthrie v. (Neb.)	853
Hickey, Hynes v. (Mich.)	1090
Hickman v. Layne (Neb.)	298
Hicks v. Swan (Iowa)	762
Hildebrandt, Holliday v. (Iowa)	89
Hill, Baldwin v. (Iowa)	889
Hill, Ford v. (Wis.)	115
Hill, Leach v. (Iowa)	69
Hill, State v. (Neb.)	541
Hill, Whitesell v. (Iowa)	894
Hilton v. Advance Thresher Co. (S. D.)	816
Hinken v. Iowa Cent. R. Co. (Iowa)	882
Hinkle v Saddler (Iowa)	765
Hinz v Chicago, B. & N. R. Co. (Wis.)	718
Historical Pub. Co. v. La Vaque (Minn.)	1150
Hogeboom, Omaha Loan & Trust Co. v. (Neb.)	14
Hogmire, Sagar v. (Mich.)	327
Hogue v. Capital Nat. Bank of Lincoln (Neb.)	1036
Holcomb, Geer v. (Wis.)	793
Holliday v. Hildebrandt (Iowa)	89
Hollister Min. Co., Clokus v. (Wis.)	398
Holmes v. Calhoun County (Iowa)	145
Holmes, Earhart v. (Iowa)	898
Holmes, Henkle v. (Iowa)	910
Holmes Sanitarium, Hutchinson v. (Wis.)	700
Home Fire Ins. Co. v. Kennedy (Neb.)	278
Home Ins. Co., Minneapolis, St. P. & S. S. M. R. Co. v. (Minn.)	132
Home Ins. Co. of New York, Carey v. (Iowa)	920
Hooper, Hall v. (Neb.)	33
Hoover v. State (Neb.)	1117
Hoover, Howery v. (Iowa)	772
Hoover, May v. (Neb.)	1134
Hornberger v. State (Neb.)	23
Horner, Merriam v. (Wis.)	808
Hornick v. Maguire (Neb.)	867
Hoskins v. Baxter (Minn.)	969
Hosmer, Voigt Brewing Co. v. (Mich.)	217
Houck v. Linn (Neb.)	1103
Hough, Stover v. (Neb.)	825
House v. Bowman (Iowa)	165
Howard v. Dwight (S. D.)	935
Howell v. Smith (Mich.)	218
Howery v. Hoover (Iowa)	772
Howland v. Sharp (Neb.)	1133
Hoyt v. Clark (Minn.)	262
Hubbell v. Avenue Inv. Co. (Iowa)	85
Huber v. La Crosse City R. Co. (Wis.)	708
Huebner, Schultz v. (Mich.)	57
Hughes v. Jones (Mich.)	337
Hughes, State v. (S. D.)	1076
Humpton v Unterkircher (Iowa)	776
Hunt v. King (Iowa)	71
Huntimer, Olson v. (S. D.)	313
Huntington v. Meyer (Wis.)	500
Huron Nat. Bank, Staples v. (S. D.)	314
Hutchinson v Holmes Sanitarium (Wis.)	700
Hutchinson, Fountain v. (Mich.)	477
Hutchinson, Griswold v. (Neb.)	819
Hutchison Manuf'g Co. v. Pinch (Mich.)	340
Hyde v. Kent (Neb.)	39
Hynes v Hickey (Mich.)	1090
Illinois Cent. R. Co., Powers v. (Iowa)	76
Incorporated Town of Cambridge v. Cook (Iowa)	884
Ingham Circuit Judge, Lansing Lumber Co. v. (Mich.)	41
Iowa Cent. R. Co., Hinken v. (Iowa)	882
Iowa City State Bank v. Novak (Iowa)	186
Iowa Inv. Co. v. Shepard (S. D.)	451
Iowa State Sav. Bank v. Coonrod (Iowa)	78
Iowa State Sav. Bank v. Jacobson (S. D.)	453
Irey, Monell v. (Neb.)	289
Isaac, Van Blarcom v. (Wis.)	617
Issitt v. Dewey (Neb.)	288
Jackson v State (Wis.)	393
Jackson, Smith v. (Iowa)	80
Jackson County, Swigart v. (Iowa)	881
Jacobson v. Van Boening (Neb.)	993
Jacobson, Iowa State Sav. Bank v. (S. D.)	453
Jacobson, Olander v. (S. D.)	1149
James, Klotz v. (Iowa)	190
Janesville Water-Power Co., State v. (Wis.)	512
Jenks v. Lansing Lumber Co. (Iowa)	231
J. F. Seiberling & Co. v. Fletcher (Neb.)	839
John Hutchison Manuf'g Co. v. Pinch (Mich.)	340
Johnson v Reed (Neb.)	405
Johnson County, Bush v. (Neb.)	1023
Johnston, Bittenhaus v. (Wis.)	805
Johnston, Kohn v., two cases (Iowa)	76
Joint School Dist. No. 8, Town of Harmony, v. School Dist. No. 5, Town of Harmony (Wis.)	794
Jones v. Phœnix Ins. Co. of Hartford, Conn. (Iowa)	169
Jones, Hughes v. (Mich.)	337
Jones, Mathews v. (Neb.)	622
Jones, Smith v. (Neb.)	19
Jones, Stall v. (Neb.)	653
Jourdan, Reed v. (Mich.)	947
J. Thompson & Sons Manuf'g Co. v. Perkins (Iowa)	874
Judge of Superior Court of Grand Rapids, Stebbins v. (Mich.)	594
Jurgensen v. Carlsen (Iowa)	877
Kaessner, Fry v. (Neb.)	1126
Kearney Milling & Elevator Co. v. Union Pac. R. Co. (Iowa)	1059
Kearney Nat. Bank, Steele v. (Neb.)	841
Keens, Sheasley v. (Neb.)	1010
Kelleher v. Chicago, St. P. & K. C. R. Co. (Iowa)	94
Keller v. Town of Gilman (Wis.)	800
Kelley Co., State Bank of Lushton v. (Neb.)	619
Kellogg, Lee v. (Mich.)	380
Kelly v. Westcott (Iowa)	74
Kelly, Larson v. (Minn.)	130
Kelsey v. Welch (S. D.)	390
Kendall v. City of Duluth (Minn.)	1150
Kennedy v. Detroit Ry. (Mich.)	495
Kennedy v. Lake Superior Terminal & Transfer R. Co. (Wis.)	1137
Kennedy, Home Fire Ins. Co. v. (Neb.)	278
Kent, Hyde v. (Neb.)	39
King, Hunt v. (Iowa)	71
King, State v. (Iowa)	735
Kinlin, Carter White-Lead Co. v. (Neb.)	536
Kinne v. Michigan Mut. Life Ins. Co. (Wis.)	359
Kinney, Cooley v. (Mich.)	674
Kinney, Union Pac. R. Co. v. (Neb.)	449
Kinsella v. Sharp (Neb.)	634
Kirschbaum, Scott v. (Neb.)	443
Kitchen v. Carter (Neb.)	855
Klatt v. N. C. Foster Lumber Co. (Wis.)	791
Klatt v. N. C. Foster Lumber Co. (Wis.)	793
Klingman, Nebraska Moline Plow Co. v. (Neb.)	1101
Klotz v. James (Iowa)	190
Knopf, People v. (Mich.)	951
Knott, Bowman v. (S. D.)	457
Knott, Conner v. (S. D.)	461
Knowles, Gillett v. (Mich.)	497
Knox v. Meehan (Minn.)	1149
Knox v. Nicoli (Iowa)	876
Koch, Cleveland v. (Mich.)	376

	Page
Koechel, First Nat. Bank of Redfield v. (S. D.)	933
Kohn v. Johnston, two cases (Iowa)	76
Kosters, Van Etten v. (Neb.)	1106
Kraus-Merkel Malting Co., Deisenrieter v. (Wis.)	112
Kreuger, Brady v. (S. D.)	1083
Kridler, Andres v. (Neb.)	649
Krueger, Young v. (Wis.)	355
Kundson, Leach v. (Iowa)	913
Kunz v. Young (Iowa)	879
Kurtz, Ristine v. (Iowa)	185
La Croix, State v. (S. D.)	944
La Crosse City R. Co., Huber v. (Wis.)	708
Lake Shore & M. S. R. Co., Fuller v. (Mich.)	593
Lake Superior Terminal & Transfer R. Co., Kennedy v. (Wis.)	1137
Lamaster, Barr v. (Neb.)	1110
Landyskowski v. Lark (Mich.)	371
Laner, State v. (Iowa)	193
Lang, Purcell v. (Iowa)	887
Lansing City Electric R. Co., City of Lansing v. (Mich.)	949
Lansing Lumber Co. v. Ingham Circuit Judge (Mich.)	41
Lansing Lumber Co., Jenks v. (Iowa)	231
Lards, Fleugel v (Mich.)	585
Lark, Landyskowski v. (Mich.)	371
Larson v. Kelly (Minn.)	130
Lathrop, Carmichael v. (Mich.)	350
La Tour, Wilson v. (Mich.)	474
Lauzon v. Belleheumer (Mich.)	345
La Vaque, Historical Pub. Co. v. (Minn.)	1150
Lawlor, Fidelity & Casualty Co. of New York v. (Minn.)	143
Layne, Hickman v. (Neb.)	298
Leach v. Funk (Iowa)	768
Leach v. Hill (Iowa)	69
Leach v. Kundson (Iowa)	913
Ledwich v Connell (Neb.)	1108
Lee v. Kellogg (Mich.)	380
Le Hane v. State (Neb.)	1017
Lehigh Coal & Iron Co., Northwestern Iron Co. v. (Wis.)	515
Leighton v. Serveson (S. D.)	938
Leipird v. Stotler (Iowa)	150
Leland, Hall v. (Minn.)	202
Leonard v. City of Detroit (Mich.)	488
Leqve v. Stoppel (Minn.)	124
Leqve v. Stoppel (Minn.)	208
Lessell v. Goodman (Iowa)	917
Leveque, Fountaine v. (Mich.)	575
Lewis v. Bell (Mich.)	1091
Lewis v. Emery (Mich.)	569
Lewis v. Mills (Neb.)	817
Lewis, City of Detroit v. (Mich.)	958
Lindsay v. Pettigrew (S. D.)	321
Linn, Houck v. (Neb.)	1103
Lisco, Bankers' Life Ass'n v. (Neb.)	412
Liscoe, Flenniken v. (Minn.)	979
Litchfield v. Sewell (Iowa)	104
Little v. Gamble (Neb.)	849
Liverpool & London & Globe Ins. Co., Carey v. (Wis.)	693
Liverpool & London & Globe Ins. Co., First Nat. Bank of Fond du Lac v. (Wis.)	693
Livesey v. Hamilton (Neb.)	644
Livingstone, Dowling v. (Mich.)	225
Lockwood v. Michigan Mut. Life Ins. Co. (Mich.)	229
Loder, State v. (Iowa)	193
Lombard Inv. Co. v. Snowden (Neb.)	839
Long v. Valleau (Iowa)	195
Longyear v. Minnesota Lumber Co. (Mich.)	567
Louden v. Vinton (Mich.)	222
Louis v. Union Pac. R. Co. (Neb.)	1133
Loushman, Murray v. (Neb.)	413
Lovell v. McCaughey (S. D.)	1085
Lundgren v. Crum (Neb.)	284
Lynch v. Free (Minn.)	973
Macartney, Gilcrest v. (Iowa)	103
McAuley v. Cooley (Neb.)	304
McAuliffe, Commercial Bank v. (Wis.)	110
McBride v. Burlington, C. R. & N. R. Co. (Iowa)	73
McCadden v. Abbot (Wis.)	694
McCall v. State (Neb.)	635
McCammon, Detroit, L. & N. R. Co. v. (Mich.)	471
McCarvel v. Phenix Ins. Co. of Brooklyn (Minn.)	367
McCaughey, Lovell v. (S. D.)	1085
McClay, Fitzgerald v. (Neb.)	828
McClay, Gibson v. (Neb.)	851
McClelland v. Scroggin (Neb.)	1123
McCoy v Northwestern Mutual Relief Ass'n (Wis.)	697
McDonald v. Magirl (Iowa)	904
McDonnell v. Rigney (Mich.)	52
McEvony, Phenix Iron-Works Co. v. (Neb.)	290
McFarland v. West Side Imp. Co. (Neb.)	637
McGavock, City of Omaha v. (Neb.)	415
McGeoch, Continental Nat. Bank of Chicago v. (Wis.)	606
McGilvray, Bowman v. (S. D.)	1149
McGlaughlin, People v. (Mich.)	385
McGuire, State v. (Iowa)	193
McHard v. Williams (S. D.)	930
McKenzie, Washington Loan & Trust Co. v. (Minn.)	976
McKinney, First Nat. Bank of Chadron v. (Neb.)	280
McNamara, State v. (Iowa)	192
Macomber v. Detroit, L. & N. R. Co. (Mich.)	376
Magirl, McDonald v. (Iowa)	904
Maguire, Hornick v. (Neb.)	867
Maher, Dean v. (Iowa)	182
Mahiat, Codde v. (Mich.)	1093
Mahler v. Brunder (Wis.)	502
Malm v. Thelin (Neb.)	650
Manchester Fire Assur. Co., First Nat. Bank of Devils Lake v. (Minn.)	136
Manchester Fire Assur. Co., Oshkosh Match Works v. (Wis.)	525
Manker v. Sine (Neb.)	840
Manning v. Connell (Neb.)	17
Marinette Iron Works Co. v. Cody (Mich.)	334
Markey v. Corey (Mich.)	493
Maroney v. Maroney (Iowa)	911
Martin v. Clark (Neb.)	40
Martin v. Smith (Mich.)	61
Martin, Burlington & M. R. R. Co. in Nebraska v. (Neb.)	15
Martin, Omaha St. R. Co. v. (Neb.)	1007
Marshall, Burdick v. (S. D.)	462
Mathews v. Jones (Neb.)	622
Matthews v. Metcalf (Iowa)	189
Matthews, Davis v. (S. D.)	456
May v. Hoover (Neb.)	1134
Maynard v. Hall (Wis.)	715
Maynard v Stillson (Mich.)	388
Mead, Tzschuck v. (Neb.)	428
Meehan, Knox v. (Minn.)	1149
Meeks v. City of St. Paul (Minn.)	966
Meeuwenberg, Alton v. (Mich.)	571
Melick, Norton v. (Iowa)	780
Melms v. Pabst Brewing Co. (Wis.)	244
Melms v. Pabst Brewing Co. (Wis.)	518
Memminger, Farmers' Loan & Trust Co. v. (Neb.)	1014
Menasha Wooden-Ware Co., Schmidt v. (Wis.)	695
Menefee v. Chesley (Iowa)	1038
Merchants' Exch. Bank v. Fuldner (Wis.)	691
Merchants' Exch. Bank, Burnam v. (Wis.)	510
Merchants' Exch. Nat. Bank of New York, Commercial Nat. Bank of Omaha v. (Neb.)	273
Merchants' & Bankers' Mut. Ins. Co., O'Leary v. (Iowa)	175
Merriam v. Horner (Wis.)	808
Merriman, Sharp v. (Mich.)	372
Messner, Boynton Furnace Co. v. (Iowa)	65
Metcalf, Matthews v. (Iowa)	189
Meyer v. Garthwaite (Wis.)	704
Meyer, Huntington v. (Wis.)	500
Meyer, Ryan v. (Mich.)	667
Meyer, Wheeler v. (Mich.)	46
Michigan Land & Iron Co. v. Cleveland Sawmill & Lumber Co. (Mich)	953

	Page
Michigan Masonic Mut. Ben. Ass'n, Wolf v. (Mich.)	576
Michigan Mut. Life Ins. Co., Kinne v. (Wis.)	359
Michigan Mut. Life Ins. Co., Lockwood v. (Mich.)	229
Michigan Trust Co. v. Adams (Mich.)	1094
Middlestadt v. Waupaca Starch & Potato Co. (Wis)	713
Millard, De Sale v. (Mich.)	481
Miller v. Brooks (Mich.)	1092
Miller, Eames v. (Mich.)	338
Miller, Hay v. (Neb.)	1115
Mills v. Bills (Iowa)	881
Mills, Lewis v. (Neb.)	817
Mills, Nelson v. (Neb.)	854
Milwaukee Mechanics' Ins. Co., Gross v. (Wis.)	712
Milwaukee Mechanics' Ins. Co., Trustees of St. Clara Female Academy of Sinsinawa Mound v. (Wis.)	1140
Milwaukee St. R. Co., Olwell v. (Wis.)	362
Milwaukee Theater Co. v. Fidelity & Casualty Co. (Wis.)	360
Minneapolis, St. P. & S. S. M. R. Co. v. Home Ins. Co. (Minn.)	132
Minneapolis, St. P. & S. S. M. R. Co., Weikle v. (Minn.)	963
Minnesota Lumber Co., Longyear v. (Mich.)	567
Minnesota Thresher Manuf'g Co., Guyar v. (Iowa)	83
Mississippi & R. R. Boom Co Akeley v. (Minn.)	202
Mississippi & R. R. Boom Co., Clough v. (Minn.)	200
Missouri Pac. R. Co. v. Hansen (Neb.)	1105
Missouri Pac. R. Co., Beavers v. (Neb.)	821
Mitchell, Brawley v. (Wis.)	799
Mitchell, Bull v. (Neb.)	632
Moffitt v. Albert (Iowa)	162
Momsen, Carpenter v. (Wis.)	692
Monell v. Irey (Neb.)	289
Monroe v. Hanson (Neb.)	12
Montgomery, Carbiener v. (Iowa)	900
Moore v. City of Kalamazoo (Mich.)	1089
Moore v. Scott (Neb.)	441
Moore v. Thompson (Mich.)	51
Morse v. Hamill (Iowa)	892
Mosher v Bay Circuit Judge (Mich.)	384
Mosher v. Bay Circuit Judge (Mich.)	478
Mosher v. Mosher (Mich.)	486
Mt. Pleasant Park Stock Co., Hart v. (Iowa)	190
Moyer, Rice v. (Iowa)	94
Mulvena, Murphy v. (Mich.)	224
Murphey v. Virgin (Neb.)	652
Murphey v. Weil (Wis.)	532
Murphy v. Mulvena (Mich.)	224
Murphy, Dobberstein v. (Minn.)	204
Murphy, Rider v. (Neb.)	837
Murray v. Loushman (Neb.)	413
Murray, Anheuser-Busch Brewing Ass'n v. (Neb.)	635
Mushrush, State v. (Iowa)	746
Mutual Fire Ins. Co. v. Phœnix Furniture Co. (Mich.)	1095
Myers, Walsh v. (Wis.)	250
Myrick, Scarborough v. (Neb.)	867
Nantker, Gilcrest v. (Neb.)	16
N. C. Foster Lumber Co., Klatt v. (Wis.)	791
N. C. Foster Lumber Co., Klatt v. (Wis.)	793
Nebraska Moline Plow Co. v. Klingman (Neb.)	1101
Neeves, Pearson v. (Wis.)	357
Neher v. Dobbs (Neb.)	864
Neidhold, Brown v. (Mich.)	349
Nelson v. Mills (Neb.)	854
Nelson v. St. Paul Title Insurance & Trust Co. (Minn.)	206
Nelson, Tyler v. (Mich.)	671
New England Furniture & Carpet Co. v. Bryant (Minn)	974
New Hampshire Trust Co., State Ins. Co. v. (Neb.)	9
New Hampshire Trust Co., State Ins. Co. v. (Neb.)	1106
Newson, State v. (S. D.)	468
Nicoli, Knox v. (Iowa)	876
Northwestern Iron Co. v. Lehigh Coal & Iron Co. (Wis.)	515
Northwestern Legion of Honor, Grimes v. (Iowa)	183
Northwestern Mutual Relief Ass'n, McCoy v. (Wis.)	697
Northwestern Nat. Bank v. Sloan (Iowa)	91
Northwestern Nat. Ins. Co., Trustees of St. Clara Female Academy of Sinsinawa Mound v. (Wis.)	1140
Norton v. Melick (Iowa)	780
Norwegian Plow Co. v. Bollman (Neb.)	292
Novak, Iowa City State Bank v. (Iowa)	186
Novelty Paper-Box & Supply Co. v. Stone (Wis.)	600
Oakland Home Fire Ins. Co. v. Bank of Commerce of Grand Island (Neb.)	646
O'Brien v. Chicago & N. W. R. Co. (Wis.)	363
O'Connor v Chicago & N. W. R. Co. (Wis.)	795
Oeflein v. Zaucke (Wis.)	108
Olander v. Jacobson (S. D.)	1149
O'Leary v. Merchants' & Bankers' Mut. Ins. Co. (Iowa)	175
O'Leary, State v (Minn.)	264
Olmstead v. Firth (Minn.)	988
Olmsted, Post v. (Neb.)	828
Olson v. Huntimer (S. D.)	313
Oltmanns v. Findlay (Neb.)	425
Olwell v. Milwaukee St. R. Co. (Wis.)	362
Omaha Brewing Ass'n v. Wuethrich (Neb.)	990
Omaha Loan & Trust Co. v. Hogeboom (Neb.)	14
Omaha Real Estate & Trust Co. v. Reiter (Neb.)	658
Omaha St. R. Co. v. Martin (Neb.)	1007
Omaha & C. B. Railway & Bridge Co., Smith v. (Iowa)	1041
Omaha & R. V. R. Co. v. Crow (Neb.)	21
Omaha & R. V. R. Co. v. Wright (Neb.)	842
Order of Brith Abraham, Cornfield v. (Minn.)	970
Osborne & Co. v. Gullikson (Minn.)	965
Oshkosh Match Works v. Manchester Fire Assur. Co. (Wis.)	525
O. S. Kelley Co., State Bank of Lushton v. (Neb.)	619
Otto, Reilly v. (Mich.)	228
Oyler v. Ross (Neb.)	1099
Pabst Brewing Co., Melms v. (Wis.)	244
Pabst Brewing Co., Melms v. (Wis.)	518
Pabst Brewing Co., Schip v. (Minn.)	3
Padden, Donohue v. (Wis.)	804
Paddock v. Sam Gosney Live-Stock Commission Co. (Neb.)	1121
Palmer v. Palmer (Iowa)	734
Palmer, Blanchard & Co., Garber v. (Neb.)	656
Parker, Smith v. (Iowa)	908
Parker's Estate, In re (Iowa)	908
Parmly, Gates v. (Wis.)	253
Parrotte, Hanover Fire Ins. Co. v. (Neb.)	636
Parsons v. Brown (Iowa)	880
Paterson, Wheeler v. (Minn.)	964
Patten Paper Co. v. Green Bay & M. Canal Co. (Wis.)	601
Patterson, Stebbins v. (Mich.)	484
Patty, State v. (Iowa)	727
Paul, Brigham v. (Minn.)	203
Pauley, Fuller v. (Neb.)	1115
Pearson v. Neeves (Wis.)	357
Peart v. Chicago, M. & St. P. R. Co. (S. D.)	814
People v. Beverly (Mich.)	379
People v. Knopf (Mich.)	951
People v. McGlaughlin (Mich.)	385
People v. Pope (Mich.)	213
People v. Powers (Mich.)	215
People v. Ricketts (Mich.)	483
People v. Smith (Mich.)	382
People v. Thacker (Mich.)	562
People v. Thompson (Mich.)	478

	Page
People v. Weaver (Mich.)	567
People v. Whipple (Mich.)	490
People v. Wirth (Mich.)	41
Perkins, J. Thompson & Sons Manuf'g Co. v. (Iowa)	874
Petaja v. Aurora Iron Min. Co. (Mich.)	951
Peters, Daley v. (Neb.)	862
Peterson v. Carpenter (Mich.)	487
Peterson v. Walter A. Wood Mowing & Reaping Mach. Co. (Iowa)	96
Peterson, Farmers' & Merchants' Ins. Co. v. (Neb.)	847
Petry, In re (Neb.)	308
Pettigrew, Lindsay v. (S. D.)	321
Pfister, Herold v. (Wis.)	355
Phenix Ins. Co. of Brooklyn, McCarvel v. (Minn.)	367
Phenix Iron-Works Co. v. McEvony (Neb.)	290
Philadelphia Mortgage & Trust Co. v. Goos (Neb.)	843
Phillips v. Wilmarth (Iowa)	1053
Philpot, State v. (Iowa)	730
Phœnix Furniture Co., Mutual Fire Ins. Co. v. (Mich.)	1095
Phœnix Ins. Co. of Hartford, Conn., Jones v. (Iowa)	169
Pierce v. Wagner (Minn.)	977
Pierce, Belatti v. (S. D.)	1088
Pillard v. Dunn (Mich.)	45
Pinch v. Willard (Mich.)	42
Pinch, John Hutchison Manuf'g Co. v. (Mich.)	340
Pioneer Fuel Co., Yanish v. (Minn.)	198
Pioneer Furniture Co., Christianson v. (Wis.)	699
Pjarrou v. State (Neb.)	422
Plano Manuf'g Co., Adamek v. (Minn.)	981
Plugge, Goodin v. (Neb.)	407
Pope, People v. (Mich.)	213
Porter, State v. (Iowa)	745
Port Huron Engine & Thresher Co., Sherman v. (S. D.)	1077
Post v. Olmsted (Neb.)	828
Potter, Shakman v. (Iowa)	1045
Powers v. Illinois Cent. R. Co. (Iowa)	76
Powers, People v. (Mich.)	215
Pratt, Campbell v. (Mich.)	473
Press, Roberts v. (Iowa)	756
Preston, Pythian Life Ass'n v. (Neb.)	445
Price, Treat v. (Neb.)	834
Prindle, Cook v. (Iowa)	781
Provident Sav. Life Assur. Soc. of New York, Goodwin v. (Iowa)	157
Purcell v. Lang (Iowa)	887
Pusteoska, Harrison v. (Iowa)	93
Pythian Life Ass'n v. Preston (Neb.)	445
Quigley v. St. Paul Title Insurance & Trust Co. (Minn.)	364
Ramge, Burnham v. (Neb.)	277
Ramge, Sweeney v. (Neb.)	9
Ratzer v. Burlington, C. R. & N. R. Co. (Minn.)	988
Rawlings v. Young Men's Christian Ass'n of Lincoln (Neb.)	1124
Raymond, Clark v. (Iowa)	86
Read, Coad v. (Neb.)	1002
Reddington, State v. (S. D.)	464
Reed v. Jourdan (Mich.)	947
Reed v. Reed (Mich.)	381
Reed, Johnson v. (Neb.)	405
Regents of University of Michigan v. Auditor General (Mich.)	956
Regier v. Shreck (Neb.)	618
Reickhoff, Denzler v. (Iowa)	147
Reilly v. Otto (Mich.)	228
Reiter, Omaha Real Estate & Trust Co. v. (Neb.)	658
Reysen v. Roate (Wis.)	599
Rice v. Moyer (Iowa)	94
Rice, Saxe v. (Minn.)	268
Richter, Schubert v (Iowa)	107
Rickard, Tredway v. (Minn.)	974
Ricketts, People v. (Mich.)	483
Riddle v. Dow (Iowa)	1066
Rider v. Murphy (Neb.)	837
Ridpath, First Nat. Bank of Wilber v. (Neb.)	37
Rigney, McDonnell v. (Mich.)	52
Ristine v. Kurtz (Iowa)	185
Ritchey, Crosby v. (Neb.)	1005
Rivard v. Rivard (Mich.)	681
Rivard, Fitzhugh v. (Mich.)	947
Roach v. Cameron (Iowa)	194
Roate, Reysen v. (Wis.)	599
Roberts v Press (Iowa)	756
Roberts, Fountain Spring Park Co. v. (Wis.)	399
Rockford Ins. Co., Trustees of St. Clara Female Academy of Sinsinawa Mound v. (Wis.)	1140
Roedel v. Village of White Cloud (Mich.)	386
Rohde v. Biggs (Mich.)	331
Romberg v. Fokken (Neb.)	282
Romberg v. Hediger (Neb.)	283
Roper, State v. (Neb.)	539
Rose, Callen v. (Neb.)	639
Rosewater v. State (Neb.)	640
Ross v. Campbell (Iowa)	1064
Ross, Oyler v. (Neb.)	1099
Rowen v. Sommers (Iowa)	897
Rudd, State v. (Iowa)	748
Ruell v. City of Alpena (Mich.)	49
Rundlett v. City of St. Paul (Minn.)	967
Russell v. District Tp. of Cleveland (Iowa)	771
Russel Wheel & Foundry Co., Findlay v. (Mich.)	50
Ryan v. Douglas County (Neb.)	30
Ryan v. Meyer (Mich.)	667
Ryan v. Wayson (Mich.)	370
Saddler, Hinkle v. (Iowa)	765
Sadilek, Warren v. (Neb.)	15
Sagar v. Hogmire (Mich.)	327
Saginaw, T. & H. R. Co. v. Bordner (Mich.)	62
St. Paul Title Insurance & Trust Co., Nelson v. (Minn.)	206
St. Paul Title Insurance & Trust Co., Quigley v. (Minn.)	364
St. Paul & M. Trust Co. v. Harrison (Minn.)	980
Salentine, Towne v. (Wis.)	395
Sam Gosney Live-Stock Commission Co., Paddock v. (Neb.)	1121
Sanders v. Wedeking (Neb.)	18
Sanger v. Skidmore (Iowa)	176
Sawyer v. Choate (Wis.)	689
Saxe v. Rice (Minn.)	268
Saxe v. Womack (Minn.)	269
Scaman v. Galligan (S. D.)	458
Scarborough v. Myrick (Neb.)	867
Schiappacasse, Baldwin v. (Mich.)	1091
Schip v. Pabst Brewing Co. (Minn.)	3
Schlegel v. Sisson (S. D.)	1087
Schmidt v Menasha Wooden-Ware Co. (Wis.)	695
Schmidt, Gilfillan v. (Minn.)	126
Schmidt, Spriesterbach v. (Minn.)	721
Schmidt's Estate, In re (Minn.)	721
School Dist. No. 5, Town of Harmony, Joint School Dist. No. 8, Town of Harmony v. (Wis.)	794
Schubert v. Richter (Wis.)	107
Schultz v. Bower (Minn.)	139
Schultz v. Huebner (Mich.)	57
Scott v. Kirschbaum (Neb.)	443
Scott v. Security Fire Ins. Co. (Iowa)	1054
Scott, Moore v. (Neb.)	441
Scoville, Frank v. (Neb.)	1113
Scroggin, McClelland v. (Neb.)	1123
Seamans, Cawker v. (Wis.)	253
Security Fire Ins. Co., Scott v. (Iowa)	1054
Seefeld, Erbacher v. (Wis.)	252
Seiberling & Co. v. Fletcher (Neb.)	839
Sell, Donovan v. (Minn.)	722
Serfling, Gallager v. (Wis.)	692
Servertson, Furenes v. (Iowa)	918
Serveson, Leighton v. (S. D.)	938
Sewell, Litchfield v. (Iowa)	104
Shakman v. Potter (Iowa)	1045

	Page
Shakman v. United States Credit System Co. (Wis.)	528
Shannahan v. Chicago, St. P., M. & O. R. Co. (Minn.)	1151
Sharp v. City of Mauston (Wis.)	803
Sharp v. Merriman (Mich.)	372
Sharp, Howland v. (Neb.)	1133
Sharp, Kinsella v. (Neb.)	634
Sharpless v. Giffen (Neb.)	285
Shattuck v. Bates (Wis.)	706
Shattuck, Shelden v. (Mich.)	220
Sheasley v. Keens (Neb.)	1010
Shelden v. Barlow (Mich.)	338
Shelden v. Shattuck (Mich.)	220
Shelley v. Smith (Iowa)	172
Shepard, Iowa Inv. Co. v. (S. D.)	451
Sherman v. Port Huron Engine & Thresher Co. (S. D.)	1077
Shickle-Harrison & Howard Iron Co. v. City of Rapid City (S. D.)	499
Shietart v. City of Detroit (Mich.)	221
Shreck, Regier v. (Neb.)	618
Sigler v. Sigler (Mich.)	489
Sine, Manker v. (Neb.)	840
Sisson, Schlegel v. (S. D.)	1087
Skidmore, Sanger v. (Iowa)	176
Skoll, In re (Minn.)	986
Skow, Smith v. (Iowa)	893
Sloan v. Bain (Neb.)	1013
Sloan, Northwestern Nat. Bank v. (Iowa)	91
Small v. Gilruth (S. D.)	452
Smith v. American Exp. Co. (Mich.)	479
Smith v. Farmers' Trust Co. (Iowa)	84
Smith v. Hawley (S. D.)	942
Smith v. Jackson (Iowa)	80
Smith v. Jones (Neb.)	19
Smith v. Omaha & C. B. Railway & Bridge Co. (Iowa)	1041
Smith v. Parker (Iowa)	908
Smith v. Skow (Iowa)	893
Smith v. Smith (Neb.)	1016
Smith v. Waalkes (Mich.)	679
Smith, Cannon v. (Neb.)	999
Smith, City of Kearney v. (Neb.)	538
Smith, Crooker v. (Neb.)	19
Smith, Howell v. (Mich.)	218
Smith, Martin v. (Mich.)	61
Smith, People v. (Mich.)	382
Smith, Shelley v. (Iowa)	172
Smith, Southard v. (S. D.)	316
Smith, Strunk v. (S. D.)	926
Smith, Wallerich v. (Iowa)	184
Smith, White v. (Neb.)	638
Snowden, Lombard Inv. Co. v. (Neb.)	839
Sommers, Rowen v. (Iowa)	897
Southard v. Smith (S. D.)	316
Sparks v. Sturgis Creamery Co. (S. D.)	500
Spaulding, In re (S. D.)	462
Spirk, State v. (Neb.)	404
Spriesterbach v. Schmidt (Minn.)	721
Springer Lithographing Co. v. Graves (Iowa)	66
Stall v. Jones (Neb.)	653
Standard Life & Accident Ins. Co., Taylor v. (Neb.)	647
Staples v. Huron Nat. Bank (S. D.)	314
Starkweather, Chicago, M. & St. P. R. Co. v. (Iowa)	87
Starling v. Supreme Council Royal Templars of Temperance (Mich.)	340
State v. Aherin (Iowa)	193
State v. Ambrose (Neb.)	306
State v. Archibald (N. D.)	234
State v. Board of Com'rs of Douglas County (Neb.)	434
State v. Bussimus (Iowa)	193
State v. Butler (Iowa)	193
State v. Chapel (Minn.)	205
State v. Cleary (Iowa)	724
State v. Danielson (Iowa)	193
State v. Deyoe (Iowa)	733
State v. Fisher (Iowa)	193
State v. Gibson (Iowa)	742
State v. Graff (Iowa)	779
State v. Hall (Iowa)	725
State v. Hall (Neb.)	642
State v. Ham (Iowa)	1038
State v. Harris (Iowa)	728
State v. Helm (Iowa)	751
State v. Hill (Neb.)	541
State v. Hughes (S. D.)	1076
State v. Janesville Water-Power Co. (Wis.)	512
State v. King (Iowa)	735
State v. La Croix (S. D.)	944
State v. Laner (Iowa)	193
State v. Loder (Iowa)	193
State v. McGuire (Iowa)	193
State v. McNamara (Iowa)	192
State v. Mushrush (Iowa)	746
State v. Newson (S. D.)	468
State v. O'Leary (Minn.)	264
State v. Patty (Iowa)	727
State v. Philpot (Iowa)	730
State v. Porter (Iowa)	745
State v. Reddington (S. D.)	464
State v. Roper (Neb.)	539
State v. Rudd (Iowa)	748
State v. Spirk (Neb.)	404
State v. Steinborn (Wis.)	798
State v. Teeters (Iowa)	754
State v. Thomas (Iowa)	743
State v. Van Vliet (Iowa)	748
State v. Weinfurther (Wis.)	702
State v. Weingarten (Wis.)	716
State v. Wiltsie (Iowa)	193
State v. Wymen (Iowa)	786
State v. Yetzer (Iowa)	737
State, Barnum v. (Wis.)	617
State, Boasen v. (Neb.)	308
State, Bush v. (Neb.)	638
State, Chicago, B. & Q. R. Co. v. (Neb.)	624
State, Franklin v. (Wis.)	107
State, Hoover v. (Neb.)	1117
State, Hornberger v. (Neb.)	23
State, Jackson v. (Wis.)	393
State, Le Hane v. (Neb.)	1017
State, McCall v. (Neb.)	635
State, Pjarrou v. (Neb.)	422
State, Rosewater v. (Neb.)	640
State, Wells v. (Neb.)	29
State, West Point Water Power & Land Imp. Co. v. (Neb.)	6
State Bank, Board of Com'rs of Hennepin County v. (Minn.)	143
State Bank of Lushton v. O. S. Kelley Co. (Neb.)	619
State Ins. Co. v. Buckstaff Bros. Manuf'g Co. (Neb.)	27
State Ins. Co. v. New Hampshire Trust Co. (Neb.)	9
State Ins. Co. v. New Hampshire Trust Co. (Neb.)	1106
Stebbins v. Judge of Superior Court of Grand Rapids (Mich.)	594
Stebbins v. Patterson (Mich.)	484
Steele v. Kearney Nat. Bank (Neb.)	841
Steenerson v. Great Northern R. Co. (Minn.)	723
Steere v. Trebilcock (Mich.)	342
Steinborn, State v. (Wis.)	798
Stephens v. Hay (Iowa)	1048
Sterner v. Haas (Mich.)	348
Stevenson, Estabrook v. (Neb.)	286
Stewart, Eldridge v. (Iowa)	891
Stillson, Maynard v. (Mich.)	388
Stone, Novelty Paper-Box & Supply Co. v. (Wis.)	600
Stoppel, Leqve v. (Minn.)	124
Stoppel, Leqve v. (Minn.)	208
Storz v. Finkelstein (Neb.)	1020
Stotler, Leipird v. (Iowa)	150
Stover v Hough (Neb.)	825
Struble v. First Nat. Bank of Stanton (Neb.)	415
Streich, Hazer v. (Wis.)	720
Strong, Flood v. (Mich.)	473
Strunk v. Smith (S. D.)	926
Sturgis Creamery Co., Sparks v. (S. D.)	500
Sundback v. Gilbert (S. D.)	941
Supreme Council Royal Templars of Temperance, Starling v. (Mich.)	340

	Page
Swan, Hicks v. (Iowa)	762
Swedish Nat. Bank of Minneapolis v. Davis (Minn.)	986
Sweeney v. Ramge (Neb.)	9
Swigart v. Jackson County (Iowa)	881
Switzer v. Davis (Iowa)	174
Sylvester, Beekman v. (Mich.)	1093
Symes, Webster v. (Mich.)	580
Tanderup v. Hansen (S. D.)	1073
Taylor v. Standard Life & Accident Ins. Co. (Neb.)	647
Taylor, Findley v. (Iowa)	744
Teague v. Fortsch (Iowa)	1056
Tecumseh Nat. Bank v. Harmon (Neb.)	1128
Teeters, State v. (Iowa)	754
Thacker, People v. (Mich.)	562
Thelin, Malm v. (Neb.)	650
Themanson, City of Kearney v. (Neb.)	996
Thoen, Hamilton v. (Iowa)	156
Thomas, State v. (Iowa)	743
Thomas, Whitcomb v. (Neb.)	818
Thompson v. Caledonia Fire Ins. Co. (Wis.)	801
Thompson v. Chicago G. W. R. Co. (Minn.)	265
Thompson, Moore v. (Mich.)	51
Thompson, People v. (Mich.)	478
Thompson, Walker v. (Mich.)	584
Thompson Nat. Bank v. Dow (Iowa)	1066
Thompson & Sons Manuf'g Co. v. Perkins (Iowa)	874
Thorpe v. Hanscom (Minn.)	1
Tinsman, Berry v. (Mich.)	579
Towl v. Bradley (Mich.)	347
Towne v. Salentine (Wis.)	395
Town of Gilman, Keller v. (Wis.)	800
Town of Guthrie Center, Eagle Iron Works v. (Iowa)	81
Town of Manning v. Wichmer (Iowa)	756
Town of Solon, Dean v. (Iowa)	182
Township of Grand Rapids, Collins v. (Mich.)	586
Travelers' Ins. Co., Emlaw v. (Mich.)	469
Travis v. Culver (Mich.)	575
Treat v. Price (Neb.)	834
Trebilcock, Steere v. (Mich.)	342
Tredway v. Rickard (Minn.)	974
Trustees of St. Clara Female Academy of Sinsinawa Mound v. Delaware Ins. Co. (Wis.)	1140
Trustees of St. Clara Female Academy of Sinsinawa Mound v. Milwaukee Mechanics' Ins. Co. (Wis.)	1140
Trustees of St. Clara Female Academy of Sinsinawa Mound v. Northwestern Nat. Ins. Co. (Wis.)	1140
Trustees of St. Clara Female Academy of Sinsinawa Mound v. Rockford Ins. Co. (Wis.)	1140
Tucker v. Anderson (Iowa)	754
Turner v. Coughran (S. D.)	810
Tyler v. Nelson (Mich.)	671
Tzschuck v. Mead (Neb.)	428
Union Pac. R. Co. v. Kinney (Neb.)	449
Union Pac. R. Co., Elm Creek Elevator Co. v. (Iowa)	1059
Union Pac. R. Co., Kearney Milling & Elevator Co. v. (Iowa)	1059
Union Pac. R. Co., Louis v. (Neb.)	1133
Union Stock-Yards Co v. Westcott (Neb.)	419
United States Credit System Co., Shakman v. (Wis.)	528
Unland v. Garton (Neb.)	1130
Unterkircher, Humpton v. (Iowa)	776
Utah Nat. Bank, Burke v. (Neb.)	295
Valleau, Long v. (Iowa)	195
Van Blarcom v. Isaac (Wis.)	617
Van Boening, Jacobson v. (Neb.)	993
Van Etten v. Coburn (Neb.)	427
Van Etten v. Edwards (Neb.)	1013
Van Etten v Kosters (Neb.)	1106
Van Vechten, Blum v. (Wis.)	507
Van Vliet, State v. (Iowa)	748
Van Wyk, De Goey v. (Iowa)	787
Veline v. Dahlquist (Minn.)	141
Vermitt, Waller v. (Iowa)	763
Village of Adams, Barnhouse v. (Neb.)	826
Village of Mendon, Will v. (Mich.)	58
Village of Petoskey, Williams v. (Mich.)	55
Village of Trenton, Clee v. (Mich.)	48
Village of White Cloud, Barnhard v. (Mich.)	387
Village of White Cloud, Roedel v. (Mich.)	386
Vinton, Louden v. (Mich.)	222
Virgin, Murphey v. (Neb.)	652
Vogland, In re (Neb.)	1028
Voigt Brewing Co. v. Hosmer (Mich.)	217
Waalkes, Smith v. (Mich.)	679
Wagg-Andersen Woolen Co. v. Dunn (Wis.)	354
Wagner, Pierce v. (Minn.)	977
Wakefield v. Connor (Neb.)	286
Walker v. Thompson (Mich.)	584
Waller v. Vermitt (Iowa)	763
Wallerich v. Smith (Iowa)	184
Walsh v. Myers (Wis.)	250
Walter A. Wood Mowing & Reaping Mach. Co. v. Gerhold (Neb.)	538
Walter A. Wood Mowing & Reaping Mach. Co., Peterson v. (Iowa)	96
Warren v. Great Northern R. Co. (Minn.)	984
Warren v. Sadilek (Neb.)	15
Warren, Barsby v. (Neb.)	409
Warren County Bank, Des Moines Nat. Bank v. (Iowa)	154
Washington Loan & Trust Co. v. McKenzie (Minn.)	976
Watts, Denison v. (Iowa)	886
Waugh v. Graham (Neb.)	301
Waupaca Starch & Potato Co., Middlestadt v. (Wis.)	713
Wayson, Ryan v. (Mich.)	370
Weaver, People v (Mich.)	567
Webber v. Webber (Mich.)	960
Webster v. Symes (Mich.)	580
Webster v. White (S. D.)	1145
Wedeking, Sanders v. (Neb.)	18
Weikle v. Minneapolis, St. P. & S. S. M. R. Co. (Minn.)	963
Weil, Murphey v. (Wis.)	532
Weinfurther, State v. (Wis.)	702
Weingarter, State v. (Wis.)	716
Welch, Kelsey v. (S. D.)	390
Wells v. Anderson (Iowa)	102
Wells v. State (Neb.)	29
Wells, Alliance Elevator Co. v. (Wis.)	796
Wells & Mulrooney Grain Co., Glover v. (Wis.)	799
Welsh v. Blackburn (Wis.)	528
Westcott, Kelly v. (Iowa)	74
Westcott, Union Stock-Yards Co. v. (Neb.)	419
Westerfield, Brown v. (Neb.)	439
Western Assur. Co., Gross v. (Wis.)	712
Western Union Tel. Co., Albers v. (Iowa)	1040
Western Union Tel. Co., Brumfield v. (Iowa)	898
West Point Water Power & Land Imp. Co. v State (Neb.)	6
West Side Imp. Co., McFarland v. (Neb.)	637
Wheeler v. Meyer (Mich.)	46
Wheeler v. Paterson (Minn.)	964
Wheeler & Wilson Manuf'g Co. v. Bjelland (Iowa)	885
Wheelock v. American Tract Soc. (Mich.)	955
Whipple, People v. (Mich.)	490
Whitcomb v. Thomas (Neb.)	818
White v. Smith (Neb.)	638
White, Webster v. (S. D.)	1145
Whitesell v. Hill (Iowa)	894
Wichmer, Town of Manning v. (Iowa)	756
Wickens v. Goldstone (Iowa)	896
Wiegand, Franke v. (Iowa)	918
Wilkie, Green v (Iowa)	1046
Will v Village of Mendon (Mich.)	58
Willard, Pinch v. (Mich.)	42
Williams v. Village of Petoskey (Mich.)	55
Williams, Fox v. (Wis.)	357
Williams, McHard v. (S. D.)	930
William Wright Co. v. Frazer (Mich.)	954
Wilmarth, Phillips v. (Iowa)	1053
Wilson v. La Tour (Mich.)	474
Wiltsie, State v. (Iowa)	193

	Page
Winona & St. P. R. Co., Corbin v. (Minn.)	271
Wirth, People v. (Mich.)	41
Wisconsin Rendering Co., Braun v. (Wis.)	196
Wolf v. Michigan Masonic Mut. Ben. Ass'n (Mich.)	576
Wolf v. Wolf (Iowa)	170
Wolf, Galligher v. (Neb.)	645
Womack, Saxe v. (Minn.)	269
Woodcock v. Hawkeye Ins. Co. (Iowa)	764
Wood Mowing & Reaping Mach. Co. v. Gerhold (Neb.)	538
Wood Mowing & Reaping Mach. Co., Peterson v. (Iowa)	96
Woods v. Chicago & G. T. R. Co. (Mich.)	328
Wright, Omaha & R. V. R. Co. v. (Neb.)	842
Wright-Co. v. Frazer (Mich.)	954
Wuethrich, Omaha Brewing Ass'n v. (Neb.)	990
Wunderlich v. Chicago & N. W. R. Co. (Wis.)	1144
Wurdeman v. Barnes (Wis.)	111
Wymen, State v. (Iowa)	786
Yanish v. Pioneer Fuel Co. (Minn.)	198
Yates v. City of Milwaukee (Wis.)	248
Yerrington, Fractional School Dist. No. 1, Paw Paw and Antwerp Tps., v. (Mich.)	324
Yetzer, State v. (Iowa)	737
Young v. Krueger (Wis.)	355
Young. Kunz v. (Iowa)	879
Young Men's Christian Ass'n of Lincoln, Rawlings v. (Neb.)	1124
Young's Estate, In re (Iowa)	163
Zautcke, Oeflein v. (Wis.)	108

See End of Index for Tables of Northwestern Cases in State Reports.

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THORPE et al. v. HANSCOM et al.

(Supreme Court of Minnesota. Feb. 7, 1896.)

DEED OF INCOMPETENT UNDER GUARDIANSHIP — VALIDITY.

1. The deed of an insane person not under guardianship is voidable only, but while he is under actual and subsisting guardianship he is conclusively presumed incompetent to make a valid deed concerning his estate, though he is in fact sane at the time he attempts to do so. If, however, at the time he made the deed, he was in fact of sound mind, and the contract fair, and the guardianship had been practically abandoned, the deed is valid, though the guardian had not been formally discharged by the court.

2. The facts found by the court considered, and *held* that they sustain its conclusions of law.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Henry C. Belden, Judge.

Action by James R. Thorpe and Samuel S. Thorpe, partners as Thorpe Bros., against Benjamin F. Hanscom and others. Judgment for plaintiffs, and defendants appeal separately. Appeal of Caroline E. Hanscom dismissed. Appeal of defendant Benjamin F. Hanscom affirmed.

Louis A. Reed, for appellant. Woods & Kingman, for respondents.

START, C. J. Action to foreclose a mortgage made by the defendants Benjamin F. Hanscom and his wife, Caroline E. Hanscom, upon the land of the former. Separate answers were interposed on behalf of each of the defendants by their guardian ad litem. The defense on the part of Hanscom was that when he executed the mortgage he was insane and under guardianship, and on the part of his wife that she was also insane when she signed the mortgage. Judgment for the plaintiff for a foreclosure of the mortgage and a sale of the premises, from which a separate appeal was taken on behalf of each defendant.

There is no bill of exceptions or settled case in the record, and the only question for our consideration is whether the conclusions of law of the trial court are sustained by the finding. The trial court found that the defendant Benjamin F. Hanscom, in January, 1889, was committed to the Hospital for the Insane at Rochester for treatment, by the probate court of Hennepin county, and that in May of the same year he left the hospital, returning to his home in Minneapolis, and was thereafter and during the summer of 1889 discharged from the hospital. In the meantime, on the 27th day of February, 1889, the probate court duly issued to the defendant Brown letters of guardianship, appointing him guardian of the person and estate of Hanscom during his insanity, who accepted the trust, and took control of the property of his ward, and continued such control except as hereinafter stated. That, after Hanscom's return and his discharge from the hospital, he engaged in business in Minneapolis, in his own name and on his own account, carrying on the business of huckster and vender, and in the fall of 1891 he rented a store, and engaged in the business of a commission merchant, also buying and selling fruit at wholesale and retail, and continued to carry on this business until after the making of the mortgage in question in this case; that he kept an open bank account in his own name, depositing and drawing moneys therefrom in the ordinary course of business. That the guardian, Brown, resided in the same neighborhood with Hanscom, and knew in a general way of his occupation and business. The court also found that during the years 1891, 1892, and 1893 Hanscom bought and sold real estate in the county of Hennepin, and that between January, 1892, and April, 1893, he made seven deeds of real estate to different parties, which were recorded in the office of the register of deeds for Hennepin county; that in February, 1892, he made a lease of the premises described in the complaint in this action for three years, and in March of the same year he foreclosed 12 mortgages held and owned by him on land in the county of Hennepin, personally employing and paying his attorney, and making the affidavits in each case as to occupancy and disbursements, and afterwards assigned several of the certificates of foreclosure sale; that these real estate transactions were duly recorded, but there is no evidence that Brown was notified of them except by such record. The court further found that Hanscom applied to the plaintiffs in July, 1892, for a loan of $3,000

for use in his business in which he was then engaged, to be secured upon the premises described in the complaint, and after investigation of the security offered and the title thereto, and making inquiries as to the character and business of Hanscom, the plaintiffs accepted his application for the loan for E. Jones Andrews, a nonresident, for whom they negotiated the loan; and thereupon, and on August 1, 1892, Hanscom and wife executed the mortgage here in question upon the premises to secure such sum, with interest, and Hanscom received therefor from the plaintiffs, as such agents, the full sum of $3,000, less reasonable commission and expenses of making the loan, which sum he deposited in the bank in his own name, and thereafter checked out a considerable part thereof and applied it to the payment of his debts contracted in his business. This mortgage was duly recorded on August 6, 1892, and was subsequently, and before the commencement of this action, assigned to the plaintiffs. That Brown had no knowledge of the execution of this mortgage by Hanscom until after the transaction was closed, and some nine months afterwards he served upon the plaintiffs notice of disaffirmance of the mortgage, but no offer was ever made by him or any one else to refund any portion of the money so received by Hanscom. The court also found that at the time Hanscom negotiated such loan, and executed the mortgage to secure it, he was in fact of sound mind and fully capable of understanding and carrying out the transaction with the plaintiffs. And, further, that the plaintiffs in this entire transaction acted in perfect good faith, with all due care and caution, and had no knowledge of the guardianship proceedings, nor of any disability on the part of Hanscom to execute the mortgage and the note accompanying it, for the purpose of securing such loan. And, further, that no record of the guardianship was ever made in the office of the register of deeds of the proper county until months after the execution and delivery of the mortgage. That nothing has ever been paid on the principal or interest of the note and mortgage, and the whole thereof is due. The foregoing are substantially the facts upon which the trial court's conclusion to the effect that the mortgage is valid, and that it be foreclosed, rests.

At the time the guardian was appointed, February 27, 1889, section 11, c. 59, Gen. St. 1878, providing for filing and recording a copy of the petition, notice, and proof of service in the office of the register of deeds, was in force, but its provisions were not complied with. This section was repealed by the Probate Code October 1, 1889, and re-enacted by section 12, c. 116, Laws 1893. Hence, at the time the mortgage was given there was no statute for recording the petition and notice for the appointment of guardian of an insane person in force; but when Hanscom was placed under guardianship such law was in force, and if it had been then complied with the plaintiffs and others having real-estate transactions with the defendant, in examining the title of his real estate, would have been advised of the fact that he was under guardianship. The view we take of this case makes it unnecessary to decide what the effect of such omission to record the petition has upon the legal rights of the respective parties hereto. As already suggested, the only question we have to answer is whether, upon the foregoing facts, the trial court erred in holding the mortgage a valid security and ordering judgment of foreclosure for the plaintiffs; because, for the purpose of this appeal, the facts we have referred to stand admitted, or, rather, it is admitted that they were proven by competent evidence to the satisfaction of both parties. Naturally, the first question which an honest layman would ask on reading the foregoing facts would be, "What possible reason in justice can there be why the plaintiffs should not receive back their money or enforce their security therefor?" We confess our inability to suggest any just or equitable reason why the action of the trial court ought not to be affirmed, for the defense is not supported by a shred of equity. The defendant makes no claim that the transaction in question was an improvident or an unfair one for him, or that he was not in fact as mentally competent to make the loan and give the mortgage as any other man, or that it was not for the interest of himself and his estate, or that the plaintiffs did not act in perfect good faith and loan him $3,000 on the faith of his mortgage, or that he has ever offered to return it; but he plants himself upon the technical proposition that the action of the probate court in placing his person and estate under guardianship was conclusive evidence of his mental incompetency to act for himself, and that until the guardian was formally discharged, and his estate restored to him by the judgment of the probate court, his contracts were under all circumstances absolutely void.

The law as to the contracts, including deeds and mortgages, of an insane person, is well settled. The deed of an insane person not under guardianship is not void, but only voidable, but while he is under actual and subsisting guardianship he is conclusively presumed incompetent to make a valid contract concerning his property, though in fact he is sane at the time of making the same. This rule is based upon convenience and necessity, for the protection of the guardian, and to enable him to properly discharge his duties as such. Without this rule it would be difficult, if not impossible, for the guardian to execute his trust, for in every action concerning the property of the ward he might be obliged to go before the jury upon the question of the ward's sanity, and one jury might find one way and another the other way. Leonard v. Leonard, 14 Pick. 280; 2 Greenl. Ev. § 371. Now, when the rea-

son for the rule does not exist, the rule does not apply. Hence, if there is in fact no actual and subsisting guardianship, but the same has been practically abandoned, and the person who had been under guardianship after such abandonment makes a deed at a time when he is in fact of sound mind and the contract is fair, the deed will be enforced, though the guardian has not been discharged by any judicial action. Elston v. Jasper, 45 Tex. 409. The evil and injustice of holding void the deed or contract of a person placed under guardianship during his insanity, made after the guardianship had been in fact abandoned, and when he was of sound mind, are emphasized by the facts of this case, where the defendant was in fact sane, and in the possession of his property, engaged in business as a merchant, also in buying and selling real estate, and foreclosing his mortgages, for some three years before the mortgage in question was made, without any objection or assertion of his rights by the guardian. To permit the defendant under such circumstances to repudiate all of his contracts and transactions during those years, simply because his guardian had not been formally discharged by the court, would be a travesty on the administration of justice. It is true that the trial court did not in express terms find that at the time the mortgage was made there was in fact no subsisting guardianship, and that the same had been practically abandoned, but such is the necessary inference and conclusion from the evidentiary facts actually found. It follows that the mortgage having been made after the guardianship had in fact terminated and been practically abandoned, and at a time when the defendant was of sound mind, it is valid.

The trial court included in the judgment $75 for attorney's fees on the foreclosure of the mortgage as stipulated therein, but made no finding of fact that such amount was reasonable. The defendant assigns this as error, and relies upon Harvesting Co. v. Clark, 30 Minn. 308, 15 N. W. 252. The case is not in point, for it relates to a stipulation in a note for attorney's fees which are not limited and regulated by statute. The attorney's fees in the mortgage in question were within the limitation of the statute, and it is not to be inferred that the court allowed a greater amount as attorney's fees than was reasonable. The appeal of the defendant Caroline E. Hanscom is dismissed by stipulation, without costs to either party, she having died since the appeal was taken. Upon the appeal of the defendant Benjamin F. Hanscom the judgment of the district court is affirmed.

SCHIP v. PABST BREWING CO.

(Supreme Court of Minnesota. Jan 29, 1896.)

INDEPENDENT CONTRACTOR—NEGLIGENCE—LIABILITY OF EMPLOYER.

The owner of an old building, which had become dangerous by reason of decay, engaged an independent contractor to tear it down. The work was dangerous, and the contractor was incompetent personally to superintend the same, all of which the owner knew when he let the contract. By reason of the contractor's incompetency, his servant was injured while employed in the work. *Held*, the owner is not liable to the servant.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Otis, Judge.

Action by Stephen Schip against the Pabst Brewing Company. Case dismissed. From an order denying a new trial, plaintiff appeals. Affirmed.

S. P. Crosby (M. R. Tyler, of counsel), for appellant. Flandrau, Squires & Cutcheon, for respondent.

CANTY, J. Defendant was the owner of an old stone building, which had been built on the steep side of a bluff at the corner of Wabasha and Third streets in St. Paul. The rear of the building, facing the Mississippi river, was five stories high, while the front was only two stories above the grade of said streets. The building was in a decayed and dangerous condition to such an extent that it became necessary to have it torn down. The defendant advertised for bids for taking down the building, and one Gorton being the lowest bidder, a contract was let to him, whereby he agreed to take down and remove the building in 30 days for the sum of $100. Gorton commenced the work, and employed the plaintiff, a common laborer, to assist him. A few days afterwards, plaintiff was injured while so at work by the giving away of the floors, and brings this action to recover damages for the injury.

It is alleged in the complaint that the work of taking down the building was of a dangerous character, requiring special skill and care in order to do it safely and without injury to employés; that Gorton was not a careful, skillful, or competent man, which defendant at and before the time it contracted with him knew, "or could readily have ascertained by the exercise of reasonable and ordinary care and prudence." It is further alleged that plaintiff was injured by reason of the incompetency of Gorton, who overloaded the floors with the material taken out of the walls; that plaintiff had no knowledge of the dangerous and defective character of the building, or of the incompetency and unskillfulness of Gorton. When the character of the case was stated to the court below on the trial, the judge directed that evidence be first given of the relations between defendant and Gorton in the taking down of the building. Plaintiff then introduced the evidence of two witnesses to the effect that Gorton was a total stranger to defendant's agent, Miesen, when the contract was let by Miesen to Gorton, and that Miesen at that time knew nothing about his competency to do such work. The second witness also stated that Miesen (who was

defendant's representative) was not around the work during its progress, but that he drove by several times, and stopped once as he was going by. Thereupon plaintiff's counsel stated: "I will say to the court that just what this witness has stated is what we shall claim about the contract, what we claim that Mr. Miesen had to do with the work, what directions he gave; all that we shall show upon that point is what we have put in. We may have more testimony, but only on this same line." Then defendant moved for a dismissal, and thereupon plaintiff offered to prove, among other things, the dangerous character of the building, the incompetency of the contractor, Gorton, and knowledge of all of the same by defendant when the contract was let to Gorton. The offer was refused, and the case dismissed. From an order denying a new trial, plaintiff appeals.

For the purposes of the case we will assume that plaintiff could have proved these offers, and was entitled to do so, if it would result in proving a cause of action against defendant. Counsel for appellant have cited us to no case which has held the owner liable to the servant of the contractor under such circumstances. There are many cases which hold that the owner of premises cannot, by employing a contractor, relieve himself from the continuing duty which he owes to the public and to the adjoining owners not to maintain a nuisance on his premises, or license any one else to do so. But we can find no case which holds that the owner owes any such continuing duty to the servant of the independent contractor, engaged in the very work of abating the nuisance. Counsel quotes language from Deford v. State, 30 Md. 204, which, in the connection in which it is used, would seem to give color to the proposition that the owner does owe such a continuing duty to the servant of the contractor; but no such question was in the case. The owner was erecting a building, the front wall of which fell into the public street, and killed plaintiff's intestate, a passer-by. It was proved that the owner employed one "Robinson to draw plans and superintend the construction of the building; * * * that he paid Robinson a commission of five per cent. on the value of the building, and that Robinson had no other interest in the matter except to make good work for the appellant [owner], who paid for all the materials, and also all bills for the workmen upon the order of Robinson; that Robinson employed one Thomas as master bricklayer, and also two carpenters; that Thomas employed the journeymen bricklayers and hod carriers." Several witnesses testified that "the cornice was too heavy for the wall, and its great weight caused the fall"; that the wall was a nine-inch wall; that the projection of the cornice was twelve inches, and that more than seven inches was dangerous. Even there the court held Thomas to be a contractor, and held the owner liable only because he contracted for the erection of a nuisance, and retained general control of its erection. We state these facts to show how pure a dictum was the language of the court intimating that the owner owes such a duty to the servant of the contractor. Wilkinson v. Spring Works, 73 Mich. 412, 41 N. W. 490, cited by appellant, is a case where a defective roof fell on a person lawfully in the street. The owner attempted to defend on the ground that he had employed a competent architect and a competent contractor when the structure was built, but the court held it was no defense. Said the court: "The injury does not arise from the act of the contractor during the performance of a work over which defendant had no control. * * * The exercise of reasonable care in the creation or maintenance of a nuisance can never be an absolute defense to an action for an injury occasioned thereby." Lawrence v. Shipman, 39 Conn. 539, 587, from which appellant quotes at length, was a case where a contractor was employed to excavate and erect a wall, and in doing so necessarily undermined the foundation of the adjoining building, causing it to fall, whereby the occupants were damaged. It was held that, if the contractor had performed the work with proper care, the building would not have fallen; that he was an independent contractor, and those employing him were not liable Whatever comfort appellant may derive from the dicta in that case, he can derive none from the decision itself, which is strongly against him. All of the cases cited by appellant are cases where the injury was to the person on a public highway or to an adjoining owner. Neither has our attention been called to any case where the owner was held liable on the sole ground of failing to exercise with due care a temporary duty of employing a competent contractor (after which his responsibility would cease), but in every case there was a continuing duty not to maintain a nuisance on his premises himself, or license others to do so. It is often laid down as one of the conditions required to relieve the owner from liability that he shall employ a competent contractor But this language (where it is not mere dictum) is always used in cases where the owner owes such continuing duty, and the work to be performed by the contractor will necessarily result in a nuisance to the public or the adjoining owner, unless great or extraordinary care is taken to prevent it from doing so. In such a case, the failure to use special care to employ a competent contractor is equivalent to licensing the nuisance which it is highly probable will result. But this rule is applied only to exceptional cases, where the work is necessarily intrinsically hazardous, such as carrying on blasting operations in the vicinity of the persons or property of others not connected with the work. But, even if this rule should

be extended so as to cover injuries to the servants of the contractor, this case would not come within the class of cases where the work to be done by the contractor is "intrinsically hazardous." Again, there are many successful contractors who are thoroughly competent to estimate in advance with a high degree of accuracy the cost of the work, but who are not at all competent to oversee the actual operations of construction, and who usually sublet the work, or employ competent foremen. And unless we completely overturn the law that has always been applied to such cases as the one at bar, we cannot hold that the owner's knowledge of the contractor's incompetency personally to superintend the performance of the work will make the owner engaging him liable to the servants employed by him on the work. Such a rule would go far towards making an independent contractor a mere foreman, for whose acts the employer is liable. In our opinion, the appellant did not offer to prove a cause of action, and the order appealed from should be affirmed. So ordered.

FARMERS' NAT. BANK OF OWATONNA v. BACKUS et al.[1]

(Supreme Court of Minnesota. Jan. 29, 1896.)

APPOINTMENT OF RECEIVER—AFFIDAVITS — FORECLOSURE OF MORTGAGE—EFFECT OF APPEARANCE.

1. In an action to foreclose a mortgage, the insolvency of the mortgagor, the inadequacy of the security, and the failure to apply the rents of the mortgaged premises in keeping up the security, by paying delinquent taxes and interest past due on the prior mortgage, is a sufficient ground for the appointment of a receiver pendente lite to collect the rents and so apply them.

2. That the mortgagor, at the time of making the first mortgage, gave the mortgagee therein named a written assignment of these rents cannot be urged by the mortgagor as a reason why a receiver should not be appointed.

3. *Held*, the court below, after giving the parties ample opportunity to present affidavits on the motion, did not abuse its discretion in refusing to hear any more affidavits, not presented at the proper time.

4. *Held*, the appellant, who was not originally a party to the action, voluntarily appeared, and became a party by appearing and opposing the motion on the merits, and submitting to and complying with an order then and there made making him a party, notwithstanding his claim that he was appearing specially only.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; J. J. Egan, Judge.

Action by the Farmers' National Bank of Owatonna against Hiram Backus and others. From an order appointing a receiver, C. W. Burdic appeals. Affirmed.

William G. White, for appellant. Herchmer Johnston, for respondent.

CANTY, J. This is an action to foreclose a mortgage made in the form of an absolute deed with an agreement to reconvey. The defendant Burdic appeals from an order appointing a receiver pendente lite to collect the rents and apply them in payment of delinquent taxes and of interest due on the first mortgage on the premises, and ordering any balance of such rents remaining in his hands to be disposed of under the further order of the court.

1. It appears by the undisputed evidence that, when the motion for the appointment of a receiver was made, the taxes for one year were unpaid and delinquent, that a considerable amount of interest was past due on the first mortgage on the premises, that the mortgaged premises were wholly inadequate as security for the first mortgage and plaintiff's second mortgage, and that the mortgagors were insolvent There was also evidence from which the court was justified in finding that the mortgagors had collected the rents from some of the tenants for several months in advance at a very large discount, in anticipation of an application for the appointment of a receiver, and had failed to apply all of the rents to the payment of taxes and interest on the first mortgage or in keeping up the security. We are of the opinion that it was a proper case for the appointment of a receiver. See Haugan v. Netland, 51 Minn. 552, 53 N. W. 873. The point is made by appellant that it does not appear that the defendant Burdic, who is grantee of the mortgagors, is insolvent. In answer, we will say that it does not appear that Burdic is in any manner liable personally for the payment of the mortgage indebtedness, and there is no presumption that he is.

2. A written assignment of the rents of the premises to the mortgagee in the first mortgage, and made at the same time that the first mortgage was made, was properly rejected by the court on the motion. What right or defense does that assignment give Burdic, as against that motion?

3. The court below rejected some affidavits offered by appellant at the close of the hearing of the motion as a part of his original defense, and to impeach or rebut affidavits of some parties who had first made affidavits for him and then contradicted these in affidavits made for plaintiff. The court, in his ruling, refused to hear any more affidavits. This is assigned as error. The court heard the motion on three different days, continuing it twice, to permit the parties to procure more affidavits, and was fully justified in shutting off the apparently inexhaustible supply.

4. Burdic was not made a party to this action when it was originally commenced, and the papers in the motion for the appointment of a receiver were not served on him; but on the hearing of that motion, on the first day it was heard, he appeared in court, claiming to appear specially, and presented, read, and filed in the motion a long affidavit, made by him, in which he avers that he had lately, but before the commencement of this

[1] Rehearing denied.

action, purchased the mortgaged premises from the mortgagors, and entered into possession of them, and was then the owner and in possession of the same. If he had stopped here, his acts might have amounted merely to a special appearance, but he proceeds in his affidavit to controvert and explain the greater portion of the facts averred in the moving papers, and states, in answer to those averments, that there is sufficient insurance on the premises, "but if, upon full investigation of all of the facts in this case, the court shall consider that this affiant, as owner of the property, ought to place a greater amount thereon, he hereby offers to do so." Thereupon the court made an order, entitled in the action, which reads as follows: "In the above-entitled action it is ordered that Charles W. Burdic, being now here in court, be and he is hereby made a party defendant to this action, and it is further ordered that the name of Charles W. Burdic be added after the last name of the defendants in the summons and complaint and all other pleadings in this action, and that the said Charles W. Burdic serve and file his answer to the complaint herein within 20 days without further notice, and that he show cause upon the order, this day returnable, on July 2, 1895, at 10 o'clock a. m., at room 4 in the courthouse in St. Paul, in said county, and that a copy of this order be forthwith served upon said Burdic." This order was then and there served on Burdic, he appeared and opposed the motion on the subsequent days, the summons and complaint were afterwards amended, and Burdic answered as so ordered. Under these circumstances, his claim that his appearance on the hearing of the motion was a special appearance is wholly untenable. Conceding that, if he had not appeared generally and become a party to the action at the time the above order was made, the order would be irregular, and not in conformity with sections 5178–5181, Gen. St. 1894, as amended by chapter 29, Gen. Laws 1895, it does not follow that the order was not a proper one to make, when he had, in fact, already become a party by his voluntary appearance and participation in the defense of the motion on the merits. This disposes of all the questions in the case worthy of consideration, and the order appealed from is affirmed.

WEST POINT WATER POWER & LAND IMP. CO. v. STATE ex rel. MOODIE, County Attorney.

(Supreme Court of Nebraska. Feb. 4, 1896.)

FISHWAYS—DUTY TO MAINTAIN—MANDAMUS—POLICE POWER.

1. Persons erecting and maintaining dams for milling purposes, in the streams of this state, do so with the implied obligation to maintain adequate fishways for the passage of fish from the lower to the higher level of such streams and their tributaries.

2. The reserved powers of the state, including the police power, are inalienable, and cannot be surrendered or bartered away by the legislature.

3. The preservation of the fish in the streams of the state is a proper function of government.

4. The duty enjoined upon the owner of milldams to construct and maintain fishways (see Cr. Code, § 87a) is designed to promote the public welfare, and may be enforced by mandamus, on the relation of the county attorneys of the several counties.

(Syllabus by the Court.)

Error to district court, Cuming county; Norris, Judge.

Petition, on the relation of P. M. Moodie, county attorney, against the West Point Water Power & Land Improvement Company for mandamus. A demurrer to the answer was sustained, and a peremptory writ awarded, and respondent brings error. Affirmed.

J. C. Crawford and M. McLaughlin, for plaintiff in error. P. M. Moodie, in proper.

POST, C. J. This was an application for a writ of mandamus to the district court for Cuming county, on the relation of P. M. Moodie, as county attorney, to require the respondent therein, plaintiff in error, to construct a suitable fishway whereby fish may readily pass over or around a dam maintained by said respondent in the Elkhorn river. An answer was filed by the respondent, in which is contained the following admission: "It admits that the respondent owns and maintains a milldam across said Elkhorn river, at or near the city of West Point, and within said county of Cuming, and that the said respondent has never provided, and has not at the present time, a suitable fishway, nor any fishway whatever, whereby fish may pass over or around said milldam." The other allegations of the answer are, in substance, that the land upon which said dam is situated is private property; that the construction of said dam was authorized by the territorial legislature in the year 1867; that the respondent has acquired the right to maintain it, as at present constructed, by adverse user; that the Elkhorn river is a private, unnavigable stream, and to require the respondent to construct a fishway would be to damage its property, within the prohibition of the state constitution. To this answer a demurrer was interposed by the relator, and sustained by the court. The respondent refusing to plead further, a peremptory writ of mandamus was awarded against it, in accordance with the prayer of the petition, and the cause removed into this court for review by the respondent.

The provision of the statute relating to the subject involved is found in section 1 of the act amendatory of prior acts, approved April 4, 1887 (see Cr. Code, § 87a), viz.: "It shall also be unlawful for any person, association of persons, or corporation to place or establish any obstruction across any stream of water in this state that shall pre-

vent the free passage of fish along said stream: provided, that all persons, associations of persons, or corporations erecting, owning, or maintaining a milldam across any stream in this state, shall at his or its own expense, construct and at all times maintain, subject to the approval of the fish commission, a suitable and substantial fishway whereby all fish passing along said stream can readily pass over or around said dam. Public waters within the meaning of this section shall embrace all lakes, ponds, rivers, creeks, bayous and streams except private artificial ponds or ponds subject to the exclusive dominion of a single ownership." Sess. Laws 1887, p. 662, c. 107, § 1. The courts of the country have frequently been called upon to give effect to acts of this character, and have, it is believed, in every instance sustained the power of the legislature over the subject. See Hooker v. Cummings, 20 Johns. 90; Town of Stoughton v. Baker, 4 Mass. 522; Burnham v. Webster, 5 Mass. 266; Com. v. McCurdy, Id. 324; Nickerson v. Brackett, 10 Mass. 212; Com. v. Chapin, 5 Pick. 199; Vinton v. Welsh, 9 Pick. 92; Com. v. Essex Co., 13 Gray, 248; Cottrill v. Myrick, 12 Me. 229; Weller v. Snover, 42 N. J. Law, 341; Parker v. People, 111 Ill. 581; Holyoke Co. v. Lyman, 15 Wall. 500. In the case last cited, which involved a statute of Massachusetts, after which ours appears to have been modeled, the subject was considered in all its phases, resulting in the conclusion that, while a grant authorizing the use of the water of a stream for mill purposes is a vested right, such right is subject to legislative control, and that one erecting a dam in a stream annually frequented by fish, does so under the implied obligation to maintain sufficient openings to permit the passage of fish at all proper seasons. In that case Mr. Justice Clifford, after citing with approval the opinion of Chief Justice Shaw in Com. v. Essex Co., supra, says: "From the earliest times the right of the public to the passage of fish in rivers, and the private rights of riparian proprietors, incident to and dependent on the public right, have been subject to regulation of the legislature. The mode adopted by the legislature, whether by public or private acts, to secure and preserve such rights, has been by requiring, in the erection of dams, such sluices and fishways as would enable these migratory fish, according to their known habits and instincts, to pass from the lower to the higher level of the water occasioned by such dam, so that, although their passage might be somewhat impeded, it would not be thereby essentially obstructed." And in Com. v. Chapin, supra, the same principle is recognized by Chief Justice Parker in the following language: "This common-law right of several fishery in the owners of lands bordering on rivers not navigable is subject to a reasonable qualification, in order to protect the rights of others, who, in virtue of owning the soil, have the same right, but might lose all advantage from it if their neighbors below them on a stream or river might, with impunity, wholly impede the passage of fish into the lakes or ponds where they, by instinct, prepare for the multiplication of the species. This restriction is founded upon that universal principle of every just code of laws: 'Sic utere tuo ut alienum non laedas.'" State v. Franklin Falls Co., 49 N. H. 240, to which we are referred in support of the opposing view, is not authority for the contention of the plaintiff in error. Indeed, it may be said to sustain the doctrine of the cases above cited since the propositions therein asserted are: (1) That the maintaining in an unnavigable river, which is the outlet of a large inland lake, of a dam without a fishway, so as to obstruct the passage of fish from the sea to the lake, is indictable at common law. (2) No right will be acquired, as against the state, by the obstruction of a public fishery for more than 20 years under a claim of right, where such obstruction originated without right.

Regarding the plaintiff in error's reliance upon a prescriptive right to maintain its dam without making provision for the passage of fish, and upon the fact that the construction of the dam was authorized by the territorial legislature, it is sufficient that the reserved powers of the state, including the right to conserve and promote the public welfare at the expense of private interests, denominated the "police power," is inalienable, and cannot be surrendered or bartered away by the legislature. Parker v. People, supra; Alger v. Weston, 14 Johns. 231; People v. Morris, 13 Wend. 329; Board v. Barrie, 34 N. Y. 657; Stone v. Mississippi, 101 U. S. 814.

Lastly, it is urged that the law recognizes no common right of fishery in the streams of this state; that such right belongs exclusively to the owners of the soil; that it is, in short, a private right only, in which the state is not interested; and that the writ of mandamus should not, therefore, have been allowed on the relation of the county attorney. In Attorney General v. Albion Academy & Normal Inst., 52 Wis. 469, 9 N. W. 391, the rule is there stated: "The question whether the attorney general can sue, or whether the suit must be brought by some private party, depends upon whether the injury sought to be redressed is public in its nature, affecting public interests, or whether it is merely private, affecting private rights and interests only. In the latter case, the attorney general cannot sue; in all others, he can. In case of a wrong which is also a public as well as a private injury, the attorney general may sue in respect to the public injury, although a private person may also sue in respect to his private injury." And, as said by this court in Smiley v. MacDonald, 42 Neb. 5, 60 N. W. 355, the test of public utility is whether the partic-

ular regulation involved has some relation to the public welfare, and whether such is, in fact, the end sought to be attained. That the declared purpose of the act, viz. the preservation of the fish in our streams, is a proper function of the state government, as tending directly to promote the public welfare, is a proposition distinctly recognized by authority, including the cases above cited. The provision for the construction of fishways must, therefore, be regarded as a duty enjoined upon persons and corporations maintaining dams in the streams of the state, in the interest of the public at large. It follows that the writ was properly allowed on the relation of the county attorney, and that the judgment of the district court should be affirmed.

BAUM IRON CO. v. BERG.

(Supreme Court of Nebraska. Feb. 4, 1896.)

EXAMINATION OF WITNESS — RESCISSION OF CONTRACT—HARMLESS ERROR.

1. The extent to which leading questions may be allowed rests in the discretion of the trial court, and its rulings in that respect will not, in the absence of an abuse of discretion, be disturbed by this court.

2. A contract cannot be rescinded in part on account of fraud, and ratified in part. It is the duty of the injured party in such case to rescind the contract as a whole or not at all.

3. A judgment will not be reversed on account of error not prejudicial to the complaining party.

(Syllabus by the Court.)

Error to district court, Douglas county; Ferguson, Judge.

Action by Louis Berg, doing business as L. Berg Manufacturing Company, against the Baum Iron Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Kennedy & Learned, for plaintiff in error. Bartlett, Baldrige & De Bord, for defendant in error.

POST, C. J. This was an action by the defendant in error, Louis Berg, doing business as the L. Berg Manufacturing Company, against the plaintiff in error, the Baum Iron Company, in the district court for Douglas county. The cause of action alleged is a quantity of hickory axles, amounting at the contract price to $282.87, also certain double-trees and wagon hounds, amounting to $4.25, making a total demand of $287.12. It is alleged that, as one of the conditions of the contract with respect to the said property, it was mutually agreed that it should be examined and accepted on behalf of the defendant below by one Hatrick, at Farmington, Iowa, at which point it was to be delivered on the cars billed to the defendant at Omaha, in this state, and that his selection should be final and binding upon the parties. It is further alleged that the property above described was selected by said Hatrick pursuant to said agreement, and shipped to the defendant below, by whom it was received June 10, 1890. The allegations of the petition are denied by the answer, accompanied by a counterclaim, in which it is charged that the plaintiff below agreed to furnish to the defendant therein, at Farmington, Iowa, certain wagon timbers of substantially the character described in the petition, to be strictly No. 1 in quality and sound in every particular. That the plaintiff, in order to cheat and defraud the defendant, falsely and fraudulently represented said Hatrick, a resident of Farmington, and a stranger to the plaintiff, to be a capable and impartial person to select such material in its (defendant's) behalf. That he, Hatrick, was not impartial, but on the contrary immediately conspired with the plaintiff to cheat and defraud the defendant by the selection of unsound material, and that, in pursuance thereof, said conspirators selected and shipped to the defendant material corresponding in size to that purchased, but which was unsound and worm-eaten, by reason of which it was wholly unfit for use, and of no value whatever. That, on discovering the fraud so practiced upon it, the defendant notified the plaintiff that it held said material subject to his (plaintiff's) order, and subject to freight charges paid thereon, and that, upon the plaintiff's refusal to remove said material, it was sold on his account by the defendant for the sum of $232.65, and which, less the sum of $101.84, charges for freight, drayage, and cost of handling, has been applied upon the demand against the plaintiff hereafter mentioned. That the material so contracted for was necessary for the use of the defendant in its business, and by reason of the plaintiff's default it has been damaged in the sum of $240. There is a further counterclaim for $95.75 on account of material which, as alleged, the plaintiff has failed to deliver in accordance with his agreement to that effect. There is also a prayer for judgment for the amounts above named, less $130.81, the net proceeds of the material sold on plaintiff's account. The reply is in effect a general denial. A trial was had, resulting in a verdict and judgment for the plaintiff therein for $332.62, and which has been removed into this court for review by petition in error of the unsuccessful party.

The first assignment to which our attention is directed by the brief of counsel for the plaintiff in error is that the district court erred in receiving in evidence the answers to certain leading questions. The extent to which leading questions may be allowed is a subject which rests in the discretion of the trial court, and, as we have frequently had occasion to hold, its rulings in that respect will not, in the absence of a clear abuse of discretion, be disturbed by this court. Obernalte v. Edgar, 28 Neb. 70, 44 N. W. 82; Insurance Co. v. Gotthelf, 35 Neb. 357, 53 N. W. 137.

The other assignments all relate to the giving and refusing of instructions. The court on its own motion gave the following, to

which exception was taken: "Fraud is not to be presumed, but must be established by the evidence. In the consideration of the question whether or not fraud was practiced upon the defendant in the selection of the axles in question, you must consider all the facts and circumstances attending the transaction and surrounding the parties as they appear from the evidence. While fraud is not to be presumed, it can seldom be established by direct evidence, and in considering the question you must consider all the evidence in regard to the acts of the parties and circumstances of the case. If you find, from a consideration of all the evidence, that the selection of the axles was fraudulent, or that Hatrick acted fraudulently or dishonestly in making such selection, then his selection cannot bind the defendant as to such materials as the evidence shows you to have been unfit for the purpose for which they were sold." The criticism of counsel is directed to the concluding paragraph of the foregoing instruction, and is, we think, not wholly unmerited. Practically, the answer charges a rescission of the contract on account of the alleged fraud and conspiracy between the plaintiff below and Hatrick. The fraud alleged, if available, is a complete defense, and not alone as to so much of the material selected as proved worthless or unsound. It was, moreover, the defendant's duty, assuming the fraud to have been proved as alleged, to rescind the contract as a whole, or not at all. Raymond v. Bearnard, 12 Johns. 274; Hendricks v. Goodrich, 15 Wis. 679; Bainter v. Fults, 15 Kan. 323; Higham v. Harris, 108 Ind. 246, 8 N. E. 255. It does not follow, however, that the error assigned is prejudicial, calling for a reversal of the judgment. An inspection of the record discloses that the question of fraud was fairly submitted to the jury, and the amount of the verdict plainly indicates that that defense was rejected as a whole. The defendant could not therefore have been prejudiced by the instruction complained of, and the giving of it was harmless error, not calling for the reversal of the judgment.

Counsel also vigorously assail instruction number 10, given at the request of the plaintiff below, as follows: "The plaintiff asks the court to instruct the jury that there is no dispute, either in the pleadings or between the parties in this case, that one Henry Hatrick was selected by the plaintiff and defendant to make selection of the axles in controversy, and that the defendant only seeks to avoid the selection made by said Hatrick on the ground of fraud and conspiracy between the said Hatrick and the plaintiff to cheat and defraud the defendant in making such selection. You are instructed that the burden of proof is upon the defendant as to such fraud, and if it has not proved the fraud alleged to the satisfaction of the jury, then the selection of Hatrick is final." As a statement of the issues made by the pleadings this instruction is not strictly accurate. It does, however, correctly state the only proposition about which there was any controversy at the close of the trial, and for that reason presents no ground for complaint on the part of the plaintiff in error. Complaint is made of the refusal of certain instructions requested by the defendant below, but they were, in so far as they state the law of the case, embodied in those given by the court on its own motion. We discover in the record no substantial error, and the judgment is accordingly affirmed. Affirmed.

SWEENEY v. RAMGE.

(Supreme Court of Nebraska. Feb. 4, 1896.)

Error to district court, Douglas county; Doane, Judge.

Action by Mortinsen C. Sweeney against Frank Ramge. Judgment for defendant. Plaintiff brings error. Affirmed.

C. A. Baldwin and Weaver & Giller, for plaintiff in error. Parke Godwin, for defendant in error.

PER CURIAM. The bill of exceptions in this case having been quashed at a former term of this court, and the petition in error presenting no question which can be considered without a bill of exceptions, the judgment is affirmed. Affirmed.

STATE INS. CO. v. NEW HAMPSHIRE TRUST CO.[1]

(Supreme Court of Nebraska. Feb. 4, 1896.)

INSURANCE—MISREPRESENTATIONS—MATERIALITY—RIGHTS OF MORTGAGEE.

1. A representation in an application for insurance that no other insurance existed on the property is not to be deemed false, in such a sense as to invalidate the insurance obtained on such application, merely because a former owner of the property, after having parted with his title, effected other insurance thereon in his own favor.

2. Where the application for insurance, and the policy issued thereon by an insurance company doing business in a sister state, bear the same date, it will not be inferred, in the absence of evidence upon that point, that the officers of the insurance company, at its home office, were influenced, by misrepresentations contained in the application, to approve a risk which, had they known of such misrepresentation, they would not have approved.

3. Where, by the terms of the policy of insurance, the loss, if any, is payable to a mortgagee as his interest appears at the time of the loss, the right of such mortgagee to maintain an action for such loss is not necessarily defeated by such misrepresentation in the application for insurance as, by the terms of the contract between the insurer and the insured, would defeat the right of the insured to maintain an action on his own behalf.

(Syllabus by the Court.)

Error to district court, Seward county; Bates, Judge.

Action by the New Hampshire Trust Company against the State Insurance Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

[1] For opinion on rehearing, see 66 N. W. 1106.

Chas. Offutt, for plaintiff in error. C. E. Holland, for defendant in error.

RYAN, C. There was a verdict, with a judgment thereon, for the defendant in error in this case, in the district court of Seward county. This judgment on March 24, 1892, was rendered for the sum of $2,124 and costs. The policy upon which plaintiff in error was found liable was issued to J. D. Brown on March 15, 1890. The property insured—a brick building—was totally destroyed by fire on January 16, 1891. The defenses specially pleaded were that, in the application for the above insurance, it had been falsely represented that Brown was the sole, undisputed owner of the property to be insured; that, likewise, it was falsely represented that there was no other insurance on the property; that in said application it was falsely represented that the building to be insured was used solely as a livery barn, whereas, in fact, the upper story thereof was used for an armory; and that by the said application there had not been disclosed the existence of a mortgage upon the premises therein described. These averments of the answer were supplemented by others to the effect that the plaintiff in error had been deceived by the above-described false representations and omission, and so had been induced to insure the property described.

In respect to the alleged false representations as to the ownership of the insured property, the bill of exceptions shows that there was introduced in evidence the record of a warranty deed from James A. Haselwood and his wife to the aforesaid Brown, whereby was conveyed the real property on which was the insured building. The plaintiff in error offered the above-named James A. Haselwood as a witness, and from him elicited the oral statements that the above deed was a trust deed; that the witness still owned in fee simple the property therein described; and that he had held possession of, and had collected the rents arising from, the said property, ever since the making of the aforesaid conveyance. It would be extremely dangerous for this court to assume, upon evidence of this nature, that the jury wrongfully found that the deed attacked was operative according to its terms.

The policy sued upon provided that the loss, if any occurred during the term covered by it, should be payable to the New Hampshire Trust Company, mortgagee, as its interest might appear at the time of such loss. When the policy sued upon was applied for and issued, there was in existence no policy of insurance upon the same property; but, something like nine months afterwards, James A. Haselwood procured to be issued by the Farmers' & Merchants' Insurance Company of Lincoln another policy, in his own favor. This last policy was of the date of June 11, 1891. The warranty deed above referred to had been executed by James A. Haselwood and his wife on February 25, 1889, and had been filed for record two days thereafter; so that, if this deed was effective to pass title, as the jury must have assumed that it was, Mr. Haselwood, at the time he procured the insurance in his own favor, had no interest whatever in the property insured. It was not shown that Brown was at all cognizant of Haselwood's attempt to effect insurance in his own behalf. Much less does the evidence disclose any approval of this attempt. Hence Brown's rights were not impaired by it.

By the failure in the application to state that the building was used for an armory, there was no such prejudice as was pleaded in respect thereto; for it was proved, beyond question, that in the armory there were kept no explosives or inflammable substances, and the keeping of these in said armory was what, in the answer, was alleged to have increased the risk. The testimony of insurance agents that armories are usually classified as extrahazardous risks was simply as to their judgment of what the action of insurance companies ordinarily would be in case such a risk was offered. In this case the written application, in which the building to be insured was described as a livery barn, was introduced in evidence. If this application could have subserved any purpose in procuring the issuance of a policy, it must have been, if this quasi expert testimony was material, by influencing the officers of the company at Des Moines to accept the proffered risk. There was no attempt to show that the policy was issued by reason of the presentation of this application at the home office. Hence there was no competent proof that the alleged misdescription therein was misleading, in view of the testimony of the aforesaid insurance agents. The averment of the answer that, without consent of the plaintiff in error, the upper story of the insured building was in January, 1891, and up to the time of the fire, changed so as to become an armory, had no support in the evidence. It was shown beyond question that this use as an armory existed from the erection of the building, in 1887. Hence the sole question presented on this branch of the case, by pleadings and evidence, had already been disposed of by the above discussion.

The mortgagee, to whom was payable the loss, by the terms of the policy, was the original plaintiff in this case. The amount secured to be paid to this mortgagee was $2,000, with interest thereon. This mortgage was dated March 15, 1888, and it was filed for record the day following. The mortgage, which was not disclosed in the application for insurance, was made to J. H. Culver on March 13, 1888, to secure the payment of $755. This mortgage was filed for record on March 23, 1888. The application, from which was omitted all mention of this last-named mortgage, was dated March 15, 1890, and the

policy thereon, claimed to have issued, was of the same date. The only mention of the defendant in error to be found in all these insurance transactions occurs in the policy sued upon, and is in the following words: "Loss, if any, is payable to the New Hampshire Trust Co., mortgagee, as their interest may appear at the time of loss." In this policy it was provided, with respect to mortgaged premises, that "if the same, or any part thereof, is incumbered by mortgage, lien, contract of sale, or otherwise, * * * or any existing incumbrance at the time of making application is not set forth in the application, * * * then, and in every such case, this policy shall be void." In Phenix Ins. Co. of Brooklyn v. Omaha Loan & Trust Co., 41 Neb. 834, 60 N. W. 133, it was held that by issuing a policy of insurance an insurer was bound to make good such loss and damage as should be caused to the insured property by fire, but that the conditions upon which the payment should be made, as between the insurer and the insured, did not necessarily qualify the right of mortgagee to collect payment under a mortgage slip which provided that the payment of loss should be made to such mortgagee as his interest appeared at the time of such loss. Under such a provision the contract of insurance, in so far as it related to the right of a mortgagee to recover, was held to be a separate and independent contract from the one which governed the right of the insured in that respect, and the cases cited fully sustain this distinction. It therefore results from the doctrine of the case last cited that the right of the defendant in error to recover the amount of loss, as its interest as mortgagee was at the time of the fire, was not defeated by the fact that, as between the insurer and the insured, there had been an omission in the application to describe or refer to the mortgage to Culver, or by the fact that there was a like omission of mention of the use of the building for an armory. In this connection it is deemed appropriate to observe that the evidence justified the amount of the verdict returned by the jury, for there was due, as interest, the amount of the verdict in excess of $2,000. There is presented by the record no other question which we can examine; for if, upon the instructions, there were such questions, they could not be considered, on account of the manner in which the instructions are grouped in the petition in error. The judgment of the district court is affirmed. Affirmed.

BARKER v. DAVIES.

(Supreme Court of Nebraska. Feb. 4, 1896.)

REVIEW ON APPEAL—OBJECTIONS NOT RAISED BELOW—PERFORMANCE OF CONTRACT—INSTRUCTIONS.

1. By failure to mention, in a motion for a new trial, the ruling upon a motion to make more specific and certain the averments of a pleading, the party complaining waives his right to have reviewed the ruling complained of.

2. Instructions *held* correct, which, while recognizing a defendant's right to insist upon the strict performance of the terms upon which a sale of personal property was alleged to have been made, nevertheless, consistently with the evidence introduced, permitted the jury to consider whether or not such strict performance had been waived by the party sought to be charged.

(Syllabus by the Court.)

Error to district court, Merrick county; Marshall, Judge.

Action by Charles K. Davies against Samuel M. Barker. Judgment for plaintiff. Defendant brings error. Affirmed.

Albert & Reeder and Norval Bros. & Lowley, for plaintiff in error. M. Whitmoyer and John Patterson, for defendant in error.

RYAN, C. This action was brought in the district court of Merrick county by the defendant in error to recover the purchase price of certain produce sold to, and the reasonable value of certain services performed for, the plaintiff in error. There was an answer, by which there was denied the purchase and delivery of the hay and straw hereinafter referred to, and, in addition, by way of counterclaim, there was alleged a payment of $96.05, as well as the existence of damages, to the amount of $100, caused by the alleged failure by plaintiff in error to cut and properly put up certain hay. By reply, these affirmative matters were denied. There was a judgment in favor of defendant in error for the sum of $197.82.

The first question argued involves the overruling of a motion to make more definite and certain the averments of the petition. As this ruling was not referred to in the motion for a new trial it cannot now be considered.

In the petition it was alleged that the defendant in error had sold and delivered to plaintiff in error 100 tons of hay at the agreed price of $2 per ton, and 70 tons of straw at the same price per ton. These items were controverted by a general denial, contained in the answer. In respect to the hay and straw, there seems to have been but little disagreement, in the evidence, that this was to be baled by the plaintiff in error, and that, after this baling was done, it was to be delivered on board the cars at a designated near-by railroad siding. It also seems clear that such of the hay as was baled was delivered as agreed. There was, however, quite a large amount of hay and all the straw which Mr. Barker never had baled, it would seem, because he thought it was not fit for baling. There was ample evidence from which the jury was justified in finding that Mr. Barker used the unbaled part of the hay and straw in maintaining and caring for his stock at a place where no railroad shipment was necessary. On this branch of the case the sole point made is indicated

by the second instruction, asked by the plaintiff in error, which was refused by the court. This instruction was in the following language: "The plaintiff claims, among other things, $200 for 100 tons of hay, which he alleges he sold and delivered to the defendant. If you find that this 100 tons of hay was a part of a larger amount, and that said 100 tons was not set apart or designated or separated from the balance of the said larger amount, and that only a part of said 100 tons was actually delivered according to the agreement, then for the amount so delivered he should be allowed $2 per ton." This instruction was properly refused; for, though the defendant in error did not load on the cars a portion of the hay, this was solely due to the fact that this hay was not baled by the other party. There was no question of a quantum meruit made in the case. On the part of the defendant in error, the claim was that he had sold 100 tons of hay at $2 per ton. This was met by a simple denial. The proof was that $2 per ton was the agreed price. For a failure to place on board the cars, no counterclaim or rebate was urged. Under these circumstances, we think the following instruction, though complained of by the plaintiff in error, embodied the correct principle applicable to the evidence as submitted to the jury: "(9) The jury is instructed that if, from the evidence in this case, they believe that in the year 1889 plaintiff sold to the defendant 100 tons of hay in the stack for the agreed price of $2 per ton, and that by the terms of sale defendant was to bale it, and the plaintiff, after such baling, was to haul it to the railroad station, and put it on board the cars, and that thereafter the defendant, on receiving returns of the sale of the hay, was to pay for it; and if the jury further, from the evidence, believe that, by the terms of sale, the 100 tons sold formed a part of 165 tons, or any greater number of tons, in stack, and that the particular stacks which the defendant was to get were not identified or separated from the other stacks,—then the right to select the stacks sold was in the defendant, and if he afterwards selected the stacks which he would take, by using a part thereof, or otherwise marking the stacks, so as to identify them, then the property in the stacks so selected or marked would vest in the defendant, and he would be liable to pay the plaintiff therefor at the rate of $2 per ton, although the hay was not baled by the defendant, or hauled to the cars by the plaintiff. In such case the plaintiff would not be under obligation to haul it until it was baled. The defendant would be entitled to such time for baling as would be reasonably necessary for that purpose, if no time was fixed by the terms of sale; and if a time was fixed, then such time should govern the time within which the baling was to be done. On the other hand, if the jury, from the evidence, believe that defendant made a selection of only a part of the 100 tons of hay, then he would only be liable to the plaintiff for the amount selected at the agreed price." It is unnecessary to quote the instruction given in relation to the straw, for the principle stated therein was the same as is found in the above instruction relative to the hay.

To entitle himself to a credit of $96.05, the plaintiff in error introduced in evidence a check signed by himself for said amount, payable to the defendant in error, across which was stamped by the drawee the words: "First National Bank. Paid March 29th, 1890. Columbus, Nebraska." There was, in connection with this check, but little satisfactory testimony given by Mr. Barker, who admitted that it was not charged to the defendant in error in his account with him, but said that, when he began to look over his papers with reference to making a defense, he found this particular check marked "Paid," and he believed it to have been given in payment upon account with the plaintiff in error, but would not swear positively that such was the case. The testimony of the defendant in error and of Alfred Davies was that this check was made by Mr. Barker, upon his own motion, to C. R. Davies, in payment for certain property purchased of Alfred, because Alfred was then a minor, and Mr. Barker did not wish to depend upon his indorsement as evidencing the receipt of the money by Alfred upon the said check. With the conclusion reached by the jury upon consideration of this evidence we cannot interfere.

It is urged that the verdict was not sustained by the evidence; but, in regard to this, also, we must disagree with the plaintiff in error. There was ample evidence showing that both the hay and the straw were taken and used by the plaintiff in error, and that the condition of payments was correctly shown by the proofs offered by the defendant in error. The judgment of the district court is therefore affirmed. Affirmed.

MONROE et al. v. HANSON et al.

(Supreme Court of Nebraska. Feb. 4, 1896.)

BONA FIDE PURCHASER—RES JUDICATA—LIMITATION OF ACTIONS.

1. The findings of a trial court which are sustained by sufficient evidence will not be disturbed on appeal to this court.

2. Possession of real estate is ordinarily notice of a claim of right, and is notice to all the world of the right or interest the person holding possession may have in the property over which it is exercised.

3. It is a general rule that an adjudication in an action affects only those who are parties to the action or in privity with them.

4. An action in which it is sought, as the relief demanded by the plaintiff or a cross petitioner, to foreclose a mechanic's lien against the rights or interest of any person in the property covered thereby, must have been commenced within two years from the date of filing the

lien, or it is barred, so far as the right to foreclose the lien is concerned, by limitation.

(Syllabus by the Court.)

Appeal from district court, Buffalo county; Holcomb, Judge.

Action by James Monroe and others against Charles Hanson and others. To the judgment rendered, certain defendants bring error. Affirmed.

Lamb, Ricketts & Wilson, for appellants. R. A. Moore, for appellees.

HARRISON, J. This is an action instituted May 7, 1891, by James Monroe, to foreclose a mortgage on lot 371 in Kearney, Buffalo county, Neb. Charles Hanson, Nora M. Jones, W. J. Cooper, Cole Bros., and some others were made defendants. W. J. Cooper and Cole Bros. filed a cross petition, in which it was pleaded that they, between the 1st day of October, 1886, and the 1st day of January, 1887, pursuant to a contract entered into with Charles E. Hanson, the owner of the lot described, furnished the material, and placed in a brick building then in process of erection thereon the necessary apparatus or appliances for heating the same by steam, and on January 31, 1887, filed and perfected a lien upon the premises for the balance due them on account,—$528; that one Walter Knutzen, who had a mechanic's lien on the premises involved in the present action, commenced suit to foreclose it June 4, 1887, in which W. J. Cooper and Cole Bros. were made parties, and filed a cross petition on June 27, 1887, asking a foreclosure of their lien, which was denied them in the trial court, but in an appeal to this court the decree was reversed, and they were accorded a foreclosure. 44 N. W. 1065. Their petition in the case at bar prayed the establishment of their lien as a first and prior one, and its foreclosure. To this answer and cross petition, Nora M. Jones, of defendants, pleaded that on the 7th day of January, 1887, by purchase from R. A. Moore, the then owner of the premises involved in this suit, she became the owner and immediately assumed possession of them, and has at all times since retained the ownership and possession; that the deed to her of the property bore date of January 8, 1887, and was recorded June 7, 1887; and that no action had ever been commenced against her to foreclose the lien of W. J. Cooper and Cole Bros., nor had its foreclosure ever been sought in any action in which she was a party; that more than two years have elapsed since their lien was filed, and any action for its enforcement is barred by limitation. The trial court decided the issues between W. J. Cooper and Cole Bros. and Nora M. Jones in favor of Mrs. Jones, and rendered a decree accordingly, from which the lienholders have appealed to this court.

It appeared in the trial of the present case, and is undisputed, that on June 4, 1887, Knutzen commenced an action to foreclose a mechanic's lien on the premises involved in the case now under consideration; that appellants herein were parties to that action, filed their cross petition to foreclose their lien, were defeated in the trial court, but on appeal to this court were successful, and obtained the relief sought. Nora M. Jones was not made a party to the Knutzen suit, nor was she served with process therein. The premises involved were transferred by Charles E. Hanson to R. A. Moore, and by Moore to Mrs. Jones, prior to the time the Knutzen case was commenced. At the time the property was so transferred, and continuing to and including the time of the pendency of the Knutzen suit, E. B. Jones, the husband of Nora M. Jones, was in partnership with R. A. Moore in the law and real-estate business; and it is claimed for appellants that the evidence discloses the purchase of this property from Hanson for the partnership, and that the conveyance to Mrs. Jones was not to her in her own right, but in trust for her husband; and that he, although not appearing on the record in the Knutzen case as a party thereto, was the real party interested, and litigated his rights, and as against this particular lien, through the names and defenses of R. A. Moore and Charles E. Hanson, both parties to that suit, and, having so proceeded, is bound by the judgment therein. We need not further discuss this contention than to say that the facts established by the testimony warranted the trial court in finding that the property was sold to Nora M. Jones by Moore, and conveyed to her, not in trust for her husband, but as her individual and separate property; and this finding, being sustained by sufficient evidence, will not be disturbed.

It is contended by counsel for appellants that "the suit in which the decree of foreclosure of the appellants' mechanic's lien was rendered was properly brought against the person holding the legal title of record of this property, and that, if other persons are afterwards discovered to own or have an interest in the property, they may be foreclosed in equity whenever their interest is discovered"; also, "if a deed to a purchaser of an equity of redemption has not been duly recorded at the time of the bringing of the bill, such party is not a necessary party so far as to render the proceedings invalid in any event, and he is not a necessary party even unless he shows affirmatively that, at the trial that was had, the plaintiff had either actual or constructive notice of the conveyance of the property before suit brought"; and, further, "if the nominal holder of the equity of redemption or the holder of an equitable title is not made a party in a suit of forclosure, he may be proceeded against in a subsequent suit, and his interest foreclosed." The evidence disclosed that Mrs. Jones purchased the property January 7, 1887; that it was conveyed to her by deed dated January 8, 1887, but

which was not recorded until June 7, 1887, or three days subsequent to June 4, 1887, the date of the commencement of the first action, or the Knutzen case, by which name we have designated it to distinguish it from the case at bar. The deed of conveyance from Moore to Mrs. Jones was not or could not be produced at the trial of the case, and the record of the same was introduced. On the margin of the page of the book in and on which it was copied appeared the following statement: "Original instrument was presented for correction on November 30th, 1892, and the record was corrected by adding the name of H. C. Andrews as a witness thereto. H. H. Seeley, County Clerk." It is urged for appellants that it appeared from this that the record of the conveyance as it existed on June 7, 1887, was of a deed which was not properly executed, and was not notice of the rights of the grantee; that "the registration of a deed defectively executed is not notice." If the recitals of this entry on the margin of the page of the book in which the deed was recorded can properly be said to be evidence of anything, they would seem to indicate that, in recording the instrument, the clerk had omitted the name of the witness, and it had been presented for the purpose of having the correction made, the omission supplied, and probably the failure of the officer to properly record the instrument could not be allowed to prejudice the rights of the party presenting it for record. We need not decide this question, however, but may pass it without expressing our opinion, as it was fully established by the evidence that Mrs. Jones, when she purchased the property, immediately entered into the possession thereof, and was in possession of it, and collecting the rents, at the time the Knutzen suit was commenced and the cross petition of W. J. Cooper and Cole Bros. was filed therein, and during and after its pendency and trial. The continued possession of Mrs. Jones was notice to all the world of her rights in the premises (Lipp v. Land Syndicate, 24 Neb. 692, 40 N. W. 129); and, if either the plaintiff or cross petitioner desired to affect her rights by the decree and judgment in the action, she should have been made a party to and brought into the suit, and, as it was not done, she was not bound or her interests affected by it. It is the general rule that no person can be affected by any judicial proceedings to which he is not a party, and a judgment takes effect only between the parties, and gives no rights to or against third persons. 1 Freem. Judgm. § 154. So a foreclosure is only effectual against those interested in the title who were parties. 2 Ballard, Real Prop. 547; 2 Jones, Mortg. 1397–1406; Merriman v. Hyde, 9 Neb. 113, 2 N. W. 218. "A person who is not party to a suit ordinarily is not bound by the adjudication, nor is a suit deemed commenced against one until he is made a party to it." Green v. Sanford, 34 Neb. 366, 51 N. W. 967; Dodge v. Railroad Co., 20 Neb. 276, 29 N. W. 936.

In reference to the right to institute the action against a person not a party to the prior suit, in which foreclosure of a mechanic's lien was sought, or in a subsequent action, as a cross petitioner, to litigate the rights of such person, and foreclose the lien as to the interest of such person in the property affected thereby, it may be said that the subsequent action in which the foreclosure of the lien is demanded, either by the lienholder as plaintiff or as cross petitioner, must be commenced within the life of the lien, or within two years after the time of its filing. The lien of W. J. Cooper and Cole Bros. was filed January 31, 1887. The suit in which they filed their cross petition praying that the lien be established against the rights of Nora M. Jones was not commenced until May 7, 1891, more than four years after the lien was filed, and the right of action thereon, as to her or her interest in the property, was barred by limitation. Squier v. Parks, 56 Iowa, 409, 9 N. W. 324; Green v. Sanford, 34 Neb. 363, 51 N. W. 967; Burlingim v. Cooper, 36 Neb. 73, 53 N. W. 1025; Pickens v. Polk, 42 Neb. 267, 60 N. W. 566; Ballard v. Thompson, 40 Neb. 529, 58 N. W. 1133. The judgment of the district court is affirmed. Affirmed.

OMAHA LOAN & TRUST CO. v. HOGEBOOM et al.

(Supreme Court of Nebraska. Feb. 4, 1896.)

RECORD ON APPEAL—CONCLUSIVENESS.

The record of the trial court in all appellate proceedings imparts absolute verity. If such record is incomplete or incorrect, the remedy is by appropriate proceeding to secure a correction thereof in the lower court.

(Syllabus by the Court.)

Appeal from district court, Sarpy county; Ambrose, Judge.

Action by the Omaha Loan & Trust Company against Hogeboom and others. Judgment for plaintiff. Defendants appeal. Dismissed.

Chas. F. Tuttle, for appellants. F. A. Brogan, for appellee.

POST, J. This is a motion by the Omaha Loan & Trust Company, the appellee, to dismiss the appeal on the ground that it was not taken within the prescribed period of six months after the date of the final decree. Two transcripts have been filed in this court, both showing a decree rendered March 27, 1895, but differing in this: that one, viz. that filed by the appellant, is accompanied by a caption in which appears the following recital: "And afterward, on the 2d day of April, 1895, there was filed in the office of the clerk of the district court a decree, and the same became of record in journal 'F,'

page 603, in words and figures following." It is contended by appellant that the necessary and only inference from the foregoing recital is that the decree was not in fact entered until April 2d, and that, following Bickel v. Dutcher, 35 Neb. 761, 53 N. W. 663, and Ward v. Urmson, 40 Neb. 695, 59 N. W. 97, the appeal taken October 1st following was within the statutory time. The statement of the caption regarding the date of the filing of the decree does not purport to be a part of the record of the district court, but is a mere recital superadded by the clerk, and indicating, if it is to be regarded for any purpose, that the draft of the decree previously rendered and entered of record was on the day named lodged in the clerk's office and placed with the files of the cause. It was said in Bickel v. Dutcher that the time for appeal begins to run against the appellant whenever it is within his power to comply with the statute regulating appeals by procuring a transcript of the proceedings of the district court. But in neither of the cases cited was it intimated that this court would look outside of the record of the trial court for the date of the order or decree appealed from. It is true that affidavits were received, but without objection, in Bickel v. Dutcher, tending to prove that the decree was rendered on a day other than that shown by the record. They were not, however, seriously urged or considered for the purpose of contradicting the record of the district court, and the decision in that case, as shown by the opinion, rests upon entirely different grounds. In State v. Hopewell, 35 Neb. 822, 53 N. W. 990, it was held that the record of the trial court is, on appeal to this court, conclusive evidence of the date of the order or decree appealed from. And if the record is incorrect, the remedy is by direct proceeding to secure a correction thereof in that court. Like views are expressed also, in Haggerty v. Walker, 21 Neb. 596, 33 N. W. 244; Worley v. Shong, 35 Neb. 311, 53 N. W. 72; McAllister v. State, 81 Ind. 256. The rule recognized in the cases cited is without doubt applicable to the case at bar. It follows that the appeal was not taken within the statutory time, and that the motion to dismiss must be sustained. Motion to dismiss sustained.

BURLINGTON & M. R. R. CO. IN NEBRASKA v. MARTIN.

(Supreme Court of Nebraska. Feb. 4, 1896.)

RIGHT TO APPEAL—PARTIES IN INTEREST.

1. The parties to a judgment, or their privies alone, can prosecute an appeal or petition in error.

2. A petition in error will be dismissed where it is prosecuted by one who has no interest in the controversy, and against whom no judgment has been entered.

(Syllabus by the Court.)

Error to district court, Adams county; Beall, Judge.

Action by Laura Martin against the Burlington & Missouri River Railroad Company in Nebraska. The Chicago, Burlington & Quincy Railroad Company was substituted as defendant Judgment for plaintiff, and the Burlington & Missouri River Railroad Company in Nebraska brings error. Dismissed.

W. S. Morlan and Marquett & Deweese, for plaintiff in error. Batty & Dungan and John Doniphan, for defendant in error.

NORVAL, J. A suit was instituted in the district court of Adams county by Laura Martin, administratrix of the estate of James Martin, deceased, against the Burlington & Missouri River Railroad Company in Nebraska to recover damages for negligently causing the death of her husband. After the petition and answer were filed, by order of the court below the Chicago, Burlington & Quincy Railroad Company was substituted as party defendant in the cause, instead of the corporation first above named. Upon the trial a verdict was returned in favor of the plaintiff against the substituted defendant for $5,000, which was followed by a judgment for a like sum. To reverse which the Burlington & Missouri River Railroad Company in Nebraska has prosecuted a petition in error, in its own name, to this court.

The proceedings must be dismissed, since it does not appear from the record that this plaintiff in error is in any manner interested in the controversy, or affected by the judgment sought to be reviewed. It is disclosed that after the said order of substitution was made the title of the cause was changed, and all papers thereafter filed therein, and the bill of exceptions, verdict, and judgment were entitled "Laura Martin, Administratrix, Plaintiff, v. Chicago, Burlington & Quincy R. R. Co., Defendant." This plaintiff in error was completely dropped out of the case when the order of substitution was entered, appeared no further therein, and no judgment was rendered against it; therefore there is not anything of which it could complain. Certainly it cannot champion the lost cause of another separate and distinct corporation, not before the court, unless a privity of interest is shown, which is not the case before us so far as we can gather from the record. It is only the parties to a judgment, or their privies, who can prosecute an appeal or petition in error. Elliott, App. Proc. § 132 et seq., and cases there cited. Dismissed.

WARREN v. SADILEK.

(Supreme Court of Nebraska. Feb. 4, 1896.)

PUBLIC OFFICER—ACTION FOR MISCONDUCT—JURISDICTION OF JUSTICE.

1. A justice of the peace has no jurisdiction to hear and determine an action brought against

a public office for misconduct in office. Rule applied.

2. *Held*, that the findings are sufficient to support the judgment.

(Syllabus by the Court.)

Error to district court, Saline county; Bush, Judge.

Action by Joshua Warren against Frank J. Sadilek. There was a judgment of dismissal, and plaintiff brings error. Affirmed.

J. D. Pope, for plaintiff in error. E. E. McGintie and A. S. Sands, for defendant in error.

NORVAL, J. This action was brought by Joshua Warren against Frank J. Sadilek, before a justice of the peace, to recover the sum of $11.44. Plaintiff had judgment for the amount claimed, and defendant prosecuted error to the district court, where a judgment of reversal was entered and the action dismissed. Plaintiff brings the case to this court on error.

The main question presented by the record for decision is whether the justice of the peace had jurisdiction of the subject-matter of the action. Section 907 of the Code of Civil Procedure provides that "justices shall not have cognizance of any action: * * * Third. In actions against justices of the peace or other officers for misconduct in office, except in cases provided for in this title." This statute specifically prohibits one justice of the peace from adjudicating upon the official misconduct of another justice of the peace or other public officer. Therefore, if this action is predicated upon the official misconduct of the defendant while in office, as is claimed by the defendant, the justice had no power to hear and determine the same; and the judgment of the justice was properly reversed for want of jurisdiction to render it. The bill of particulars alleges, in substance and effect, that the defendant was and is the county treasurer of Saline county; that on the 28th day of July, 1891, there was due from the plaintiff, as taxes on personal property for the year 1889, the sum of $49.20; that on said day demand was made upon plaintiff for said money, through the defendant's tax collector, which sum the plaintiff paid on the following day, and received credit therefor in payment of his said taxes; that afterwards the defendant issued a distress warrant for the said sum of $49.20 against plaintiff for his personal taxes of 1889, which writ was levied upon certain personal property of plaintiff on July 31, 1891, and to prevent the sale thereof under said levy, plaintiff paid the defendant, under protest, the amount demanded by him, to wit, $60.67, the same being the above amount of taxes for the year 1889 and $11.47 costs, fees, and charges made under said writ; and that subsequently defendant returned to plaintiff the sum of $49.23. This action is to recover the amount aforesaid paid as fees and costs. Do these facts show that the gist of the action is the official misconduct of the defendant as county treasurer? We must answer the question in the affirmative. It is disclosed that he received and collected the moneys from the plaintiff, not as an individual, but in his official capacity. The taxes upon which the distress warrant was issued had already been paid, and to release his property from the levy the plaintiff was compelled to pay them again, as well as more than $11 for costs. The taxes having been previously received by the county treasurer, he was not entitled to fees or costs. If the acts of the defendant do not establish official misconduct, or, as expressed in the statute, "misconduct in office," then it is scarcely possible for a cause of action against a county treasurer for official misconduct to ever accrue. It is of the official acts and conduct of the defendant, and not of his personal actions, that complaint is made. Neihardt v. Kilmer, 12 Neb. 36, 10 N. W. 531, is not in point. As the fact alleged constitutes misconduct in office, the justice had no jurisdiction of the action.

It is insisted that the finding of the district court is insufficient to sustain the judgment of reversal. The finding was that error existed as alleged in the petition in error. This pleading contained four assignments, viz.: (1) The bill of particulars fails to state a cause of action. (2) The justice court had no jurisdiction to hear and determine the action. (3) The action is brought for alleged misconduct in office of the defendant as county treasurer, and said justice court is expressly prohibited by law from assuming to hear and determine said cause. (4) The judgment of the justice court is wholly without jurisdiction of the subject-matter, and void. The general finding by the district court of error in the record was sufficient, without specifying which assignment of the petition in error was sustained. Haller v. Blaco, 14 Neb. 196, 15 N. W. 348. The judgment of the court below is affirmed. Affirmed.

GILCREST v. NANTKER.

(Supreme Court of Nebraska. Feb. 4, 1896.)

PETITION FOR NEW TRIAL—MERITORIOUS CAUSE OF ACTION.

A petition by a plaintiff for a new trial, under section 602 of the Code, after the term at which judgment was rendered, is properly denied where the petition in the original suit fails to state sufficient facts to have supported a judgment in his favor, and where it does not appear that his alleged cause of action is meritorious.

(Syllabus by the Court.)

Error to district court, Buffalo county; Holcomb, Judge.

Action by F. H. Gilcrest against Henry Nantker. Judgment for defendant. Plaintiff brings error. Affirmed.

R. A. Moore, for plaintiff in error. Marston & Nevius, for defendant in error.

NORVAL, J. This was an action in equity brought in the court below by the plaintiff in error against Henry Nantker to obtain a new trial in a suit at law between the same parties. A general demurrer to the petition was sustained, and the cause dismissed. The original action was to recover damages for alleged deceit and false representations in the sale of a horse by Nantker to Gilcrest. The verdict was for the defendant. Plaintiff's motion for a new trial was overruled, and judgment was rendered for the defendant, which was affirmed by this court at the September, 1891, term, for the reason the petition failed to state a cause of action. The record shows that the district court offered, in the original cause, to sustain the motion for a new trial, and permit the plaintiff to amend his petition, conditioned alone that the costs of the trial should be taxed to the plaintiff. Gilcrest, by his attorney, elected to stand upon his motion, and declined to amend his petition, whereupon said motion was overruled. The facts set forth in the application for equitable relief against the judgment, briefly stated, are these: That, when the motion for a new trial came on for hearing and decision, R. A. Moore, who had represented the plaintiff in the cause from its inception, appeared for said plaintiff, and elected, for him, to stand upon said motion, and not to submit to the order of the court relating to amending of the petition and the taxing of costs; that said election was made without said attorney consulting with his client, and while plaintiff was absent from Buffalo county, he being at the time in the city of Omaha, and possessing no knowledge that the motion would be called up in his absence from the county; that on his return from Omaha, and before he had an opportunity to consult with his said attorney, he was taken dangerously ill, and by reason thereof was confined to his bed for the period of two or three months thereafter, and until after the adjournment of the term of court at which the judgment was pronounced; that during said illness he was prohibited by his physician from consulting with the members of his own family, or others, upon matters of business,—much less, his said attorney; that as soon as plaintiff recovered from said illness, and was able to converse with his attorney, he was informed by Mr. Moore of the order of the court, and the disposition made of the case, whereupon he instructed his attorney that he desired to abide the order of the court made in passing upon the motion for a new trial, and submit to the payment of costs; and the petition for a new trial was soon thereafter prepared and filed.

The petition for a new trial was made after the term at which the judgment complained of was rendered, and is based upon paragraph 7 of section 602 of the Code of Civil Procedure, which provides for granting new trials "for unavoidable casualty or misfortune, preventing the party from prosecuting or defending." Whether the facts alleged in the application bring the case within the quoted provision of the statute, we do not decide, since it is clear, from other considerations hereafter stated, that the demurrer to the petition was rightfully sustained on another ground. The petition in the original suit did not state a cause of action. This, as already mentioned, was decided in Gilcrest v. Nantker, 42 Neb. 564, 60 N. W. 906, and wherein the pleading was defective need not be restated. The averments being insufficient to entitle the plaintiff to recover, it is obvious that a new trial, if granted, would have been a barren victory, unless an amended petition was filed. True, plaintiff might have recast his pleading, if the facts would allow him to do so; but his application for a new trial contains no averment that the defects in the petition could be remedied by amendment, nor that he has a meritorious cause of action, and no fact constituting his alleged cause of action is pleaded. This court has held, where a defendant petitions for a new trial after the term at which judgment was entered, he must plead the facts showing that his alleged defense is meritorious, otherwise his application will be defective. Gould v. Loughran, 19 Neb. 392, 27 N. W. 397; Railroad Co v. Manning, 23 Neb. 552, 37 N. W. 462; Osborn v. Gehr, 29 Neb. 661, 46 N. W. 84; Insurance Co. v. Meyer, 30 Neb. 135, 46 N. W. 292; Hughes v. Housel, 33 Neb. 703, 50 N W. 1127; Petalka v. Fitle, 33 Neb. 756, 51 N. W. 131. And, when a new trial is sought after the term by a plaintiff, it must appear that he has a valid cause of action. Proctor v. Pettitt, 25 Neb. 96, 41 N. W. 131; Thompson v. Sharp, 17 Neb. 69, 22 N. W. 78. Since the application for a new trial fails to disclose that plaintiff has any cause for action against the defendant, the district court did not err in sustaining the demurrer.

The litigation concerning the horse in controversy, "now in the land of shadows,"—so we are advised by the very interesting and able brief of counsel for defendant,—has been protracted and varied. To this plaintiff it has been both expensive and fruitless, and having failed to obtain relief in equity, as well as at law, may we express the hope that that poor old horse may never be the subject of further investigation before any earthly tribunal. Affirmed.

MANNING v. CONNELL et al.

(Supreme Court of Nebraska. Feb. 4, 1896.)

APPEALABLE ORDER—DISSOLUTION OF RESTRAINING ORDER.

The orders sought to be reviewed upon petition in error, being only for the dissolution of a temporary restraining order, and in denial of a temporary injunction, it is *held* that neither of these is a final order, and this proceeding is

therefore dismissed. Bartram v. Sherman, 65 N. W. 789, 46 Neb. —, followed.

(Syllabus by the Court.)

Error to district court, Douglas county; Ogden, Judge.

Action by Joseph P. Manning against William J. Connell and William L. Peabody. From an order vacating a temporary restraining order, plaintiff brings error. Dismissed.

D. Van Etten, for plaintiff in error. Connell & Ives, for defendants in error.

RYAN, C. In the district court of Douglas county plaintiff obtained the following temporary restraining order: "Upon reading the petition of plaintiff in the foregoing action, duly verified, and for good cause shown, it is ordered that the application of the plaintiff, Joseph P. Manning, for an order of injunction as prayed in said action, be, and the same is hereby, set for hearing on Saturday, the 21st day of January, 1893, at 10 o'clock in the forenoon of that day, or as soon thereafter as the same can be heard at court room number 1, at the courthouse in the said county of Douglas, and that notice of the hearing of this order be given to defendant by Thursday, January 19, 1893; and, it is hereby further ordered by the court that a restraining order be, and the same is hereby, allowed, restraining and enjoining the said defendants, and their agents, servants, employés, and representatives, as prayed in said petition, to be and continue in full force and effect until the hearing and final determination of the application of said plaintiff for said order of injunction herein, and until the further order of court in that regard, upon plaintiff executing an undertaking in the sum of five hundred dollars as required by law.' On hearing for the purposes in the above order indicated, the temporary restraining order was vacated, and the temporary injunction prayed was refused and denied. By petition in error plaintiff seeks to have the above reviewed as final orders. The quotation of the entire restraining order, supplemented by a full description of the orders sought to be reviewed, shows that this case falls within the rule announced and enforced in Bartram v. Sherman, 46 Neb. —, 65 N. W. 789. For the reason that, as indicated, the orders sought to be reviewed are not final, this proceeding is dismissed. Dismissed.

SANDERS v. WEDEKING et al.

(Supreme Court of Nebraska. Feb. 4, 1896.)

REVIEW ON APPEAL—SUFFICIENCY OF EVIDENCE—INDORSEE OF NOTE—BONA FIDE PURCHASER.

The special verdicts in this case are found, upon examination, to be sustained by sufficient evidence. The judgment upon a general verdict, in accord with the special findings, is affirmed.

(Syllabus by the Court.)

Error to district court, Fillmore county; Hastings, Judge.

Action by A. B. Sanders against William Wedeking and Christ. Wedeking. Judgment for defendants. Plaintiff brings error. Affirmed.

J. D. Pope, for plaintiff in error. Billings & Billings and O. M. Quackenbush, for defendants in error.

RYAN, C. This action was brought by plaintiff in error as indorsee upon a promissory note for $200, made by the defendants in error to the People's Bank of Tobias. The defense of usury was sustained by the findings and verdict of the jury, and the sole question presented for our determination is whether or not these findings and this judgment adverse to the plaintiff in error were sustained by sufficient evidence. When the note was given, Worden A. Sanders, a son of the plaintiff in error, was assistant cashier of the bank above named, though it appears that his duties as such assistant cashier admitted of his devoting attention to his trade of jeweler in a building different from that in which the banking business was conducted. He was, however, in the bank when the cashier, Stanley Larsen, made the loan to the defendants in error, which is conceded in its inception to have been usurious. It was the custom of this bank to loan at usurious rates, and the assistant cashier was aware of this; for, upon being asked at what rate this bank made loans, he told one of the defendants in error that it was 2 per cent. a month on short time, but that, if a man took lots of money for six months, it would be cheaper. When the cashier of the bank was arranging for this particular loan, the assistant cashier was near by, in the same room; and, as one of the defendants testified, he was within hearing distance of the conversation, carried on, as it was, in an ordinary tone of voice by each party. Immediately after this note was taken, it was transferred by the following indorsement: "Pay to A. B. Sanders, without recourse on me. Stanley Larsen, Cas." The payment for the transfer of this note, it was testified without contradiction, was made by Worden A. Sanders. Whether this payment was with his own means, whereby he became the owner of this note, and afterwards transferred it to his father, or whether he bought with means of his father in his hands, were propositions contested and submitted to the jury, which, by special verdict, found the latter established by the proofs. The fact that the indorsement was made by the cashier directly to A. B. Sanders would seem entitled to some weight, as indicating that, in this purchasing, Worden A. Sanders was acting as the agent of his father. He, however, denied that this was the case, and testified that his father had loaned him $600, to be reloaned by Worden as his own, and that, hav-

ing bought this note with a part of this money, he caused it to be indorsed to his father direct, in part payment of said $600 which he was owing. D. H Conant, who was county judge when the case was tried in the county court, testified in the district court that, on the trial before him, plaintiff in error had testified that his son had purchased the note for the plaintiff in error. In this Mr. Conant was corroborated by one of the defendants in error On these two propositions of facts—First, that Worden A. Sanders, at the time of the purchase of the note, had knowledge of such facts that the defense of usury against him could properly be shown; and, second, that this bound his father, for whom he was acting as agent—there was sufficient evidence to sustain the verdict of the jury. There is presented by the record no other question, and the judgment of the district court is affirmed. Affirmed.

SMITH v. JONES, Sheriff, et al.

(Supreme Court of Nebraska. Feb. 4, 1896.)

AUTHORITY OF ATTORNEY—RELEASE OF DEBTOR—RATIFICATION.

1. An attorney employed to collect a debt has not, by virtue of his general employment, authority to release a debtor except upon payment of the full amount of the debt in money.

2. Evidence examined, and *held* insufficient to authorize attorneys to make a contract, as claimed by plaintiff, for the release of a judgment.

(Syllabus by the Court.)

Appeal from district court, Custer county; Neville, Judge.

Action by Humphrey Smith against James B. Jones, sheriff, and others. Judgment for plaintiff. Defendants appeal. Reversed and dismissed.

Darnall & Kirkpatrick, for appellants. O'Neill & Morgan, for appellee.

IRVINE, C. This was an action by the appellee against Jones, the sheriff of Custer county, Foster, his deputy, and the Farmers' & Merchants' Insurance Company, to restrain the defendants from the enforcement of a judgment of a justice of the peace obtained by the insurance company against Smith.

Relief against the judgment was sought on the ground that, after the judgment was rendered (quoting the petition), "the Farmers' & Merchants' Insurance Company acknowledged the payment of said judgment, and receipted for same in the following words and figures, to wit: 'Broken Bow, Sept. 8, 1890. Received of Humphrey Smith, two dollars, one-half costs Farmers' & Merchants' Insurance Co. vs. Smith; also application for $3,000.00 insurance,—in consideration of which we agree to release judgment in this case. Kirkpatrick & Holcomb, Attorneys for Plaintiff.'" The evidence shows that, after the judgment was obtained, an agreement was entered into between Smith and Kirkpatrick & Holcomb, attorneys for the insurance company, whereby the judgment was to be released on payment by Smith of one-half the costs, estimated at $2, and the taking out of new insurance to the amount of $3,000. Smith paid the $2, and made application for insurance. The company wrote the policy and sent it to the attorneys, but it was never delivered to Smith for the reason that he failed to pay the premium thereon. It will be observed that the instrument which plaintiff counts upon as evidence of the satisfaction of the judgment is not, in form, a release of the judgment, but an agreement to release. Whether in consideration of the application for insurance, or in consideration of the insurance, is doubtful, from the terms of the instrument. There is a conflict in the evidence as to whether the judgment was to be released on Smith's making application for the insurance, or whether it was to be released only on his payment of the premium; but the evidence in support of the former view is very slight. In any event, the conflict is not material. The attorneys, by the undisputed evidence, had no express authority to release the judgment except upon the taking out of and paying for the new insurance. They merely had a general employment to collect the debt evidenced by the judgment; and the only subsequent authority obtained was through a letter inclosing the policy, with directions to collect the premium, and sent in response to a submission by the attorneys of a proposition to satisfy the judgment on the actual taking out of new insurance. The ordinary powers of an attorney do not authorize him to execute any discharge of a debtor but upon the actual payment of the full amount of the debt, and that in money only. Hamrick v. Combs, 14 Neb. 381, 15 N. W. 731; Stoll v. Sheldon, 13 Neb. 207, 13 N. W. 201. See, also, Bank v. Green, 8 Neb. 297, and Luce v. Foster, 42 Neb. 818, 60 N. W. 1027. If the agreement was as Smith claims, it was without authority on the part of the attorneys, and was not ratified by the insurance company. It follows that the judgment of the district court, granting an injunction, as prayed by the plaintiff, was erroneous. Reversed and dismissed.

CROOKER v. SMITH.

(Supreme Court of Nebraska. Feb. 4, 1896.)

GUARDIAN—REMOVAL.

1. The county court has power to remove a guardian, upon notice, when he has become incapable of discharging his trust, or evidently unsuited therefor. Comp. St. c. 34, § 28.

2. The disability justifying a removal need not be one arising after the appointment. A guardian may be removed whenever found unsuitable.

3. The word "unsuitable" in the statute applies to any case where the guardian is incapable or not in a situation to properly protect his ward's interests.

4. Corruption or malfeasance is not necessary to authorize the removal of a guardian; evidence of a failure to properly protect the ward's rights is sufficient proof of "unsuitability."
(Syllabus by the Court.)

Error to district court, Lancaster county; Field, Judge.

Proceeding on behalf of Marion W. C. Smith, a minor, against Jabez C. Crooker, for the removal of the latter as guardian. There was a decree of removal, and the defendant brings error. Affirmed.

J. C. Crooker, in pro. per. Abbott, Selleck & Lane, for defendant in error.

IRVINE, C. This was a proceeding instituted in the county court of Lancaster county for the removal of Jabez C. Crooker, who had theretofore been appointed guardian of the estate of Marion W. C. Smith, a minor. February 20, 1889, Crooker was appointed guardian; and May 20, 1890, a petition was filed in the county court charging that Crooker had failed to make a report, although he had sold real estate belonging to the ward. The prayer was for an order requiring the guardian to report and account. An order was made requiring the guardian to file his report on or before May 29th. On May 28th the report was filed, and subsequently exceptions thereto were filed on behalf of the ward. June 26th there was filed on behalf of the ward a petition praying for the removal of the guardian, the charges made being, in brief, that the guardian had paid out the sum of $103.25 of the ward's estate in discharge of a personal debt of one George D. Smith, and sought to charge the ward therefor; that the ward, although over the age of 14 years when the appointment was made and consented to, had since found her relations with her guardian unpleasant, and that she wished him removed. On the hearing by the county court, it was found that the guardian had not reported in the time required by law; that he had paid out $41.30 without authority of law; that the guardian, because of his age and temperament, was unsuitable for his trust; and that the ward complained of existing unpleasant relations; wherefore it was ordered that the guardian be removed, and that his report be allowed, except said sum of $41.30. An appeal was taken to the district court, where the matter was again tried, with similar findings, except that the amount found to have been unlawfully paid out was $56.75. A decree was there entered, removing the guardian, and rendering judgment for the last-named sum. The guardian prosecutes error.

It is first urged that the county court was without authority to remove the guardian; that is, that the proceedings were without jurisdiction. Comp. St. c. 34, § 28, provides: "When any guardian, appointed either by the testator or court of probate, shall become insane, or otherwise incapable of discharging his trust, or evidently unsuitable therefor, the court, after notice to such guardian and all others interested, may remove him." This provision is in the chapter having reference to guardians and wards, and the court referred to, when taken with the context, is evidently the court which is now called the "county court," which has succeeded in probate matters and matters of this character to the jurisdiction of the probate court in existence when the statute was passed. The county court had jurisdiction, upon proper notice, to remove the guardian if he had become insane or otherwise incapable of discharging his trust, or evidently unsuitable therefor. No question is raised in this case as to the sufficiency of the notice given. We think to construe the language as referring only to disabilities occurring after the appointment of the guardian would be to give a construction at once strained and impolitic. It never could have been the intent of the legislature that a guardian once appointed should obtain an inalienable vested right to the office. He is an officer of the court, charged with duties of a fiduciary character. It is the duty of the court to see that these duties are performed; and it is within the power of the court to remove an incompetent guardian in order to protect the estate of the ward, although such incompetency existed at the time of the appointment.

The only other question in the case is whether the findings of the court were sustained by the evidence, and whether those findings show that the guardian was unsuitable for discharging his trust. Some of the facts are as follows: The ward was the daughter of George D. Smith and Marion Smith. Marion Smith was seised of a lot in the city of Lincoln. She died, and Crooker, with the consent of the ward, but this consent obtained at the instance of her father, George D. Smith, was appointed guardian. Five days thereafter, he made application to the district court of Lancaster county to sell the lot in question; alleging that its improvements were in a dilapidated condition, and in need of repairs; that there were delinquent taxes thereon; that no personal propert had come into his hands; and that the funds to be realized from the sale were necessary for the education and maintenance of the ward. To this petition, on the same day, there was filed an answer by Smith, admitting that the ward's mother had died seised of the title to the lot, but alleging that he had furnished the consideration money, and that she held the title in trust for him. On March 3d a stipulation was filed, signed by Smith and by the guardian, whereby it was agreed that Smith had purchased and paid for the lot, the title to which had been taken in the name of Smith's wife, the ward's mother; that the estate of the ward therein was two-fifths, and that of Smith three-fifths; that a sale should be ordered, and out of the proceeds there should be paid to the

guardian for the ward two-fifths, and to Smith three-fifths, less costs, taxes, and assessments. A license to sell was granted on that stipulation, but thereafter a motion was filed showing that the authority to sell on a license granted under such a stipulation was deemed by learned lawyers to be invalid, and that a sale could not be made thereon, wherefore it was stipulated that the license be set aside. Then Smith filed an amended answer, claiming only as tenant by curtesy; and on this there was a hearing and license to sell given, fixing the interest of the ward at three-fifths, and that of Smith at two-fifths, and directing that the costs, taxes, and assessments be paid out of the ward's share. The license authorized a private sale, and a sale was negotiated with one Vieth for $2,700. It was then discovered that there was of record a judgment against Smith for about $280. A cancellation of this was procured for the sum of $103.25. The lot was sold to Vieth, and the sale confirmed, without any disclosure, so far as appears from the record, of the satisfaction of the judgment or its disposition. Vieth paid $1,500 in cash, and gave two notes,—one for $200, and one for $1,000,—secured by mortgage, for the balance of the purchase money. Out of the cash payment, the costs, taxes, and assessments and the $103.25 in satisfaction of the judgment were paid, and the remainder was paid to Smith, in discharge of his two-thirds interest in the land. The $103.25 was charged to the ward. The guardian retained the two notes and a very small balance in money, representing the ward's interest. Comment on these proceedings is hardly necessary. The guardian, in the first place, entered into a stipulation which he had no right to make, admitting facts which might deprive his ward of any beneficial interest in the land. The vice of this proceeding was so apparent that the parties thereto were compelled, on their own motion, to set it aside, because no one who took counsel on the matter would purchase the lot on such a record. The proceedings by which the ward's interests were finally determined, and the taxes and assessments ordered paid out of that interest, are not here reviewable; but, in pursuance of those proceedings, the guardian, by private arrangement, disposed of a portion of his ward's interest in the proceeds by discharging a judgment which was not even an apparent lien on his ward's estate. It was a judgment against Smith, in whom the title had never been, and could not be, a lien, unless it might be upon Smith's life estate. Having done this, while the proceedings were to obtain money for the maintenance and education of his ward, he gave practically all the money realized to the father in satisfaction of his life estate, and retained for his ward only the evidences of indebtedness. He failed within the time required by law to report these proceedings to the county court, and did not report at all until compelled by order of the court so to do.

From the brief filed by the guardian, it is evident that he considers the findings of the county and district courts as equivalent to a conviction of corrupt practice on his part. The findings have no such effect, and this opinion has no such effect. The record merely shows that, perhaps through inadvertence or otherwise innocently, the guardian had failed to properly care for the interests of the ward. He had done several things to her disadvantage which he had no right to do. We think the word "unsuitable," in the statute, is very broad in its meaning, and applies to every case where the guardian, for any reason, is shown not to be capable of or not in a situation to suitably protect his ward's interests. Judged by this test, the evidence amply warranted the county and district courts in their findings. Judgment affirmed.

OMAHA & R. V. RY. CO. v. CROW.

(Supreme Court of Nebraska. Feb. 4, 1896.)

CARRIERS — LIVE-STOCK SHIPMENTS — INJURIES TO SHIPPER—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

1. A shipper of cattle, who, for the purpose of enabling him to care for his stock in transit, receives a drover's pass, is not, while accompanying his stock, entitled to all the rights and privileges of an ordinary passenger for hire, and an instruction to the contrary effect was erroneous.

2. One who ships cattle, and undertakes, upon a pass given him for that purpose, to accompany and care for his stock in transit, does so under the implied conditions that he will submit to whatever inconveniences are necessarily incident to his undertaking.

3. In an action for damages from injuries inflicted by an engine upon a shipper of live stock, who was accompanying and caring for such stock under the arrangement above indicated, the question of the existence of negligence such as would give rise to a cause of action, or of such contributory negligence as would defeat it, is one of fact, to be determined by the jury.

(Syllabus by the Court.)

Error to district court, Valley county; Thompson, Judge.

Action by Marilla L. Crow, administratrix of Jonathan S. Crow, deceased, against the Omaha & Republican Valley Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

J. M. Thurston, W. R. Kelly, and E. P. Smith, for plaintiff in error. Reese & Gilkeson and Chas. A. Munn, for defendant in error.

RYAN, C. In the district court of Valley county there was recovered a verdict in the sum of $5,000, upon which judgment was rendered, in favor of the defendant in error. In describing the pleadings and the proceedings in the district court, it will probably avoid confusion to designate the parties according to their relation to the suit in that court, rather than—as each is—plaintiff in error or defendant in error in this court. The plaintiff,

Marilla L. Crow, in her petition, alleged that she was the administratrix of the estate of Jonathan S. Crow, deceased; that the defendant was a common carrier of freight and passengers over a line of railroad between Ord and South Omaha, which it owned; that on March 3, 1892, the said defendant, in consideration of the receipt by it of $126 paid by Jonathan S. Crow, undertook to ship three car loads of cattle, and safely carry said Jonathan S. Crow from Ord to South Omaha, but that while said Jonathan S. Crow was being carried in pursuance of said undertaking, and while he was performing his duty in looking after and taking care of said cattle while they were being transported to South Omaha, the said defendant negligently and carelessly ran an engine against, upon, and over said Jonathan S. Crow, and thereby caused his death. There were described in the petition eight children of said decedent, who survived him, and it was alleged that these survivors, and the widow of Jonathan S. Crow, had sustained damages by his death in the sum of $5,000, for which sum judgment was prayed. The answer was in denial of all the averments of the petition. At the commencement of the trial it was admitted in open court that the plaintiff was the duly-qualified administratrix of the estate of Jonathan S. Crow; that said decedent left, him surviving, the widow and children described in the petition; that said widow and surviving children at the time of said trial were the heirs at law of said Jonathan S. Crow, and as such were entitled to the benefit of the statutes of Nebraska in that behalf enacted; and that this suit was instituted for their benefit, under the statutes. It was also admitted that the age and physical condition of Jonathan S. Crow had been such, just before his death, that, if plaintiff was at all entitled to recover, the verdict must be for $5,000.

As the defendant offered no evidence whatever, there is but little room for disagreement as to the ultimate facts which must determine this error proceeding. On March 3, 1892, Jonathan S. Crow & Son shipped three car loads of cattle from Ord to South Omaha. For the purpose of taking care of these cattle, Jonathan S. Crow was permitted to accompany his cattle, and accordingly there was issued to him a ticket by its terms good only for a continuous passage on the same train. On the back of this ticket were printed conditions required to be, and which were, signed by Mr. Crow, whereby he assumed all risk of accidents, and agreed that the Union Pacific system should not, under any circumstances, be liable for damage of any kind, whether to himself or to the stock which he was to accompany. Under the repeated decisions of this court, we cannot think that this stipulation of release should cut any figure in this case. Railroad Co. v. Palmer, 38 Neb. 463, 56 N. W. 957; Railway Co. v. Vandeventer, 26 Neb. 222, 41 N. W. 998. There was shipped by the same train to South Omaha, from Ord, other car loads of stock, and these were accompanied by shippers who were neighbors and acquaintances of Mr. Crow. When the train reached Grand Island all these shippers left the caboose, and sought to procure a lunch at what had formerly been a lunch stand near or upon the line of the Union Pacific Railway. When, not being able to procure a lunch, these shippers sought their train, they found it had been placed in the freight yard of said Union Pacific Railway, and that both the engine and the caboose had been therefrom detached. It was conclusively shown in evidence that the only safe course open to them, under the circumstances, was to keep very close to their stock, so as to prevent any of the cattle from getting down in the cars, as they were liable to do. There was no notice usually given when a train like theirs would start, and often it happened that shippers would be compelled to wait for hours near their stock, or run the risk of being left whenever the caboose should be attached. It was testified by different witnesses, and not denied, that, if a shipper was not ready to board the caboose immediately after it was attached, he was in imminent danger of being left, for the attaching of the caboose to the train was the signal for its immediate departure from Grand Island. The testimony shows that the night of March 3, 1892, was dark and foggy at Grand Island; that there was a drizzling rain; and that the electric and other artificial lights had but little tendency towards overcoming the prevailing darkness. The train in which were the cars of stock accompanied by Mr. Crow and his friends was standing upon a track running nearly east and west. At a distance of about eight feet north of this track there was a parallel track, upon which was standing the way car which had been brought from Ord, and detached from the cars which the stock-shippers were watching. An engine backed along this track from the west, and shoved the way car upon a switch. To accomplish this, it was necessary to pass the stockmen, who were standing along the north side of one of their cars of stock. Across the rear of the tender of this engine there was a footboard, which projected over the track about two feet, at a height of about ten inches above the track traveled by the engine. The space between the cars which the stockmen were watching and the projecting end of the footboard nearest them was about five feet across. It is not certain there was a light on the rear end of the tender. If there was such a light, its elevation was so great, or the light itself was so dim, that it gave no warning of the movements of the engine which we are about to describe. After the engine had shoved the way car upon the switch, eastward, it moved westward, beyond where the waiting stockmen were standing. No witness was able to say just how far westward this engine had proceeded before it made a stop, and began backing eastward. It is disclosed by the evi-

dence of the surviving stockmen that they first discovered this engine when, in backing eastward, it was within from five to ten feet of them. After this engine had passed westward these stockmen paid no attention to it, and Mr. Crow shifted his position slightly, so that, when the engine, without warning given by bell, whistle, or otherwise, backed towards the east, he was struck, thrown down, and killed. From the facts which we have detailed, it was clearly made to appear that Jonathan S. Crow was properly alongside the car wherein the stock of himself or of his friends was contained.

The district court, in respect to his relation to the railroad company, gave the instruction numbered 5 requested by the plaintiff, which was as follows: "The jury are instructed that a drover or a stockman traveling on a pass such as was given to Jonathan S. Crow, deceased, in this case, for the purpose of taking care of his stock on the train, is a passenger for hire, and is entitled to the same rights and privileges as other passengers for hire, riding on ordinary railway tickets." It seems to us that this instruction overstates the liability of railway companies in the class of cases contemplated. An owner of stock, who, for the purpose of taking care of such stock, receives free transportation, does so under such conditions as the duty of caring for his stock may require. If he is entitled to the same rights and privileges as ordinary passengers for hire, he could scarcely be expected to be satisfied to ride in an ordinary caboose. The duty of a railroad company to stop its trains at passenger depots for the purpose of receiving passengers, and of permitting of their alighting safely, would exist, under the above rule, and there would be devolved upon the passenger the correlative obligation of remaining at such depot until his train should stop at that place. In such case it would be absolutely impossible for a stockman to pass alongside the cars containing his cattle, and, having discovered such had fallen or laid down, assist them to regain their feet. In the case under consideration the testimony showed, without question, that this was exactly the duty of Mr. Crow in respect to the cattle which he was accompanying to South Omaha. The fact that he was in the freight yard of the railroad company, looking after his cattle, and waiting for the departure of his train, is inconsistent with the rule above laid down by the court; for, if this rule was a correct statement of the law which should be held applicable to the facts disclosed by the evidence, Mr. Crow should have awaited the departure of his train at the passenger depot, and it was evidence of negligence for him to venture into the freight yard to care for his stock, or to take passage on his train. The court should have instructed the jury that whether or not the deceased was negligent in waiting for the caboose where he did, and whether or not he was guilty of negligence in any respect while so waiting, was a question of fact, to be, by the jury, determined upon consideration of all the evidence.

On the part of the railroad company there were requested numerous instructions defining what facts, or group of facts, would constitute contributory negligence, and what enumerated facts would not justify the inference of negligence, among which latter was the failure to ring the bell or to sound a whistle within the limits of the freight yard. The refusal of the district court to follow this method of giving instructions has been by this court sanctioned in Railroad Co. v. Craig, 39 Neb. 601, 58 N. W. 209, and the Nebraska cases therein cited. Still later, the practice of instructing the jury that certain facts justify or fail to justify the inference of negligence has been disapproved in Railroad Co. v. Morgan, 40 Neb. 604, 59 N. W. 81; Railroad Co. v. Oleson, 40 Neb. 889, 59 N. W. 354; Railroad Co. v. Chollette, 41 Neb. 578, 59 N. W. 921; Pray v. Railway Co., 44 Neb. 167, 62 N. W. 447; Spears v. Railroad Co., 43 Neb. 720, 62 N. W. 68. The utmost extent to which the district court could properly go was to indicate what facts, if proved, might properly be taken into consideration in determining the presence or absence of negligence. Whether or not the plaintiff's intestate was negligent in the performance of duties which the railroad company had acquiesced in his performing was a question of fact, which should have been submitted, as such, to the jury, in view of the evidence as to what such intestate, of necessity, was required to do, and how he was required to do it, in properly caring for his cattle. In our view, it was not proper to attempt to confer upon Mr. Crow the unlimited rights and privileges of ordinary passengers for hire. While he was, for certain purposes, a passenger, he was not such in the usual, unrestricted sense of that term. His contractual right was to proceed upon the freight train upon which his cattle were shipped, from Ord to South Omaha; his duty was to care for his stock in transit; and his rights and privileges as a passenger were limited by the necessity of traveling on the aforesaid freight train, and by the requirement that he should care for his stock. For the reason that in the instruction quoted this limitation and requirement, with all their necessary incidents, were ignored, the judgment of the district court is reversed. Reversed.

HARRISON, J., not sitting.

HORNBERGER v. STATE.

(Supreme Court of Nebraska. Feb. 4, 1896.)

INTOXICATING LIQUORS — INFORMATION — INTENT — BURDEN OF PROOF — LICENSE — PROOF OF RECORDS — JUDICIAL NOTICE — ATTORNEY'S FEE.

1. *Held*, that the information was framed under section 20, c. 50, Comp. St., and charges

a single offense, namely, that the accused kept intoxicating liquors in his place of business for the purpose of sale without a license or permit.

2. The unlawful intent with which the liquors were kept may be presumed from the fact of their sale in violation of law.

3. When, under an information for keeping intoxicating liquors for sale, a sale is proved, the burden is upon the accused to show that he held a license or permit from the proper authorities.

4. The existence of a record must be proved by its production, or an authenticated copy thereof. The nonexistence of a record may be proved by the testimony of one who is cognizant of such fact.

5. The sale of intoxicating liquors within cities and villages can only be carried on under ordinances duly enacted by the corporate authorities thereof Until a proper ordinance is adopted, no license or permit for the sale of liquors within such corporate limits can lawfully issue.

6. Where a city or village is incorporated by a special act of the territorial legislature, the courts will take judicial notice of such incorporation, in case the legislature has in said act declared it to be a public law.

7. It is not error to refuse to direct a verdict for a defendant in a criminal prosecution, at the close of the testimony for the state, where the evidence before the jury would warrant a conviction.

8. A conviction will not be reversed for the giving of an instruction containing harmless error.

9. An attorney's fee cannot be taxed against a defendant under section 22, c. 50, Comp. St., in a case prosecuted by the county attorney.

10. As the only prejudicial error in the record relates to the entering of judgment upon the verdict, the cause is remanded to the trial court, with directions to enter a proper judgment on the verdict. Dodge v. State, 4 Neb. 220; Griffen v. State, 64 N. W. 966, 46 Neb. 282,—followed.

(Syllabus by the Court.)

Error to district court, Sarpy county; Blair, Judge.

Henry Hornberger was convicted of keeping intoxicating liquors for the purpose of sale without a license, and brings error. Reversed, with directions.

Schomp & Corson, for plaintiff in error. A. S. Churchill, Atty. Gen., and George A. Day, Dep. Atty. Gen., for the State.

NORVAL, J. Plaintiff in error was convicted of keeping intoxicating liquors for the purpose of sale without a license, in violation of law, and was sentenced to pay a fine of $100 and costs of suit, and an attorney's fee of $50 to William R. Patrick. The information under which the prosecution was had, omitting the verification, is as follows: "State of Nebraska, County of Sarpy, ss. In the District Court of the Fourth Judicial District of Nebraska in and for Sarpy County. The State of Nebraska, Plaintiff, vs. Henry Hornberger, Defendant. Be it remembered, that Henry C. Lefler, county attorney in and for Sarpy county, and in the Fourth judicial district of the state of Nebraska, who prosecutes in the name and by the authority of the state of Nebraska, comes herein in person into this court at this, the October, term, A. D. 1894, thereof, and for the state of Nebraska gives the court to understand and be informed that he has reason to believe and does believe that intoxicating liquors, to wit, beer and whisky, were unlawfully and willfully kept by one Henry Hornberger in a certain two-story frame building, occupied and conducted as a drug store by the said Henry Hornberger, and situated on lot 8, block 102, in the village of Bellevue, in said county and state, on or about the 26th day of May, 1894; that said liquor above described was intended to be, and was then and there being, by and under the direction of the said Henry Hornberger, unlawfully sold, without a license or druggist's permit having been obtained by said Henry Hornberger for the sale of said liquors above described according to law, and that within thirty days preceding the 26th day of May, 1894, to wit, on or about the 23rd day of May, 1894, malt and spirituous liquors, to wit, beer and whisky, were by said Henry Hornberger sold in said premises above described, without license or druggist's permit, in violation of the provisions of chapter 50 of the statutes of Nebraska, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska. Henry C. Lefler, County Attorney." The defendant filed a motion in the court below to quash the information, on the ground that it did not set out the names of the persons to whom the sale of the liquors were alleged to have been made, which motion was overruled, and this decision is assigned as error.

It is doubtless true, as counsel for the accused in his brief contends, that in an information for the sale of intoxicating liquors the names of the persons to whom the unlawful sales were made must be alleged, if known; and, if unknown, such fact should be averred as an excuse, or the information will be defective. Such is the holding of this court. State v. Pischel, 16 Neb. 490, 608, 20 N. W. 848, 21 N. W. 468; Martin v. State, 30 Neb. 423, 46 N. W. 618. It will be observed that the information herein does not contain such averment, and for that reason would be bad if the prosecution was for the violation of section 11 of chapter 50 of the Compiled Statutes, which makes it a misdemeanor for one to dispose of liquors without a license. But it is clear the information was framed under section 20 of said chapter, which makes it unlawful for any person to keep intoxicating liquors for the purpose of sale without license, and prescribes a penalty therefor. The gravamen of the charge here is not the selling of liquors in violation of law, but the keeping them in his place of business for sale without a license. The averment in the information relating to sales made by the defendant was inserted to show his unlawful intent in keeping the liquors for sale in contravention of the statute. Such unlawful in-

tent may be presumed from the fact of their sale without license. Rauschkolb v. State, 46 Neb. —, 65 N. W. 776. It was unnecessary to allege the names of the vendees of the liquors, and the motion to quash was properly overruled.

Objection is made to permitting Harry F. Clark to answer the following interrogatory, propounded to him by the state: "Q. You may state to the jury, in your own way, what took place there on that occasion with reference to any intoxicating liquors of any character." The witness had already testified that he was acquainted with the accused, and to the witness' having been in the defendant's place of business on or about a certain day of May, preceding the trial, when the accused and others were present. The criticism that the question was too general in its scope is not tenable. The purpose of the testimony sought to be elicited was relevant and material to the issue to be tried, whatever may be said as to the competency of the answer given by the witness. No objection, however, was made to the answer upon any ground; hence it is not before us for review.

One John Nolan, the chairman of the board of trustees of the village of Bellevue, the municipality within which the alleged offense was committed, was examined as a witness on behalf of the state, and testified to purchasing and drinking beer in defendant's drug store on the 15th of May. The witness made further answers to questions put by the state, over the objections of the defendant, as follows: "76. Q. You may state to the jury whether or not a license for the sale of liquor, or a druggist's permit for the sale of liquor, was ever issued to the defendant by the board of trustees of the village of Bellevue?" (Objected to as incompetent, irrelevant, immaterial, and for the further reason it is not shown that at that time he was chairman of the board of village trustees. Overruled, and defendant excepts.) "A. Not since I have been a member. 77. Q. How long have you been a member of the board of trustees of the village of Bellevue? A. This is my seventh year. 78. Q. Continuously? A. Yes, sir. * * * 84. Q. Mr. Nolan, do you know whether or not the village trustees of Bellevue, by reason of any existing ordinance, are authorized at the present time, or whether or not they were empowered during the month of May last, to issue a license or druggist's permit?" (Objected to as incompetent, hearsay, and that the records of the village of Bellevue are the best evidence. Overruled, and defendant excepts.) "A. We had no ordinance; there was no ordinance empowering us to grant a permit to sell liquor, or give a license, in force them days. 85. Q. And never has been? A. Not that I know of, since I have been on the board. 86. Q. I will ask you if you know whether or not any application was ever made by the defendant Hornberger to the trustees of the village of Bellevue, either for a license or a druggist's permit, during the last year." (Objected to as incompetent, irrelevant, and immaterial. Overruled, and defendant excepts.) "A. Not to my knowledge." The testimony objected to was immaterial, since, after the state had proved a sale of liquors, the onus was upon the accused to prove that he had a license or permit from the proper authorities. He not having introduced any evidence tending to establish that he possessed such license or permit, the state was not called upon to establish a negative. State v. Cron, 23 Minn. 140; State v. Bach, 36 Minn. 234, 30 N. W. 764. The defendant could not have been in the least prejudiced before the jury by the admission of the testimony quoted above, merely because the state made a stronger case than it was required to do.

It is contended, in argument, that question 76 was objectionable, in that it did not call for the best evidence,—in other words, whether or not a permit or license was issued to the defendant for the sale of intoxicants, the recorded proceedings of the board of trustees were the best evidence of the fact of the issuing or nonissuing of such license or permit. Undoubtedly, the journal of the proceedings of such board is admissible in evidence for the purpose suggested; but it is equally clear that it is proper to show that a license was not granted to a particular person by the testimony of the officer whose duty it would be to issue such license if one were granted.

The contention is made that the testimony of Nolan as to the nonexistence of an ordinance of the village authorizing the granting of liquor licenses or druggist's permits was incompetent and immaterial, for the reason such right is conferred by statute, and such power is not derived from ordinances. In this counsel is in error. He must have overlooked State v. Andrews, 11 Neb. 523, where it was held that "the traffic in liquors within the limits of cities and villages can only be carried on under ordinances duly passed by the corporate authorities thereof. Until this is done no application can be made and no other step taken towards the procurement of a license to sell liquors within the limits of such corporation." If the village of Bellevue had not, by ordinance duly enacted, empowered its board of trustees to license and regulate the sale of intoxicating liquors within the limits of the village, it requires no argument to show that the keeping of liquors by the accused for sale within said corporation was without sanction of law. An ordinance, or a certified copy thereof, is the best evidence of its contents; but the nonexistence of an ordinance, of necessity, cannot be proved in that mode. It can be established by the testimony of the person who is cognizant of such fact, or it may be presumed by the

absence of entry in the record of licenses. There is a marked difference between testifying to the existence of a record and the absence of it. Gutta Percha & Rubber Manuf'g Co. v. Village of Ogalalla, 40 Neb. 775, 59 N. W. 513; Smith v. Bank, 45 Neb. 444, 63 N. W. 796.

Complaint is made of the overruling of the defendant's motion to dismiss, at the close of the state's testimony, on the ground no case had been made out against the prisoner. It is conceded in the brief that the prosecution, when it closed its case, had proven that the accused had intoxicating liquors in his possession when arrested, which were seized under a search warrant; and, further, had the state rested after showing the arrest of defendant and the seizure of the liquors, the burden would have been upon him, under the statute, to have shown that such liquors were kept for a lawful purpose, and not in violation of law. But it is argued that, inasmuch as the state assumed the onus of proving that the defendant had no permit or license from the board of trustees of the village of Bellevue to sell intoxicating liquors, it became necessary for the state to establish that fact beyond a reasonable doubt, and that the prosecution failed in that regard; therefore the defendant was entitled to a peremptory instruction to the jury to return a verdict of acquittal. This argument is based upon the erroneous assumption that the state had failed to establish that no license or permit had been issued to the defendant by the board of trustees. It was not only proven that no such license or permit was issued, but that none could have been granted, since the corporate authorities of the village never had been authorized by ordinance so to do.

It is said there is no competent evidence in the record of the incorporation of the village of Bellevue, and if it is unincorporated the county board of Sarpy county alone possessed the power to grant a license or permit to sell intoxicating liquors; and since the state failed to show that one was not issued by such board, there can be no conviction. It is true no articles of incorporation and no legislative enactment incorporating Bellevue were put in evidence, but this is not fatal to the prosecution. It was shown upon the trial that said municipality elected village officers annually for years, during which time the powers of a village had been exercised by a board of trustees. Sufficient was established to show that Bellevue was at least a de facto corporation. Arapahoe Village v. Albee, 24 Neb. 242, 38 N. W. 737. Further, we know, although not proven upon the trial, that Bellevue was incorporated by special act passed by the territorial legislature and approved March 15, 1855 (Laws 1855, p. 382). Its incorporation has been subsequently frequently recognized by the legislature by the passage of amendments to its charter and changing the geographical limits of the municipality. See Sess. Laws 1855, p. 423; Sess. Laws 1855–56, p. 171; Sess. Laws 1858, p. 339; Sess. Laws 1859–60, p. 109; Sess. Laws 1860–61, p. 173; Sess. Laws 1860–61, p. 135; Sess. Laws 1869, p. 269. The foregoing acts are not, strictly speaking, private in their character, but are generally known and regarded as public local laws. By section 8 of "An act to amend an act entitled 'An act to incorporate Bellevue City'" (Sess. Laws 1860–61, p. 135) it is provided, "This act and the act to which this is amendatory are hereby declared to be public acts," etc. Thus, it will be observed that the legislature has declared the act incorporating Bellevue and the acts amendatory thereto to be public laws. And the courts will take judicial notice of such laws, without proof of their existence. Bowie v. Kansas City, 51 Mo. 454; Inhabitants of Town of Butler v. Robinson, 75 Mo. 192. The rule is stated thus in 1 Dill. Mun. Corp. (3d Ed.) § 83: "Courts will judicially notice the charter or incorporating act of a municipal corporation without being specially pleaded, not only when it is declared to be a public statute, but when it is public or general in its nature or purposes, though there be no express provision to that effect." See 1 Beach, Pub. Corp. § 74. In Hard v. City of Decorah, 43 Iowa, 313, Day, J., in delivering the opinion of the court, observes, "Where a town or city is incorporated by special act of the legislature, the statute partakes of the nature of a public act, and courts take judicial notice of it." This doctrine is fully sustained by the authorities. Prell v. McDonald, 7 Kan. 426; City of Solomon v. Hughes, 24 Kan. 211; Case v. Mayor of Mobile, 30 Ala. 538; State v. Mayor, etc., of Murfreesboro, 11 Humph. 217; Stier v. City of Oskaloosa, 41 Iowa, 353; State v. Tosney, 26 Minn. 262, 3 N. W. 345; Perryman v. City of Greenville, 51 Ala. 507; Village of Winooski v. Gokey, 49 Vt. 282; Doyle v Village of Bradford, 90 Ill. 416; Beaty v. Knowler, 4 Pet. 152. We must not be understood as holding that courts will take judicial notice of the organization of cities and villages under the general laws of the state authorizing cities and villages to become incorporated, as this question is not before us. What we do decide is that where a city or village is incorporated by special act of the territorial legislature we will take judicial notice of its incorporation, when the legislature has in said act declared it to be a public statute. We are mindful of the fact that the legislative enactments already mentioned incorporate "Bellevue city." We know judicially that Bellevue contains a population of less than 1,500 and more than 200. Therefore, by virtue of section 40 of the act of the legislature of 1879, entitled "An act to provide for the organization, government, and powers of cities and villages" (Sess. Laws 1879, p. 193), Bellevue became, ipso facto, a village, governed by the provisions of said act. State

v. Palmer, 10 Neb. 203, 4 N. W. 965; State v. Holden, 19 Neb. 249, 27 N. W. 120; State v. Babcock, 25 Neb. 709, 41 N. W. 654. It follows that its corporate authorities possessed the power to regulate and license the traffic of liquors within the limits of the corporation. There was no error in refusing to direct a nonsuit. If there had been no evidence before the jury sufficient to sustain a conviction, then, and then only, would it have been proper for the court to direct a verdict for the defendant below.

The next assignment of error is predicated upon the first paragraph of the instruction, which is in the following language: "(1) The court instructs the jury that, in order to find the defendant guilty, it is only necessary that the jury believe from the evidence, beyond a reasonable doubt, that the defendant, either by himself, his agent, or servant, on the 26th day of May, 1894, or within thirty days preceding that time, in the county of Sarpy, and state of Nebraska, kept for sale, without license or permit, beer or whisky." Two criticisms are made upon this instruction. It is claimed to be erroneous because it failed to inform the jury that the liquors must have been kept for sale in the corporate limits of Bellevue in order to constitute the offense charged. Plaintiff in error could not have been prejudiced by this omission, since the evidence was directed to proving that the defendant had the liquors in his place of business in the village of Bellevue, for the purpose of sale, and no testimony was offered to show that he had liquors anywhere else. In the next place this instruction is claimed to be bad, inasmuch as it limited the time within which the offense must be committed to 30 days prior to May 28, 1894. Had the place wherein the liquors were found been described in the information as the residence of the accused, then, under section 20 of chapter 50 of the Compiled Statutes, the limitation stated by the court would have been not only proper, but indispensable. But, as the place set forth in the information is not a residence, the 30-days limitation was unnecessary. It was more favorable to the defendant than he had a right to ask. The information was filed October 3, 1894, and as the penalty provided by law for the crime is not restricted to a fine of less than $100, the state had a right to show that the offense was committed at any time within 18 months prior to the filing of the information. The error in the instruction was harmless. Jolly v. State, 43 Neb. 857, 62 N. W. 300.

By the third instruction the court told the jury, in effect, that the burden of showing a license or permit was upon the defendant. In this there was no error. The motion in arrest of judgment is based upon an alleged insufficiency of the information. Having already held that a crime was charged, this assignment requires no further attention.

It is finally insisted that the judgment is contrary to law, and is not supported by the findings, in so far as it awarded an attorney's fee of $50 to William R. Patrick to be paid by the plaintiff in error. Section 22 of said chapter 50 provides: "In case the defendant is acquitted he shall be discharged and the liquors returned, but if found guilty, in addition to the payment of a fine he shall pay all costs of prosecution, including a reasonable attorney's fee to the prosecuting attorney (in case the county attorney does not prosecute), to be determined by the court, in no case less than twenty-five dollars, which shall be taxed in the costs and recovered as other costs." It is proper for the trial court, under this statute, in case of a conviction, to tax against the defendant a fee of not less than $25 to be paid to the attorney who prosecuted, only where the county attorney does not conduct the prosecution. While the bill of exceptions shows that Mr. Patrick examined the witnesses, it appears from the journal entry in the case that the state was represented on the trial by "Henry C. Lefler, County Attorney." This being true, no attorney's fee should have been allowed. No other error being found in the record, the judgment, in accordance with Dodge v. State, 4 Neb. 220, and Griffen v. State, 46 Neb. 282, 64 N. W. 966, is reversed, and the cause remanded to the district court, with directions to enter the proper judgment on the verdict heretofore returned. Judgment accordingly.

STATE INS. CO. v. BUCKSTAFF BROS. MANUF'G CO.

(Supreme Court of Nebraska. Feb. 4, 1896.)

RECORD ON APPEAL—STIPULATIONS—AFFIRMANCE.

1. A written stipulation of facts or mode of proof filed in a cause forms no part of the record, unless made so by a bill of exceptions.

2. Nor can such stipulation make a part of the record in which the same is filed the bill of exceptions settled and allowed in another cause.

3. Where the petition in error presents no question for review, the judgment of the trial court will be affirmed.

(Syllabus by the Court.)

Error to district court, Lancaster county; Hall, Judge.

Action by the Buckstaff Bros. Manufacturing Company against the State Insurance Company of Des Moines. Judgment for plaintiff. Defendant brings error. Affirmed.

J. Fawcett, Greene & Breckenridge, and Stevens & Cochran, for plaintiff in error. C. O. Whedon, for defendant in error.

PER CURIAM. This cause was submitted on the motion of the defendant in error to affirm the judgment of the trial court. We have held, where an examination of the record of a cause brought to this court for review discloses that the petition in error presents no question for consideration on a motion to dismiss the proceedings, the cause will be considered on its merits, and the judgment affirmed. Upton v. Cady, 38 Neb.

209, 56 N. W. 881; Erck v. Bank, 43 Neb. 613, 62 N. W. 67. The rule stated above is a salutary one, and its enforcement will tend to discourage the bringing of cases to this court for delay merely.

The petition in error herein contains 48 assignments, of which 4 question the sufficiency of the evidence to support the verdict; 3 attack the rulings of the court upon the admission of testimony; 2 relate to challenges of jurors; 27 are predicated upon the giving and refusing of that number of instructions, while but 1 instruction is copied into the transcript; 6 are based upon submitting to the jury special findings from 1 to 6, inclusive, and no such findings have been certified up; 1 that the verdict is contrary to the fifteenth instruction, no such instruction being in the record; and 1 that the court erred in overruling the motion for a new trial. Of course, we must disregard the assignments which are foreign to the record, and it is obvious that not one of the other errors assigned can be considered without reference to a bill of exceptions containing the evidence adduced on the trial in the court below, and preserving the rulings complained of, and the exceptions thereto. The important inquiry is whether there is any bill of exceptions in this case. In the transcript brought here we find the following stipulation of the parties: "In the District Court of Lancaster County, State of Nebraska. The Buckstaff Brothers Manufacturing Company vs. State Ins. Co. of Des Moines. Stipulation. It is hereby stipulated and agreed that this case be submitted to the jury now in the box in the case of the Buckstaff Brothers Manufacturing Company versus the American Fire Insurance Company of New York, upon the record already made in the said case; the jury to consider all of the oral testimony and exhibits admitted in said case. All of the exhibits admitted or offered in said case are to be taken and considered as applicable to this case; all of the testimony offered, whether oral or written, and excluded by the court, shall be considered as offered in this case; and all of the rulings of the court during the trial of said American Fire Insurance Company's case shall be considered as having been made in this case, and all of the exceptions to said testimony and said rulings shall be considered as in this case. The intention being that this case, when submitted, shall be upon the same record, in all respects, with the same rights and exceptions to both parties, as in said case of Buckstaff Brothers Manufacturing Company versus the American Fire Insurance Company of New York. It is understood that the defendant makes no defense by reason of insufficiency of proofs of loss, and no further testimony is to be introduced in this case, excepting only the insurance policy sued on. This case is to be submitted upon the instructions of the court to be given to the jury, and it is understood that the instructions asked for by both parties in said American Fire Insurance Company case shall be considered as asked for by the respective parties in this case. Buckstaff Brothers Manufacturing Company, by Chas. O. Whedon, Its Attorney. State Insurance Company, by J. Fawcett, Its Attorney."

It appears that a bill of exceptions was settled and allowed in the case mentioned in the foregoing stipulation, and it is argued that the same should be treated and considered as a part of the record in the case at bar. Clearly, there is nothing in the above stipulation which will justify such a conclusion, although such may have been the intention of the parties when they entered into the same. It was contemplated that other and additional testimony should be adduced in this case than was given in the case of the American Fire Insurance Company, namely, the policy herein declared upon. A proper bill of exceptions in that case, therefore, would not include all the evidence in the case at bar. There is no order of court making any portion of the record in the case to which reference has been made a part of the record herein. If the bill of exceptions of what transpired in such other action is to be considered a part of this record, it is such solely by reason of the stipulation alluded to, since it is not entitled in this suit, nor was it signed and allowed herein. If such stipulation is not itself properly a part of this record, then it is plain that it cannot be considered by us for any purpose whatever. The bill of exceptions in one cause cannot properly preserve and bring into the record what transpired in another suit between different parties, so that we could not expect to find in the bill of exceptions in the case of the American Fire Insurance Company the evidence adduced and rulings made during the trial in this cause. It is true, the written stipulation provides that this case should be submitted to and decided by the court below upon the same record as to the rulings of the court, and upon the same testimony as in the other case, save only the policy in suit, but there is nothing to show that this agreement was acted upon by the litigants and the court. On the contrary, the record affirmatively shows that the cause was submitted to the jury impaneled in the other case by "agreement in open court," from which the inference may be indulged that the written stipulation was ignored by the parties, and not considered by the court. The steps requisite to preserve the evidence upon which the jury found their verdict, and the rulings of the court during the trial, have not been taken. This could be accomplished only by a bill of exceptions duly settled in the mode required by statute. A stipulation of the attorneys in a cause is no more part of the record than a deposition, or any other evidence which may have been improperly included in the transcript. Matters which are not properly part of the rec-

ord cannot be made so by being improperly inserted in the transcript. A stipulation of facts or mode of proof cannot take the place of a bill of exceptions. Credit Foncier v. Rogers, 8 Neb. 34; State v. Knapp, 8 Neb. 436, 1 N. W. 128; Herbison v. Taylor, 29 Neb. 217, 45 N. W. 626; McCarn v. Cooley, 30 Neb. 552, 46 N. W. 715. This stipulation could have been brought into the record by a bill of exceptions, but, that not having been done, it is not properly before the court, and hence it cannot be considered.

It is said, in argument, the stipulation was entered into "to relieve the court, counsel, and clients, and the interested public, of the repetition of an endless amount of time, labor, and expense." The motive was indeed a laudable one, and it is to be regretted that the failure to make the stipulation a part of the record prevents us from determining whether the judgment was right or wrong. The court, however, is not to blame, since this question of practice had already been settled by repeated decisions. Nor was it necessary, under the views herein expressed, as counsel suppose, that the ponderous and voluminous bill of exceptions in the case of American Fire Insurance Company should be duplicated, at an enormous and needless expense, in order to have preserved the rights of the parties. No reason occurs to us why it might not have been brought into this record without copying, by settling of a brief bill of exceptions herein, making it a part thereof by referring to and identifying the same in such a manner that there could possibly be no mistake as to what is referred to. Even if this were not so, yet the matter of labor and expense involved in duplicating the bill of exceptions is no reason why we should consider as parts of this record the stipulation set out above, and the bill of exceptions in another cause, when they have not been made so in the mode prescribed by statute. Inasmuch as no bill of exceptions has been allowed in this case, the errors relied upon for a reversal cannot be reviewed, and the motion to affirm the judgment must be sustained. Affirmed.

WELLS v. STATE.

(Supreme Court of Nebraska. Feb. 4, 1896.)

ASSAULT—EVIDENCE—INSTRUCTIONS.

1. To render the failure to give an instruction prejudicially erroneous, it is not sufficient that correct abstract propositions of law are therein embodied, but, in addition, it is requisite that such propositions be applicable to facts, at least in some degree, inferable from the evidence.

2. Evidence examined, and found sufficient to sustain the verdict.

(Syllabus by the Court.)

Error to district court, Richardson county; Bush, Judge.

C. C. Wells was convicted of assault, and brings error. Affirmed.

Reavis & Reavis, for plaintiff in error. A. S. Churchill, Atty. Gen., and George A. Day, Deputy, for defendant in error.

RYAN, C. Plaintiff in error was, by a jury, found guilty of an assault in manner and form as charged in the information. This information was filed in the district court of Richardson county, and thereby the offense charged was that Columbus C. Wells "upon one Oscar Larabee, then and there being, unlawfully, purposely, feloniously, and of his deliberate malice, did make an assault with a dangerous weapon, to wit, a hammer, * * * with intent * * * and thereby him, the said Oscar Larabee, unlawfully, purposely, feloniously, and of his deliberate malice, to inflict upon said Oscar Larabee great bodily injury," etc. In the brief submitted on behalf of the plaintiff in error, there are argued but two questions. Of these, one is that the verdict is not sustained by sufficient evidence. There is no room for doubt that Wells struck Larabee, at least twice, with a hammer, at the time and place described in the information. That there was such provocation that Larabee would have been entitled to but little sympathy if his punishment had been greater than it was, there can be no question; and yet this provocation was only by the use of insulting language, uttered at such a distance that it was necessary for the accused to take several steps that he might be able to show his resentment. When these steps had been taken, it cannot be determined with certainty, from the bill of exceptions, which party first laid hands upon the other. There was sufficient evidence, however, to justify the jury in returning the verdict which it did return, and we cannot, therefore, set it aside as being without sufficient support.

In the brief the other ground of criticism is thus stated: "The court told the jury, in general terms, that they might convict the defendant of a simple assault, but failed to explain to the jury the legal meaning of the word 'assault' when used in that connection." One of the definitions of this word suggested by plaintiff in error is that given in Rapalje & Lawrence's Law Dictionary, to wit: "In criminal law, assault is (1) an attempt unlawfully to apply any actual force, however small, to the person of another, directly or indirectly; (2) the act of using such a gesture towards another person as to give him reasonable grounds to believe that the person using the gesture meant to apply actual force to his person." Counsel for plaintiff in error, in the course of their argument to establish their contention that the word "assault" should by the court have been defined without request, say that "courts are supposed to know their duties,—a violent presumption in many cases,—and it is not incumbent on the defendant in a criminal case to ask the court to tell the jury what elements enter into a given transaction, as constituents thereof, to

make it a crime." With the confident belief that we shall be able to show by a fair examination of the record that plaintiff in error has no just cause to complain that his rights were prejudiced by the district court in the trial of this case, we shall first consider the instruction which it is claimed should have been supplemented by a definition of the word "assault." It was in this language: "The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that defendant, not acting in self-defense, made an assault upon the prosecuting witness with the hammer, as alleged in the information, with no intention of feloniously inflicting great bodily injury upon the said prosecuting witness, then the jury may find the defendant guilty of an assault." As has already been stated, there was sufficient evidence to sustain the verdict of "guilty of an assault in manner and form as charged in the information." The evidence showed that plaintiff in error struck the prosecuting witness, at least twice, with a hammer. There were therefore no such conditions shown by the proofs that, under the above-quoted definition, a mere assault could have been inferred. If, under these conditions, the court had instructed the jury, as it is contended on behalf of the defendant in error that it should have done, following most text writers, there would have been given an instruction to the effect that "an assault is the unlawful attempt, coupled with the present ability, to do injury to another." As this definition was not applicable to the facts proved, in any view of the case, it was not erroneous to omit to give this or an equivalent instruction. An assault with intent to commit great bodily injury is punishable by imprisonment in the penitentiary for not less than one, nor more than five, years. Sess. Laws 1889, c. 34, § 1. Notwithstanding a verdict of guilty of the above-described offense, the judgment of the court was that Columbus C. Wells pay a fine of $15 and costs of the prosecution. For a mere assault, it was discretionary with the court to impose a fine to the extent of $100, or to commit the defendant to the county jail for a period not exceeding three months. A fine of but $15 was certainly not excessive for a mere assault, and, no matter what instruction as to what constituted an assault might have been given, the jury could not have dealt as leniently with the prisoner as did the court, in treating his offense as a mere assault. Whatever error was committed was not such as to afford plaintiff in error any just cause of complaint. The judgment of the district court is affirmed.

RYAN et al. v. DOUGLAS COUNTY et al.

(Supreme Court of Nebraska. Feb. 4, 1896.)

ASSIGNMENT OF VOUCHERS—CONSTRUCTION.

1. The term "due" is employed to express distinct ideas. In some connections it is held to mean a debt immediately payable. In others it signifies a state of indebtedness merely, without reference to the time of payment, but does not include contingent liabilities which may ripen into absolute indebtedness upon the future performance of contract obligations.

2. R. & W., being engaged as contractors in the construction of a public building for D. county, executed an assignment as follows: "To the Board of County Commissioners: For value received, we hereby assign all our interest in warrants or vouchers due us from said county to the Bank of Commerce, and hereby authorize said bank to receipt for said warrants or vouchers in our name, and to pay all warrants or vouchers to the Bank of Commerce." *Held* not to include money subsequently earned by R. & W. in the performance of their contract with the county.

(Syllabus by the Court.)

Appeal from district court, Douglas county; Scott, Judge.

Petition, in the nature of a bill of interpleader, by Ryan & Walsh against the county of Douglas and others, to determine the priority of claims. From the decree rendered, certain defendants appeal. Reversed with directions.

Brome, Andrews & Sheean, Cowin & McHugh, and J. J. O'Connor, for appellants. Cornish & Robertson, for appellees.

POST, C. J. In the year 1887 the firm of Ryan & Walsh, by written contract, undertook the erection, for Douglas county, of a building described as a county hospital, the stipulated price therefor being $120,033. Soon after the commencement of the work, a controversy arose between the contractors and the county, involving the construction of the plans and specifications for said building. During the progress of the work, difficulties multiplied so that Ryan & Walsh, in order to protect themselves in their disputes with the county, consulted Hon. John C. Cowin, of the Omaha bar, upon whose advice they appear to have acted until some time in the year 1888. In the year last named, Mr. Cowin associated with himself Mr. W. D. McHugh, in the firm name of Cowin & McHugh, and thereafter said firm represented Ryan & Walsh in said controversy. On the completion of the building, in the month of February, 1890, Ryan & Walsh, under the advice of Cowin & McHugh, presented a bill for $69,404.09, being the amount of the balance claimed by them, and which included the sum of $50,612.09 for extra work and material done and furnished at the special instance and request of the county. The county board, after a protracted investigation, made an order allowing the sum of $17,951.57 in full of said demand, and from which an appeal was by the claimants taken to the district court for Douglas county. Ryan & Walsh in the meantime, being pressed for funds with which to carry on their work and to meet their obligations incurred for material, gave numerous written orders upon the county, directing payment out of money earned by them under said contract. Among the orders thus given

was one in favor of the Bank of Commerce, as follows: "For value received, we hereby assign all our interest in warrants or vouchers due us from said county to the Bank of Commerce, and hereby authorize said bank to receipt for said vouchers or warrants in our name, and to pay all warrants or vouchers to the said Bank of Commerce. Walsh & Ryan. Dennis Cunningham. Jerry Ryan." It was deemed advisable by the bank, in order to protect its rights under the foregoing assignment, to join in the appeal of Ryan & Walsh, and the necessary bond and notice were accordingly given by it. Issue being joined in the district court, a trial was had therein at the February, 1891, term, resulting in a verdict and judgment for Ryan & Walsh in the sum of $37,571.20. On the 27th day of February, 1891, Cowin & McHugh filed notice of an attorney's lien upon said judgment in the sum of $4,000, being a general balance claimed for their services in said cause. On the 20th day of November, 1891, they filed a second notice, in which they claimed a further lien in the sum of $1,000, being $150 for money advanced in the prosecution of said cause, and $850 for services rendered since the date of the lien first mentioned; and on the 27th day of June, 1891, J. J. O'Connor gave written notice of an attorney's lien in said cause on account of services rendered Ryan & Walsh in the sum of $5,000. The situation was further complicated by suits of creditors, other than those above named, to enforce payment on account of the orders or partial assignments held by them, in which the county had been enjoined from paying, and Ryan & Walsh from receiving, any part of the money adjudged due the latter. In view of the many conflicting claims, Ryan & Walsh, who were then insolvent, on the 20th day of November, 1891, by their attorneys, Cowin & McHugh, instituted proceedings in the nature of a bill of interpleader, to which the county and the several claimants of the fund in dispute, 18 in number, were made parties. Upon the issues joined by the answers of the defendants named in said proceeding, there was a final decree, determining the rights of the parties in the premises, but which at this time concerns us only so far as it relates to the claims of Cowin & McHugh, O'Connor, and the Bank of Commerce. The answer of the bank is unfortunately not found in the record, but, judging from the decree of the district court, its contention therein was that the effect of the order or assignment above set out was to create in its favor a first lien for advancements made, and to be made, to Ryan & Walsh, of all money then due, or to be thereafter earned by them under their contract with the county. In that view the court evidently concurred, since it is, in the third finding, recited: "That on the 19th day of February, 1889, the said plaintiffs sold, assigned, transferred, and set over to the said Bank of Commerce, by an instrument in writing bearing that date, all their right, title, and interest in and to all moneys, warrants, or vouchers due or to become due to the said plaintiffs from the said county of Douglas under and by virtue of said contract between said plaintiff and said county of Douglas, and authorized the said Bank of Commerce to receipt for all vouchers or warrants in the name of said plaintiffs, and instructed the defendant the county of Douglas to pay all warrants or vouchers due or to become due to said plaintiffs from said county of Douglas under said contract to the said Bank of Commerce, said instrument being intended between the parties as collateral security merely to the indebtedness then owing, and which thereafter might be contracted, by said plaintiffs with the said Bank of Commerce; that the board of county commissioners were duly notified of said order or assignment, and the same was filed with the board of county commissioners of Douglas county on the 20th day of March, A. D. 1889." The indebtedness of Ryan & Walsh to the bank at that time approximated $20,000, and there were delivered to it by the county clerk, subsequent to the date of the said assignment, five warrants drawn to Ryan & Walsh, aggregating $17,946.93, and dated, respectively, February 20, March 16, May 20, July 20, and September 7, 1889. The bank also, according to the finding of the court, relying upon said assignment, advanced to Ryan & Walsh the further sum of $35,144.12, which was used by them in carrying on the work under their contract with the county, and which sum is now due and wholly unpaid. The court, upon the foregoing findings and evidence, ordered the amount due on the judgment against the county to be applied—First, in satisfaction of the indebtedness of Ryan & Walsh to the bank; second, that the balance should be distributed pro rata among the other assignees of said firm,—and from which order and decree Cowin & McHugh and O'Connor have appealed to this court.

The question first suggested on this appeal is the effect of the instrument upon which the bank rests its claim to the fund in controversy. That an order payable out of a particular fund operates as an assignment thereof pro tanto is conceded by appellants. Nor can it be doubted that an assignment of money to become due by the terms of an existing contract is valid and enforceable in equity. Field v. Mayor, etc., of New York, 6 N. Y. 179; Devlin v. Mayor, etc., of New York, 63 N. Y. 15; Ruple v. Bindley, 91 Pa. St. 299; Bates v. Lumber Co. (Minn.) 57 N. W. 218; Krapp v. Eldridge, 33 Kan. 106, 5 Pac. 372. But does the assignment in this instance, by its terms, include money subsequently earned by Ryan & Walsh in the prosecution of the work in which they were then engaged? We think not. Counsel for the bank, in the brief submitted by them, refer to no authority in support of the conclusion of the district court, and our own investigation has been equally unproductive of that result. The cases examined, on the

other hand, tend strongly to support the opposing view. The language of the assignment is "all our interest in warrants or vouchers due us from said county." The word "due," according to the consensus of judicial opinion, has a double meaning, viz.: (1) That the debt or obligation to which it applies has by contract or operation of law become immediately payable; (2) a simple indebtedness, without reference to the time of payment, in which it is synonymous with "owing," and includes all debts, whether payable in præsenti or in futuro. In Allen v. Patterson, 7 N. Y. 476, it was alleged that there was due from the defendant, on account for goods sold and delivered, the sum of $371.01. On affirming an order overruling a demurrer to the complaint, it was said: "Counsel insist that the statement that there was 'due,' etc., did not amount to a statement that the debt had become payable; that it meant no more than the statement that the defendant is 'indebted,' etc.; and that, if the word 'due' had two significations, the plaintiff could not select between them, and impute to it the one which suits his purpose best." And after citing with approval the opinion of Judge Story in U. S. v. State Bank of North Carolina, 6 Pet. 29, holding that the word "due" is used both to express the mere state of indebtment and to indicate that the debt had in fact become payable, it was said: "In the latter sense I think the word 'due' was used by the pleader in the complaint." District Tp. of Jasper v. District Tp. of Sheridan, 47 Iowa, 183, was an action for the recovery of money as agreed between the parties, on the change of district boundaries, for the division of school funds due the first Monday in April. The fund in controversy was derived from taxes previously assessed, but which were payable at a later date. In disposing of the question, the court say: "It is claimed by the defendant that a fund is due when the time arrives in which payment is enforceable; and it must be admitted that this is the ordinary meaning of the word. But, while that is so, there is certainly another meaning, somewhat broader." In Foster v. Singer, 69 Wis. 392, 34 N. W. 395, the defendant was served with garnishee process in an action against Phillips, an employé, under a statute which authorized the appropriation by that means of debts "due or to become due" to the execution defendant. The garnishee summons was served August 28th, and the controversy involved the salary of the defendant for that month, which, according to the evidence, was payable monthly at the end of each month. It was held that the salary for August was not on the day of the service "money due," within the meaning of the statute, since the defendant could not have maintained an action therefor against the garnishee. It was further held that it was not "money to become due," since the contract was an entirety, and to entitle Phillips, the defendant, to recover, it was necessary for him to work the entire month. In the opinion by Taylor, J., we find this language: "If Phillips had quit work on the 29th, he could not have recovered any part of his wages for the month. The debt, therefore, would only become due upon the contingency that Phillips continued to work for the garnishee for the entire month." In Bishop v. Young, 17 Wis. 46, it was also sought to charge the defendant as garnishee. But his liability was shown to be contingent upon the completion by Grant, the attachment defendant, as contractor, of certain buildings then in course of construction. Grant, among other conditions, had stipulated to complete the buildings by a given date, and, in case of his failure, to pay to Young damage at a given rate during the period of his default. In affirming the judgment below for the defendant, it is said: "The 'property, moneys, and credits' here spoken of are such as are in the hands of the garnishee which belong to the principal debtor. And the 'debts due or to become due' evidently relate to such as the garnishee owes absolutely, though payable in the future. We have no idea the statute intended to include in the language 'to become due' a debt which might possibly become due upon the performance of a contract by the defendant in attachment." See, also, as supporting the views above expressed, Scudder v. Scudder, 10 N. J. Law, 340; Hoyt v. Hoyt, 16 N. J. Law, 138; Looney v. Hughes, 26 N. Y. 514; Fowler v. Hoffman, 31 Mich. 219. The rule distinctly recognized by the authorities is that the term "money due," etc., implies such an obligation as will, by the effluence of time alone, ripen into a cause of action; and in no reported case, we believe, have like expressions been held to include property having a potential existence only. The reasoning in Bishop v. Young is quite as applicable to the case before us. Here the fund which is the subject of the controversy is the product of the labor and skill of the contractors subsequent to the assignment relied upon, and had at the time in question no actual existence. Further liability of the county under the contract was conjectural merely, and contingent upon the performance by Ryan & Walsh of their stipulated obligations. It was not, in any legal sense of the term "money due"; and the assignment was accordingly ineffectual for the purpose of transferring the title thereof to the bank.

It follows that the appellants, for the value of the services rendered by them for Ryan & Walsh in the matter of the claim against the county, are entitled to lien upon the judgment recovered, which is enforceable in this proceeding. The bank, it should be noted, relied upon its alleged paramount title to the proceeds of the judgment, without contesting seriously the value placed upon the appellants' services. As to the claim of Cowin &

McHugh, it is sufficient to say that their employment began in the year 1887, and that the foundation for the claim afterwards successfully prosecuted against the county was laid by their construction of the plans and specifications, together with their advice during the progress of the work. The bill for extras, which was contested by the county on the ground that they were provided for by the contract, included 200 different items, requiring much time and labor in the preparation of the cause for trial. The trial which resulted in the judgment for Ryan & Walsh was begun February 10th, and continued without interruption until March 3d. Subsequently a bill of exceptions, consisting of 1,900 pages of typewritten matter, was served upon Cowin & McHugh, which, after examination and approval by them, was allowed by the presiding judge. The county, intending to have the judgment reviewed in this court, at once procured a transcript of the record of the district court to accompany the petition in error. However, about that time the county board, after argument by Cowin & McHugh, abandoned the proposed proceedings in error, and which determination was expressed by an appropriate resolution. Also, as illustrating the character and value of the services rendered by appellants, it may be mentioned that the motion for a new trial submitted by the county attorney contained 287 assignments, mostly relating to rulings during the course of the trial; and, as already appears, the amount recovered exceeds the allowance of the county board by more than $20,000. None of the witnesses examined upon that subject, including Hon. T. J. Mahoney, who represented the county throughout the entire controversy, place the services of counsel for Ryan & Walsh at less than $5,000, while the average estimate thereof greatly exceeds that sum. The claim of Cowin & McHugh cannot, upon the record before us, be said to be unreasonable. Indeed, a finding in their favor much greater than the amount of their claim would be warranted by the evidence.

The solution of the questions presented by O'Connor's claim is attended with more difficulty. It is, in the first place, not clear from the evidence whether his appearance in the district court was for Ryan & Walsh or Walsh alone. Previous to the alleged employment, the members of the firm named, consisting of Jerry Ryan, Edward Walsh, and Dennis Cunningham, had become involved in controversies with each other, culminating in a suit by Ryan against his copartners, in which O'Connor appeared as attorney for Walsh, and which resulted in an order restraining the latter from certain threatened acts in the name of the firm. According to the testimony of both Ryan and Cunningham, Cowin & McHugh were the only attorneys authorized to represent the said firm, and O'Connor's appearance in the district court was as the representative of Walsh individually. But, in the absence of record evidence to support that contention, the actual appearance of Mr. O'Connor in the name of the firm, and his active participation in the trial, of which the partners were all aware, raises a presumption of employment by the firm too strong to be thus overcome. That proceeding was prosecuted in the name and for the benefit of the firm, and the law implies a promise to pay the reasonable value of the service rendered by appellant therein. It is, however, as we have seen, conclusively shown by the record that Cowin & McHugh prepared the cause for trial, and were responsible for its management during every stage of its progress to judgment. The office of O'Connor was that of an assistant, only, for the purpose of the trial, and $1,000 will, it is believed, under the circumstances of the case, liberally compensate him for his services.

The decree of the district court will accordingly be reversed, with directions to proceed in accordance with this opinion, or, should appellants elect within 30 days from this date, a final order will be entered here, so modifying the decree as to allow the appellants Cowin & McHugh the sum of $5,000 and interest from February 23, 1891, and to J. J. O'Connor $1,000, with interest from the date last named; said amounts to be first liens upon the fund in controversy, and to prorate with each other. Reversed.

HALL et al. v. HOOPER et al.

(Supreme Court of Nebraska. Feb. 4, 1896.)

ACTION TO QUIET TITLE—WHO MAY BRING—MORTGAGE FORECLOSURE—VALIDITY—PRINCIPAL AND AGENT—RATIFICATION—ESTOPPEL—LIMITATIONS—ADVERSE POSSESSION.

1. Any person claiming title to real property in this state, whether in or out of possession, may maintain an action against any person or persons claiming adversely, for the purpose of determining such estate and quieting title. Foree v. Stubbs, 59 N. W. 798, 41 Neb. 271, followed.

2. Such an action may be maintained by a remainder-man during the continuance of the particular estate.

3. Where a judicial sale and conveyance of land have been made under a void decree, a court of equity will not give affirmative relief to the person whose estate was sought to be divested, unless he shows some equitable interest in the land. Hughes v. Housel, 50 N. W. 1127, 33 Neb. 703, followed.

4. The assignee of notes secured by mortgage, even though the assignment be without consideration, succeeds to the right of the mortgagee to have redemption made as a condition of canceling the mortgage. Loney v. Courtnay, 39 N. W. 616, 24 Neb. 580, followed.

5. A principal who ratifies a contract made for him by another must adopt all the instrumentalities employed by such agent to bring it to a consummation. Joslin v. Miller, 15 N. W. 214, 14 Neb. 91, followed.

6. Therefore, where A. purchased land and caused it to be conveyed to his wife, he giving at the time of the conveyance a mortgage in his own name upon the land to secure a portion of the purchase money, the wife, by accepting

the deed, adopted also the mortgage. It became an equitable mortgage upon the land.

7. The fact that the husband was not authorized in writing to act in the matter is immaterial. The statute of frauds is not applicable to the case.

8. A conveyance was made which was void as against creditors, and, as a part of the same transaction, a purchase-money mortgage was executed on the same land. A creditor caused the land to be subjected to the payment of his judgment. A portion of the land was sold, completely satisfying the judgment. The former creditor afterwards became the assignee of the mortgage. *Held*, that he was not estopped by the creditors' bill and proceedings thereon from foreclosing the mortgage upon that portion of the land which had not been subjected to the payment of his judgment.

9. A mortgagor, in order to remove the cloud cast upon his title by a sheriff's deed executed in pursuance of a void foreclosure, must offer to pay what is equitably due under the mortgage.

10. When a mortgagor seeks such affirmative relief, he is not relieved from the necessity of offering to redeem by the fact that the statute of limitations has barred the mortgagee's right to foreclose. Merriam v. Goodlett, 54 N. W. 686, 36 Neb. 384, followed.

11. The statute of limitations begins to run against a bill to redeem from the time when, the mortgage having matured, the mortgagee enters into open and notorious possession of the premises under claim of ownership.

12. Whether the period of limitation in such case is 4 or 10 years is not decided.

13. A mortgagee under a mortgage purporting to encumber the fee sought to foreclose against the fee, and bought the land at the foreclosure sale, and the sheriff's deed purported to convey the fee, and was immediately recorded. He entered into actual possession of the land. The foreclosure was void. The plaintiffs undertook to annul the deed. They were remaindermen after a life estate, the tenant of which was not a party to the suit. By their petition they admitted that the mortgagee had by the proceedings obtained the life estate, but the proof showed that the proceedings were void as to the life tenant as well as to the plaintiffs. *Held*, that the mortgagee's possession was adverse to the plaintiffs, and not merely for the life estate.

14. The plaintiffs having undertaken to have both the mortgage and proceedings to foreclose it declared void, and the court having determined that, while the foreclosure was void, the mortgage was not, an opportunity to amend the petition by offering to redeem was denied, the proof showing that the right to redeem was barred by the statute of limitations.

(Syllabus by the Court.)

Appeal from district court, Hall county; Harrison, Judge.

Action by George T. Hall and another against Edward Hooper and others to quiet title. From a decree of dismissal, plaintiffs appeal. Affirmed.

R. C. Glanville, R. R. Horth, and Chas. G. Ryan, for appellants. Abbott & Caldwell, for appellees.

IRVINE, C. For a proper understanding of this case a statement of the substance of the pleadings is necessary. The appellants, George T. Hall and Mary J. Monroe, in their petition allege that one Mrs. Milton S. Hall was in her lifetime the owner in fee of certain land in Hall county; that she died seised of said land November 24, 1871, leaving surviving her her husband, Milton S. Hall, who is still living, and the plaintiffs, her only children by said Milton S. Hall; and that thereby Milton S. Hall became seised of an estate by curtesy in said premises, and the plaintiffs became owners in fee of the remainder. The petition then alleges certain proceedings and deeds in pursuance thereof, whereunder the defendant Hooper claims to have divested the estate and become the owner in fee of the land. These proceedings are pleaded at length. It is then alleged that all these proceedings were void as to the plaintiffs and their mother, for want of jurisdiction of the person, and that they were of no effect to pass any title to Hooper except the life estate of Milton S. Hall, which has not yet determined. The plaintiffs also aver that they had no notice of the claim of Hooper to the fee of the land until within two years of the commencement of the action. They allege that said proceedings and deeds constitute a cloud upon their title, and pray that the deeds be adjudged void in so far as they purport to convey the estate of the plaintiffs, and that title to the remainder be quieted in plaintiffs. There are certain other averments against the other defendants, claiming under a mortgage from Hooper, and leading to a prayer that this mortgage be set aside; but these averments it will not be necessary to notice, as the decision of the case must be based entirely upon the issues between the plaintiffs and Hooper. The answer alleges possession and the exercise of acts of ownership by Hooper since 1872; denies that Mrs. Hall was ever the owner or in possession of the land; denies that the deed under which she claims was ever executed or delivered to her, or that she ever paid any consideration for the property; and, in short, denies most of the allegations of the petition, and closes with a plea of the statute of limitations.

From the pleadings and evidence, the facts in regard to the title appear as follows: In 1868 Hooper commenced an action against Milton S. Hall for the recovery of a debt. A writ of attachment was issued, and one Peterson was garnished. Peterson, it would be inferred, never answered the order of garnishment, but, in 1869, he, being indebted to Hall in about the sum of $1,200, conveyed the land in controversy by deed running to "Mrs. Milton S. Hall"; and at the same time, and as part of the same transaction, a mortgage was executed to Peterson, by "M. S. Hall," to secure notes amounting to $1,006, that being the difference between the estimated value of the land and Peterson's debt to Hall. Mrs. Hall was not present, and it is perfectly clear that the transaction was one between Hall and Peterson for Hall's benefit, Mrs. Hall having no interest therein. Hooper proceeded to judgment in his action against Hall, and caused execution to be levied on the land. He then, in September, 1870, began an action in the na-

ture of a creditors' bill, naming as defendants M. S. Hall, Mrs. Milton S. Hall, and Peterson. The petition in that case alleged the recovery of the judgment and levy of execution; alleged the attachment and garnishment of Peterson; and charged that the conveyance to Mrs. Hall was the result of a conspiracy between Hall and Peterson to cheat and defraud Hooper. It alleged that Mrs. Milton S. Hall was a fictitious person, and that Hall was the person intended by the deed from Peterson. The prayer was that "Mrs. Milton S. Hall" be declared to mean "M. S. Hall"; that the mortgage to Peterson be declared void against plaintiff, and that the land be subjected to the judgment. There was an attempt by the publication of notice to obtain constructive service upon all the defendants; but as the affidavit for publication made no reference whatever to Mrs. Hall, it may be assumed that the proceedings as to her were absolutely void. Hall and Peterson made default, and a decree was entered directing a sale of the land in satisfaction of Hooper's judgment. Under this decree all but 40 acres were sold to Hooper, at a price more than sufficient to satisfy his judgment. Subsequently, in 1876, Hooper having become the owner of the notes to secure which Hall had given the mortgage, he brought an action against Hall and his then wife, but not against the heirs of the first Mrs. Hall (he having remarried), to foreclose the mortgage. Service in this case was constructive, but the affidavit for publication is conceded to have been fatally defective. A decree of foreclosure was entered, and the remaining 40 acres sold under that decree to Hooper.

It will be observed that the plaintiffs claim relief solely on the ground that the proceedings were void as to them and their ancestor, —the proceedings on the creditors' bill, because no jurisdiction was obtained as to Mrs. Hall; the foreclosure proceedings, because no jurisdiction was obtained over any person, and the plaintiffs were not even made parties. No offer to redeem from the mortgage is made, because the plaintiffs' theory is that, the title being in Mrs. Hall, the mortgage executed by Hall alone created no lien upon her land. In addition to the issues already stated, the defendant pleads that plaintiffs are estopped, by claiming under the deed to Mrs. Hall, from denying the validity of the mortgage executed by Hall as a part of the same transaction. The plaintiffs, in reply, charge two estoppels. They charge that Hooper is estopped to deny the validity of the conveyance to Mrs. Hall, because he claims under a deed purporting to convey her interest. They further charge that the defendant is estopped to assert the validity of the mortgage because of his successful impeachment thereof by the proceedings on the creditors' bill.

The district court found "that the plaintiffs have now no cause of action," and dismissed the case. From this decree the plaintiffs appeal. It may be inferred from the use of the word "now" in the finding above quoted, as well as from the direction which the argument has largely taken, that the district court was of the opinion that an action to quiet title would not lie while Hooper was in actual possession of the land. It is clear that plaintiffs, while admitting an estate in Hooper for the life of Hall, could not yet maintain ejectment. If this was the view of the district court, it was fully warranted by the case of State v. Sioux City & P. R. Co., 7 Neb. 357, followed by several other cases, implying that an action to quiet title will not lie against one in actual possession of the land in controversy. A defendant in such actual possession is entitled to the rights accorded by an action of ejectment, where the plaintiff, claiming the legal title, seeks to oust him from possession. Gregory v. Bank, 16 Neb. 411, 20 N. W. 286; Snowden v. Tyler, 21 Neb. 199, 31 N. W. 661; Betts v. Sims, 25 Neb. 166, 41 N. W. 117. The rule stated in these cases is unquestionably correct; but in State v. Sioux City & P. R. Co., supra, and some other cases, its limitations were lost sight of. The distinction was not observed between an action to establish title and an action to recover possession of the land. Comp. St. c. 73, § 57, provides that an action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate. Section 59 provides that any person or persons having an interest in remainder or reversion in real estate shall be entitled to all the rights and benefits of this act. In Foree v. Stubbs, 41 Neb. 271, 59 N. W. 798, decided since this case was tried in the district court, the object of this statute was carefully considered. State v. Sioux City & P. R. Co. was overruled in so far as it denied a right to proceed to quiet title against one in possession, and the rule established in conformity with the language of the statute. If Hooper was tenant of the life estate, a possessory action could not now be maintained against him; but the plaintiffs could proceed under section 59 to have their estate in remainder established.

It becomes necessary to consider separately the title to that portion of the land sold under the decree based on the creditors' bill, and that portion sold under the decree of foreclosure. Considering first the former portion, the plaintiffs claim solely under the deed from Peterson, and because of want of jurisdiction over Mrs. Hall in the proceedings resulting in the sale. The evidence shows beyond all controversy that Mrs. Hall paid no consideration for the land and had no connection with the transaction. It is

clear as anything can be made by human evidence that the conveyance of the land to her was an artifice to divest any lien or claim which might have been obtained by virtue of the garnishment of Peterson in the action against Hall. The plaintiffs merely represent Mrs. Hall. They have no higher claim than she had. They are here seeking the affirmative aid of a court of equity to establish their title. Whatever may be the rights of parties to assert at law the invalidity of a judgment, or at law or in equity to resist its enforcement for want of jurisdiction to render it, it is the firmly-established doctrine that a court of equity will not lend its affirmative aid to persons seeking to avoid the enforcement of a void judgment, unless it be made to appear that they have a valid defense thereto. Railroad Co. v. Manning, 23 Neb. 552, 37 N. W. 462; Osborn v. Gehr, 29 Neb. 661, 46 N. W. 84; Insurance Co. v. Meyer, 30 Neb. 135, 46 N. W. 292; Wilson v. Shipman, 34 Neb. 573, 52 N. W. 576; Janes v. Howell, 37 Neb. 320, 55 N. W. 965; Pilger v. Torrence, 42 Neb. 903, 61 N. W. 99. In some of the cases cited the rule was confined to judgments regular on their face, but we can perceive no distinction on principle. The doctrine is based on the broad principle that to obtain relief from a court of equity an equitable right must be shown. Where a party is without equity in his favor, the court will remit him to his legal remedies. If one cannot obtain the aid of a court of equity to prevent the enforcement of a void judgment without showing a defense thereto, it would seem to follow that he cannot without showing such defense obtain the assistance of a court of equity to vacate proceedings whereby the judgment has already been enforced; and, to apply the rule to the present case, the plaintiffs cannot be permitted to set aside the sale made under the void decree without establishing an equity to the land in themselves. Hughes v. Housel, 33 Neb. 703, 50 N. W. 1127.

As to the 40-acre tract the case rests on entirely different principles. Hooper claims title, not under the creditors' bill, or adversely to the conveyance to Mrs. Hall, but through that conveyance, or, at least, through the foreclosure of the mortgage which was a part of the transaction. Mrs. Hall died before the foreclosure suit was instituted. The plaintiffs were not made parties, and Hall, who was made a party, was not subjected to valid service. The proceedings were therefore wholly without jurisdiction, and the foreclosure and sale were void. The plaintiffs contend that the mortgage was not a lien upon the land beyond Hall's life estate, which fell in subsequent to the execution of the mortgage. This claim is based on the fact that the mortgage was executed by M. S. Hall in his own name, and did not purport even to be the act of Mrs. Hall, or that of Hall as her agent. It must be remembered, however, that the conveyance was made to Mrs. Hall in satisfaction of Peterson's debt to Hall, and the mortgage was executed, at the same time and as a part of the same transaction, to secure the repayment of the excess of the value of the land over Peterson's debt to Hall. The plaintiffs are entitled to Mrs. Halls' rights,—no more. Hooper, on the other hand, by the purchase of the Peterson notes became vested with Peterson's rights. It is argued that there is no proof that he paid any consideration for the notes. This, however, makes no difference. Loney v. Courtnay, 24 Neb. 580, 39 N. W. 616. Assuming that Hall at the time of the transaction was without any authority to contract on behalf of Mrs. Hall, it is nevertheless the established law that a principal who affirms or ratifies a contract made for him by his agent must adopt all the instrumentalities employed by his agent to bring it to a consummation. Joslin v. Miller, 14 Neb. 91, 15 N. W. 214. The mortgage cannot be sustained as a legal mortgage, because not executed by the owner of the fee. But an application of the principle stated requires that it should be given effect as an equitable mortgage. Love v. Mining Co., 32 Cal. 639; Miller v. Railroad Co., 36 Vt. 452. The rule established by these cases is that a mortgage made by an agent in his own name is binding in equity, if the agent had authority, and the failure to execute it in the name of the principal resulted from accident or mistake. It is true that Hall had no authority in writing from Mrs. Hall to execute the mortgage, as would seem to be required by the Compiled Statutes (chapter 32, § 25); but we do not think that, in order to give effect to the equitable principle underlying these decisions, the transaction must necessarily be evidenced as required by the statute of frauds. In the Vermont case cited there was no memorandum which to our mind would be sufficient to satisfy the statute. All that existed was a resolution of the board of directors of the corporation on whose behalf the conveyance was executed. We think the case is within the principle of Morrow v. Jones, 41 Neb. 867, 60 N. W. 369, where a grantee in a deed absolute in form was held bound through the acceptance of the deed by the defeasance executed by an attorney not in that behalf authorized. The mortgage by Hall must therefore be treated as a valid lien upon the land, as between the parties to the transaction. What the rights of a bona fide purchaser would be need not be considered. The case as to the 40-acre tract then resolves itself to this: The mortgagors seek to have their title established against a mortgagee in possession under a sale made to him in the course of void foreclosure proceedings. It is pleaded that Hooper is estopped from setting up title under the foreclosure proceedings by reason of his prior proceedings under the creditors' bill adjudging the mortgage, as well as the deed to Mrs. Hall, void as against him; but the conveyances attack-

ed by the creditors' bill were not absolutely void; they were only void as against creditors. Hooper was a creditor at the time, and he did successfully attack the conveyances; but he satisfied his debt through a sale of the remainder of the land. His debt having been satisfied, the basis on which he obtained the decree in the creditors' bill was destroyed. He was no longer a creditor. He was no longer entitled to attack the conveyances as to the rest of the land. Much less was he estopped from affirming them. Let us suppose that the mortgage had been foreclosed by Peterson himself upon this 40 acres. The decree on the creditors' bill would certainly not estop him from such proceedings. Suppose, on foreclosure by him, Hooper bought the land. He could certainly take good title. Suppose, on the other hand, the land sold in pursuance of the creditors' bill had been bought by a stranger. Hooper would certainly be estopped from setting up the mortgage as against the title of such a stranger acquired under proceedings by Hooper impeaching the mortgage. But Hooper had in the first instance his election to avoid the conveyances or to let them stand. He elected to avoid them as a creditor, and subjected a portion of the land to the payment of his debt. The debt was entirely satisfied out of that portion. He was no longer a creditor, and could not assert any claim against the remaining portion. He then had the same right to deal with the grantees of the remaining portion on the faith of their ownership as a stranger with notice would have. It is a purely fortuitous circumstance that the same person acquired title to that portion subjected to sale by the creditors' bill and to that portion sold under the mortgage; and no estoppel arises.

The petition having been drawn on the theory that not only were the foreclosure proceedings void, but the mortgage also, no offer was made to redeem from the mortgage. We hold that the mortgage was not void, and therefore the plaintiffs, representing the mortgagor, must, in order to remove the cloud cast by the deed executing the foreclosure sale, offer to pay what is equitably due under the mortgage. Loney v. Courtnay, supra. The fact that the action was not brought until more than 10 years after the mortgage matured does not relieve the plaintiffs from the obligation. Merriam v. Goodlett, 36 Neb. 384, 54 N. W. 686. Although the statute of limitations has prevented a foreclosure of the mortgage, the mortgagor must offer to redeem in order to obtain affirmative relief from a court of equity. In the case last cited, the plaintiff was permitted to amend in this court by offering to redeem; but in the case before us it stands admitted that Hooper entered into possession in 1876, much more than 10 years before this suit was brought. It has been held that where the lands have remained unoccupied the statute of limitations does not begin to run against a bill to redeem until tender of money or a refusal to reconvey. Wilson v. Richards, 1 Neb. 342. But we think, by all the authorities, the statute does begin to run after the debt matures, from the time the mortgagee enters into open, notorious, and actual possession under claim of ownership. Even under the old practice, where courts of equity were not bound by, but merely followed, the analogy of the statute of limitations, such was the rule. Anon. (by Lord Hardwicke) 3 Atk. 313; Dexter v. Arnold, 1 Sumn. 109, Fed. Cas. No. 3,857; Knowlton v. Walker, 13 Wis. 264; Montgomery v. Chadwick, 7 Iowa, 114. The action was therefore barred, whether the 4 or the 10 year statute applies, and the defendant pleaded the bar.

It is contended that Hooper is rightfully in possession for the life estate of Milton S. Hall, and that, therefore, the statute has not yet begun to run; but we have already held that under our law this action may be maintained by a remainder-man during the term of the tenant for life. Indeed, as already suggested, if this were not true, the plaintiffs would have no standing in court at this time. The answer made to this is that Hooper's possession has never become adverse to the plaintiffs, on account of such life estate; but as to this 40-acre tract, at least, there is not only no presumption that Hooper's possession is for the life estate of Hall, but it was manifestly, from the outset, adverse to the plaintiffs under a claim of ownership in fee. The foreclosure proceedings are as much void against Hall as they are against the plaintiffs. The mortgage purports to encumber the fee. Foreclosure was sought against the fee. The sheriff's deed purports to convey the fee. It was recorded the day after its execution. Everything shows that Hooper's possession has been under a claim derived from the foreclosure, and not as a life tenant. Amendments are by the Code permitted in furtherance of justice. Code Civ. Proc. § 144. We hold the mortgage to have been a valid equitable incumbrance upon the land, and that the plaintiffs are not entitled to relief against it as against the mortgagee in possession under a void foreclosure sale, without offering to redeem. They have not so offered, and their right to redeem being barred by the statute of limitations, we cannot now permit an amendment for that purpose. Judgment affirmed.

HARRISON, J., not sitting.

FIRST NAT. BANK OF WILBER v. RIDPATH.

(Supreme Court of Nebraska. Feb. 4, 1896.)

AUTHORITY OF AGENT—EVIDENCE—RATIFICATION OF SIMILAR ACTS.

When the extent of an agent's authority is in issue, no special instructions having been given to him, his actual authority to do a par-

ticular act in connection with the transaction may be inferred from proof that the principal had authorized or ratified similar acts in connection with past transactions of the same character, and intrusted to the agent under similar circumstances.

(Syllabus by the Court.)

Error to district court, Saline county; Bush, Judge.

Action by the First National Bank of Wilber against James W. Ridpath. Judgment for defendant. Plaintiff brings error. Affirmed.

J. H. Grimm and E. W. Metcalfe, for plaintiff in error. Hastings & McGintie, for defendant in error.

IRVINE, C. This was an action of replevin by the plaintiff in error against the defendant in error for certain live stock which the plaintiff in error claimed under a chattel mortgage executed by the defendant in error to Lytle & Maynard to secure a note which had been sold by Lytle & Maynard to the plaintiff in error. There was verdict and judgment for the defendant, which the plaintiff seeks to reverse.

The most important assignment of error is that the verdict is not sustained by the evidence. The evidence shows that Ridpath gave to Lytle & Maynard his promissory note for $279.77, May 22, 1891, payable one month after date. This note was sold to the plaintiff bank, and was secured by chattel mortgage on the stock in controversy. Before the note became due it was sent to the Bank of Western by the plaintiff for collection. Lytle and Maynard were both officers of the Bank of Western. Maynard was its president. The evidence tends to show that, instead of collecting the note, the Bank of Western took a new note, again to the order of Lytle & Maynard, and a new mortgage on the same property. Ridpath knew nothing of the plaintiff's ownership of the old note. It bears a general indorsement by Lytle & Maynard, and nothing indicating its ownership. There is also evidence tending to show that the new note and mortgage passed into the possession of a third party, who endeavored to collect the debt. It also appears from the testimony of the cashier of the plaintiff bank that prior to this transaction the plaintiff had done a good deal of business with the Bank of Western and Lytle & Maynard, and it had been the plaintiff's custom to send notes purchased of Lytle & Maynard, or the Bank of Western, to the Bank of Western for collection, and that frequently, instead of collecting such notes, the Bank of Western had procured renewal notes, and sent them to the plaintiff in lieu of payment. We think this evidence sustains the verdict. Where the authority of an agent is in issue, proof of the exercise by him, with the knowledge of the principal, of similar authority in past transactions, may be material in two respects: In the first place, where notice is brought home to the person with whom a contract is made, such evidence tends to show that the agent was acting within the scope of his apparent authority, and so tends to bind the principal, even though actual authority in the particular instance be disproved. In the second place, the exercise of such authority in past transactions, known to the principal, tends to prove that in the particular transaction in question the agent possessed actual authority, there being no special instructions; because, where an agent, under certain circumstances, had been permitted to exercise a certain authority, the principal knowing the facts, and a similar transaction is intrusted to him under the same circumstances as before, and without special instructions, the presumption is, his authority is the same. In this case there is no evidence that this particular note was not sent under the same circumstances, and with the same authority on the part of the Bank of Western, which existed with regard to similar notes which had been sent it. Therefore the jury was justified in inferring, from the fact that other notes sent by plaintiff to the Bank of Western had been satisfied by the taking of renewal notes therefor, that the Bank of Western had similar authority in this case. If such authority existed, Ridpath should not suffer, if, as seems to be the case, the agent was dishonest, and disposed of the new security to a stranger, instead of sending it to its principal.

The foregoing considerations really dispose of the merits of the case. The giving of certain instructions requested by the defendant is assigned as error, but the assignment is directed en masse against the whole group of instructions, and some are manifestly correct. Error is also assigned upon the giving of the single instruction given by the court of its own motion. It will not be necessary to quote this instruction, because it is in accord with the rule we have already stated in considering the sufficiency of the evidence.

The admission in evidence of the second mortgage is assigned as error. The objection to its receipt was that it was incompetent, immaterial, and irrelevant. The instrument offered was one properly certified by the county clerk as a copy of the instrument on file in his office. It was therefore competent. Code Civ. Proc. § 408; Comp. St. c. 32, § 14. It was relevant and material because there was sufficient in the parol testimony to identify it as the mortgage which had been given in satisfaction of that on which plaintiff bases its claim.

An argument is made to the effect that no renewal of a mortgage debt, no matter in what form the new debt is evidenced, satisfies the mortgage; but here not only was the evidence of indebtedness changed, but a new security was taken, as the defendant

testifies, in satisfaction of the old. This, no doubt, extinguished the existing mortgage. Judgment affirmed.

FELBER v. GOODING.

(Supreme Court of Nebraska. Feb. 4, 1896.)

APPEAL—BILL OF EXCEPTIONS—AUTHENTICATION.

The matters contained in what purports to be a bill of exceptions need not be examined or considered in this court, unless such document is authenticated by a certificate of the clerk of the proper district court, identifying it.

(Syllabus by the Court.)

Error to district court, Cedar county; Norris, Judge.

In the matter of the accounting of Addison M. Gooding, administrator. In the county court, James J. Felber objected, and from a judgment rejecting the report the administrator appeals to the district court. Report of the administrator affirmed, and the objector brings error. Affirmed.

Wilbur F. Bryant and J. C. Robinson, for plaintiff in error. Barnes & Tyler, for defendant in error.

HARRISON, J. The defendant in error was appointed administrator of the estate of Henry Felber, deceased, by the county court of Cedar county, and, upon presentation and examination of his final report as such administrator, it was, as to certain items therein, disallowed, from which determination of the matters adjudicated the administrator appealed to the district court. A trial of the points in controversy resulted in their decision favorable to the administrator. From this error proceedings have been prosecuted to this court on behalf of one of the heirs of Henry Felber, deceased, who had objected to the allowance of the report of the administrator in the county court, and contested the questions involved in the hearing upon appeal.

To understand and properly determine any of the questions raised by the assignments of error and discussed in the brief of the complaining party necessitates an examination of the evidence introduced before the trial court. In the record there is what purports to be a bill of exceptions as allowed by the trial judge, but the only authentication by the clerk of the district court of any portion of the papers presented here is as follows: "I, John J. Goebel, clerk of the district court in and for said county, do hereby certify that the within and foregoing is a true and correct copy of the 'objections of James J. Felber, motion for new trial, and last journal entry,' as the same are on file and of record in my office, at Hartington, Nebraska." From this it will readily be seen that there is a very small part of the files of the case in this court authenticated by the certificate of the clerk of the district court, as required by law, and that the bill of exceptions is not included.

It is indispensably necessary that a bill of exceptions be properly authenticated. If not, it will not be examined or considered. Code Civ. Proc. § 587b; Martin v. Fillmore Co., 44 Neb. 719, 62 N. W. 863; Yenney v. Bank, 44 Neb. 402, 62 N. W. 872; Moore v. Waterman, 40 Neb. 498, 58 N. W. 940.

As the adjudication of points discussed and contended for by plaintiff in error must be governed by conclusions formed from an examination of the evidence, and the bill of exceptions containing the testimony is not authenticated in such a manner as to present it here for examination, it follows that the assignments of error are not supported, must be overruled, and the judgment or decree of the district court affirmed. Affirmed.

HYDE v. KENT.

(Supreme Court of Nebraska. Feb. 4, 1896.)

ADJOURNMENT—PRESUMPTION ON APPEAL—VACATING JUDGMENT—QUASHING SUMMONS.

1. This court will not presume the adjournment sine die of a term of the district court from the fact that a period of 23 days has intervened since a given day thereof.

2. Action of the district court in setting aside a judgment, and quashing the summons irregularly issued and served, on motion and objection of the defendant at the same term, approved.

(Syllabus by the Court.)

Error to district court, Douglas county; Davis, Judge.

Action by Mary T. Hyde against L. H. Kent. From an order setting aside a judgment by default, and quashing the summons, plaintiff brings error. Affirmed.

Harwood, Ames & Pettis, for plaintiff in error. Wm. E. Healey, for defendant in error.

POST, C. J. We learn from the record of this cause that on the 19th day of April, 1892, which was a day of the February, 1892, term of the district court for Douglas county, the plaintiff in error recovered a judgment therein by default against the defendant in error, in the sum of $1,118 and costs. On the 11th day of May following, the defendant entered in said cause his objection to the jurisdiction of the court, as follows: "Mary T. Hyde v. L. H. Kent. L. H. Kent, named above, defendant, appearing specially, and only for the purpose of objecting to the jurisdiction of the court, and for the stating herein of such objection to the jurisdiction of the court, the affidavit of said L. H. Kent filed herewith, together with all the matters and things therein contained, as herein referred to and made a part thereof." The record discloses no ruling upon the foregoing objection except as hereafter shown, and on December 10th, the same year, a motion to quash the summons was interposed by the defendant, as follows: "Mary T. Hyde v. L. H. Kent. The defendant, appearing especially, and for the

purpose of this motion only, objects to the jurisdiction of the court, and moves that the pretended service herein of summons be quashed; and for the stating herein of such objection to the jurisdiction of the court, and the reasons for the quashing of said pretended service, the affidavit of said L. H. Kent filed herein, upon May 11, 1892, is referred to, and made a part hereof." Afterwards, during the January, 1893, term, to wit, on January 6th, an order was entered setting aside the judgment above mentioned, in which it is recited that the defendant's objection to the jurisdiction of the court had been previously submitted and taken under advisement, and "that from a consideration of the evidence the court finds that the return of the sheriff of service of summons is untrue, and that no proper service of summons was made upon the defendant." Exception was in due form taken to the order last named, and which is renewed in this court by proper assignment of error.

The objection made to the service is that the summons issued February 6th, and served February 13th, named February 7th as the answer day. That such objection, if made in season, should have been sustained, is conceded by the plaintiff in error, and is apparent from an inspection of the record, since the summons was, by its command, made returnable the day after it was issued, and was served six days subsequent to the answer day therein named. But it is argued that the district court was without authority to entertain the objection when presented by motion at a term subsequent to that at which the judgment was rendered. It is, however, unnecessary to consider the merits of that proposition, for the reason that it is without any support in the record. The judgment was, as already appears, rendered April 19th, which was a day of the February, 1892, term; while the first objection to the jurisdiction of the court, accompanied by the evidence which was finally submitted to the court, was filed May 11th, following, there being nothing to indicate whether the last-named day was during the same or a subsequent term. That this court may presume the adjournment sine die of a term of the district court from the lapse of time alone is apparent both from reason and authority. Conway v. Grimes, 46 Neb. 288, 64 N. W. 971. It would be useless at this time, if, indeed, it were possible, to determine the length of time necessary to raise such a presumption. It is sufficient that an adjournment will not be presumed from the time (23 days) intervening between the date of the judgment by which it was sought to obtain jurisdiction of the court over his person. Plaintiff also relies upon the rule asserted in Wilson v. Shipman, 34 Neb. 573, 52 N. W. 576, viz. that all presumptions are in favor of the veracity of the return of the sheriff when assailed in this manner, and that, in order to disprove the recitals thereof, their falsity must be affirmatively shown. But that rule can have no application to the case at bar, for the reason that the irregularity for which the judgment was set aside appears affirmatively from the transcript of the original summons and accompanying return, as well as from the affidavits of the defendant.

Our examination has been confined to the subjects discussed in the briefs of counsel, which do not include the question whether the ruling complained of is a final order, within the meaning of the Code, which may be reviewed upon petition in error pending further proceedings in the case by the district court. Upon that question, it is, for reasons stated, needless to express any opinion. There is no error in the record, and the order of the district court must be affirmed.

MARTIN et al. v. CLARK.

(Supreme Court of Nebraska. Feb. 4, 1896.)

REVIEW ON APPEAL.

This case presents only a question of fact. Evidence *held* sufficient to sustain the verdict.

(Syllabus by the Court.)

Error to district court, Buffalo county; Holcomb, Judge.

Action by A. Augusta Clark against Henry Martin and others. Judgment for plaintiff. Defendants bring error. Affirmed.

Marston & Nevius, for plaintiffs in error. Calkins & Pratt, for defendant in error.

IRVINE, C. The defendant in error brought this action against the plaintiffs in error, charging, under one count, that she had employed plaintiffs in error as her agents to purchase certain land for her; that they falsely represented to her that the lowest price for which the land could be obtained was $5,000, and that she, relying on said representations, gave them $5,000 wherewith to make the purchase; that in truth and in fact the price asked for said land was only $4,000, whereby plaintiffs in error obtained and converted to their own use $1,000. A second count of the petition charges other acts of fraud, but the court instructed the jury that the second count was not supported by the evidence, so we need not regard it. On the first count there was a verdict for defendant in error. No complaint is made of any ruling of the district court upon a question of law. The instructions are admitted to be correct as statements of law. The argument of the plaintiffs in error is that the verdict is not sustained by the evidence, in this: that the evidence fails to show that the plaintiffs in error were agents of or employed by the defendant in error at the time of the transaction complained of. In this particular it is also claimed that certain instructions

should not have been given, because not based on any evidence. It will be fruitless to recite the evidence in this opinion, as the question is entirely one of fact. We have examined the record carefully, and think that, while the evidence on that point in question is not direct or very strong, it is sufficient to justify the jury in finding that a fiduciary relationship existed between the parties. Judgment affirmed.

LANSING LUMBER CO. v. INGHAM CIRCUIT JUDGE.

(Supreme Court of Michigan. Feb. 7, 1896.)

MANDAMUS TO JUDGE — EXTENDING TIME FOR TAKING PROOFS.

A party failed to take its proofs in an important case within the time fixed, by reason of the illness of one of its solicitors, and an order extending the time was granted by the circuit court commissioner. *Held*, on the facts of the particular case, that the circuit court would be required to vacate an order closing proofs, entered regardless of the extension given by the commissioner.

Application for mandamus by the Lansing Lumber Company against the Ingham circuit judge. Granted.

M. V. Montgomery, for relator. George P. Wanty and Jay P. Lee, for respondent.

MOORE, J. In 1894 the Michigan Trust Company, complainant, filed a bill against the Lansing Lumber Company and Orlando M. Barnes, defendants, in the circuit court for the county of Ingham, in chancery. Such proceedings were had in that case in the circuit court and in the supreme court as resulted in an order being entered on the 18th of March, 1895, providing for the taking of proofs within 60 days. At the end of the 60 days another order was entered, extending the time for taking proofs 60 days. On the 10th day of June the complainant began taking its evidence, and continued from time to time up to and including July 9th, when it closed its proofs, and the further taking of proofs was continued until July 31st, on which day another continuance was had until August 6th. On August 6th the relator applied to the circuit court commissioner for an order extending the time in which to take testimony, which order was granted. Six days later the Michigan Trust Company, thinking the circuit court commissioner had not the authority to enter such an order, entered an order closing proofs. The relator then applied to the circuit court for a vacation of the order closing proofs, which application was denied. Thereafter another petition was filed in the circuit court, asking for a rehearing of the former one, and again asking that the order closing proofs be set aside, and the relator be allowed to take his testimony. This petition was denied, and the relator now asks for a writ of mandamus compelling the circuit judge to vacate the order closing the proofs. It is with great hesitation that this court acts in a matter involving the discretion of a circuit judge, and it would not depart from the rule, were it not apparent now that the failure to take testimony on the part of the relator was due to the illness of one of its solicitors, Mr. M. V. Montgomery, and because of the importance of the issues involved in the case, which ought not to be disposed of without the proofs on both sides being taken. It is made a condition of this order that the proofs on the part of the relator be put in within 20 days from this date, with the leave to put in rebutting proofs on the part of the Michigan Trust Company, complainant, within 10 days thereafter, and upon the further condition that the case of The Michigan Trust Company vs. The Lansing Lumber Company and Orlando M. Barnes, in chancery, be put on the calendar for hearing at the first term of the circuit court for the county of Ingham, without further notice, and to have precedence over all other cases on the chancery calendar, without costs in this court.

MONTGOMERY, J., did not sit. The other justices concurred.

PEOPLE v. WIRTH.

(Supreme Court of Michigan. Feb. 7, 1896.)

CRIMINAL LAW—REMARKS OF COUNSEL—WITNESS—CIRCUMSTANCES AFFECTING CREDIBILITY.

1. The statement by a prosecuting attorney to a jury that he believed the evidence showed the witnesses for the defendant to be "a lot of liars" is not ground for reversal.

2. On a trial for assault, a witness for defendant testified that he witnessed the assault, which was made by one M., and not by defendant. *Held*, that it was competent to show, on cross-examination to discredit the witness, that he was present at the preliminary examination of M. and the defendant, and heard M. testify that he did not commit the assault, and permitted M. to be discharged and defendant bound over without disclosing his knowledge.

Error to recorder's court of Detroit; William W. Chapin, Judge.

August Wirth was convicted of assault and battery, and brings error. Affirmed.

George F. Robison, for appellant. Allan H. Frazer, Pros. Atty., and Henry A. Mandell, Asst. Pros. Atty., for the People.

GRANT, J. Under an information charging the respondent with assault with intent to do great bodily harm less than murder, he was convicted of assault and battery.

1. It is first insisted that there was no evidence that the respondent participated in the assault, and that therefore the court should have directed an acquittal. We think there was evidence upon this point for the consideration of the jury, but it is not important to state it.

2. Complaint is made that the assistant prosecuting attorney, in addressing the jury,

said, "I believe the evidence shows that they [the witnesses for the defense] are a lot of liars." Two witnesses, aside from the respondent, were sworn for the defense. Their character and conduct in relation to the alleged assault were before the jury. Upon them the attorney based the argument that they were not worthy of belief. While the language was severe, we cannot hold that it was not justified. We are not aware of any decision which holds that an attorney may not state to the jury his belief that a witness is or is not entitled to credence, in a case where the testimony is conflicting, and the result depends upon which witnesses the jury find are truthful. A broad latitude must be allowed in such cases.

3. One John St. Clair was sworn as a witness for the respondent, and testified he was present at the assault; that one Montgomery made it, and that respondent was in the saloon at the time. On cross-examination, the prosecuting attorney elicited from the witness the fact that he was present at the examination of Montgomery and respondent, both of whom were charged with making the assault, and that he heard Montgomery swear that he did not make it. We think this testimony was competent. While the witness was under no legal obligation to disclose to the prosecution what he knew about the case, yet the fact that he did know, and permitted the guilty party to escape and an innocent party to be held for trial without imparting his knowledge of the transaction, was competent evidence to affect his credibility. The conviction is affirmed. The other justices concurred.

PINCH v. WILLARD.

(Supreme Court of Michigan. Jan. 16, 1896.)

CHATTEL MORTGAGE—WHAT CONSTITUTES—PAROL EVIDENCE—USURY—SET-OFF—WHEN ALLOWED.

1. A bill of sale absolute on its face may, in an action by the vendee for possession of the property, be shown by parol to have been given as security.

2. Where the consideration of a bill of sale of horses on which D held a mortgage was $1,000, $250 to be paid as forfeit, and the balance at a future date to D., and the $250 was given by the vendor to the vendee, who paid it to D., and the horses were never delivered to the vendee, and he never claimed any interest in them, and the vendor, wishing to prevent the horses from being taken under D.'s mortgage, borrowed from P. $750, which was paid to D., and, at the vendor's request, the vendee assigned the bill of sale to P., under a verbal agreement that the vendor would execute to P. a note for the amount loaned and the amount of an old debt, and secure the note on the horses and certain land, which note and land security were never given, the bill of sale should be treated as a chattel mortgage from the vendor to P.

3. The amount of usurious payments cannot be set off against a debt arising out of a subsequent and distinct transaction between the parties.

4. The fact that it was agreed that a mortgage given to secure a present loan should also secure the payment of any indebtedness which might then exist in favor of the mortgagee was not equivalent to an agreement that, if it was found that the mortgagee was indebted to the mortgagor, the indebtedness might be applied on the amount of the loan secured.

5. In replevin for property claimed under a chattel mortgage, an indebtedness due the mortgagor from the mortgagee cannot be set off against the mortgage debt.

Error to circuit court, Eaton county; Clement Smith, Judge.

Replevin by Benjamin W. Pinch against Aaron H. Willard. Judgment was rendered for defendant, and plaintiff brings error. Reversed.

Huggett & Smith, for appellant. Powers & Stine, for appellee.

HOOKER, J. The parties to this action settled accounts upon May 15, 1890, and found the sum of $1,853.48 due from the defendant to the plaintiff. The sum of $1,500 was thereupon paid, leaving a balance of $353.48. It should be added that the defendant claims that this included some usurious items, i. e. that such were included in the settlement. The amount of these does not appear. A chattel mortgage covering the property in controversy (excepting the horses) was given to plaintiff at this time. The plaintiff claims, and there was evidence tending to show, that their dealings continued until November 30, 1892, when they ceased, and that there was no statement after May 15, 1890; that, through such dealing, the defendant became indebted to the plaintiff on various other obligations, some of them providing for bonuses of from $5 to $10 per month, in addition to legal interest, and that he paid to plaintiff large sums of money at different times. Upon these transactions the plaintiff claims that a balance was due to him. The defendant was also indebted to one Downs in a large amount, which was secured by a mortgage upon a large number of horses, including those in dispute. On October 18, 1892, the defendant executed and delivered to William J. Hickok a bill of sale, of which the following is a copy: "Olivet, Mich., Oct. 18, '92. I have this day sold to W. J. Hickok twenty-one head of horse stock, mares, colts, and fillies, as I may wish to select from my stud of horses. Description of said stock is not given, and only possession of stock is given, and right and title to said stock guarantied to be perfect. Consideration of this sale is one thousand dollars. Received payment of two hundred and fifty dollars as forfeit; balance to be paid in the month of November (next), and said amount $750 to be paid into the hands of James T. Downs or his agent. A. H. Willard." At the same time, Hickok was directed to take $250 from a sum of money in his possession, belonging to the defendant, and pay it to Downs, which Hickok did. It seems to have been contemplated that Hickok should obtain a release from Downs of the property covered by the bill of sale,

and the record contains evidence that he did so in writing, and Hickok testifies that it was conditioned upon payment of $750 additional during November, 1892. Whether Hickok promised Downs to pay is not shown; and the only evidence of a promise to pay is contained in the bill of sale, which does not bear his signature. Hickok testified that he expected Willard would pay it, and that he never made any payment upon the bill of sale. He testified also that he understood that, if he did pay the $750, the property should be his absolutely. It may be claimed that this was afterwards modified by the statement that "there was no condition by which he was to hold it in the nature of a mortgage or lien upon the horses to secure his debt if he paid the money, unless he saw fit." He does not appear to have claimed any interest in the property, and, in speaking of the bill of sale, says: "I had a paper that claimed to be a bill of sale in my possession." And he says that "it was not my idea that he was to furnish the stock as security for the $750 and the old debt he owed me."

We are unable to find any evidence of payment or promise by Hickok in the record, unless the taking and holding this writing implied one. When we view this in the light of surrounding circumstances, we doubt the intention of the parties to make any contract in relation to the matter, and are more inclined to think that Hickok was accommodating and acting for Willard, as Willard testifies. Hickok says: "I wasn't present when the horses were selected, but from Mr. Downs' conversation afterwards I supposed he understood it. I supposed that they were selected out so that Mr. Downs would know upon what horses the mortgage remained, and I supposed Mr. Downs supposed I had bought them. So far as I know, Mr. Downs didn't know but that I had bought them right out from his conversation which I had with him afterwards. I should say this was done at the request of Mr. Willard, and in his interest, and that this arrangement was made with Mr. Willard's request, although I had a little interest. Mr. Willard was owing me a little about sawing, and I was to receive some of my pay. I made this arrangement with him. I attended to this business for him under those circumstances, that I was to receive my pay. I have received it in part. Q. Was there any understanding between you and Mr. Willard that you were to have this stock as security provided you paid the additional $750 mentioned in the bill of sale? Was there any talk about that? A. Not as security, sir. Q. Was there any talk about his securing you for money he then owed you before this paper was made? A. Why, no difference. There was no particular security. Witness: I expected Mr. Willard would furnish the $750 to go to Mr. Downs on or before the 30th day of November. That was the understanding when the paper was made. However, there was a little talk that possibly I might pay it. There was nothing definite in relation to it. It was not my idea that he was to furnish the stock as security for the $750 and the old debt he owed me. I saw the stock on Mr. Deringer's farm. I supposed Mr. Willard paid the pasturage. I did not pay any. Mr. Willard directed me to make the assignment to Mr. Pinch. The horses were not upon my farm anywhere. I furnished them no feed in any way. I don't think there was any agreement between me and Mr. Willard that I was to be owner of the property in any different way from what I have told. I acted under Mr. Willard's direction. In all the transactions I acted largely under his direction. I was not a loser in any way in the matter in case the $250 was not paid to Mr. Downs." But, whatever may be thought about this, the parties, Hickok and Willard, did not carry out any arrangement in the nature of a sale. Hickok paid nothing; Willard delivered nothing; and, at Willard's direction, Hickok subsequently assigned his interest to Pinch, and received money from Pinch for Willard, and delivered it to Downs. That came about in this way: Some time in November, Willard asked Pinch to loan him $750, to pay Downs, offering to have Hickok assign this bill of sale to Pinch, if he would do so, and to pay him interest on the loan. Pinch agreed to do this, and it ran along until the last of the month, when Pinch refused, unless Willard would give him a deed of certain land, and make such deed and the property covered by the bill of sale security for the other debts claimed by him to be owing to him from Willard, together with the $750 to be advanced. Willard declined to do that, but at the last moment they reached some sort of understanding, and the money was paid, and assignment of the writing was made by Hickok, as stated. The parties disagree about this arrangement. Willard claims that the money was borrowed, and the bill of sale assigned by way of security, while Pinch claims that he paid the money, and took the assignment on the promise of Willard that he would come the next day, or soon thereafter, and execute a contract and note for all the money owing which should be secured as hereinbefore stated. He claims that Willard did not do this, and, therefore, that he had a right to stand upon his purchase of the horses for $750, through the Hickok bill of sale, which gave him an absolute title to them. Pinch testifies that he bought these horses of Hickok at Willard's request, to prevent Downs from taking them on his mortgage; that he understood that Hickok refused to pay any more money on them; that he did not know that Hickok did not own the horses, but surmised how the thing was. He said that, at the time he took the bill of sale, a verbal agreement was made to be reduced to writing. Willard

was to see Pinch on the next day, and make a complete statement of all their dealings, mortgages, and accounts, and make a written contract to secure, with security upon 80 acres of land and 20 head of horses. That was to take the place of the old indebtedness, and secure this $750.

Upon this verbal contract, which was never put in writing, this money was paid and bill of sale assigned. The plaintiff does not show that there was an express agreement that he should buy these horses. It is plain that it was not expected that they should extinguish any claim he might have for the $750, which it was evident was to be considered a loan, upon which he was to receive interest, and for which the horses were to be held as security. Upon the facts, the court was clearly right in saying that this bill of sale was given by Willard to Pinch as security. It was as though he had made a new bill of sale on payment of $750, and we fail to see how the fact that the instrument was assigned to Pinch at Willard's direction places the parties in any different relation to each other. That a bill of sale may be shown in a court of law to have been given for security is established by several cases cited by counsel. Fuller v. Parrish, 3 Mich. 211; Picard v. McCormick, 11 Mich. 68; Cooper v. Brock, 41 Mich. 488, 2 N. W. 660; Seligman v. Ten Eyck's Estate, 74 Mich. 525, 42 N. W. 134; Weed v. Mirick, 62 Mich. 414, 29 N. W. 78. Counsel argue that, conceding this, "the cases have never gone further than to hold that a defeasance in such case may rest in parol; that no case holds that such proof may be introduced to show that the bill was not intended as a bill of sale, that the title was not conveyed thereby." We think this an overnice distinction. Our understanding of the rule is that a bill of sale, absolute upon its face, may be shown by parol to have been given under circumstances that indicate that it was intended as security for a debt, and not a sale of the chattels; and we know of no case that holds that such an instrument is an exception to the rule that title does not pass under a mortgage. That such is the rule, see Lucking v. Wesson, 25 Mich. 443, overruling Tannahill v. Tuttle, 3 Mich. 104, and Thurber v. Jewett, Id. 295; Flanders v. Chamberlain, 24 Mich. 305. See, also, Kohl v. Lynn, 34 Mich. 360; Farrington v. Bristol, 35 Mich. 28; Gardner v. Matteson, 38 Mich. 200; Haynes v. Leppig, 40 Mich. 602; Brink v. Freoff, Id. 611; Wilson v. Montague, 57 Mich. 638, 24 N. W. 851; Bank v. Weed, 89 Mich. 857, 50 N. W. 864.

If there is any good reason why a bill of sale, absolute in form, but which the law holds in fact a security in the nature of a chattel mortgage, not intended to transfer property, but as a security merely, should be held to convey title, it has not been suggested. The court evidently treated this transaction as a bill of sale given, not only to cover the $750 debt, but all other obligations, for he permitted the parties to go at length into their accounts subsequent to May 15th. He directed the jury to strike a balance, and give the plaintiff a verdict if they found anything due to him. This was in accord with the plaintiff's claim that he was to be secured on the horses and land for all indebtedness.

Counsel for the plaintiff insist that the court should have treated the chattel mortgage and bill of sale as two distinct claims. This is true so far as to have authorized a verdict of not guilty as to the property conveyed by the mortgage, if the jury should find the debt of $353.48 paid up, for there appears to be no claim that this mortgage secured the $750 item. But the plaintiff suffered no injury by this omission. As the jury found a balance of only $239.63, it is evident that they found that this property was discharged by payment of the debt. In this connection we will consider the assignment of error upon the instruction in relation to usury. The transaction in question took place November 30th, and there were no dealings between the parties afterwards. Counsel urge that the plaintiff should have recovered the amount of money loaned at that time—i. e. $750—at the least, and that such sum could not lawfully be reduced by bonuses. It is manifest that it was so reduced, or that the jury must be supposed to have found a balance against the plaintiff, in which bonuses could not be included. In other words, he argues that if the defendant did not owe anything on November 30th, previous to the $750 deal, the question of bonus could not be considered, as, where usury has been paid, it is not recoverable; and such we understand to be the law. It seems self-evident that the jury must have found that payments, with or without unpaid bonuses, equaled all previous obligations; and it is obvious that nothing in the nature of a bonus or a promise to pay usury could be applied upon the $750 debt. It follows that, if the same was not reduced by usury already paid, it must have been reduced by an offset consisting of a previously existing balance against the plaintiff. The plaintiff unquestionably held the horses as security for $750. Nothing had been paid upon this obligation, and he had a right to enforce it. If, at the time the $750 was obtained, the defendant owed plaintiff nothing, then these horses would be security for only $750. The fact that the parties supposed that something was due to the plaintiff, and agreed that it should be secured by the horses, was not equivalent to an agreement that if it was found otherwise, and that the balance was in favor of the defendant, such balance might be applied upon the $750 debt by way of offset, as appears to have been done. This was erroneous, unless it is proper to prove offsets in actions of replevin. As we have frequently had occasion to say, set-off is a

creature of the statute, and it has never been authorized in actions of tort. For authorities holding that accounts cannot be adjusted or settled in an action of replevin, see Whitworth v. Thomas, 83 Ala. 308, 3 South. 781; Otter v. Williams, 21 Ill. 120; Streeter v. Streeter, 43 Ill. 155; Wat. Set-Off, 169; Fairman v. Fluck, 5 Watts, 516; Peterson v. Haight, 3 Whart. 150. See Dole v. McGraw, 71 Mich. 110, 38 N. W. 686.

Under the proofs, the jury could not legitimately find a verdict of not guilty, as the court instructed them they might do. True, they did not, but under this instruction, they found an opportunity to render a much smaller verdict than the undisputed testimony shows that the plaintiff was entitled to. The objectionable feature in the charge is as follows. "And if you find a proper demand of the property was made by the plaintiff before the commencement of this suit, your verdict must be for the plaintiff, unless you find that there is nothing due the plaintiff—was nothing due to the plaintiff at the time of the commencement of this suit. And upon the amount covered by the bill of sale or contract of November 30, 1892, you would compute simple interest thereon from the time of the payment of the same to Mr. Hickok, which was on the 30th day of November, 1892. And, in determining the question of payment, you are to take into account the whole dealings between the parties, and as proven in this case; that is to say, you are to ascertain what amount of money Mr. Pinch has let Mr. Willard have, and what amount he has received back, not taking into account the bonuses or unlawful interest, which will be explained to you further on. And if, upon striking the balance, you find that Pinch has been paid in full, your verdict should be not guilty; but, if you find that Mr. Pinch has not been paid in full, you are then to determine what amount remains unpaid, and state the amount in your verdict." The judgment must therefore be reversed, and a new trial ordered.

McGRATH, C. J., took no part in the decision in this case. The other justices concurred.

PILLARD v. DUNN.

(Supreme Court of Michigan. Feb. 7, 1896.)

WITNESS—COMPETENCY—FACTS EQUALLY WITHIN DECEDENT'S KNOWLEDGE—EVIDENCE AS TO HANDWRITING.

1. In an action by an administrator on a note, plaintiff having introduced testimony that it was signed by defendant, in the presence of intestate, at a certain time and place, defendant, in support of his plea that he did not execute it, may testify that he never signed it, and that at the time mentioned he was at another place; this not being within the rule prohibiting a party from testifying to transactions with decedents, the facts testified to not being equally within the knowledge of deceased.

2. So, too, plaintiff having introduced a letter written by defendant to deceased, and the envelope in which it was inclosed, and testimony that the note was inclosed therein, defendant was competent to testify that the letter had no reference to the note.

3. One cannot testify, as an expert, that a signature to a note was not his; the only attempt to lay a foundation therefor being that he was asked if he was able to read and write, and if he would know his own signature when he saw it.

Error to circuit court, Wayne county; Willard M. Lillibridge, Judge.

Action by George F. Pillard, administrator, against James Dunn. Judgment for plaintiff. Defendant brings error. Reversed.

Moore & Moore, for appellant. Wilkinson & Post, for appellee.

LONG, C. J. Plaintiff, as administrator, sued the defendant, declaring on the common counts, with copy of note of $200 attached, and claimed in the bill of particulars an additional $200 for moneys loaned. The defendant pleaded the general issue, with notice of the statute of limitations as to the claim for money loaned, and attached his affidavit denying the execution of the note. On the trial the plaintiff produced a Mrs. Seacord, who testified that the note was signed by the defendant in the presence of the deceased. The note was then given in evidence. The plaintiff also offered in evidence a letter, and the envelope in which it was sent, written by the defendant to the deceased in her lifetime, which were objected to because they were not dated, and there was no showing as to what they referred to. On cross-examination the witness Mrs. Seacord testified that the note was signed on the day of its date, February 17, 1890, at Romulus, Wayne county, this state. The plaintiff also called Mrs. Bourquen, who testified that she knew the defendant's handwriting, and that the note, as well as the letter and envelope, were in the defendant's handwriting. The plaintiff was sworn in his own behalf, and testified that he knew the handwriting, and that the signature to the note was the defendant's. The defendant then introduced a witness, one George Brink, who testified that from January 31 to June, 1890, the defendant was at Munith, Jackson county, and he was there every day, and that he saw him every day; that on February 17, 1890, the defendant and witness paid to one Sutton $12.50, and took a receipt, which witness produced. The defendant was then called, and testified in his own behalf that he was in Munith, Jackson county, every day from January 31 to June, 1890; that on the 17th day of February, 1890, he was at Munith, and remembered the fact of the money's being paid to Mr. Sutton as testified to by the witness Brink; and that he (the defendant) furnished the money to make that payment, and was present when the payment was made. Counsel for plaintiff then moved to strike out the testimony of the defendant as to his being at Munith,

Jackson county, for the reason that it was immaterial, except as it bore on the question of the execution and delivery of the note, and, as the execution and delivery of the note must have been equally within the knowledge of the deceased, defendant could not testify in regard to it. The court sustained the objection, and struck out all the defendant's testimony as to his whereabouts from January to June, 1890. The defendant was then asked whether he was at his mother's house, in Romulus, on February 17th, or on February 16th, 17th, and 18th, or on either of those days, or at any time during February, 1890, and whether he was present at any time when any note was signed, and whether he ever signed the note promising to pay his mother $200. The defendant was also asked, as an expert, if, in his opinion, the signature was his. He was further asked if the letter which was offered in evidence had any reference to the note in question. All these questions were excluded upon the ground that they were facts equally within the knowledge of the deceased, and incompetent under the statute.

The court was in error in striking out the testimony given by the defendant, and in refusing to receive the testimony offered, except as hereinafter stated. It is well settled in this state that an opposite party can testify, unless the particular fact testified to was equally within the knowledge of the deceased. It cannot be said that because Mrs. Seacord testified that the defendant signed the note in the presence of his mother (the deceased) on February 17, 1890, at Romulus, Wayne county, that it was true. It may or may not have been true. That would be a question for the jury, if it was disputed or denied, and certainly the defendant may be permitted to testify that it was not true. In Ripley v. Seligman, 88 Mich. 177, 50 N. W. 143, it was held that the opposite party could testify that he had purchased warrants and scrip to enter lands for the deceased, and that he selected the lands, as these acts were not done in the presence of the deceased. The precise question involved here was involved in Pinney v. Orth, 88 N. Y. 447. There suit was brought by the representatives of the deceased against Orth to recover a claim for alleged services rendered by the deceased to Orth. On the trial a witness testified to an alleged conversation between Orth and the deceased. Thereupon Mr. Orth took the stand, and proposed to deny the conversation. The testimony was excluded. Speaking of this, the court said: "We think that Mr. Orth, for instance, was competent to testify that he was not in the city of New York at the time referred to by the witness, or that the witness was at some other place, or that he never met the witness at the office where the conversations are alleged to have occurred; and, on the same principle, we see no reason why he should not have been allowed to testify that the witness was never present at that office when any conversation took place between Mr. Orth and the deceased, so long as he refrained from testifying as to anything that was or was not said between him and the deceased. The fact that the interview between the party and the deceased did not occur at the place named by the witness, but in a different room, we think, was an independent fact, inquiry as to which did not trench upon the rule. It was not testimony as to the transaction itself, but as to the fact whether the witness saw the party and the deceased together at the place named by the witness. A party surely ought to be allowed to testify that he never was in a particular house or room, or never met the witness or the deceased there, for the purpose of contradicting the witness who testified to a transaction between them at that place." The court further stated, in speaking of the provision of the act that the prohibition "does not preclude the witness from testifying to extraneous facts or circumstances tending to show that the witness who has testified affirmatively to such a transaction or communication has testified falsely, or that it is impossible that his statement can be true; as, for instance, that the survivor was at the time absent from the country where the transaction is stated to have occurred." So in the present case. The defendant had a right to testify that he was not in Romulus on February 17, 1890, but was at Munith, Jackson county, this state. This was not necessarily a fact equally within the knowledge of the deceased, and the fact was not established simply because Mrs. Seacord testified to it. The court was also in error in not permitting the questions propounded to the witness in reference to the letter and envelope to be answered by him.

We know of no rule of evidence that would permit the defendant to testify, as an expert, that it was not his handwriting upon the note, as no foundation was laid upon which it can be said that the defendant was an expert in handwriting. He was simply asked if he was able to read and write, and if he would know his own signature when he saw it. We think this question was properly excluded. For the errors pointed out the judgment must be reversed, and a new trial ordered. The other justices concurred.

WHEELER et al. v. MEYER et al.

(Supreme Court of Michigan. Feb. 7, 1896.)

ACTION ON BOND—EVIDENCE.

1. A finding that an inventory was attached to a bond at the time it was signed by the surety is warranted by testimony of the person who drew it that he pinned the inventory to the bond, that it was pinned to it when the principal signed it, that the principal took it to the surety, and when it came back with the surety's signature the inventory was still pinned there-

on: it being moreover recited in the bond that "an inventory is hereunto attached and made a part hereof."

2. A debtor executed to his creditor a bill of sale of goods to secure certain notes. Thereafter the creditor delivered the goods to the debtor, who gave a bond conditioned to sell the goods and account to the creditor for the proceeds till the amount so paid amounted to a certain sum. *Held*, that admission of the notes in evidence in an action on the bond was not error, they having been offered and admitted simply for the purpose of establishing the consideration and showing the history of the transaction.

Error to circuit court, Wayne county; Robert E. Frazer, Judge.

Action by Russell Wheeler and another against Louisa Meyer and another. Judgment for plaintiffs. Defendants bring error. Affirmed.

Albert J. Chapman, for appellants. Corliss, Andrus & Leete, for appellees.

LONG, C. J. This case was before this court at the January term, 1893, reversed and remanded for new trial, and reported in 95 Mich. 36, 54 N. W. 689. It was again tried in the circuit court of Wayne county in October, 1893, and brought to this court and heard at the June term of 1894, was again reversed and remanded for new trial, and is reported in 101 Mich. 465, 59 N. W. 811. It has been again tried, and comes to this court upon writ of error by defendants. The facts have been so fully stated in the former opinions that it is unnecessary to restate them here. The first objection relates to the admission of the bond and inventory in evidence, and counsel for defendants contend that there was no proof which authorized the court to permit them to be received in evidence, for the reason that the daughter of Mrs. Meyer testified that the inventory was not attached to the bond at the time Mrs. Meyer signed it. We think there was some testimony given by the plaintiffs which tended to show that the inventory was attached to the bond when Mrs. Meyer signed it. Judge Lillibridge testified that he drew the bond, and cut from one of the notices of sale the description or inventory of the property, and pinned the same to the bond, and that when Mr. Guilloz signed the bond this inventory was pinned to it, and Guilloz took it to get the other signature, and that when it came back to him it was signed by Mrs. Meyer, and the inventory was still pinned thereon. This, taken in connection with the fact that the bond recited that "therefore, if said John F. Guilloz shall well and truly take possession of said stock of goods and chattels, an inventory of which is hereunto attached, marked 'Exhibit A,' and made a part hereof," is some evidence that the inventory was attached at the time Mrs. Meyer signed her name. It is true that Mr. Guilloz testified that the inventory was not attached, but the court submitted that question to the jury, as follows: "This suit is brought upon this bond in question, and the principal question for you to determine is the liability of John F. Guilloz and of Mrs. Meyer upon this bond, and that is all the matter you are to adjust in this trial. It seems that one of the principal questions arising in the case is whether there was a certain paper attached to the bond at the time it was executed. It is claimed on the part of the plaintiffs in this suit that this bond was executed by John F. Guilloz, and at the time it was executed there was a certain paper, which was an inventory of the property, attached or pinned to the bond, and it is claimed that that inventory was pinned to the bond at the time it was delivered to John F. Guilloz, and that Guilloz took the bond with that paper pinned to it, and returned it with the signature of Mrs. Meyer to it. Mrs. Meyer claims that at the time she executed this bond this paper was not pinned to the bond at all, but that she signed it at the request of her son-in-law, Mr. Guilloz, and that she did not know or read or understand the contents of this paper, and that it was not pinned to the bond at all. When you come to deliberate on this case, one question for you to determine is whether this exhibit,—'A,' I believe, is the title of it, but at any rate you will know it by being an inventory or list of the property that was claimed to be turned over to John F. Guilloz, and for which he was asked to account under the terms of the bond,—you are asked to decide whether this paper was attached to the bond at the time it was signed by Mrs. Meyer. The law of the case, as I understand it, is this, in reference to that particular: If you shall find that this paper was attached,—whether you shall find that this paper was attached or not to the bond, John F. Guilloz is liable for a proper disposition of this property under the bond for all this property,—but if this paper was attached to the bond at the time Mrs. Meyer signed it, then Mrs. Meyer is liable for the proper distribution of the property described in this inventory Exhibit A; but if it was not attached to the bond at the time she signed it, then she is only liable under this bond for such property as was actually turned over to John F. Guilloz. She is not liable for any property that was not turned over to John F. Guilloz, if she did not know the contents of this paper and it was not attached to the bond at the time she signed it." We think this was a fair submission of the question to the jury.

It is contended further that three certain notes should not have been admitted in evidence. A bill of sale was executed by Guilloz Bros. to plaintiffs December 27, 1888, and given to secure the payment of these notes. When the notes were offered in evidence, counsel stated that they "were offered simply for the purpose of establishing the consideration and of showing the history of the transaction." The court admitted them for that reason, and no other. We see no error in this. We have examined the other assignments of error and the charge of the court with much care, and are of the opinion that

the case was tried substantially upon the theory set out in the former opinions, and in accordance with the rules there stated. The charge of the court fully protected the rights of the defendants, and was open, full, and fair in all respects. We find no error in the record, and the judgment must be affirmed. The other justices concurred.

GUMZ et al. v. GIEGLING et al.

(Supreme Court of Michigan. Feb. 7, 1896.)

PROMISSORY NOTE — INDORSEMENT BEFORE DELIVERY — JOINT MAKER — PAROL EVIDENCE.

1. One, not the payee, who indorses a note before it is uttered, or indorsed by the payee, is a joint maker.

2. In an action on a note indorsed by defendant before it was uttered, or indorsed by the payee, parol evidence of an agreement, made prior to the execution of the note, that defendant's indorsement was not to create any liability against him, was inadmissible.

Error to circuit court, Manistee county; James B. McMahon, Judge.

Action by Rudolph Gumz and others against Henry Giegling and another on a promissory note. Judgment for plaintiffs, and defendants bring error. Affirmed.

This suit was brought upon a promissory note for $700 dated August 14, 1893, payable to the order of R. Gumz & Co. one year from date, indorsed by defendant Waal. The defendant Waal pleaded the general issue, with notice that the note was given for a prior indebtedness of defendant Giegling; that Waal, when applied to by plaintiffs to indorse the note, refused to do so, and was induced to indorse the same on the representation of plaintiffs that his signature was to be a matter of form, and not for the purpose of creating any liability on his part, but was to be used only to enable them to have an additional argument and lever to use upon Giegling to induce him to pay the note; and that plaintiffs promised that no claim or demand should be made on him for payment, and that his signature should not be considered as creating any liability. At the conclusion of the proofs the court directed a verdict in plaintiffs' favor.

George L. Hilliker, for appellant Waal. Dorel & Smith, for appellees.

GRANT, J. (after stating the facts). Plaintiffs had sold meat to defendant Giegling, who kept a meat shop in Manistee. The account was an open one, and had been running between four and five months previous to the date of the note. They refused to sell him any more goods unless the account was paid or secured. Giegling was unable to pay, and Mr. Schaaf, plaintiffs' agent, asked him to give a note with an indorsement. Mr. Giegling suggested that they see defendant Waal, and that he might indorse a note for him. The two went together to Mr. Waal's office. Mr. Waal gave evidence to sustain the facts set up in his notice. It, however, conclusively appears from his own testimony, as well as that of Mr. Schaaf and Mr. Giegling, that all the conversation upon which he relies as a defense occurred before the note was made out and signed. It is therefore sought to vary the terms of a plain written contract by parol evidence of what took place before its execution. Mr. Waal himself testified, "After the talk was had all round, we all came in there; and the note was drawn up and signed at once, and handed over to Mr. Schaaf." Time for the payment was extended one year. Giegling told Mr. Waal that, if plaintiffs got this note, they would sell him more meat.

Waal was not the payee upon the note, and indorsed it before it was uttered, and before the payee had indorsed it. He is therefore a joint maker. Rothschild v. Grix, 31 Mich. 150. If the note had been executed by Giegling, and delivered to plaintiffs, and they had afterwards secured the indorsement of Waal, without consideration, this defense would have been open to him, under the authority of Kulenkamp v. Groff, 71 Mich. 675, 40 N. W. 57. That decision, however, expressly holds that under the facts of this case the defense cannot be sustained. See, also, Aultman & Taylor Co. v. Gorham, 87 Mich. 233, 49 N. W. 486. The learned circuit judge was correct in directing a verdict for plaintiffs. The judgment is affirmed. The other justices concurred.

CLEE et al. v. VILLAGE OF TRENTON et al.

(Supreme Court of Michigan. Feb. 7, 1896.)

CITY TAXES — RESTRAINING COLLECTION.

Collection of a general tax for proper city purposes will not be restrained, on the ground that it was rendered necessary by the use of city funds for building sidewalks, the cost of which should have been paid by individuals.

Appeal from circuit court, Wayne county, in chancery; William L. Carpenter, Judge.

Bill by John Clee and others against the village of Trenton to restrain collection of taxes. From a decree dismissing the bill, complainants appeal. Affirmed.

Washington I. Robinson, for appellants. James H. Pound, for appellee.

LONG, C. J. The opinion of the court below, filed in this case, sufficiently states the facts, as follows:

"Complainants are taxpayers in the village of Trenton. They seek an injunction restraining the village from collecting the tax assessed against each and all of them, upon two grounds: First, that it is the intention of the village to remit the tax of one O'Donnell, a manufacturer; and, second, that a portion of the tax is made necessary by the fact that the council built sidewalks which should have been built by private individuals.

I am satisfied that the council will not refund the tax of O'Donnell. Moreover, the fact that it might have had the intention to do that could not have afforded grounds for the injunction restraining its collecting any tax. The proper remedy would have been a bill to have prevented the refunding of said tax. Respecting the second contention, as I stated when the case was submitted to me, I am of the opinion that the council did build sidewalks which should have been built by private individuals, and in my judgment it was not authorized to build such sidewalks, under the circumstances, at the public expense. It appears by the testimony, however, that the council bought the material and employed the labor, and apparently have paid for these walks. The tax, therefore, is raised, not to build walks nor to pay for building them, but to raise a fund to replace what has been expended by building these walks. The case stands as if the city of Detroit, having made an unwarranted expenditure out of funds in its possession, is thereby prevented from raising by tax the amount which it has unlawfully expended. There can be but one answer to this question. If the money has been taken out of the city treasury, and the necessities of the city require it, the only proper way to raise it is by taxation. The complainants' remedy in such a case is an injunction, which prevents the village from paying for the improvement out of the public funds. It results, therefore, in my opinion, that the bill must be dismissed."

The testimony fully supports the facts stated by the trial court. The defendant disclaimed any intention to refund the taxes to O'Donnell, and it appeared conclusively that the moneys sought to be raised were necessary to carry on the affairs of the village. These moneys sought to be raised were not for an illegal purpose, and the mere fact that moneys had been wrongfully and illegally expended would not make the present tax void. The decree must be affirmed. The other justices concurred.

RUELL v. CITY OF ALPENA.

(Supreme Court of Michigan. Feb. 7, 1896.)

MUNICIPAL CORPORATIONS—SALARY OF POLICEMAN—ORDINANCE.

A city ordinance provided for the appointment of officers in the police department, and fixed their salaries. Afterwards, by an amendment of the city charter, control of the police department was transferred to a board of police commissioners, but the power to fix salaries still remained in the city council. *Held*, that the provisions of the ordinance as to salaries remained in force, and applied to officers appointed by the police commissioners.

Error to circuit court, Alpena county; Robert J. Kelley, Judge.

Action by Edward A. Ruell against the City of Alpena. Judgment for defendant and plaintiff brings error. Reversed.

By the charter of the city of Alpena prior to 1891 the general police power was vested in the common council. So, also, was the power "to determine and regulate the compensation of all officers elected or appointed." Under that charter the council passed an ordinance providing that the council should have power to appoint a chief of police, a sergeant of police, and patrolmen, to divide the city into precincts, and "assign sergeants of police to each of said precincts." The salary of the sergeant was fixed by the ordinance at $2.50 per day. In 1891 the charter was amended by act of the legislature, providing for the appointment of a board of police commissioners, in which, when organized, was vested the general control of the police department. Local Acts 1891, p. 1047, § 7. By the amended charter the power to fix salaries was not conferred upon this board nor taken away from the common council. The board was duly organized in May, 1892, and adopted rules and regulations for the government of the department, and in them provided for a chief of police and a first and second sergeant. It appointed plaintiff first sergeant, and reported its action to the common council, with the recommendation that "his salary be fixed and remain as at present, $50 per month." He had previously been employed upon the force as patrolman at that salary. This report was placed on file by the council, and no further action was taken upon it. Plaintiff entered upon the duties of his office, and continued therein until March, 1894, when he was discharged. About two months after his appointment, he presented a communication to the council claiming his salary under the above ordinance at $2.50 per day. The council took no other action than the reference of the demand to the board of police commissioners. In February, 1894, he made a similar demand, and thereupon the board discharged him. He then instituted this suit to recover the difference between $50 per month, which he had received, and $2.50 per day, which he claimed as his right under the ordinance.

J. D. Turnbull, for appellant. I. S. Canfield, for appellee.

GRANT, J. (after stating the facts). Under both the old and amended charters the exclusive power to fix salaries was in the common council. The provisions of the ordinance, enacted under the old charter, fixing the salaries of the police officers, were not repealed by that provision of the amended charter authorizing the formation of a board of commissioners and giving it control of the police department. The council had taken no other action fixing the plaintiff's salary, and it was therefore governed by the ordinance. Miller v. Board, 41 Mich. 4, 2 N. W. 180. See, also, People v. Board of Police, 75 N. Y. 38; Kehn v. State, 93 N. Y. 294; Ryce

v. City of Osage (Iowa) 55 N. W. 532. Reversed, and new trial ordered. The other justices concurred.

FINDLAY v. RUSSEL WHEEL & FOUNDRY CO.

(Supreme Court of Michigan. Feb. 7, 1896.)

MASTER AND SERVANT—FOREMAN—WHEN FELLOW SERVANT—ASSUMPTION OF RISK.

1. The foreman of a room in a car shop, who works with the men under his charge, is a fellow servant with them as to all acts which it is not the duty of the master to perform; and one injured by his negligence while working with him cannot recover from the master on the ground that the foreman was vice principal.

2. One employed in a car factory to do general work, such as carrying timbers, painting, and lifting, is within the line of his employment when assisting to hoist car bodies on their trucks by means of block and tackle machinery.

3. Where the danger connected with doing certain work is obvious to any one of common intelligence, it is not negligence in a master not to warn his servant of it.

Error to circuit court, Wayne county; William L. Carpenter, Judge.

Action by William Findlay against the Russel Wheel & Foundry Company. Judgment for plaintiff, and defendant brings error. Reversed.

Moore & Moore (Russel & Campbell, of counsel), for appellant. John G. Hawley, for appellee.

HOOKER, J. The plaintiff was engaged in the manufacture of cars at the defendant's car shop. The car bodies were placed upon trucks, by the use of a rope, both ends of which extended to a point near the ceiling, where they passed through a double block, after which the ends united in a ring. A drum or winch is situated near, from which a rope proceeded through a sheave just above the floor. The rope had a hook at the end, which was used to hook into the ring mentioned. Winding the rope upon the drum had the effect of drawing it through the sheave, and, in turn, would draw the double rope through the double block above, thus lifting the car or weight. A chain five or six feet long was fastened by one end near the sheave. At the other end of the chain was a hook. When the weight was raised sufficiently high, the chain was passed through the ring, and the hook was hooked into or about the chain, thereby holding and taking the weight off from the sheave or winch, permitting the rope to be withdrawn. It is apparent that the rope could only be unhooked from the ring after the chain had been passed through and fastened, and the testimony shows that it was sometimes disengaged with difficulty, by jerking. On the day in question, the plaintiff was called by the foreman in charge of the room to aid in hitching and unhitching the rope, and to assist in placing a flat car upon its trucks. The foreman was in the habit of working with the men, there being about 14 in his department. After the chain was fastened, the plaintiff attempted to unhook the rope, giving the signal, by saying "All right," which, he says, meant that the foreman, King, who had charge of the winch, should slacken the rope by unwinding the rope from the drum. Plaintiff states that, instead of doing so, he set the drum in motion the wrong way, thereby winding up the rope, and raising the weight, and that he (the plaintiff) had his hand upon the rope, and it was drawn down into the sheave, resulting in the loss of two fingers. He recovered a judgment against the defendant, in an action for negligence, and the defendant has appealed. The only errors assigned are the submission of the case to the jury and the refusal to direct a verdict for the defendant.

The plaintiff contends that he should recover—First, because, the defendant's vice principal was guilty of negligence in the use of the winch, by starting it up without notice; second, because the plaintiff was called upon to perform a dangerous service, without reasonable caution, when the plaintiff was unaware of the peril, which service was not within the scope of his employment. We think that the evidence shows, beyond dispute, that the plaintiff was not called to work outside of his line of duty. He testified that he "was working in the car shop, and was carrying timber, painting, and other general work of that kind, and lifting, and such like." He said, further, that it was customary for the foreman to call upon himself and fellows to render this service, and he had rendered it on several occasions. It does not appear that he was employed to do any particular part of the work, but to do general work, including lifting. The work was not only in the line of his duty, and work with which he was familiar, from observation and experience, for the period of two years: but it should have been obvious to the most casual observer, or the veriest tyro in mechanics, that the winding of the rope upon the drum would raise the weight, and draw the hand into the sheave, if not removed, and that injury would result. We cannot say that the plaintiff was negligent. His hand was within two or three feet of the drum. If started suddenly and rapidly, in a different direction from what was expected, there was little time to think; and there is nothing to indicate that it was negligent to take hold of the rope to disengage it.

But one question remains, viz. was the foreman, King, a fellow servant? This question has been frequently before the court of late, and we have repeatedly held that a foreman of a department, who takes part in the performance of labor with his men, is a fellow servant, as to acts which it is not the duty of the master to perform. Beesley

v. W. F. Wheeler & Co. (Mich.) 61 N. W. 658; Schroeder v. Railroad Co., Id. 666. The court should have directed a verdict for the defendant. The judgment is reversed, and a new trial ordered. The other justices concurred.

FENLON v. DULUTH, S. S. & A. RY. CO.

(Supreme Court of Michigan. Feb. 7, 1896.)

MASTER AND SERVANT — NEGLIGENCE OF MASTER.

In an action against a railroad company, by a brakeman, for injuries received while attempting to couple cars supplied with double deadwoods, it appeared that plaintiff sought employment of defendant, stating that he had 27 days' experience; that he had been at work for defendant over a month where cars with double deadwoods were in common use; that he frequently worked on trains containing them; and that he saw the deadwoods, and recognized the danger, and attempted to couple the cars by reaching under the deadwoods, in the manner that he testified that it should be done. *Held*, that the facts failed to show negligence of defendant.

Error to circuit court, Mackinac county; Oscar Adams, Judge.

Action by Thomas Fenlon against the Duluth, South Shore & Atlantic Railway Company for personal injuries caused by defendant's negligence. There was a judgment for plaintiff, and defendant brings error. Reversed.

Henry Hoffman (A. B. Eldredge, of counsel), for appellant. Brown & Bertch, for appellee.

HOOKER, J. The plaintiff lost an arm in attempting to couple cars supplied with double deadwoods. As the danger was obvious, and plaintiff's own testimony shows that he saw and recognized the danger, and attempted to couple the cars by reaching under the deadwoods, in the manner that he testified that it should be done, it can hardly be said that the accident happened by reason of the failure of the defendant to instruct him how to couple such cars. He sought employment, saying that he had 27 days' exeperience. We may reasonably presume that he meant that the defendant should understand that he had 27 days' experience as a brakeman, as that was the kind of a job he obtained, and that was the kind of experience that he had previously. There was nothing to indicate to the defendant that he was familiar with but one kind of car, or that he was unfamiliar with double deadwoods. He worked from some time in June until August 5th on a road where such cars were in common use, and it is shown that he frequently worked upon trains containing them. He admits that he saw them, and does not deny that he worked on a train that had "a whole lot of those cars," but does not remember of coupling any of them. We think that there was an absence of evidence tending to establish negligence upon the part of the defendant. A similar case is that of Kohn v. McNulta, 147 U. S. 239, 13 Sup. Ct. 298. The judgment is reversed, and a new trial ordered. The other justices concurred.

MOORE v. THOMPSON.

(Supreme Court of Michigan. Feb. 7, 1896.)

APPEAL—REVIEW—OBJECTIONS WAIVED.

Where a declaration, during two trials in the circuit court and one trial in the supreme court, is treated by the parties and the courts as containing a count for false imprisonment, it is too late on a second appeal to claim that the declaration does not contain such count, and that the count is one for malicious prosecution.

Error to circuit court, Livingston county; Rollin H. Person, Judge.

Action by Kate T. Moore against Wilford B. Thompson. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Henry C. Waldron (Thompson & Harriman, of counsel), for appellant. Sawyer & Knowlton, for appellee.

MOORE, J. This case has been in this court before, and is reported, Moore v. Thompson, in 92 Mich. 498, 52 N. W. 1000, wherein is contained a full statement of the facts, from which this record does not differ materially. The law as settled in that case must control this one, in so far as it is applicable. It is urged by the counsel for appellant that the declaration does not contain any count for false imprisonment, and that the last count of plaintiff's declaration is a count in malicious prosecution. This case has been tried twice in the circuit court and once in this court. In the former trial in this court, Montgomery, J., who wrote the prevailing opinion, stated the case as being "an action for slander and false imprisonment." 92 Mich. 501, 52 N. W. 1000. Grant, J., who wrote the dissenting opinion, wrote, "The declaration in this case contains two counts,—one for false imprisonment, and the other for slander." In both of the trials in the circuit court, the counsel for the defendant treated this count as one for false imprisonment, and offered several requests to charge, in which he characterized the count as one for false imprisonment. No other claim has been made until the case is brought here this time. In the case of Advertiser & Tribune Co. v. Detroit, 43 Mich. 116, 5 N. W. 72, it was held that the objection relied upon as error must be brought to the notice of the trial court. Also, see case of Howry v. Eppinger, 34 Mich. 30, and the many cases cited there. We do not intimate that the count is not a count for false imprisonment; but, if it is not, it is too late to raise the question now. Objection is made to some portions of the charge of the trial judge, but an inspection of his

charge as an entirety does not disclose any material error. We think it in harmony with the law of the case as decided when the case was here before. The judgment of the court below is affirmed. The other justices concurred.

McDONNELL v. RIGNEY.

(Supreme Court of Michigan. Feb. 7, 1896.)

CONTRACT—VALIDITY—PUBLIC POLICY.

A contract whereby one party, for certain commissions, is to attend meetings of persons solicited to buy real estate from the other party, and persuade them to become purchasers, representing himself to them as a purchaser by subscribing for lots, which the owner is to take off his hands if he does not wish to retain them,—concealing from the intending buyers his arrangment with such owner,—is against public policy, and cannot be enforced.

Error to circuit court, Houghton county; Jay A. Hubbell, Judge.

Assumpsit by Simon McDonnell against John J. Rigney to recover for services. The court directed a verdict for defendant, and from the judgment thereon plaintiff brings error. Affirmed.

Dunstan & Hanchette, for appellant. Chadbourne & Rees, for appellee.

LONG, C. J. The court charged the jury in this case as follows: "It appears from the testimony in the case given by the plaintiff himself that he made an arrangement or an agreement with the defendant whereby he was to be paid a commission for the sale of certain real estate which the defendant was offering for sale; that, pursuant to the agreement so made, he was to subscribe for certain lots at meetings of persons solicited to become buyers, and that the defendant was to take off his hands such subscriptions as he made, if he did not wish to retain them. It appears further that this arrangement, both with respect to the compensation he was to receive, and with respect to his colorable subscription for lots, was concealed from the buyers, or those who proposed to be buyers, and that he attended meetings of proposed buyers, and talked with persons thought likely to become buyers, with the view to induce them to become such, concealing from them both of said arrangements with the defendant. Such an arrangement is contrary to the policy of the law and to sound morals, in that it tends to deceive persons so dealt with, by inducing them to rely upon advice which they supposed to be disinterested, though in fact interested, advice. The law will not permit him to recover the compensation agreed upon for the fulfillment of such a contract, and your verdict must therefore be for the defendant." Plaintiff brings error.

The plaintiff's own testimony, given in the record, shows the facts as stated in this charge. We think the court was warranted in directing verdict in favor of the defendant, upon the plaintiff's own showing. The courts will enforce no contracts grounded in turpitude, or opposed to upright and fair dealing, which are opposed to public policy. This rule is followed in Thomas v. Caulkett, 57 Mich. 392, 24 N. W. 154; Humphrey v. Transportation Co. (Mich.) 65 N. W. 13. The question is so fully covered by these cases that any further discussion of the principle is unnecessary. The judgment must be affirmed. The other justices concurred.

CLUTTON v. CLUTTON (two cases).

(Supreme Court of Michigan. Feb. 7, 1896.)

DIVORCE—NONRESIDENT DEFENDANT—CROSS BILL—VERIFICATION—AMENDMENT—NONCOLLUSION CLAUSE.

1. How. Ann. St. § 6231, provides that no divorce shall be granted when the cause therefor occurred without the state, unless the complainant or defendant have resided in the state two years immediately preceding the suit. *Held* that, where the complainant has resided in the state the full statutory period, and defendant is a nonresident, the defendant may make her answer a cross bill for divorce and alimony.

2. A nonresident defendant, in an action for divorce, should be allowed to amend her answer, made a cross bill for divorce, by adding to the verification thereof the statutory noncollusion clause.

Appeal from circuit court, Wayne county, in chancery; George S. Hosmer, Judge.

Action for divorce by Jonathan L. Clutton against Annie J. Clutton. Defendant filed a cross bill for divorce and alimony. From a decree dismissing her cross bill, defendant appeals. Reversed.

John Ward, for appellant. Franklin L. Lord, for appellee.

MOORE, J. The complainant, Jonathan L. Clutton, a resident of the city of Detroit since June, 1886, brought his suit for divorce against the defendant, Anna J. Clutton, a resident of Ontario, alleging the marriage of the parties in Ontario, and charging, as causes for divorce, desertion and denial of marital privileges. The defendant, Anna J. Clutton, appeared in the suit, and filed her answer, admitting the marriage between the parties, as stated in the original bill, but denying all of the causes for divorce stated therein by complainant; and in her answer charged complainant with having deserted her in 1886, and with having failed to support her. She further charges "that complainant, being of sufficient ability, and worth twenty thousand dollars or more, as she is informed and believes, has grossly refused and neglected to provide a suitable, or any, maintenance for herself or their said children, and that she claims the benefit of this answer, and the facts and charges set forth therein, as a cross bill, and prays that she may be granted a divorce from the bonds

of matrimony with the complainant, and that she may be released from the obligations thereof, and that she may have such other and further relief," etc. This answer and cross bill were sworn to, but the verification did not contain the statutory noncollusion clause. The complainant filed a general replication to the answer, and a general demurrer to it as a cross bill. The court below sustained the demurrer, dismissed the cross bill, and the defendant appeals to this court. The only questions necessary to discuss here are: First. Was it essential, in order to sustain the cross bill, that the noncollusion clause should have been stated in said bill? Second. Can a decree of divorce be granted a nonresident of the state, who is brought in by the complainant, who is and has been a resident of the state for the statutory period required to give the court jurisdiction?

As to the first question, it was held, in the case of Ayres v. Circuit Judge, 90 Mich. 380, 51 N. W. 461, that the oath or affirmation administered to the complainant, in swearing to a bill for divorce, shall negative the existence of any collusion, understanding, or agreement whatever between the affiant and the defendant in relation to the application for divorce, is mandatory, and its absence cannot be waived by any act of the defendant. In Tackaberry v. Tackaberry, 101 Mich. 102, 59 N. W. 400, a different rule is stated in relation to a cross bill. It was there held that the objection, made for the first time on appeal, that the answer to a cross bill in a divorce case is not sworn to, comes too late. In the case of Daly v. Hosmer, 102 Mich. 392, 60 N. W. 758, it was held that it was a proper exercise of the court's discretion to permit the amendment of the verification of a cross bill by adding the noncollusion clause, and the filing of a replication, after decree; and it was further stated that, had the question arisen upon the hearing, the power to do so would probably not have been questioned, and that the questions were not raised then, but, when raised, were no more meritorious than they would have been upon the hearing. We think the case before us is one where it would be very proper to admit the verification of the cross bill, if the facts would warrant it, so as to show noncollusion.

As to the other question, it is urged that the statute forbids the granting of a decree of divorce in favor of a nonresident of the state, citing, How. Ann. St. § 6231, which reads: "No divorce shall be granted unless the party exhibiting the petition or bill of complaint therefor shall have resided in this state one year immediately preceding the time of exhibiting such petition or bill, or unless the marriage was solemnized in this state, and the complainant shall have resided in this state, from the time of such marriage to the time of exhibiting the petition or bill, and when the cause for divorce occurred out of this state, no divorce shall be granted unless the complainant or defendant shall have resided within this state two years next preceding the filing of the petition or bill, and no proofs or testimony shall be taken in any cause until four months after the filing of such petition or bill for divorce, except where the cause for divorce is desertion, or when the testimony is taken conditionally for the purpose of perpetuating such testimony." Prior to the enactment of this statute, it had been repeatedly held, in this state, that a decree of divorce could be granted where one of the parties was a resident of the state. Is it not true that the complainant's filing his bill brought the marital relations existing between him and the defendant, and the parties thereto, under the jurisdiction of the court? The defendant, having appeared in said proceeding, was equally interested with the complainant in the subject-matter of the suit as a proceeding in rem, and, having submitted herself to the jurisdiction of the court, its jurisdiction having been first invoked by the complainant, ought she not to be entitled to a final hearing of the case, and to such relief as is equitably hers? Is it not probable that, in enacting the latter portion of the statute, contained in these words, "when the cause for divorce occurred out of this state, no divorce shall be granted unless the complainant or defendant shall have resided within this state two years next preceding the filing of the petition or bill," the legislature had just such a condition as exists in this proceeding in mind? Section 6231, as an entirety, has not been construed by this court, but portions of it have been. It has been contended that, under that portion of the statute reading, "no proofs or testimony shall be taken in any cause until four months after the filing of such petition or bill of divorce," where relief was sought by way of answer in the nature of a cross bill in a divorce proceeding, no testimony could be taken until four months had elapsed after the filing of the cross bill. It is possible that a literal interpretation of the statute would sustain that contention, but it was held, in the case, already cited, of Daly v. Hosmer, that a proper construction of this provision would allow testimony to be taken before four months had elapsed after the filing of the answer in the nature of a cross bill, if four months had intervened after the filing of the original bill. It was stated "that this provision of the statute was to prevent hasty divorces, and that the object is attained in four months from the filing of the petition or bill as well, where a cross bill is filed, as where it is not." The question now under discussion has never been determined by the Michigan court.

A similar statute was construed in the case of Jenness v. Jenness, 24 Ind. 359. The statute of that state provides "that divorces may be decreed on petition filed by any person who, at the time, * * * shall have been a bona fide resident of the state

one year previous to the filing of the same, and a bona fide resident of the county at the time of filing such petition." Another section provides the method of notifying the defendant when not a resident of the state, and another section of the statute provides that, "in addition to an answer, the defendant may file a cross petition for divorce, and when filed, the court shall decree the divorce to the party legally entitled to the same." In that case the defendant was a nonresident of the state, and it was urged, as it is here, that the court could not grant her a divorce. The court discussed the question at length, and granted a decree to the nonresident defendant, making use of this language: "That to give the statute any other construction would be to say that, in two cases precisely alike in their facts, the defendant in one being a resident, and in the other a nonresident, the former might result in a decree for divorce on cross petition, with such alimony as ought to be given where the plaintiff is in fault; while in the latter, that vindication of character, which can often be secured only by a decree, could not be had by the defendant, nor could the alimony be adjusted upon the basis of the fact that the defendant was the party aggrieved. Such a discrimination against nonresident defendants finds no place within the letter of the statute, still less in its spirit; and a construction which would allow it would invite, in the class of cases in which they could be most successfully perpetrated, the very worst abuses." It was further added: "While our statute is intended to prevent nonresidents from making use of our courts to perpetrate frauds upon their unsuspecting wives or husbands, by coming here to petition for divorces, it at the same time arms them with every weapon of defense which is afforded to our own people, when brought into court at the suit of those whose bona fide residence here gives us jurisdiction."

In Illinois the statute provides as follows: "No person shall be entitled to a divorce in pursuance of the provisions of this act, who has not resided in the state one whole year, next before filing his or her bill or petition, unless the offense or injury complained of was committed within this state, or whilst one or both of the parties resided in this state." That statute was construed in the case of Sterl v. Sterl, 2 Ill. App. 223. In that case the complainant filed his bill for divorce against his wife, who was a resident of the city of New York. She filed her cross bill in the cause, charging the appellee with desertion, and also adultery, committed in the state of Illinois. In discussing the case the court say: "It is insisted by the appellee that, under the provision of the above section of the statute, the appellant had no right to file her cross bill, praying, among other things, for a divorce, for the reason that she was not a resident of the state, and, that fact appearing on the face of her cross bill, he could avail himself of such fact of nonresidence by way of demurrer. * * * It is a familiar principle of law that a court of equity, having acquired jurisdiction of the parties and of the subject-matter of the suit, will retain and exercise such jurisdiction until the equities of all the parties are meted out to them. In this case the jurisdiction of the court is invoked by the appellee, he having, as he had a legal right to do, filed his bill against appellant, praying relief, and summoning the appellant into court. When she is thus brought in, and, having responded to the claims of the appellee by answering his bill of complaint, being, as it were, then forced into the court, submits herself to its jurisdiction, and asks the court to grant to her certain equitable rights, to which she claims to be entitled, then it is the appellee challenges the jurisdiction of the court to grant her any equitable rights, but continues to clamor for his. This position is unconscionable and indefensible upon the principles of equity. But we are told, and it is urged by the appellee that, by reason of the arbitrary provisions of the statute, there is no escape from this dilemma, and that, as a consequence, the appellant is in the court for the purpose of receiving its mandate and yielding obedience to its orders, but without any equitable rights which the appellee is bound to respect, for the reason, as he claims, that she resided in New York, and not in Illinois, and notwithstanding she is dragged into the court at the suit of the appellee, and, as may be presumed, against her will. We think that, by the plainest principles of equity, the appellee is, under such circumstance, precluded from questioning the jurisdiction of the court which he has himself invoked, and that, the court having acquired jurisdiction of the subject-matter and the parties to the suit at the instance and by the prayer of the appellee, he cannot be heard to question the jurisdiction of the court to hear, consider, and determine all the equities of the parties, to the end that complete justice may be done to all in the same case." The court held that the nonresident wife, upon her showing, was entitled to relief.

We think it follows that it would be a reasonable construction of the Michigan statute to say that, where the complainant in a divorce proceeding has resided in the state the full statutory period, and the defendant has appeared in the cause, the court has jurisdiction over the parties, and the right to dispose of the issue between them upon its merits and according to equity, even if, in order to do so, it is necessary to grant a decree of divorce to the defendant for the reasons stated in her answer, filed in the nature of a cross bill. In the case at issue the verification of the cross bill should have been amended as we have indicated, and the demurrer should have

been overruled. The cause is remanded for hearing in the court below, with costs to appellant. The other justices concurred.

WILLIAMS v. VILLAGE OF PETOSKEY.

(Supreme Court of Michigan. Feb. 7, 1896.)

BRIDGE—LIABILITY OF VILLAGE—HIGHWAY IN FACT—DAMAGES—ERRONEOUS INSTRUCTIONS.

1. Though Pub. Acts 1879, No. 280, under which the village of Petoskey was incorporated, in section 4 provides that all bridges built across Bear river within the village limits shall be maintained by the township of Bear Creek at large, yet where a bridge, which was erected by private persons, but recognized by the village and the township, crossed said Bear creek, and also an artificial channel running parallel therewith constructed by the village for its own use, the village is liable for the safe maintenance of that portion which crossed its said channel.

2. Where a bridge was built by private persons, and the village adopted an ordinance purporting to open and dedicate, as approaches to the bridge, certain land purchased for waterwork purposes, the land so dedicated is a highway, in fact, for the maintenance of which the village is liable.

3. It was error to charge, in an action for personal injuries, that plaintiff was entitled to recover expenses for nursing, where there was no evidence of any expenses incurred in that respect.

Error to circuit court, Emmet county; Oscar Adams, Judge.

Action by Mae A. Williams against the village of Petoskey for personal injuries. There was a judgment for plaintiff, and defendant brings error. Reversed.

Clay E. Call (Wylie & Clapperton, of counsel), for appellant. A. D. Cruickshank and M. F. Guinon, for appellee.

MONTGOMERY, J. Action for negligent injury. The declaration avers: "The said defendant, before and at the time of the committing of the grievance and negligence hereinafter mentioned, controlled, used, and had jurisdiction of a certain wooden bridge located on Lake street, within the corporate limits of said village of Petoskey, the defendant herein. Said bridge was constructed over and across Bear river, so called, and the water race way or flume used by said defendant for the purpose of conducting water from said Bear river into the waterworks of said village of Petoskey; said flume or race way running alongside of said river and under said bridge constructed across Bear river and flume, as aforesaid, and being within said village of Petoskey; said bridge being about sixty feet in length and constructed about twelve feet above the waters of said Bear river, and said Lake street being a public street or highway running through said village of Petoskey; and the said race which crosses said Bear river and the water race way or flume, as aforesaid, being a public bridge located on said street, over said river and flume, as aforesaid, and the said street or highway, to wit, Lake street, being a public street and highway used and controlled by the village of Petoskey as a public street. And the said bridge, as aforesaid, was owned, controlled, used, and under the jurisdiction of the said village of Petoskey, upon the 24th day of December, 1891, and for a long time prior thereto; and being at that time, to wit, the 24th day of December, 1891, the property of said defendant, and under the control and management of said defendant, and being a public highway and bridge, as aforesaid, it was then and there the duty of said defendant, by and through its proper officers and representatives, to keep said bridge in good, proper, and sufficient repair, to keep proper railings and guards on said bridge at all times, and to keep said railings and guards in good repair, so that the public might cross, use, and enjoy said bridge in their traveling on said bridge, with safety to themselves." The pleader then proceeds to aver that the defendant negligently allowed the railing to be removed from the bridge, and that it also allowed the light which was customarily maintained in the nighttime to be extinguished, and that the plaintiff, "by reason of the want of the light of said lamp usually kept lighted by said defendant upon said bridge, and the absence of the railing and guard on said bridge, fell over the side of said bridge upon the timbers of said bridge extending out from and over the race way, as aforesaid, and was greatly bruised, injured, and wounded thereby in her back, chest, head, neck, and shoulders, and her limbs fractured, her chin cut, and her chest and back permanently injured; and fell from said timbers into said race way, over which said bridge passed, as aforesaid, into the water of said race way or flume, being of a depth of four or five feet, with a swift and strong current; and by reason of said stepping off and through the space of said bridge where the railing had been removed and torn down from said bridge, and falling over the side of said bridge on said timbers, as aforesaid, became insensible from said wounds, cuts, bruises," etc. The plaintiff recovered, and defendant brings error. It is contended that the village of Petoskey is not responsible for the maintenance of a bridge, for the reason that the law of its incorporation imposed the duty of maintaining bridges across Bear river on the township of Bear Creek at large; second, that the bridge in question was not on the public street; and, third, it is contended that if the village be held responsible for the maintenance of the bridge in question, there was error in submitting the case to the jury.

1. By section 4 of Act No. 280 of the Local Acts of 1879, under which the defendant was incorporated, it was provided that "the bridge or bridges now built, or that may hereafter be built across Bear river within the territory described in section one of this act, shall be built and maintained by the township of Bear Creek at large, in the same manner as though the said village was not

incorporated." It appears that the bridge in question was not built by either corporation, but its history is as follows: In 1881, a tract of land, embracing the river from its mouth some distance upstream (northerly), was purchased by the village, and used for waterworks purposes. A dam was placed at a sharp bend in the river, and a flume or race way constructed in a northerly course and about 15 feet west of the river, across the water lot, so called, to the pumping station. A street called "Lake Street" extended from the village, in a westerly direction, to the water lot, and a street was also platted on substantially the same line, west of the water lot. In 1885 private parties residing in the village and township contributed the necessary fund, and built the bridge in question, on the line of the street and across the water lot. The common council appropriated $50 for "improvement of Lake St. west, and approaches to the bridge," and later adopted a resolution relating to the land connecting Lake street with the land west of the water lot, as follows: "Whereas, certain public-spirited citizens of the township of Bear Creek have built two bridges, for public travel and accommodation, over Bear creek, on ground belonging to the village of Petoskey, and no street or highway having been laid out over said grounds on which said bridges are located, and said bridges being deemed by the council of said village necessary public improvements, therefore, be it resolved by the council of the village of Petoskey, that the following described lands owned by the village of Petoskey be and hereby are laid out and opened and dedicated to the public for highway purposes;" and the village also contracted for the placing of a light on the bridge. In 1891 the council gave to the Chicago & West Michigan Railway Company permission to change the course of the river, and it was ordered that the committee on fire and water take full charge of the work of changing the course of the river and building a stone wall for a new course. It was while the railway company was prosecuting this work that the railing on the bridge was taken off, and left off, and resulted in the injury to plaintiff. It appears that a motion was made that the committee on streets be instructed to confer with the township board relating to the removal of a portion of the Lake Street bridge for the purpose of the improvements contemplated by the railway company, but the record fails to show that any action was taken under this resolution. It also appears that the township board, on the 27th of November, 1885, passed the following resolution: "Moved and carried that the following resolution be adopted: Whereas, certain public-spirited citizens of the township of Bear Creek have erected two public bridges on highways crossing Bear river in said township, and signified their intention to dedicate said bridge to the public for highway purposes; and whereas, we deem said bridge a necessary improvement: Therefore, be it resolved, by the township board of the township of Bear Creek, that said bridges be, and the same are hereby, accepted by said board for and in behalf of the township, and that the said bridges be, and the same hereby are, dedicated to the public for highway purposes." It is not made clear by the testimony whether the bridge in question is one of the bridges referred to, but the inference is a fair one that it is. In the absence of express legislation, the village, by virtue of its control over the streets and thoroughfares within its limits, is primarily and solely liable for their maintenance. The difficulty here arises out of the statutory imposition of a duty, which would otherwise rest upon the village, upon the township at large. We think, however, it was not within the power of the village to extend the duty thus imposed. When this statute was enacted, there was a stream known as "Bear River," which, if crossed at this point, required a bridge perhaps 30 to 35 feet in length. By the construction of the new flume or race way subsequently, some 15 feet from the river, and itself 12 feet in width, it made it necessary that any bridge spanning the two streams should be about 60 feet in length. Surely it cannot be said to have been within the contemplation of the legislature that a duty would rest upon the township to bridge artificial channels constructed by the village for its own use. Neither the village nor township constructed the bridge in question, but both recognized it,—the village, by building approaches to it and dedicating the street to public travel. We think that the court was right in holding that the defendant village was responsible for any want of repair in that part of the bridge which extended across its own artificial stream, and that the statute imposed no duty on the township to build or maintain any bridge at that point. It is not a defense that the bridge was built by private subscription, as the village afterwards recognized it, built approaches to it, and opened it for travel. Saulsbury v. Village of Ithica, 94 N. Y. 27. It is suggested that the declaration is not broad enough to admit recovery on this theory, as but one bridge is referred to; but it is clearly averred that the injury occurred by reason of the absence of the railing across the flume or race way, and the fact that the duty of the defendant was stated more broadly than the circumstances warranted would not have misled the defendant, inasmuch as the bridge at this point was within a highway under the control of the city and was a structure which it was its duty to maintain.

2. It is contended that the record fails to show that the locus in quo was a street. It is contended that the village purchased the land for the purpose of maintaining waterworks, and that there is no statutory authority to dedicate it to the public as a street,

and that it has not been in use long enough to constitute it a street by user. In the view which we take of this question, we need not determine whether this way was, in strictness, a legal highway. It was certainly a highway in fact, open to the public, and travel was invited over it. It has been held that if a municipality, in opening and working a highway, extends the limits in such a way as to invite travel through land which in fact lies outside of the legal highway, that portion is nevertheless to be considered a portion of the way, in determining the duty to repair. O'Neil v. Village of West Branch, 81 Mich. 544, 45 N. W. 1023. In Gallagher v. City of St. Paul, 28 Fed. 305, an instruction that it was not essential that there should be any formal acceptance of a street; that if there was a user permitted by the city, and that if the public were all invited without any dissent by the city to use it as a public street, the city would be required to keep it in repair,—was sustained. See, also, Village of Mansfield v. Moore, 21 Ill. App. 326; 2 Dill. Mun. Corp. § 1009, and cases cited. We think it should be held that the village, by its action in this case, has estopped itself from asserting, as against those whom it has invited to travel over this bridge, that it is not a public highway.

3. Complaint is made that the circuit judge instructed the jury that the defendant, if held responsible, might recover from the railway company. Though this might well have been omitted, we should hesitate to say that the defendant was damaged by it. There was, however, one error committed on the trial, which compels us, reluctantly, to reverse the judgment and direct a new trial. The circuit judge charged the jury upon the question of damages as follows: "You should take into consideration the expense to the plaintiff of the resulting illness to the plaintiff from the said accident, including in this her bills for medicine, nursing, and physician's care." There is no evidence whatever that any bill for nursing was incurred; nor were the circumstances such as to imply that those who ministered to her wants intended to make any charge. Within previous rulings of this court, this instruction was error. Cousins v. Railway Co., 96 Mich. 386, 56 N. W. 14; Shippy v. Village of Au Sable, 65 Mich. 494, 502, 32 N. W. 741. Judgment reversed, and a new trial ordered.

McGRATH, C. J., did not sit. The other justices concurred.

SCHULTZ v. HUEBNER.

(Supreme Court of Michigan. Feb. 7, 1896.)

SLANDER—CRIMINAL PROSECUTION—COMPLAINT—SUFFICIENCY—FALSE IMPRISONMENT—DEFENSE OF OFFICER—OF COMPLAINANT.

1. A complaint charging that the defendant imputed to the affiant a crime by falsely and maliciously saying, "You are a swindler; you beat the poor people out of their money, and are a cheat and a fraud," charges an offense, under How. Ann. St. § 9315, making it a misdemeanor to impute to another the commission of "any crime, felony or misdemeanor or any infamous or degrading act."

2. A complaint and warrant valid on their face will protect the officer making the arrest under them from liability for false imprisonment.

3. A complaint and warrant sufficient to protect the officer making the arrest from liability for false imprisonment will also exempt the complaining witness from like liability.

Error to circuit court, Saginaw county; Robert B. McKnight, Judge.

Action by Frederick Schultz against August Huebner for false imprisonment and malicious prosecution. From a judgment for plaintiff, defendant brings error. Reversed.

The declaration contains two counts,—one for malicious prosecution, the other for false imprisonment. At the conclusion of the proofs, plaintiff withdrew the count for malicious prosecution. The case was submitted to the jury upon the count for false imprisonment, and a verdict rendered for the plaintiff for his actual damages, $45. The defendant made a criminal complaint against the plaintiff, under 2 How. Ann. St. § 9315, which provides "that any person who shall falsely and maliciously by word, writing, sign or otherwise accuse, attribute or impute to another the commission of any crime, felony or misdemeanor, or any infamous or degrading act, shall be deemed guilty of a misdemeanor," etc. The alleged slanderous words were spoken in the German language, are stated in the complaint, and translated as follows: "You are a swindler; you beat the poor people out of their money, and are a cheat and a fraud." A warrant was issued upon the complaint, placed in the hands of an officer, who arrested the plaintiff, who who was brought before the justice, tried by a jury, and convicted. He appealed the case to the circuit court, where a nolle prosequi was entered, and the prisoner discharged. Before making the complaint, the defendant went to an attorney of good standing, and stated to him that the plaintiff had used the language as above given. This attorney advised him that it constituted a criminal offense under the above statute, and also consulted the prosecuting attorney, who was of the same opinion. Before the trial, the complaint was submitted to the prosecuting attorney of the county, who held the complaint to be good, and conducted the prosecution before the justice. It is not shown that the defendant took any other part in the criminal proceedings than to make the complaint. The court instructed the jury that the words used did not constitute any crime known to our statute, that there was therefore no authority for arresting the plaintiff, and that all persons connected with the arrest were liable for false imprisonment.

Beach & Gavit and J. H. Davitt, for appellant. Trask & Smith, for appellee.

GRANT, J. (after stating the facts). We think the court erred in his instruction that the complaint and warrant were void. The question whether an offense was charged must be determined by the words alleged to constitute the offense, and not by the inference of the affiant therefrom. The language clearly imputed degrading acts to the defendant, and the court was not deprived of jurisdiction because he chose to say that it was a crime rather than an infamous or degrading act. It is not necessary under this statute that the libelous words should impute a specific crime, or that some specific infamous or degrading act should be charged. To say of another, "You are a thief," would impute a crime. So, also, to say of another, "You are a swindler," imputes degrading conduct and acts. Both are indictable under this statute. It follows that a valid complaint and warrant were issued, which protected the officer making the arrest, and the justice of the peace, from liability for false imprisonment. They also exempted the complaining witness from the like liability, although he may be held liable upon the count for malicious prosecution. Wheaton v. Beecher, 49 Mich. 349, 13 N. W. 769; 7 Am. & Eng. Enc. Law, 680; Langford v. Railroad Co., 144 Mass. 431, 11 N. E. 697; Murphy v. Walters, 34 Mich. 180; Johnson v. Maxon, 23 Mich. 128; Ward v. Cozzens, 3 Mich. 252. See, also, Love v. Wood, 55 Mich. 451, 21 N. W. 887; Hill v. Taylor, 50 Mich. 549, 15 N. W. 899. Under this record the action for false imprisonment cannot be sustained. Judgment reversed, and new trial ordered. The other justices concurred.

WILL v. VILLAGE OF MENDON.

(Supreme Court of Michigan. Feb. 7, 1896.)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—EVIDENCE—NOTICE OF DEFECT—PLEADING AND PROOF—STATEMENTS AS TO PAIN—JUROR—COMPETENCY—NEW TRIAL.

1. Where a city assumes control and care of a walk, that the fee of the soil over which the walk is constructed is in another will not prevent the city from being liable for personal injuries caused by a defect in the walk.

2. To show that a city has assumed control of such a walk, evidence that a witness repaired the walk for the city is admissible.

3. In an action against a city for personal injuries caused by a fall due to the tipping of a plank in a sidewalk, evidence of the general bad condition of the walk near to the plank by which plaintiff was thrown is admissible to show notice to the city of the defect.

4 In an action for injuries to certain parts of the body, evidence of pain in other parts of the body by reason of such injuries is admissible in evidence.

5. In an action for personal injuries, statements and exclamations by plaintiff as to the extent, nature, and location of pain, made at the time she was feeling the pain, are admissible in evidence as original evidence.

6. A witness who nursed a person who had received personal injuries may testify that the injuries caused a numbness in the injured person's limbs, as a fact within his observation.

7. That plaintiff, in an action for personal injuries against a town stopped some time before the trial at the house of one of the jurors, who, on being told about the injuries received by her, asked why she did not sue the town therefor, and was told that suit had been commenced, is not ground for a new trial, where the juror, on voir dire, stated that he had been told by plaintiff about her injuries, but that he had no prejudice in her favor, and could try the case impartially.

Error to circuit court, St. Joseph county; Noah P. Loveridge, Judge.

Action by Mary Will against the village of Mendon. There was a judgment for plaintiff, and defendant brings error. Affirmed.

H. P. Stewart and Howard & Roos, for appellant. B. E. & L. F. Andrews and George L. Yaple, for appellee.

HOOKER, J. The plaintiff recovered a judgment for an injury suffered through a fall on a defective sidewalk by reason of being tripped by the tipping up of a board on July 4, 1889. The defendant claims that the place where the accident occurred was land owned by a railroad company, which was used as a street, and that the city was not responsible for the injury. There was testimony that the city assumed to control and use this land as a public street. The court charged the jury as follows: "I instruct you that if you are satisfied from the evidence that the defendant assumed care and control of the walk, and that it was in the care and control of the defendant at the time of the alleged accident, then, notwithstanding the fee of the soil over which the walk in question is constructed may have been in the railroad company, that fact alone would not prevent the plaintiff from recovering in this action. If the village assumes the control of a sidewalk, it is its duty to keep it in repair." This instruction was warranted by the cases of O'Neil v. Village of West Branch, 81 Mich. 547, 45 N. W. 1023; Detwiler v. City of Lansing, 95 Mich. 484, 55 N. W. 361. The testimony of Steverns that he repaired this walk in 1886 for the city was proper evidence upon this subject. The same may be said of the council proceedings of December 10, 1888, with reference to repairs. If the resolution did not cover the identical piece of walk, it tended to show that the city had resumed control of this railroad land for the highway.

The testimony of several witnesses as to the condition of the sidewalk in the vicinity of the place where the accident is alleged to have occurred was taken, subject to objection. Mr. Young, the city lamplighter, testified that he went over it early in 1889, and that he notified the council of the bad condition of the walk in this vicinity, and in this particular place. Witnesses were allowed to testify with reference to the condition of the walk for the distance of four or five rods north and south of the cross walk. It is contended that this was improper, inasmuch as the accident was shown to have occurred

at a point from 16 to 20 feet south of the cross walk; that the nature of the accident, being occasioned by the tipping up of a plank, was consistent with the theory that the walk at that place was in good repair, and that the plank first became loose at the time of the accident, and, therefore, that the walk might have been in fairly good condition, and the cause of the tipping of the board might have been a defective or rusted nail, not apparent to observation. We think that this testimony was properly admitted. It may have tended to show the age and general condition, as to decay, of this piece of walk, showing that it did or did not require inspection and repair. If these boards were loose, with nails rusted and broken; if stringers and boards showed age,—it might indicate a bad condition of the walk, or at least be evidence tending to show notice of its actual condition to the city authorities. Strudgeon v. Village of Sand Beach (decided at the present term) 65 N. W. 616.

Error is assigned upon the refusal of the court to give several instructions to the jury. An examination satisfies us that the points were covered by the charge given.

We think there is nothing in the point that a witness was cross-examined as to his interest in the case, both in relation to aiding the defendant, and the fact that he was a large taxpayer of the village.

The plaintiff testified to pains in her head and stomach, and it is claimed that this was not admissible, for the reason that the declaration did not include injury to either. Her testimony was as follows: "I am worse in respect to my hip and spine. My spine, from the back of my neck clear down, is sore, and it is very sore in places, and I have a great deal of pain in my head and in my hip; and sometimes there is something that seems as if it catches me in the bottom of my foot, and it seems to wind, and seems to go to the back of my head, and it makes my head ache. (Mr. Howard: We object to any testimony in regard to the head, for there is nothing of that kind in the declaration. [Overruled, and exception taken.] Mr. Yaple: So far as recovery is concerned, we are limited to the declaration.) It makes me sick. It commences in that way, and it causes me to be very sick with pain, and it causes me to be very sick at the stomach. There are a good many times, if I go to church, that I have to go out because I am sick. [Same objection as before. Same ruling, and exception.] The sickness that I spoke of in church would be a sharp pain in my hip and side, and it strikes to my stomach." The declaration alleges injury to feet, legs, side, back, spine, and womb, by which she became sick, very lame, diseased, and disabled, and suffered great pain. The evidence was not admitted to prove injuries to the head and stomach, but as showing the pain suffered from the injury to other members. We think it was not error to admit this testimony.

The plaintiff's husband was permitted to testify to the complaints and statements of the plaintiff as to the location, nature, and extent of her pain and suffering. This was objected to as hearsay. He was present at the time of the accident, and cared for her afterwards. Unless her exclamations and statements upon this subject were admissible, her own testimony was the limit; and we think his testimony was within the rule laid down in Hyatt v. Adams, 16 Mich. 199. Mr. Justice Christiancy there said: "The court did not err in admitting the evidence of exclamations of pain and suffering uttered by the deceased, and her complaints as to the nature of her suffering during and after the operation, though some of them were in the absence of the defendant. This is the natural and ordinary mode in which physical pain and suffering are made known to others, and the only mode by which their nature and extent can be ascertained. Such exclamations and statements are therefore original evidence; but it was, of course, open to the defendant to show, or to raise an inference, if he could, that they were feigned, or intended to deceive. They were clearly admissible as tending to show the malpractice of the defendant, though not for the purposes of aggravating the damages." The testimony of the witness refers to statements of present, rather than relations of past, suffering. In Johnson v. McKee, 27 Mich. 472, Mr. Justice Campbell said: "A number of errors are alleged upon the reception of testimony showing the statements by plaintiff at various times concerning his pains and bodily sufferings. These are objected to as hearsay statements, and as declarations in his own favor." In Railroad Co. v. Huntley, 38 Mich. 543, it is said that "they [such complaints and statements] are received, therefore, as acts, rather than declarations, and admitted from necessity. These statements are admitted only upon the ground that they are the natural and ordinary accompaniments and expressions of suffering. It would be impossible in most cases to know the existence or extent or character of pain without them. They are received, therefore, as acts, rather than declarations, and admitted from necessity. The rule which admits declarations of present suffering has never been extended so as to include declarations either of past suffering, or of the causes in the past of such suffering, so as to make such statements proof of the facts. Declarations concerning the past are narratives, and not acts. Exclamations of suffering may be, and, if honest, are, parts of the occurrence itself. It is difficult to lay down any very clear line of admission or exclusion, where the exclamation refers to the feelings of the moment. But we think it would not be safe to receive such testimony in any case where it is not the natural and ordinary expression of pain, called out without purpose, or in the course of

medical treatment. The unstudied expressions of daily life, or the statements on which a medical adviser is expected to act, and which, if feigned, he should have skill enough to subject to some test of truth, stand on a footing which removes them, in general, from suspicion." Strudgeon v. Village of Sand Beach, supra, and cases cited.

The husband was allowed to testify to numbness of the leg, which is alleged to have been beyond his knowledge. The testimony given was as follows: "There was not any improvement in her condition during this time. She made complaints right along. Some of the complaints were about her private parts, and complaints with regard to injuries, or the way she was feeling in consequence of those injuries. She was suffering all the while in her back, hip, leg, and limb. She complained about the whole length of her back, and up between her shoulders. I don't know as she complained of any particular points, one more than another. The pain ran up between her shoulders, clear across the back, clear over her hips, and down the back, between the shoulders, and then around here on the hip. I bandaged her foot, and helped her around the room. I bathed her back and sides in the evening. I bathed the whole length of her back. We are doing that yet. I don't think she has improved at any time in respect to these injuries that I have mentioned. I think she is getting worse, if anything, in respect to the numbness of her limb. (Mr. Howard: I object to that, and move to strike that answer out, for the reason that it is a physical impossibility for the witness to tell whether the numbness in his wife's limb has increased or not. Court: If he was nursing and rubbing, he may have observed it. I think I will deny the motion to strike out. [Exception taken to the ruling of the court.]) There was numbness of her arm, and occasionally she would lose the use of it for a short time, and would drop anything and not know at the time that it left her hand, and losing a part of the sight of the right eye. Q. Did she at these times complain, or describe the pains more particularly than you have given? [Objected to as indefinite. Overruled, and exception taken.] Q. What did she say in that respect? A. After she was hurt, she did not complain of the sharp cutting in her foot, as I remember of, but there was pain in her limb, hip, and spine. She complained of that most all the while. She complained of nervousness and sleeplessness through the night, and pain in her right side and through her limb, and a drawing up of the foot, commencing in her foot; and it would go to the top of her head, and wake her up out of her sleep." While it may be true that the husband could not testify to a sensation experienced by the wife, he might testify to her complaints, within the rule above stated, and this appears to be the nature of his testimony as a whole. But "numbness" is a term not limited to sensation. Webster defines the word "numb" as follows: "Infeebled in, or destitute of, the power of sensation and motion; rendered torpid," etc. Inability to move or to use the limb might be obvious to another. We think the testimony given was proper. In Harris v. Railway Co., 76 Mich. 229, 42 N. W. 1111, a witness was asked, "Now, from what you have seen or heard, can you state whether she has the full use of her left arm?" This was held admissible as testimony of a fact which fell within the observation of the witness.

The other assignments of error related to the denial of the motion for a new trial. The grounds of said motion will be noticed: (1) That it was against the weight of evidence; (2) newly-discovered evidence; (3) incompetency of a juror. The judge denied the motion, giving reasons as follows: (1) That it was not one of the grounds mainly relied upon in the argument of the motion, and he did not consider it. (2) That reasonable diligence would have discovered the evidence alleged; that the affidavits indicate that the newly-discovered witness is not a person of good repute and credibility, and that the testimony would not be likely to influence a jury upon another trial.

The affidavits in support of the motion for new trial alleged that the juror had stated that Mrs. Will came to his house upon an occasion anterior to the trial, and, seeing that she was lame, he asked her what was the matter, and she said, "Why, don't you know I hurt my foot in the sidewalk at Mendon?" Whereupon he said, "Why do you not bring suit against the village?" and she told him that she had, and he asked, "Why did you not bring suit sooner?" and she replied that they had promised to settle, but she was not going to wait longer. He asked who her attorney was, and she told him. He was examined as to competency, and it does not appear that he refused to answer any question asked him. On such examination he said: Mrs. Will came to him, and stopped, putting her horse in his barn, and said she was in town on business. He asked her about it, and she told him she was injured by the defective sidewalk. That he knew about the circumstances, and formed no opinion, had no prejudice in her favor, and could try the case impartially. Upon this record, we think the court committed no error in relation to the motion for new trial. We find no error in the record, and the judgment will be affirmed.

McGRATH, C. J., took no part in the decision. The other justices concurred.

MARTIN v. SMITH.

(Supreme Court of Michigan. Feb. 7, 1896.)

APPEAL—OBJECTIONS NOT RAISED BELOW—NEGOTIABLE INSTRUMENTS—PRESENTMENT AND DEMAND—NOTICE OF DISHONOR—EVIDENCE.

1. A judgment rendered by a justice of the peace will not be reversed because the testimony admitted was not the best evidence, if no objection was made to it on the trial.

2. In an action on a note, the cashier of the C. bank testified that it was the custom among the banks in the city to send messengers once a day to one of the banks to adjust accounts; that it was the duty of each messenger, on receiving claims against the bank represented by him, to take the same to such bank to be passed on by the cashier; that, on the day the note in suit matured, it was delivered to the messenger of the I. bank, at which it was payable; that the clearance books of both banks showed a balance that day of $510 in favor of the C. bank, but that $100 (the amount of said note) was rejected by the I. bank, and a check for $410 given by it to the C. bank to adjust the accounts; and that witness, as notary public, made certificate of protest. *Held* sufficient to warrant a finding of due presentment, demand, and dishonor.

3. The testimony of a notary who had made certificate of protest of a note for nonpayment that he did not remember mailing notice to the indorser, but testified that he did so because of his habit of mailing notices when he made certificate of protest, is sufficient to justify a finding that notice of dishonor was sent to the indorser.

Error to circuit court, Ingham county; Rollin H. Person, Judge.

Action in justice court by George B. Martin against Marion D. Skinner, the maker, and Robert Smith, the indorser, of a note. On removal of the action to the circuit court by certiorari, a judgment for plaintiff was affirmed, and defendant Smith brings error. Affirmed.

Jason E. Nichols, for appellant. Charles F. Hammond, for appellee.

HOOKER, J. Martin, being the owner of a promissory note given by M. D. Skinner to Robert Smith, and by him transferred to Martin by indorsement, left the same with the City National Bank of Lansing for demand and protest. The note was payable at the Ingham County Savings Bank of Lansing. This is an action brought by Martin upon this note. He recovered in justice court, and at circuit upon certiorari. It is now brought to this court by writ of error, by Smith, the indorser. The errors alleged are: First, that a proper and legal demand was not shown; second, that the testimony did not support the judgment. Plaintiff sought to prove demand and protest, by the certificate, in the usual form, of a notary. Plaintiff also introduced the following testimony: "I am the assistant cashier of the City National Bank of Lansing, Michigan, and was such cashier on September 26th, 1894, and am the notary public who protested the note introduced in evidence. I signed this certificate attached to the note as such notary public. I did not go in person to the Ingham County Savings Bank on the 26th day of September, 1894, or at any other time, to demand payment upon this note, and never demanded payment of M. D. Skinner. The note in question was left at our bank on or prior to September 26, 1894, for protest, and I protested it in the usual and customary manner of protesting paper at our bank and in the other banks in this city, as I understood it, which was as follows: On September 26, 1894, and for some time prior thereto, the several banks in the city of Lansing had, by an agreement among themselves, established what might be called a custom of meeting once a day, at 1:30 p. m., at one of the banks, for the purpose of adjusting the accounts between such banks, or what might be styled a clearance. This was done by the various banks' making up a list of accounts against the other banks in a clearance book, and bundling the checks, drafts, and claims against the other banks severally, and sending some employé of the bank to the place of meeting that week for the purpose of adjusting such accounts. This was never done by the cashiers of the banks, but by some of the employés. The week in September in which the 26th day occurred, the meeting was at our bank. The agent from the Ingham County Savings Bank came to ours, or the City National Bank, and there was delivered to him, among other checks and accounts against the Ingham County Savings Bank, the note in question. It was a further custom, by agreement among the said banks, that at the meeting of the agents of said banks at 1:30 p. m., as aforesaid, that the checks, accounts, and notes against each bank, with a list of the same on the clearing book, was taken back to the bank, to be passed on by the cashier of such bank, and the same being honored and allowed, or dishonored and rejected, by said cashier. Our clearance book and the books of the bank show that on September 26, 1894, there was a balance due to our bank from the Ingham County Savings Bank the sum of $510.09. This is also shown by the clearance book in the Ingham County Savings Bank. Both books show that the item of $100, which I believe this note represented, was rejected by the Ingham County Savings Bank, and we were given a draft on New York for $410.09 by that bank to adjust the accounts of that day. I do not know, of my own knowledge, other than what I gather from our clearance book and the clearance book of the Ingham County Savings Bank that any demand was made at the Ingham County Savings Bank for payment upon this note. I mailed a notice of protest in this case on that day, addressed to Robert Smith, Lansing, Michigan. I do not remember of mailing it, but testify from my habit of mailing letters notifying indorsers when I make a protest on a note, as I did in this case." Adelbert Baker, a witness produced and sworn on the part of the plaintiff, testi-

fied as follows: "I am assistant cashier of the Ingham County Savings Bank. I have no remembrance of any demand being made at our bank on September 26, 1894, for payment on the note in question. The clearance book of the Ingham County Savings Bank on September 26, 1894, shows that there was an item on the said date of $100 that was rejected. Whether this was the note in question I am unable to say. I have no remembrance of seeing the note in question, and have no knowledge concerning it, whatever, other than I stated." There is evidence tending to show that the note was seasonably sent by the City National Bank to the Ingham County Savings Bank, for presentation and demand, through the messenger of the latter bank; that the officers of the latter bank received it, and recognized the demand, and refused to pay. If the note actually reached the Ingham County Savings Bank, during banking hours of the proper day, under circumstances which both banks understood to be intended as presentation and demand of payment, and such understanding was acted upon by the Ingham County Savings Bank by returning the paper rejected, there was a compliance with the law. Nichols v. Goldsmith, 7 Wend. 160.

It is contended that no witness testified that the note was taken to the bank, or received there, but while it is true that there is no direct evidence of those particular facts, there is proof of circumstances which tend strongly to prove them, as well as the understanding of both that this was a presentation and demand of payment, and refusal. Both of the bank officers testify that their testimony rests upon what the books of their respective banks show as to demand at the Ingham County Savings Bank, or, in other words, that they do not testify to the facts from recollection, but from what the books show; and it is said that this was insufficient evidence to establish the fact that the note was taken to the Ingham County Savings Bank, inasmuch as it rested entirely on the statements of others. But the evidence does not appear to have been objected to, and we have held that a case should not be reversed because the testimony admitted by the justice was not the best evidence, where it was not objected to on the trial. See Hart v. Port Huron, 46 Mich. 428, 9 N. W. 481; Manufacturing Co. v. Winter (Mich.) 64 N. W. 1053.

It is further objected that the record does not show that notice of dishonor was given. In our opinion, the effect of the testimony of Mr. Hopkins is that he does not remember of mailing the notice, and that he testified that he did so from his memoranda and his habit of mailing notices when, as in this case, he made certificate of protest. It was equivalent to saying that, from the certificate of protest made by him, which recites the fact, he had no doubt that he mailed the notice as therein stated. This was evidence tending to show notice. 2 Phil. Ev. p. 549 (Cowen & Hill's Notes); Miller v. Hackley, 5 Johns. 375; Bank v. Culver, 2 Hill, 531; Fisher v. Kyle, 27 Mich. 454. But the certificate of protest was presumptive evidence of presentment, demand, and notice of dishonor, under the statute (1 How. Ann. St. § 632), if, as the certificate states, it was under the notary's seal of office. We think that there was evidence to support the judgment. The judgment of the circuit court must therefore be affirmed. The other justices concurred.

SAGINAW, T. & H. R. CO. v. BORDNER et al.

(Supreme Court of Michigan. Jan. 28, 1896.)

RAILROAD COMPANIES—CONDEMNATION PROCEEDINGS—PETITION—SERVICE OF NOTICE—NECESSITY.

1. Under 3 How. Ann. St. § 3332, relating to service of notice in condemnation proceedings on a nonresident landowner, and providing that, if he has an agent within the state, service may be made on such agent, or upon him personally, out of or within the state, the notice may be served on him personally without the state, though he has an agent within the state.

2. That a railway has sold a number of carloads of gravel will not prevent it from condemning land necessary for the more convenient removal of gravel from its gravel pits.

Appeal from probate court, Huron county; John Lange, Judge.

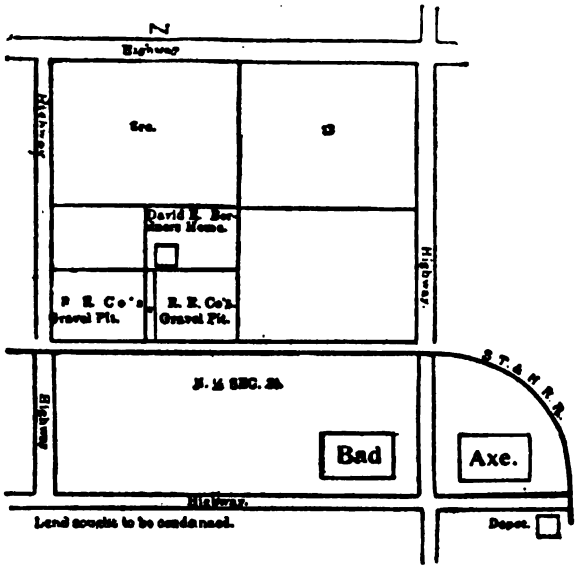
Condemnation proceedings by the Saginaw, Tuscola & Huron Railroad Company against David R. Bordner and another. There was a decree for complainant, and respondents appeal. Affirmed.

George W. Clark (T. W. Atwood, of counsel), for appellants. W. T. Bope, for appellee.

HOOKER, J. The petitioner, a railroad company, built its railroad across section 13 in the township of Colfax, Huron county, about 1886, most of the deeds of right of way being procured in 1885. At that time, David R. Bordner owned the N. ½ of the S. W. ¼ of section 13; also a strip of land one rod wide off the west side of the S. E. ¼ of the S. W. ¼ aforesaid. Bordner claims that a highway existed on the line between sections 13 and 24; but, if there is any evidence of such existence, it is a bare scintilla. Certainly, there has been none there since, for petitioner's railroad and right of way are upon that line, and the brief for respondents states that such highway was vacated at the time said railroad was built. The accompanying plat shows the situation of the premises.

The petitioner has acquired the entire S. ½ of the S. W. ¼ for a gravel pit, which, as will be seen from the diagram, was cut in two about the middle by respondents' strip of land. The testimony shows that the

* DIAGRAM.



gravel is about 22 feet deep, and the petitioner's tracks could not run through both pits connecting with the main track at both ends, by reason of their inability to cross respondents' strip. It has therefore been compelled to use short spurs. Proceedings were had by which that parcel was condemned, and the respondents bring the case here for review.

Two questions are raised. The first goes to the jurisdiction. Respondents claim and show that in January, 1886, he deeded the W. ½ of the N. ½ of the S. W. ¼ of section 13 to his brother, Henry H. Bordner, who lived in Pennsylvania at the time, and has ever since, and that his said brother also held a mortgage upon the parcel sought to be condemned at the time these proceedings were instituted. Proof was made by affidavit that a copy of the petition and the statutory notice were mailed to Henry H. Bordner, by registered letter, in due season, and that his registry return receipt, signed by him, was received by the affiant in due season. As the record stands, it shows personal service out of the state, the signature to the receipt being proved. It is contended that service upon Henry H. Bordner at his home cannot be treated as sufficient, unless the record shows that he had no agent in Michigan upon whom it could be served. We think the statute permits personal service out of the state, or service upon an agent, if there be one, at the option of the petitioner. See 3 How. Ann. St. § 3332.[1]

[1] 3 How. Ann. St. § 3332, provides for service of notice in condemnation proceedings against a nonresident land owner, and that if he resides out of this state, but has such agent as aforesaid residing in this state, then such service may be made on such agent in the manner aforesaid, or upon him personally, out of or within this state.

The second question goes to the merits of the proceeding. It is said that the record does not show that the petitioner needs this land for gravel, as it appears that it has but 66 miles of track, and that it has 85 acres of gravel in the vicinity of Bad Axe, some of which is in beds 22 feet deep, and there is no evidence as to the amount needed for railway purposes. Again it is contended that the company is seeking to acquire gravel for speculative purposes, it appearing that it has sold large quantities of this gravel in Bay City. It is also said that the petitioner seeks to condemn this land merely for its convenience, so that it may unite the two spurs; and it is argued that the land of the respondents cannot be taken under the right of eminent domain when sought by the petitioner for mere convenience or gain. It is a well-known fact that the gravel is essential for ballast upon railway tracks. The record shows that these parcels comprise the most of the gravel that petitioner owns. It also shows that the excavation and removal of the gravel would be attended with less danger if the track could be connected with the main line at both ends, and that it could be removed more cheaply. This testimony is proper to be considered by the jury as bearing upon the question of necessity. The statute (3 How. Ann. St. § 3323) authorizes the condemnation of gravel beds. In this case the jury have determined the necessity, upon testimony tending to show it, and a view of the premises, and we will not review the question further than to ascertain that there was evidence to support the verdict. Railway v. Dunlap, 47 Mich. 467, 11 N. W. 271; Railway Co. v. Voorheis, 50 Mich. 511, 15 N. W. 882. It is, doubtless, true that the railroad company would not be willing to

pay $250, the amount of the award, for half an acre of land, were it not for the fact that its possession would facilitate the use of the pits now belonging to it; but that fact is not conclusive, nor is the fact that it has sold some hundred car loads of gravel. They were proper subjects for consideration by the jury, to whom they were, doubtless, presented. We find no error in the proceedings, and the order of the probate court will therefore be affirmed, with costs. The other justices concurred.

ANDERSON v. DES MOINES ST. R. CO.

(Supreme Court of Iowa. Feb. 6, 1896.)

STREET RAILWAYS—PERSONAL INJURIES—EVIDENCE.

In an action against a street-railway company for personal injuries received in being thrown from a street car, evidence that defendant paid plaintiff $1.50 and received a receipt discharging it from liability, and that the conductor of the car from which plaintiff fell did not know for what corporation he was working, is insufficient to show that the car was operated by defendant, where defendant's manager testified that the car belonged to another corporation, of which he was also manager; the two corporations being operated under an arrangement that the total operating expenses of both should be apportioned between them in proportion to the number of cars run by each, the earnings from the lines being kept separate.

Appeal from district court, Polk county; W. F. Conrad, Judge.

Action at law to recover on account of personal injuries alleged to have been caused by negligence on the part of the defendant. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant appeals. Reversed.

Guernsey & Baily, for appellant. W. H. McHenry, for appellee.

ROBINSON, J. On the 12th day of September, 1891, the plaintiff was a passenger on a street car which was operated on Ingersoll avenue in Des Moines. At a point on the avenue known as "Hubbell Station," she alighted from the car, and fell on or from the platform, receiving the injuries of which she complains. She alleges that the car was operated by the defendant; that, when the car stopped, she attempted to leave it, but it was started before she succeeded; and that thereby she was thrown on the platform, and seriously injured. The answer contains a general denial and an averment to the effect that the injuries of which the plaintiff complains were caused by her own negligence. A settlement of her claim is also pleaded. The verdict and judgment were for the sum of $200.

After the evidence was submitted the defendant asked the court to instruct the jury to return a verdict in its favor, on the ground that the evidence does not show that it owned or was operating the car from which the plaintiff stepped or was thrown at the time of the accident, nor the track upon which it was operated, and that the evidence was insufficient to sustain a verdict for the plaintiff. The car in question was numbered 2, marked on the outside, "Des Moines Rapid-Transit Company." George B. Hippee testified, for the defendant, substantially as follows: The railway track on Ingersoll avenue was constructed by the Des Moines Rapid-Transit Company, but at the time of the accident both the track and the car were owned and operated by the Des Moines Suburban Railway Company. That company owned an electric plant, and furnished the power to operate its own cars, and also cars on the railway system of the defendant, the Des Moines Street-Railroad Company. These two companies were separate and distinct corporations. The defendant never owned nor operated the Ingersoll avenue railway line, nor did it operate the car in question. Hippee was manager of both companies, and carried on the business of the Suburban Railway Company by authority of its board of directors. That company had its own officers, and the earnings of its line were kept separate from the earnings of the defendant. There was an arrangement between the companies, however, under which the operating expenses of both were divided according to the number of cars operated. Thus, if the Suburban Company operated one-fourth as many cars during the month as were run by the defendant, the former paid one-fifth and the latter four-fifths of the operating expenses of the two systems for that time. The earnings of the Suburban Company were devoted solely to its own use. It had given its own bonds, upon which it paid the interest, and it also paid its own debts. This testimony is not contradicted by any one.

To show that the defendant was responsible for the alleged negligence in question, the plaintiff relies upon the fact that an agent of the defendant paid on her account $1.50, and took from her a receipt, of which the following is a copy: "Des Moines, Iowa, Sept. 12, 1891. Received of the Des Moines Street-Railroad Company one dollar and fifty cents, in full for damages sustained by falling off of the Ingersoll Ave. car about 7:30 a. m., Sept. 12, 1891. S. A. Anderson. Witness: Frank Duncan." The settlement evidenced by that receipt was made by D. M. Finch, who was working for the defendant at the time it was given, and the amount paid was for repairing the glasses of the plaintiff, which were broken by her fall, and for a preparation to apply to her face to heal scratches of the skin, also caused by her fall. The plaintiff relies, further, on the fact that the conductor of the car in question did not know for what company he was working. But these facts are not sufficient to establish liability on the part of the defendant, as against the testimony given by Hippee. It is said the jury did not believe him, and were justified in rejecting his testimony as un-

worthy of belief. There was nothing in the character of his testimony, nor in other evidence shown by the record, to make what he said improbable, and the jury were not authorized to reject it arbitrarily. There is no admission in the receipt, which was drawn by Finch, that the defendant was liable for the accident. Any apparent acknowledgment of liability shown by the receipt is explained by the fact that the expenses of the two companies were divided between them. The employment of the conductor was verbal; and, as the two companies were managed by one person, the ignorance of the conductor as to his employer is not entitled to much weight. Certainly it does not show that he was employed by the defendant.

After a careful examination of the entire record, we reach the conclusion that the plaintiff failed to show that the defendant was in any manner responsible for the injuries for which she seeks to recover. The instruction asked by the defendant, to which we have referred, should have been given, and for the error of the court in refusing it the judgment is reversed.

BOYNTON FURNACE CO. v. MESSNER et al.

(Supreme Court of Iowa. Feb. 6, 1896.)

SALE—DAMAGES—BREACH OF WARRANTY—RETURN OF PROPERTY.

In an action to recover the price of a boiler, it was not error to permit defendants, in support of a counterclaim for breach of warranty of two boilers, to testify that the boilers were of no value to them, where it appeared that defendants were plaintiff's agents for the sale of the boilers, which had been put into buildings owned by other persons, according to plaintiff's directions, but both boilers, being unsuitable for the purpose for which they were intended, were subsequently taken out and stored for plaintiff, though defendants made no offer to return the same.

Appeal from superior court of Cedar Rapids; T. M. Giberson, Judge.

Action at law to recover the alleged contract price of a hot-water boiler and heater, and for certain attachments thereto. There was a defense setting up a breach of warranty of the articles sold, and for damages on account thereof, as well as for damages for breach of warranty for another hot-water boiler sold by the plaintiff to the defendants. There was a trial by jury. Verdict and judgment for the defendants. Plaintiff appeals. Affirmed.

U. C. Blake and John M. Redmond, for appellant. C. J. Deacon and M. P. Smith, for appellees.

ROTHROCK, J. 1. The pleadings are somewhat confused, owing to the fact that by the answer and counterclaim the defendants claimed damages for the breach of warranty of two boilers. There was a reply to the counterclaim, and upon these pleadings the court determined that the defendants were entitled to open and close the case in the introduction of the evidence, and in the arguments to the jury. Thereupon the plaintiff offered to amend its petition. Defendants objected thereto, and the court sustained the objection, but permitted the amendment to be filed as an amendment to the reply. Complaint is made of this ruling. We think it was right. The amendment proposed did not change the issues, nor the burden of proof, and it was properly ordered to be filed as an amendment to the reply.

2. It appears from the record and evidence in the case that the plaintiff is engaged in the manufacture and sale of hot-air furnaces and hot-water heaters, and its western trade is supplied from the city of Chicago. In 1891 the plaintiff, by its agents, solicitors, and managers, was engaged in introducing its hot-water boilers in this state. The defendants were plumbers and steam and gas fitters at the city of Cedar Rapids. One Douglas, an agent of the plaintiff's, appeared at the place of business of the defendants to secure them as agents to handle the hot-water heaters for the plaintiff. At that time the defendants had an application to furnish a steam-heating plant for Moses Bloom, at Iowa City; and Douglas and one of the defendants went to that place, and induced Bloom to allow them to put in the hot-water system manufactured by the plaintiff. The contract by Bloom was made with the defendants, and the plaintiff shipped the boiler to the defendants, at Iowa City. This was in February, 1891. The boiler was placed in the building, and pipes and radiators were attached, but the plant was a failure. It did not heat the building properly. Before the failure became a demonstration, the defendants found another customer, in the person of the keeper of an hotel, and they ordered a hot-water boiler to heat that building. That plant was set up and put in operation, and it did not heat the hotel. It is claimed that the hot-water boiler was warranted to be a perfect and complete heater, and the evidence fully sustains that claim. And there was evidence from which the jury might well find that the boiler ordered for the hotel was under the same inducement and warranty that was made when the boiler was ordered for Bloom's building. The plaintiff claimed that all matters of difference were settled by the parties in December, 1891. This was denied by the defendants. Special interrogatories were submitted to the jury at the instance of the plaintiff, and the answers thereto were to the effect that there was no settlement, and that all of the pipes, radiators, and all of the connections, were properly placed in the Bloom Building, and that there was a fair test of the plant in that building. These findings were supported by the evidence. Indeed, the facts show that the boiler was placed in the Bloom Building in ac-

cord with the directions of the agent, Douglas. And there was evidence which sustained the verdict, in so far as the placing of the boiler in the hotel was concerned. It is true, Douglas was not present when that building was examined, but there was evidence that the defendants followed the directions and specifications prescribed by Douglas as to the size of the boiler, and the necessary radiation, and the general construction of the plant It was not contemplated by the parties that an agent of the plaintiff would be present to direct the work and prepare specifications for each plant.

3. The winter was over before the defendants abandoned their efforts to make the boilers in the two buildings heat them in compliance with the contracts. Further efforts were made at the beginning of the next winter, without success; and the boilers were removed, and left in the buildings or on the premises, where they were stored, and, so far as appears, they are still there. A steam-heating boiler was put into the Bloom Building, and the pipes and radiators were connected with the steam boiler. Another make of heater was put into the hotel. The defendants claimed quite a large sum as damages for labor, loss of time, and expenses in attempting to make the plants do proper service. They paid for the boiler put in the Bloom Building before becoming satisfied that it would not furnish sufficient heat. The jury returned a verdict for the defendants for $398.25. By the special findings it appeared that part of this amount was made up by allowing for the expense of putting in and taking out the boilers. The court being of opinion that these items were not legitimate damages, the defendants remitted that much of the verdict, and judgment was entered for $196.75 and costs.

4. The defendants, in their answer and counterclaim, alleged that the boilers were not accepted by them, and that they were of no value to them. The court permitted the defendants to testify that the boilers were of no value to them. This evidence was objected to, and exceptions were taken, and it is claimed that the rulings were erroneous. It is true that the defendants did not make a formal tender of the boilers to the plaintiff. But under the averments of the petition, and in view of the acts of the parties, and the relations they sustained to each other, the rule that the measure of damages is the difference between the actual and market value of the boilers is not the only evidence applicable to that question. Much of the work in putting in these plants, and the efforts to make them comply with the contracts, was under the personal direction and supervision of the plaintiff's agents, and the relation of the parties was quite different from that of an ordinary sale of personal property. Under these circumstances, and in view of the fact that the defendants make no claim to the boilers, and have stored them for the plaintiff, we think there was no error in the ruling of the court.

Other objections are made to rulings of the court which do not require special consideration. We find no error in the case prejudicial to the appellant, and it is affirmed.

SPRINGER LITHOGRAPHING CO. v. GRAVES.

(Supreme Court of Iowa. Jan. 27, 1896.)

GUARANTY—EXTENSION TO DEBTOR—ACTS AFFECTING LIABILITY OF GUARANTOR.

1. An extension of an indebtedness granted the debtor for a valuable consideration releases a guarantor thereof, unless it is affirmatively shown to have been made with his consent.

2. The writing of letters by the guarantor of an account, after its maturity, to the creditor, stating that he should expect the creditor to give the debtor "time and opportunity to pay"; asking that the debtor be given a "reasonable chance," but urging that he be pressed for payment,—do not amount to a consent to the taking of a note from the debtor, some months afterwards, extending the time of payment six months.

3. Under a guaranty that a principal will take and pay for certain goods as needed from week to week, and take and pay for all before a certain date, delivery of the goods before that date is essential to the liability of the guarantor.

Appeal from district court, Pottawattamie county; W. S. Lewis, Judge.

Action at law upon a contract of guaranty executed by appellee, Graves. The case was tried to the court without a jury, and judgment was rendered dismissing plaintiff's petition. Plaintiff appeals. Affirmed.

Leonard Everett and J. J. Stewart, for appellant. Stone & Dawson, for appellee.

DEEMER, J. Appellant is a corporation engaged in the manufacture of posters, and other fine printing and lithographing, doing business in the city of New York. One John Springer is its president and manager. The defendant Travers is a theatrical manager, and, at the time in question, was the proprietor of a company which was playing what is known as the "Private Secretary." In the spring of 1891, Travers was in negotiation with appellant for the printing of posters for his dramatic company, and on June 4, 1891, defendant (and appellee) Graves who is a resident of Council Bluffs, addressed to John Springer the following letter:

"H. C. Graves & Sons, Council Bluffs, Iowa, June 4, 1891. Mr. John Springer, New York City—Dear Sir: I will insure you that Mr. Edwin Travers will take of you what paper and printing he may need for his play, the 'Private Secretary,' and pay for the same, from week to week, as he may need it. Yours, very truly, H. C. Graves."

This letter reached Springer in due course of mail, and, on June 9th, defendant Travers gave plaintiff the following order:

"The Springer Lithographing Company,

548–550 West Twenty-Third Street, New York, N. Y.

"New York, June 9, 1891. Dear Sirs: You will please execute for me the following described work: [Here follows list.] The same to be delivered in the city of New York on or before August 20, 1891. And we hereby agree to take and pay for all of said work on before June 1, 1892, and to pay for the same as delivered. [Signed] Edwin Travers."

On the same day the following letter was addressed to appellee, Graves, by John Springer, President:

"New York, June 9, 1891. Dear Sir: We herewith hand you our regular form of guaranty, which please execute and return. Mr. Travers has, no doubt, written you concerning this matter. Yours, etc., John H. Springer, Pr.

"H. C. Graves & Sons, Council Bluffs, Iowa."

Inclosed with this letter was the contract of guaranty referred to therein. This last writing was not executed or returned by Graves. But appellant, shortly after the receipt of the order, began shipping the posters which had been ordered by Travers, and continued to send them, day after day, in small amounts, to the different towns and cities along the route of the theatrical company. No further communication was had between appellant and Graves until January 23, 1892; and, in the meantime, plaintiff had shipped to Travers, on his order, goods to the amount of $2,745.64, and had received on account thereof the following amounts: August 12, 1891, $200; September 14th, $200; September 30th, $200; October 8th, $200; November 2d, $200; November 28th, $100; December 29th, $100. On January 23, 1892, Graves wrote appellant as follows:

"I write to say that I will not insure Mr. Edwin Travers to pay for more printing or paper after this date."

On January 26, 1892, Travers paid $150 more on the account, and on February 4th was indebted to appellant in the sum of $1,395.64. On the last-named date, appellant answered Graves' letter as follows:

"New York, Feb. 4, 1892. Dear Sir: We are in receipt of yours of Jan. 23d, and inclose you herewith statement of the Travers account; showing balance due us $2,666.47, of which we have delivered him goods to the amount of $1,395.64, and have goods on hand amounting to $1,270.83. We would be pleased to have your check by return mail for the amount of the goods delivered. Hoping you will give the matter your immediate attention, we are, yours, etc., The Springer Lithographing Co., J. A. H.

"H. C. Graves, Esq., Council Bluffs, Iowa."

And on the 15th of February it sent him the following telegram:

"New York, Feb. 15, 1892. H. C. Graves, Care H. C. Graves & Sons, Council Bluffs, Io.: Have you sent remittance, account Travers, or will you honor draft for one thousand dollars? The Springer Lithographing Co."

To this Graves replied that he would not honor draft, and on the 17th wrote the letter which is set out under that date, in the fourth division of this opinion. In response to further demands made by appellant, Graves, on March 20th, wrote the letter which is also set out in the fourth division of this opinion. The appellant continued to ship the posters ordered by Travers, and received from him a further payment of $150 on February 15, 1892. On May 1, 1892, plaintiff accepted from Travers his promissory note for the sum of $1,222.37,—the balance claimed to be due on account. This note was due seven months after date, and drew interest at the rate of 6 per cent. Travers paid $500 more on June 13, 1892. Appellee had no notice or knowledge that a note had been taken from Travers until about the time of the maturity of the same, when demand was made upon him for its payment. Graves refused to pay the account or any part of it; and plaintiff then commenced this suit to recover for all the goods manufactured and shipped, as well as for goods manufactured but not delivered, and claimed a balance due of $1,222.37, with interest on the same for 17 months at the rate of 6 per cent. The action was brought upon the account (not upon the note), and the defendant's alleged guaranty of date June 4, 1891. Travers was made a party, but was not served with notice, nor did he make any appearance to the suit. Appellee, Graves, admitted the making of the alleged instrument of guaranty, but alleged that neither plaintiff nor John Springer ever gave him notice of its acceptance. He further pleaded that the instrument of guaranty was not made to appellant, or for its benefit, but was personal to John Springer, and further avers that he countermanded the same on January 23, 1892, and that, at the time of the countermand, appellant had been fully paid for all goods sold or delivered to Travers up to that time. He also pleaded that on February 4th appellant had shipped to Travers goods to the amount of $1,395.64, and had received from him the sum of $1,350, and that appellant at this time recognized the revocation of the guaranty, and agreed that appellee should be bound for only the balance due at that time. Appellee further pleaded that appellant did not comply with the terms of the guaranty, on its part, but, instead of requiring Travers to make payment from time to time, as required by the guaranty, permitted Travers to remain in default, without the knowledge of appellee, and continued to ship and deliver goods to Travers, without requiring or demanding payment in accordance with the terms of the guaranty, until the aggregate had amounted to a large sum; that appellant did not inform appellee of the failure of Travers to pay for each shipment of goods as the same were delivered, but, in violation of the terms of the guaranty, continued to ship and

deliver him posters from time to time without requiring payment therefor; that, in violation of the terms of the guaranty, appellant extended credit and further time to Travers from time to time without the consent of appellee; and that on May 1st a settlement was had between appellant and Travers, and, in violation of the terms of the guaranty, appellant extended the time of payment of the balance due, and accepted from Travers the note before referred to, and thus further extended the time of payment, without the knowledge or consent of appellee. All other allegations of appellant's petition were denied by the appellee. On these issues the case was tried to the court, and a judgment was rendered dismissing the plaintiff's petition, and plaintiff appeals.

1. The court below made no findings of fact or conclusions of law, but dismissed plaintiff's petition, and taxed the costs to it. Consequently, we are to determine whether any of the defenses pleaded are sustained by the evidence.

It is first insisted by appellee's counsel that the guaranty sued on was never accepted or acted upon by the plaintiff. This is purely a question of fact, and, if there is nothing else in the case to sustain the judgment of the court below, we think it can be planted upon the proposition that there is such a conflict in the evidence, or the inferences to be drawn therefrom, on this branch of the case, as that we cannot interfere.

The letter of guaranty, dated June 4, 1891, was addressed to and forwarded to John Springer, at New York City. Travers gave his order June 9th. On the 9th of June, "John H. Springer. Pr.," sent to Graves & Sons the letter hereinbefore set out, inclosing therewith a form of guaranty, for Graves & Sons to sign, to the Springer Lithographing Company.

There is nothing in the evidence showing, or tending to show that Graves knew that Springer was the president or manager of the plaintiff, or that he intended any one to act upon the guaranty, other than the person to whom it was addressed. Neither Graves nor Graves & Sons made any answer to the letter of June 9, 1891; but the plaintiff proceeded to fill Travers' order, as it says, relying upon the guaranty dated June 4th. It is evident that this letter reached plaintiff before the 9th of that month; and, if it did, it is quite manifest that plaintiff did not rely upon it, or if it did, Graves was justified in believing, when he received the letter from plaintiff dated June 9th, that it did not rely upon it. And, as neither he nor his firm signed the blank form sent them for execution, the plaintiff did not rely upon it. It is true that the officers and agents of plaintiff say they relied upon the guaranty in suit before accepting the order from Travers, but their statements are not conclusive. If they received it before June 9th, as the court may well have found they did, then their conduct in sending the blank form for Graves & Sons to sign, after the receipt of the one dated June 4th, clearly shows they did not rely upon the first guaranty, but rather upon the hope that Graves & Sons would sign the one dated June 9th. If they did not receive it until after June 9th, then it is apparent they did not rely upon it in selling the goods to Travers; for they closed their contract with him on this day, and there is, so far as shown, no consideration for a subsequently received guaranty.

2. We are not to be understood as indicating that these would be our conclusions, had we to try the case anew. Our thought is that the court below may have found that the guaranty in suit was never accepted or acted upon by the plaintiff; and, if this was its finding, we cannot interfere.

3. On May 1, 1892, plaintiff accepted the note of Travers for the amount it claimed to be due. This note drew 6 per cent. interest, and was due in seven months from date. It had a consideration additional to the account to support it. It included interest on the account, which could not have been collected at law, and provided for the payment of interest, which the account did not bear, and also included interest on goods which had not been delivered at the time the note was executed. Now, without saying that a new consideration is needed to support an agreement for an extension of time which will release a guarantor, it sufficiently appears in this case that there was a sufficient additional consideration to support the agreement to extend the time of payment of the account until December 1, 1893; and this released Graves, even if it be conceded that he was a guarantor, unless it be shown affirmatively that he consented to the extension. Manning v. Alger, 52 N. W. 542, 85 Iowa, 617.

4. It is argued by appellant's counsel that Graves consented to this extension, and the following letters are relied upon in support of the claim:

"Council Bluffs, Io., Feb. 17-92. Springer Lithographing Co., New York, N. Y.—Gents: Your favor of the 4th inst. came just as I was leaving for a trip in Nebraska, and did not get time to answer it before going, and, on return, find your wire here, and have made reply to that by wire. The statement which you sent is probably plain, taken in connection with the one sent Mr. Travers Jan. 13th; but I never saw that statement, and consequently this one is rather indefinite and incomplete. Will you kindly make out a new statement, and send me, showing an itemized account of the paper furnished and shipped out for Mr. Travers up to the 23rd of Jan., from beginning of business, and also the different amounts of money you have received from him from time to time since you begun business with him? Also, please give an account of the money that he has sent you since you got the $150.00 for which you have given him credit on Jan. 26th. I will not honor any draft on this account,

and shall expect you to give Mr. Travers time and opportunity to pay you before calling on me for any money. Yours, very truly, H. C. Graves.

"Council Bluffs, Io., Mch. 20, 1892. Springer Lithographing Co., New York, N. Y.—Dear Sirs: Your favor at hand regarding the Travers bill, and, in reply, would say, as I have written you before, that it will be useless to make a sight draft on me, as I will not honor any draft on the account. It is not customary to call on one giving security for a bill until at least a reasonable opportunity has been allowed the original maker of the bill to raise the money for it. No effort has been made on your part to collect this account from the original party, nor do you seem disposed to give him any time or chance to raise the amount due you, even though he has written you that he has the promise of the money soon to liquidate the whole of the bill. I have also written you that I was satisfied that Travers had the money in view to pay your bill, and still you urge me into a premature payment, not only for that part of the bill for which I am holden for, but that part of it for which I am not responsible. You will not forward your interests in this matter by getting into too great a hurry over it, and I would ask you, as I have before, to give Travers a reasonable chance to pay the bill before calling on me for it, and will say, too, that I do not intend to be forced into paying any part of it until he had such a chance. Yours, respectfully, H. C. Graves."

The exact statements relied upon in these letters are, "I shall expect you to give Travers time and opportunity to pay," found in the letter of February 17, 1892, and "I will ask you, as I have before, to give Travers a reasonable chance to pay the bill, and I do not intend to be forced into paying any part of it until he has had such a chance," in the letter of March 28, 1892. We have set out the whole of the letters, that we may better understand just what effect should be given these particular statements. We do not think these statements of Graves can be properly construed to mean a request of plaintiff to change the period of performance, or to make a new and binding contract with Travers which would prevent their taking steps to enforce their account until the expiration of the time fixed in the new contract. Graves seemed to have no doubt of the ability of Travers to pay the account in a short time, and was insisting that plaintiff should use reasonable efforts to collect from the principal, and give him a reasonable time and opportunity to pay before calling upon him (Graves). This is far from consenting to the making of a valid and binding contract changing the date of performance from June 2, 1892, to December 1, 1892. The reason why a guarantor is released by a valid agreement extending the time of payment is because it is an alteration of the contract for which the guarantor is responsible. He is bound only by the terms of the contract guarantied, and, if these are varied without his consent, it is no longer his contract, and he is not bound by it. We do not think there was any request or agreement here to alter the old contract, or to change the time of payment as therein fixed. Reasonable delay and continued diligence are all that seem to have been demanded. But, aside from all this, there was not only a change in the contract by reason of extension of time, but also a change in the amount due thereunder, as we have before stated. The guaranty was to the effect that Travers would take and pay for the goods from week to week as the same were needed, and the original contract was that Travers should take and pay for the work as the same was delivered, and for all of it before June 1, 1892. Delivery of the goods before June 1, 1892, was essential to a liability. But, by the terms of the note, Travers agreed to pay for the goods which had not been delivered, and also agreed to pay interest on the amount of the same from the time of the execution of the note. He also agreed to pay interest on the whole account, which was not contemplated in the original contract with Travers and so avoided the contract of guaranty, even if it ever had an existence. Brandt, Sur. § 379. No claim is made that these changes were consented to.

We reach the conclusion that the district court may have found for appellee, Graves, on either of the propositions suggested in this opinion; and as we must presume in favor of the action of the trial court, and assume that it based its conclusions on some tenable ground, it follows that its judgment should be affirmed.

LEACH v. HILL et al.

(Supreme Court of Iowa. Jan. 29, 1896.)

EVIDENCE — STATEMENTS OF THIRD PERSONS — PLEADINGS AS EVIDENCE—WAIVER—INSTRUCTIONS—EXCEPTIONS—APPEAL—REVIEW.

1. In an action to recover on a check alleged to have been issued by defendant's agent for stock purchased for defendant, under an agreement between defendant and the agent that defendant should pay the checks, evidence that the agent requested third persons, from whom he had also purchased stock, not to disclose to his principal the price paid therefor, is inadmissible against plaintiff, such requests not having been made in his presence.

2. A complaint which has been withdrawn and superseded by an amended pleading is not in evidence, unless it is introduced on the trial as other evidence.

3. Where defendant's counsel is erroneously permitted to comment on the original complaint, which has been superseded by an amended complaint, as evidence of admissions, without having introduced the pleading in evidence, that plaintiff's counsel in his concluding argument attempts to explain such admissions does not waive the error.

4. The exception, "To the giving of which instructions plaintiff * * * duly excepted," is insufficient to bring up for review any specific

instruction, and the exception will not be sustained if any one of the instructions is good.

5. The giving of time within which to file a motion for a new trial, and in arrest of judgment, does not extend the time for filing exceptions to instructions.

Appeal from district court, Dallas county; J. H. Applegate, Judge.

Action at law to recover from defendants the amount of a certain check issued by defendant Sisson, upon the Exchange Bank of Earlham, to one J. C. Hill, and by Hill indorsed and assigned to the plaintiff. Trial to a jury, verdict and judgment for defendants except J. C. Hill, and plaintiff and defendant J. C. Hill appeal. Reversed.

White & Clarke, for appellants. D. W. Woodin and Cummins & Wright, for appellees.

DEEMER, J. The pleadings in this case are voluminous, and are somewhat involved. They cover about 16 closely-printed pages of the abstract, and are too lengthy to be set out in full. The action, as has been stated, is to recover the amount of a certain check issued by defendant Sisson, upon the Exchange Bank of Earlham, to one J. C. Hill, and by Hill indorsed to the plaintiff. The defendant M. D. Hill is made a party defendant, because it is alleged that he and others constitute the Exchange Bank, he being the cashier. It is alleged in the petition, in substance, that in the year 1892 defendant Earley was engaged in buying live stock in Dallas county, through the agency of defendant Sisson, under an arrangement by the terms of which Sisson was to buy the stock for and on account of Earley, and the stock, after its purchase, was to be delivered to Earley, and shipped, either in his name or in the name of M. D. Hill; that the stock was to be paid for by checks drawn by Sisson upon the bank, which Earley promised to provide for and pay. That the checks were to be drawn in the name of Sisson simply as a convenience to Earley, but that they in fact were his checks, and that Sisson was to have no interest therein, except as agent for Earley. That by the terms of the arrangement between them it was agreed that Earley should carry on this business in the name of C. E. Sisson, and that in this name all purchases should be made and all checks drawn,—this being done for convenience, so that Earley could distinguish the business done by Sisson from his other purchases of stock, and to conceal from the persons with whom the business was done that it was in fact the business of Earley. That the check in suit was issued to J. C. Hill by Sisson, pursuant to these arrangements, for stock purchased by Sisson from him, and was by Hill indorsed and transferred to plaintiff. That the stock for which it was issued was delivered to Earley, shipped to the markets, and the proceeds received by him, according to the arrangement between the parties. The plaintiff further states, as a cause of action against M. D. Hill and the Exchange Bank, that he had general knowledge of the arrangements between Earley and Sisson, and of the fact that checks issued by Sisson pursuant thereto were and had been continually paid by him and the bank, and, prior to the 19th day of November, had himself paid checks drawn by Sisson, pursuant to the arrangement aforesaid, but prior to each payment had inquired of Hill as to whether the checks would be paid, as he knew that Sisson was individually irresponsible; that on the 19th day of November, 1892, on presentation of a number of checks to him, which had been executed pursuant to the arrangement between Sisson and Earley, as aforesaid, he made inquiry through and over the telephone of M. D. Hill as to whether these checks would be paid, and received in answer thereto, through the agent of the telephone company, the following, in writing: "It will be all O. K. to cash checks from C. E. Sisson to the amount of stock that he gets. Sat., Nov. 19, 1892. Hill." That on receipt of this message, and relying thereon, plaintiff paid all checks issued by Sisson pursuant to the arrangement aforesaid, without further or additional inquiry, in reliance upon statements from Sisson that they were issued for stock, and in reliance upon the previous course of business between the parties and the written authority given by defendant, M. D. Hill. That all checks so issued and cashed by plaintiff were paid, up to the date of the one now in suit. The plaintiff further averred that the message sent him by the telephone company was in response to an inquiry from him as to whether all checks thereafter issued by Sisson would be paid by Hill, and that he at the same time informed Hill that he desired the information to avoid calling him up thereafter when each check should be presented. The answer of defendant Earley is practically a general denial. M. D. Hill, in effect, denies each and every allegation of the petition, except that he admits sending the telephonic message as stated, but says it was in response to a question regarding certain checks named in the inquiry,—the one in suit not being included,—and that the message had no reference to any others which had been or might be issued by Sisson. Defendant J. C. Hill admitted the allegations of the petition, and further pleaded that his liability on the check was and is secondary; and he asked the court to so find. He further filed a cross petition against his codefendants, in which he in effect adopted the allegations of plaintiff's petition, and further pleaded that he had knowledge of the manner in which these parties had been doing their business and paying the checks of Sisson, and that he fully believed that the check which was given him would be paid by M. D. Hill or the Exchange Bank; that the check upon which suit is brought was given for stock purchased of

him, and that defendant Earley received the stock so purchased, and received for the same an amount greater than the amount of the check. And this defendant asked that, in the event plaintiff did not recover, he have judgment against his codefendants for the value of the stock sold and delivered by him. On these issues the case was submitted to a jury, which returned a verdict for the plaintiff, against the defendant J. C. Hill, for the amount of the check, and for the defendants Thomas Earley and M. D. Hill; and plaintiff and defendant J. C. Hill appeal.

1. The defendants were permitted to prove by witnesses Garoutte and Longmire, over objections interposed by the plaintiff, that they had sold stock to Sisson in January, 1893, for which he gave his checks on the Exchange Bank, and that Sisson asked each of them to conceal from Earley the prices and weight of the stock so purchased, as he wanted to make a deal with Earley, and did not want him to know anything about the weights or prices paid. The objection lodged against this testimony was that it was incompetent, irrelevant, and immaterial, being declarations made by a third person not in the presence of plaintiff. The objections were clearly good, and should have been sustained. No foundation had been laid for the introduction of such testimony for impeaching purposes, and for this only was it admissible. Such declarations were not binding upon the plaintiff, and could have no other effect than to prejudice and poison the case in the minds of the jury.

2. The original petition in this case was filed on the 28th of February, 1893. This was superseded by an amended and substituted petition filed on the 16th day of January, 1894, the substance of which, with amendments, we have heretofore given. In the argument of the case to the jury, one of appellees' counsel was permitted by the court to read the original petition to the jury, and comment upon the same in his discourse. This course of procedure was objected to by appellant's counsel, on the ground that the original had been withdrawn and superseded by the amended and substituted petition, and had not been offered in evidence upon the trial, and no opportunity had been given the plaintiff to explain the same. The objection was overruled, and this ruling is made the basis for one of the assignments of error. The question seems to be ruled by the case of Shipley v. Reasoner, 87 Iowa, 555, 54 N. W. 470, wherein it is held that such superseded pleadings cannot be considered in evidence without being introduced. We there said: "Being only evidence, and subject to explanation, it seems that it should be introduced as any other evidence, and unless so introduced it should not be considered. To hold otherwise is to permit a party to spring a surprise upon his adversary by presenting the admissions when the opportunity to explain has passed. Surely the law does not contemplate such an unfair practice, that would deprive a party of the privilege of explaining how or why the admission was made." It is contended, however, by counsel for appellee, that the error, if any, in this respect, was waived, because plaintiff's counsel in their concluding argument replied to the comments of counsel, and explained to the jury the reason for the amendment and the additional statements therein. Is it true that because counsel comment upon and attempt to explain matters which have been erroneously considered against them, they waive the error, if any, in the procedure? We think not. Counsel in argument must make the best of the case as they find it. And if, perchance, they answer an illegitimate and erroneous argument or procedure on the other side, they do not by so doing waive the error. Nor do we think that by so doing they remove any prejudice which might have arisen had they kept silent.

3. Certain of the instructions given by the court are complained of. The record discloses this exception taken at the time the instructions were given: "To the giving of which instructions the plaintiff and the defendant J. C. Hill duly excepted." Under repeated and well-settled rules of this court, this is not sufficient to bring up for review any specific instruction. The exceptions go to the instructions as a whole, and if any part of them are good, then the objections to them are without merit. It is practically conceded that some of them are good. Hence it follows that the exceptions to certain of them cannot be considered. Hallenbeck v. Garst (decided at present term) 65 N. W. 417. Plaintiffs were given time within which to file a motion for a new trial, and in arrest of judgment, but nothing was said about exceptions to the instructions. When the motion came in, it included exceptions to the instructions in proper form, but as such they were filed too late. The agreement, as we have observed, did not give time for filing these exceptions, and they came too late. This point has been heretofore decided by this court in the case of Bush v. Nichols, 77 Iowa, 171, 41 N. W. 608. See, also, authorities cited in this opinion, and Hollenbeck v. Garst, supra. We cannot consider the assignments of error relating to the instructions.

4. Other errors are assigned, but as the questions may not arise upon a retrial, we do not consider them. For the errors pointed out, the judgment is reversed.

HUNT v. KING et al.

(Supreme Court of Iowa. Jan. 29, 1896.)

MECHANICS' LIENS—CONTRACTOR'S BOND.

The sureties on a bond to secure the performance of contract for the erection of a

building for a county, which provided that the contractor should obtain a certificate to the effect that no mechanics' liens or other claims are chargeable to the county, are not liable for claims against the contractor for materials furnished for which the material men have no claim or lien against the county.

Appeal from district court, Franklin county; S. M. Weaver, Judge.

The defendants, other than George H. King, are John F. Scott, O. F. Dorrance, and some seven others. In 1890, the defendant King entered into a written contract with Franklin county, Iowa, to erect in said county a courthouse, for the agreed price of $40,000, the said King to furnish the labor and materials therefor. The contract contained specifications as to the construction and the payments to be made. To secure the county for the performance of the contract on his part, King executed a bond, with John F. Scott, O. F. Dorrance, and the other defendants as sureties. The plaintiff furnished to King materials for use in the construction of the courthouse, and he is the assignee of other claims for materials so furnished, all of which claims are unpaid, and the defendant King is insolvent. This action is on the bond to recover for the materials so furnished. The petition recites the contract and bond, with other facts, and asks judgment. The defendants, other than King, demurred to the petition, and from a ruling sustaining the demurrer the plaintiff appealed. Affirmed.

E. P. Andrews and John M. Hemingway, for appellant. John T. Scott and J. W. Luke, for appellees.

GRANGER, J. The contract, after recitals as to the manner of construction of the building, contains the following: "For and in consideration of the faithful performance of the foregoing stipulations by the party of the second part, the party of the first part, said Franklin county, agrees to pay to the party of the second part the sum of forty thousand dollars, as follows: Every fourth Saturday after the commencement of the excavation for said building, and during the continuous erection of said building, the superintendent, as designated by the party of the first part, shall make the estimate of all materials delivered on the premises, or used in the construction, and all labor done on said courthouse building, which estimate shall be in writing, and particularly set forth the items of material and labor furnished and done, which estimate shall be the only voucher for the payment of money to the party of the second part. Twenty per cent. of each estimate shall be retained by the party of the first part until the works are fully completed and accepted by the party of the first part (but in no case shall said estimates exceed the proportionate contract price of said building, and all materials, when estimated, shall become the property of the party of the first part), when all unpaid percentages, or estimates, or other sums that may be due shall be paid; provided that, upon a final settlement, a certificate shall be procured from the superintendent that said building is erected in a good and workmanlike manner, and that the drawings and specifications are fully complied with; and *provided, further, that a satisfactory certificate shall be obtained to the effect that no mechanics' liens or other claims are chargeable to the party of the second part;* and provided, further, that all drawings, details, and specifications shall be delivered to the superintendent of the party of the first part." The demurrer presents the question that the plaintiff is neither a party nor a privy to the contract, so as to be entitled to recover the bond. The particular language relied on by appellant is that italicized, which is a proviso against full payment before a "satisfactory certificate shall be obtained to the effect that no mechanics' liens or other claims are chargeable" to the county. Appellant's thought is that King's undertaking with the county was that he "should perform all the covenants of his contract, including the agreement to pay all parties who did work upon the building or furnished material." But the contract does not say that. The county has only contracted against payment when there are liens or claims chargeable to it. Would it be contended that the county could avoid payment to King, because material or labor was not paid for, if it conceded that claims therefor were not chargeable to it? The contract could bear no such construction, because of the definite language used. We do not discover a word to indicate a purpose of the county to protect others than itself from loss because of payments made. The provisions are against liens or claims "chargeable to it." A reason for such a provision in its own behalf is found in the provision of the law by which a laborer or material furnisher has a claim against a public corporation for labor or material furnished for the construction of any public building. Acts 20th Gen. Assem., c. 179. Appellant cites Jordan v. Kavanaugh, 63 Iowa, 152, 18 N. W. 851, and Baker v. Bryan, 64 Iowa, 561, 21 N. W. 83. The cases are different. In each case there was a bond given to secure the performance of the contract on the part of the contractor. In the first case the contract in terms provided that Kavanaugh should pay all just claims against him, or against any subcontractor under him, for labor or material. It was held that the bond was given as security that Kavanaugh would perform the covenants in the contract. In the other case the bond recited that it was security that the principal "would pay all claims for labor and material used in the construction of the building, and produce proper receipt therefor." The same rule was applied in that case. In those cases the bondsmen were held to the terms of

their undertakings. No such terms are employed in this contract, or the bond. They purport to secure the county against liability because of liens or claims. It seems to us that the court below was clearly right, and the judgment is affirmed.

McBRIDE v. BURLINGTON, C. R. & N. RY. CO.

(Supreme Court of Iowa. Jan. 29, 1896.)

DEATH BY WRONGFUL ACT — LIMITATIONS — CONCEALMENT OF FACTS.

Where an administratrix knew that her intestate was killed while in defendant's employ, the running of limitations against the claim for damages was not interrupted by defendant's representations that it was in no manner to blame for deceased's death, nor by its concealment of the facts concerning the accident which caused his death.

Appeal from district court, Linn county; William G. Thompson, Judge.

Action for damages. Demurrer to petition sustained, and plaintiff appeals. Affirmed.

Rickel, Crocker & Christie, for appellant. S. K. Tracy and J. C. Leonard, for appellee.

KINNE, J. 1. This action is brought by plaintiff, as administratrix of the estate of John McBride, deceased, for the recovery of damages resulting from his death, which it is claimed was caused by the negligence of the defendant company. The petition is in four counts. The first count charges, in substance, that on August 14, 1888, plaintiff's intestate, John McBride, who was also her husband, was in the employ of the defendant company as a section hand, and that, while engaged in the proper performance of his duties as such, he, with other employés of the defendant company, was propelling a hand car of defendant upon its track, and that said car "jumped" the track, and in falling said McBride was killed, by reason of the derailment of said car, and without fault on his part. That said car was not properly constructed, that it was out of repair and unfit for use, and that such condition was known to the defendant. That, by reason of its defective and dangerous condition, the injury resulted. That, intending to cheat and defraud plaintiff, and the heirs of said estate, defendant falsely and fraudulently represented to plaintiff that the death of John McBride resulted from an accident; that defendant was in no manner to blame; that said car was not defective or out of repair. That upon said McBride's death defendant caused said car to be removed to its shops, and its construction and identity to be so changed as to conceal the same. That plaintiff has been unable, by the exercise of due diligence, to acquire a knowledge of the facts; but the same have been concealed, actively and fraudulently, from her; nor did she learn them until within one year prior to the bringing of this action. That she believed and relied upon the representations made to her, and was deceived thereby. The second count is substantially the same as the first. The third count sets forth the same facts, and claims damages, by reason of said fraud and deceit, in being deprived of her right of action. The fourth count is the same as the first, with the additional averment that, by reason of false and fraudulent representations of defendant, which were relied upon by plaintiff, she was induced to accept the sum of $250 in settlement of her claim for the death of her husband. Defendant demurred to all of said counts, because the cause of action, if any, was barred by the statute of limitations, and the averments of fraud did not defeat the bar of the statute. The court sustained the demurrer, and, the plaintiff refusing to plead further, and electing to stand upon her petition, judgment was entered dismissing her petition, and for costs. She appeals.

2. Our statute provides that all actions founded on injuries to the person, whether based upon contract or tort, must be brought within two years after their causes accrue. Code, § 2529, par. 1. Unless, therefore, there is something, outside of the statute itself, which has prevented its running, this action is barred. The contention of appellant is that the facts alleged bring this case within the rule laid down by this court in the case of District Tp. of Boomer v. French, 40 Iowa, 601, and subsequent cases. It was held in the case referred to that, "when a party against whom a cause of action existed in favor of another, by fraud or actual fraudulent concealment, prevented such other from obtaining a knowledge thereof, the statute of limitations would only commence to run from the time the cause of action was discovered, or might by the use of diligence have been discovered." This case, and others which we shall refer to, are, it is insisted, controlling in the case at bar. The French Case was one where the defendant, who was the duly-elected and acting treasurer of a school district, had during his term of office received a large sum of money belonging to the district, which he appropriated to his own use, and upon a settlement with the district failed to account for. He had so kept his books, by means of false, fictitious, and fraudulent entries, and had practiced such false concealments and misrepresentations, as to keep from the defendant's knowledge the fact of the receipt of said money. It was held that the cause of action did not grow out of the fraud, but existed independent of it, and the doctrine above stated was established. In Bradford v. McCormick, 71 Iowa, 130, 32 N. W. 93, the action was to recover from the defendant, a justice of the peace, and the sureties on his official bond, money which he had collected in 1882. The action was begun in 1885, some two years after the term of office of the justice had expired. The charge was that he had fraud-

ulently concealed from plaintiff the fact that he had collected said money, and that he had converted it to his own use. It appeared upon the trial that the justice had reported to plaintiff that no money had been paid him on the judgment owned by plaintiff, and it was held such a fraudulent concealment as prevented the running of the statute. In Wilder v. Secor, 72 Iowa, 161, 33 N. W. 448, the action was for the conversion of a draft sent for collection to defendants as attorneys. It appeared that the draft was sent to defendants to file as a claim against an estate. They filed the claim in their own name, and, being indebted to the estate, settled with the administrator, and set off the amount of the claim against their indebtedness to the estate. The facts were not disclosed to plaintiff for more than five years, and the defendants led the plaintiff to believe that the claim was allowed in his name and would be paid him. It was held that the cause of action accrued when the conversion took place, but defendants had fraudulently concealed the facts, and hence the statute had not run. Carrier v. Railway Co., 79 Iowa, 86, 44 N. W. 203, and Cook v. Railway Co., 81 Iowa, 563, 46 N. W. 1080, involved substantially the same facts. They were actions for the recovery of overcharges for freight shipped, and it appeared that defendant charged and received for transporting plaintiffs' shipments a sum in excess of what was reasonable for the service rendered. The fraudulent concealment consisted in representing that the sums charged were the usual rates and the same rates that were charged all other shippers for the same service, which was untrue, and in fraudulently concealing from plaintiffs the fact that a less rate was charged other shippers for the same service. In all of these cases the cause of action existed independent of the fraud and concealment, but because of the concealment of the facts upon which the cause of action arose it was held the actions were not barred by the statute. Now, in French's Case the district had no knowledge within the period of limitations that the treasurer had received and converted the money. The same is true in Bradford's Case and in Wilder's Case. In the Railway Cases all of the facts which would create a cause of action were concealed. We think these cases differ much from the one at bar. In the case at bar, what created a cause of action against defendant? Manifestly the cause of action, if any existed, arose when McBride was killed. True it is that negligence could not be predicated against the company from the fact alone that McBride was killed while in their employment. Now, we are asked by counsel to go further, and hold that, although some of the facts which go to make up or give a right to a cause of action are known, still, because some of them are not made known or are concealed, therefore that is such a fraudulent concealment as will prevent the running of the statute. There was no concealment in this case of the fact that McBride was killed by the hand car; that he was so killed while in the defendant's service. While it is true that one necessary ingredient of the cause of action,—defendant's negligence,—was concealed, still, every other fact which went to constitute a cause of action was known to plaintiff. The body of the cause of action, if we may call it such,—the killing of McBride while in defendant's service,—was never concealed. Now, if the defendant did not disclose to the plaintiff the particular facts as to how such accident occurred, or if it asserted that his death was accidental and its hand car in good order, it is, at most, a concealment of evidence which might establish one element in a cause of action. We do not think the rule should be so extended. The demurrer was properly sustained. Affirmed.

KELLY v. WESTCOTT.

(Supreme Court of Iowa. Jan. 29, 1896.)

VENDOR AND PURCHASER—LIABILITY OF VENDOR FOR SPECIAL ASSESSMENTS.

A contract for sale of a lot required the lot to be clear of all incumbrances, except special assessments, which were to be deducted from the cash payment. Before the contract was made, one D. learned from the vendee that he would buy the lot, and then induced the vendor to allow him to sell it for $22,500 and allow him $500 of it to pay the special assessments and his commission. He afterwards acted as much for the vendee as for the vendor, and neither gave him any general authority. When the contract was made, the vendee paid $500 to D., who agreed that such assessments should be paid out of the first or cash payment. When the deed was made, the vendee paid the vendor $7,000, the balance of the cash payment. Neither D. nor the vendor paid such assessments. *Held*, that the vendor was not liable to the vendee for the amount of the assessments, in the absence of authority by D. to make him liable by a promise to pay them.

Appeal from district court, Woodbury county; F. R. Gaynor, Judge.

Action to recover the amount of certain assessments on real estate sold by the defendant to the plaintiff. The cause was tried as in equity, and a judgment was rendered in favor of the plaintiff for $416.08, and costs. The defendant appeals. Reversed.

Wright, Hubbard & Bevington, for appellant. T. P. Murphy, for appellee.

ROBINSON, J. On the 4th day of June, 1889, the defendant made and delivered to the plaintiff an instrument in writing, of which the following is a copy: "I, George E. Westcott, have this day bargained and sold to John C. Kelly lot 9, block 10, Sioux City, East addition, Woodbury county, Iowa, on the following terms and conditions: $7,500 cash on delivery of deed, and three promissory notes of $5,000 each, respectively, in 1,

2, and 3 years, with 8 per cent. interest, to be secured by mortgage on said property. I agree to furnish abstract showing perfect title and transfer by warranty deed. Said property to be clear of all liens and incumbrances, except special assessments, which shall be deducted from above $7,500 cash payment. The above property is sold subject to lease on same to C. J. Chamberlain. Geo. E. Westcott. June 4, 1888." On the instrument is indorsed the following: "Received check for $500 on the within contract, which is to be deducted from the first cash payment. Geo. E. Westcott." About two weeks later the plaintiff paid the defendant $7,000 by check, and received from him a deed for the lot. The deed recited a consideration of $22,500, and contained covenants of title and warranty, excepting as to all special assessments, to which the deed was made subject. When the contract of sale was made, there were special assessments on the lot to the amount of $336.40, which have not been paid. The petition alleges that the contract between the parties required that the amount of the assessments be deducted from the cash payment; that when the payment of $500 was made, the agent of the defendant represented to the plaintiff that the special assessments would be paid from the cash payment; that, relying upon the statements of the agent, the plaintiff did not deduct the amount of the assessments from the $7,000, and that when that was made and the deed was delivered it was mutually understood between the parties that the agent of the defendant had paid the special assessments. The defendant denies all liability for the special assessments, and avérs that Dunbar, the man who is charged to have represented him, was in fact the agent of the plaintiff, and was to pay the special assessments from the $500 payment. It appears that the sale of the lot was effected through the instrumentality of Dunbar. He was not formally employed by either party. A person who is not shown to have had any interest in the lot, nor any business connections with its owner, suggested to Dunbar that he see the plaintiff in regard to the lot. Acting upon that suggestion, Dunbar saw Kelly, who said that if the lot "could be bought at a proper figure he thought he would buy it." At that time Dunbar had not seen Westcott in regard to the lot, and in fact was not known to him; but, after seeing Kelly, Dunbar saw Westcott, and tried to obtain terms on the lot which Kelly would accept. The price first asked was $25,000, but after some negotiations, which were carried on through Dunbar, Westcott agreed to sell the lot for $22,500. At that time he did not know to whom Dunbar was trying to make the sale. Westcott finally agreed to take the amount last stated for the lot, and to allow Dunbar $500 of it to pay the special assessments and his commission. Dunbar testifies that Westcott represented that the special assessments would not exceed $150, but that is denied by Westcott, and is not established by the evidence. It is claimed by Dunbar that he told Kelly what Westcott said about deducting the special assessments from the commission, and that he would have to look to Kelly for the remainder of his commission, and that Kelly finally authorized him to close the transaction on that basis. It is clear that Westcott did not agree to pay the special assessments, excepting as their amount should be deducted from the first payment of $500, and we are of the opinion that the plaintiff has failed to sustain the averments of his petition to the effect that the agent of the defendant represented to him, when the first payment was made, that the special assessments would be satisfied from it. It is insisted by the appellee, however, that this is an action to recover money paid by mistake; but, if that be conceded, we do not think the proof sustains his claim that money was paid under a mistake of fact. The plaintiff testifies that "Dunbar had agreed, on behalf of his principal, that the special assessments should be paid out of the first or cash payment. He agreed to pay them on receipt of the money," and that the first payment of $500 was made to Dunbar. If the plaintiff relied upon what Dunbar said in making the payments, he relied, not upon a representation as to an existing fact, but upon a promise to perform an act. He had before him the contract of the defendant, which provided that the special assessments should be deducted from the first payment, not that they should be paid by the defendant. The last payment was made to the defendant in person, and the deed was delivered by him. Although it was made subject to the assessments, which, according to the claims of the plaintiff, should have been paid nearly two weeks before, nothing was said in regard to them. It thus appears that the money was paid, not under a mistake of fact, but, if the claim of the plaintiff be well founded, upon the promise of Dunbar to pay the special assessments. It is insisted that Dunbar was the agent of the defendant, and that the latter was bound by the promise of payment made. It is at least doubtful if the petition seeks a recovery for a breach of contract, but, without deciding that it does, we may say that it is not shown that Dunbar was authorized to make the defendant liable by a promise to pay the assessments. Dunbar acted as much for the plaintiff as for the defendant, and neither gave him any general authority in regard to the sale and purchase of the lot. His agency for each was special; therefore each was required to ascertain the extent of his power to bind the other. The case is not within the rule of Eadie v. Ashbaugh, 44 Iowa, 519; Milligan v. Davis, 49 Iowa, 126, and similar cases. The defendant had not authorized Dunbar to contract for him to pay

the special assessments, and the plaintiff had no sufficient reasons for believing that he had. The plaintiff relied upon the promise of Dunbar, which, at most, only made him liable, and must look to him for performance. We conclude that the judgment of the district court is erroneous and it is reversed.

POWERS v. ILLINOIS CENT. R. CO.

(Supreme Court of Iowa. Jan. 30, 1896.)

APPEAL—JUDGE'S CERTIFICATE—TIME OF MAKING AND FILING.

The certificate of the judge, authorized by Code, § 3173, in case of an appeal, where the amount in controversy is less than $100, must be made and filed when the case is decided and judgment entered.

Appeal from district court, O'Brien county; Scott M. Ladd, Judge.

John F. Duncombe and T. F. Ward, for appellant. Boies & Roth, for appellee.

KINNE, J. This action was brought to recover double damages for killing hogs. The amount in controversy does not exceed $100; hence the case comes to this court upon a certificate of the trial judge. Code, § 3173. It appears that judgment was entered in the district court on October 10, 1894. The certificate was made and filed on the 11th of October, 1894. Under repeated holdings of this court, this was too late. The certificate must be made when the cause is decided and judgment entered. Hershfield v. Bank, 39 Iowa, 699; Schultz v. Holbrook, 86 Iowa, 572, 53 N. W. 285; Foye v. Walker, 62 Iowa, 252, 17 N. W. 494; Nicely v. Rogers, 39 Iowa, 441; Brown v. Grundy Co, 78 Iowa, 562, 43 N. W. 529. We cannot, therefore, consider the questions thus certified. Dismissed.

KOHN et al. v. JOHNSTON et al. (two cases).

(Supreme Court of Iowa. Jan. 30, 1896.)

FRAUDULENT CONVEYANCES—UNRECORDED CHATTEL MORTGAGE — INTENT — REBUTTAL EVIDENCE—INSTRUCTIONS.

1. In a proceeding to charge defendant garnishee with certain property alleged to belong to codefendants, plaintiff's debtors, it appeared that the garnishee received from the codefendants a mortgage on their stock of goods; that it was kept from record for a year, during which plaintiff sold codefendants goods, believing that their stock was unincumbered; that the garnishee stood in intimate relation to codefendants; and that the mortgage was not recorded until he learned that a claim was about to be prosecuted against them. *Held*, that the question whether there was an agreement not to record the mortgage was for the jury.

2. It is error to admit, in rebuttal, pleadings in prior cases against the same parties, where they contain nothing to meet any claim or statements made by the witnesses of the opposite parties.

3. Instructions must be construed together, and where objections urged to them severally are removed by such construction, the objections will not be considered.

Appeal from district court, Tama county; John R. Caldwell, Judge.

This is a garnishment proceeding, in which plaintiffs are seeking to hold W. F. Johnston as garnishee, to pay the amount of a judgment they hold against W. S. Johnston & Co., W. S. Johnston, and Wesley Johnston, by reason of his holding certain property which, it is claimed, belongs to the judgment defendants. The garnishee made answers which were controverted by plaintiffs, and a trial was had to a jury upon the issues thus made, resulting in a verdict and judgment for the plaintiffs, from which the garnishee appeals. Reversed.

W. H. Stivers and J. W. Willett, for appellant. Struble & Stiger, for appellees.

DEEMER, J. March 1, 1892, the appellees commenced an attachment suit against the firm of W. S. Johnston & Co., and caused the appellant herein to be garnished as a supposed debtor of Johnston & Co., or as holding property belonging to the firm. The appellant answered, denying any indebtedness to the defendants in the main suit, and, further, stating that on March 4, 1891, the firm was indebted to him and others in a sum in excess of $5,000; and that on that day it executed a chattel mortgage upon its stock of goods to secure this indebtedness; that on the 18th day of February, 1892, said indebtedness remaining unpaid, he took possession of the property covered by the mortgage, and was holding the same to secure the amount due, as well as the further sum of $325, rent due him for the use of the store building in which the goods were kept. Afterwards this part of the answer was amended, the garnishee therein stating that on the 29th of February, 1892, and before the service of garnishment, he had an accounting with the firm, and it was agreed in this settlement that he (the garnishee) should take the goods in payment of the indebtedness due him, which was accordingly done, and all the indebtedness canceled, and that at the time of the garnishment he was the absolute owner of the goods. The plaintiffs, who are the appellees, controverting these answers, alleged that the garnishee's mortgage, while executed March 4, 1891, was not filed for record until February 18, 1892, and that during all the intervening time it was concealed from plaintiffs, and its existence carefully, willfully, and fraudulently concealed, for the purpose of enabling the firm which executed it to purchase goods on credit, and to have a credit it did not in fact possess,—all of which was pursuant to a parol and secret understanding, between the appellant and the firm, that such mortgage should not be recorded. They further alleged that they sold their goods to the firm, for the purchase price of which this suit was brought, without notice of the mortgage, believing that the firm owned the stock of which it was pos-

sessed free from any incumbrances; that the firm had no other property subject to execution except its stock; and that, at the time of the garnishment, it was in fact insolvent. They further stated in their pleading that the alleged settlement between the garnishee and the firm of Johnston & Co. was simply a device to defraud plaintiffs, and hinder them in the collection of their claim. It was also charged that W. F. Johnston, the garnishee, purposely withheld his mortgage from the records, with the purpose and intent that Johnston & Co. might, through the credit which they were enabled to obtain by reason of the concealment of the mortgage, purchase goods, and add the same to their stock, and thus increase the value of the garnishee's security. Each and all of these statements and claims of the plaintiffs were denied by the garnishee. Such were the issues on which the case was tried. We have stated them with some particularity, in order that the questions presented may be the better understood. The garnishee, at the conclusion of the plaintiffs' evidence, moved the court for a verdict in his favor. This motion was overruled, and exception taken. It is now insisted that the court was in error in its ruling. We do not find it necessary to determine the question presented, on account of the final decision which must be had; and as the case will be retried it is better that we express no opinion

2. The plaintiffs were permitted to introduce in rebuttal, and to read in evidence, the petitions, notices, writs, and returns in two cases, brought against the firm of Johnston & Co., on the 18th and 19th days of February, 1892, respectively,—one by Ella C. Philips, administratrix, and the other by the Toledo Savings Bank. The petitions in each case recited that defendants had disposed of their property with intent to defraud their creditors. None of these papers were properly received in rebuttal, for there was nothing in them which met any claim or statement which had previously been made by the garnishee or his witnesses. Nor do we think they were competent or material for any purpose. The garnishee had recorded his mortgage and taken possession of the stock of goods before either action was commenced, and as to one of them, there is no showing that the garnishee knew that it was either commenced or threatened at the time he recorded his mortgage. Appellees claim they show the indebtedness of Johnston & Co., but this is clearly incorrect, as they are merely ex parte statements of supposed creditors. It is insisted that these furnished the motive for recording the mortgage; but we have seen that this cannot be so, because the mortgage was recorded before the petitions were filed or any proceedings had. It is probable that the fact that such suits were brought or contemplated before the garnishee recorded his mortgage might be shown, if such fact were known to him, but the pleadings, notices, writs, and returns filed and issued in the case were entirely irrelevant and immaterial to the issues presented. In view of some of the statements made in the pleadings, we cannot say that their admission was without prejudice.

3. In the fifth instruction the court told the jury, in substance, that if the garnishee withheld his mortgage from the records, pursuant to a secret understanding between the parties thereto, for the purpose of enabling Johnston & Co. to obtain credit, and that plaintiffs sold their goods to Johnston & Co., believing that they were the owners of the merchandise of which they were possessed, free of incumbrance, and that the garnishee kept his mortgage from the record for the purpose of not impairing the credit of the firm, then the transaction was fraudulent. In the eighth instruction he said that, if the mortgage was withheld from the record by the garnishee for the purpose of maintaining the credit of Johnston & Co., and to lead parties who dealt with them to believe that their stock was free from incumbrance, and that plaintiffs were induced to give credit when, otherwise, they would not have done so, had the mortgage been recorded, then the mortgage would be fraudulent, whether there was an understanding between the parties that the mortgage should not be recorded or not. In the eleventh instruction the court said, in effect, that if the mortgage was not recorded by reason of an oversight or inadvertence, and not pursuant to an understanding between the parties, and without any intent to maintain the credit of Johnston & Co., then their verdict should be for the defendant. It is insisted that these instructions were contradictory, misleading, and confusing, that the fifth has no evidence in its support, and that the eleventh casts the burden of showing the validity of the mortgage upon the garnishee. We do not think either of these positions are tenable. The instructions are not in conflict, but, when construed together, are harmonious. They not only present the plaintiffs' theory of the case, but the defendant's as well, and are entirely consistent, as we understand them. The eleventh does not relate to the burden of the proof. This matter was covered in another instruction with reference to where the burden was, and there is no rule better settled in the law than that all the instructions should be considered and construed together. When this is done in this case, there is no room for the objections urged. It is further contended that there is no evidence to support the fifth paragraph. It must be confessed that it is somewhat meager, and yet we do not think there was such a lack of it as to justify us in saying that there was none from which the jury might have found its verdict. Counsel for appellant cite Meyer v. Houck (Iowa) 52 N. W. 236, in support of their contention. It may be well to observe, with reference to

this case, that the rule announced therein is apparently misapprehended by attorneys who practice at this bar. The doctrine of scintilla of evidence, as applied to that case, relates to the powers and duties of trial courts, and not as to the rule to be applied when the case reaches this court. This has been fully explained heretofore in the cases of Phillips v. Phillips (Iowa) 61 N. W. 1071; Bever v. Spangler (Iowa) 61 N. W. 1072.

We look, then, to the testimony, and find that it tends to show that the garnishee is a careful and prudent business man; that he has had much to do with chattel mortgages, and undoubtedly understood the effect of placing on record one which secured a debt amounting to a large part of the value of the stock covered thereby; that he had previously held a mortgage upon this same stock, which he did not record; that the garnishee stood in intimate relations to the members of the firm, and had an office in the store; and that the stock of goods was practically all the property owned by the firm or the individual members thereof. The garnishee testified, with reference to the recording of the mortgage, as follows: "It was on the morning of the 18th that I heard some threats of prosecution being commenced on the Philips claim against W. S. Johnston & Co. It was the Philips claim. When I heard of that prosecution being commenced against them on the Philips claim, it immediately occurred to me that I had a chattel mortgage on the stock. I don't know as I remember how much it was. I suppose I did, and I soon afterwards put it upon record. I was informed the prosecution was about to be commenced. There had no suit been commenced at the date of the recording of my mortgage. There was nothing served on me before it was recorded. The moment I heard of the prosecution, I did not stop to ask any questions. I went and looked the matter up, and found it was not on record, and I put it on. * * * No one informed me of the threatened prosecution of the Philips claim. I simply overhead it." In view of all this evidence, and some other which might be detailed, we cannot say that the jury was not justified in inferring an agreement between the parties not to record the mortgage, although all parties to the instrument expressly denied that there was such an agreement. The cases of Goll v. Miller, 87 Iowa, 426, 54 N. W. 443, and Falker v. Linehan, 88 Iowa, 641, 55 N. W. 503, shed light upon this question. We are not to be understood as indicating our views as to what the verdict should have been. Our conclusion is, simply, that there was enough evidence on the question of the agreement not to record to take the case to the jury. For the error pointed out in the admission of evidence, the judgment is reversed.

KINNE, J., took no part.

IOWA STATE SAV. BANK v. COONROD.

(Supreme Court of Iowa. Jan. 30, 1896.)

EQUITABLE MORTGAGE—EVIDENCE.

It appeared that the land in question once belonged to defendant; that it was sold to plaintiff under a mortgage foreclosure sale; that plaintiff agreed that if no redemption were made the land might be sold on such terms as would reimburse it for all claims,—the balance, if any, to go to defendant; that defendant abandoned a design to redeem, and permitted the premises to go to a deed; that defendant remained in possession of the land as a tenant; and that written leases were entered into by the parties for several successive years. *Held*, that the evidence failed to show an equitable mortgage as claimed by defendant.

Appeal from district court, Audubon county; N. W. Macy, Judge.

The plaintiff commenced this action to recover a balance of rents due upon a written lease of certain farm lands in Audubon county. The defendant filed an answer and cross petition in equity, by which she sought to establish an equitable mortgage lien upon the land. The cause was heard as in equity, upon the issue made in the cross petition, and the district court determined that the defendant failed to establish any interest in the land. The defendant appeals. Affirmed.

Theo. F. Myers and F. E. Brainard, for appellant. Andrews & Hanna, for appellee.

ROTHROCK, J. The plaintiff bank is located at Burlington, in this state; and the defendant and her husband, S. D. Coonrod, formerly resided in that vicinity. The husband was a customer of the bank, and became indebted to it. He had no property clear of incumbrances, and the bank took second mortgages on the land in controversy, and other lands in Audubon county. As to one or two tracts, the security taken was not in the form of mortgages, but the taking up of contracts made by S. D. Coonrod for the purchase of land. These transactions commenced in the year 1876, and in the year 1879. Coonrod was indebted to the bank in the sum of nearly $7,000, and all of that sum was a lien upon the land, either by mortgages made directly to the plaintiff, or by the buying in of prior liens for the purchase money of the land. The plaintiff commenced an action on one of its mortgages, and a decree of foreclosure was entered August 31, 1879. A special execution was issued, and the land was sold thereon to the plaintiff, and in pursuance thereof a sheriff's deed was made to the plaintiff. This proceeding involved most of the land upon which the plaintiff had liens. One or two other foreclosures were had upon contracts taken up by the plaintiff, but they need not be specially mentioned. Indeed, it is unnecessary to make any further statement of facts than that S. D. Coonrod in 1878 conveyed to his wife whatever interest he had in that part of the land now in controversy.

The sole question to be determined is whether the deed, under the foreclosure above mentioned, should be held, under the evidence, to be an equitable mortgage. The defendant sets forth her claim in her cross petition as follows: "That about the year 1879, the said S. D. Coonrod being financially embarrassed, the said S. D. Coonrod and defendant entered into the following agreement, with and at the request of plaintiff, to wit: That plaintiff should foreclose the $1,000 mortgage hereinbefore mentioned, and should obtain a sheriff's deed, under such foreclosure, to the lands included in said mortgage, and should hold said lands in trust for this defendant, and the rent and profit of said land were to be applied as follows: First, to the payment of 8 per cent. annual interest on the entire debt of the said S. D. Coonrod to plaintiff, and the balance, if any, towards the extinguishment of said debt. And it was further agreed that when an advantageous sale of said land could be made, that same should be sold by plaintiff, and all of the proceeds of such sale, over and above the indebtedness of said S. D. Coonrod to plaintiff, with 8 per cent. annual interest thereon, should be paid to this defendant. And it was also agreed that this defendant should have the privilege and right to redeem said land, or any portion thereof not sold by plaintiff, at any time she saw fit so to do, before all of said lands had been sold by plaintiff." The plaintiff obtained its sheriff's deed to the land on the 28th day of February, 1881, and this action to recover for the rent of the land was commenced on the 15th day of February, 1892. During all that time, or for nine successive years, up to and including the year 1890, the plaintiff and the defendant entered into written leases, by which the defendant agreed to pay a money rent to the plaintiff for the use of the land. There is not one word in all these leases from which it can be inferred that the defendant claimed any legal or equitable ownership in the land, or in the proceeds of the sale of it by the plaintiff, in case such sales should be made. And during that time the defendant made charges against plaintiff for improvements on the land, and some of them were paid. All of these leases, and the acts of the parties under them, are absolutely inconsistent with any other conclusion than that the parties regarded the plaintiff as the absolute owner of the land. The claim that the plaintiff held the land in trust for the defendant is founded upon oral declarations and statements claimed to have been made by the officers of the bank, and by letters written by the cashier of the bank to S. D. Coonrod, and by Coonrod to the cashier, and by letters written by the cashier to H. W. Hanna. The evidence of oral declarations and statements is in such conflict that a court of equity would not be justified in finding therefrom that the sheriff's deed was intended as a mortgage. One witness, who is probably as well informed on the subject as any other person, and who collected the rents of the land, testified that S. D. Coonrod "admitted at all times that the mortgage foreclosed by plaintiff, on which the deed was issued, was a legitimate debt, and that the lands in controversy were the lands of plaintiff, and that they had the absolute title thereto."

The district court made special findings, which we think correctly set forth the ultimate facts, as established by the evidence. The findings are as follows: "(1) That in the foreclosure proceedings against the premises, for the rent of which plaintiff seeks to recover, and the sales thereunder, there was no fraud or imposition practiced by plaintiff upon defendant, or upon her husband; the plaintiff at that time, and prior thereto, holding valid and unpaid mortgages thereon. (2) That the evidence fairly shows that the plaintiff designed and proceeded to foreclose certain of its mortgages upon said premises, but did not desire to become the owner of the same for the purpose of speculation, and was willing and offered to sell said premises to defendant's husband, or to the defendant herself, or to another, or to permit the same to be sold, upon such terms, in case no redemption was made, whereby the plaintiff could be reimbursed for all claims held by it, including interest, costs, and expenses, together with taxes and liens against the land, and that any sum above such an amount the defendant's husband or herself should have the benefit of. (3) That during the time allowed for redemption the defendant and her husband abandoned the design to redeem from the sales under the plaintiff's foreclosure proceedings, and so notified plaintiff, and permitted the premises to go to deed with the intention, if they were able, to repurchase a part or all of the same, upon such terms as would reimburse plaintiff as aforesaid and leave something for them. (4) That in pursuance of such conclusion, and the conditional offer to sell, the defendant and her husband remained in possession of said premises after the same had gone to deed, and thereafter certain written leases therefor were entered into, but that the evidence fails to show that the deeds to plaintiff, and the leases for said premises, are in law a mortgage, or that the relation of mortgagor and mortgagee existed between the plaintiff and defendant after the expiration of the time to redeem, or that either so regarded the transaction." It is to be conceded that there are some letters written by the cashier of the bank, after it acquired title by the deed, to the effect that the bank did not want more than was justly due to it; but there is no evidence that the parties understood the transaction as a mortgage, or mere pledge for the payment of the mortgage debt. It is a familiar doctrine of the law that any conveyance of lands which is

intended merely as a security for the payment of money will be regarded in equity as a mortgage, and that in such cases the courts are not limited to the written instrument executed by the parties, but all the facts and surrounding circumstances will be taken into consideration. But where it is sought to show that an absolute conveyance by deed was intended by the parties as a mortgage or lien for the payment of money, the character of the instrument must be shown, by clear and satisfactory evidence that the deed was intended as a mortgage. These principles have been so long established that no citation of authorities need be made in their support. And it is sufficient to say that, in all the cases cited by appellant, not one of them holds that such a transaction as this is shown to be by the evidence should be regarded as an equitable mortgage. The case, in its facts, is more nearly like that of Dunn v. Zwilling (Iowa) 62 N. W. 746, than any to which our attention has been directed. We held that the transaction involved in that case created an express trust, and that it could be established only by deed, as provided in section 1934 of the Code. We do not dispose of this case upon that ground, for the reason that the evidence fails to show that there was a resulting or implied trust, as claimed by the defendant. The judgment of the district court is affirmed.

SMITH v. JACKSON.

(Supreme Court of Iowa. Jan. 30, 1896.)

BOND—DISCHARGE—EVIDENCE OF EMPLOYMENT—INSTRUCTIONS.

1. A writing in which one promised another that for six months he would not use intoxicating liquors does not tend to show that the one making the promise was during such time in the employ of the other, or to contradict the statement of the former that he was not in such employ.

2. A bond conditioned for the payment by an agent to his employer of all money he should receive on account of his agency is discharged by the employer's taking the agent's note in full satisfaction of all claims under the bond, and agreeing to return the bond; there having been some dispute as to the amount due, a higher rate of interest being provided in it than could otherwise have been demanded, and it also having provided for attorney's fees in case of suit.

3. An instruction that defendant's claim that certain money was for traveling expenses was not sustained need not be given, where, under the instructions given, it would not avail defendant if such claim was sustained.

Appeal from district court, Woodbury county; A. Van Wagenen, Judge.

Action at law on a bond given by an insurance agent to secure the faithful performance of his duties. There was a trial by jury, and a verdict and judgment for the defendant. The plaintiff appeals. Affirmed.

Lewis, Holmes & Beardsley, for appellant. John N. Weaver, for appellee.

ROBINSON, J. On the 8th day of October, 1888, the plaintiff appointed E. E. Hartsook an agent for the purpose of procuring applications for life insurance, and performing such other duties as should be intrusted to him. The bond made the obligors liable for the payment to the plaintiff of all money belonging to him which should at any time be received by Hartsook, or for which he should be liable, and all money which he then owed or might thereafter owe to the plaintiff, either on account of advances to Hartsook, or otherwise. The bond further provided that Hartsook should faithfully discharge his duties as agent, and that it should continue in force until all transactions under the agency should be settled, and all liabilities of Hartsook by reason thereof should be discharged. The bond was signed by Hartsook as principal, and S. B. Jackson and W. W. Byam as sureties, all of whom are named as parties defendant. It is claimed by the plaintiff that prior to the 20th day of May, 1890, Hartsook received money which belonged to the plaintiff to the amount of $346, and that on that date, as evidence of the amount due, Hartsook gave for it his note; that prior to the 23d day of January, 1891, he received the further sum of $43, for which, on that date, he gave his note, as further evidence of the amount due; that both sums were received by virtue of the agency; and that Hartsook has wholly failed to pay them, or any part of them. Judgment is asked for the amount stated. The defendant Jackson admits the execution of the bond, but denies that the notes described were given to evidence amounts due the plaintiff by virtue of the agency, for which there is liability on the bond, and denies all liability in this action. He alleges that the larger of the notes was given in full settlement and discharge of all liability of Hartsook and his sureties on the bond, and was so received by the plaintiff, upon his verbal promise to cancel and surrender the bond, and that the smaller note was given after the agency of Hartsook was terminated, and after the defendant had been discharged from liability by the settlement stated, for an individual loan made to Hartsook, which had no relation to the agency. Judgment was rendered in favor of Jackson for costs. The trial in the district court was against Jackson alone, and he is the only one of the defendants who appears to be interested in this appeal.

1. The plaintiff claimed on the trial that Hartsook was in his employment as agent when the $43 note was given. That claim was denied by Hartsook, as a witness; and, to affect his credibility on that point, the plaintiff offered in evidence an instrument in writing, of which the following is a copy: "New York Life Insurance Company. January 5, 6 p. m., 1891. For the period six months from date and hour, I promise G. A. Smith to refrain from the use of all in-

toxicating liquors, wine, whisky, or beer. E. E. Hartsook." The defendant made to it an objection in words as follows: "I object to it, your honor, for the reason that no such purpose appears on the face of it, and it is nothing unusual for a man to make a promise of that kind." The objection was sustained, and the writing was not received as evidence. The objection was not expressed in ordinary legal form, but it was to the effect that the writing was immaterial; and, when so considered, we think the objection was well founded. The writing did not show, nor tend to show, that Hartsook was in the employment of the plaintiff when it was made. It did not tend to contradict the statements of Hartsook, and nothing in the case made it relevant to the issues presented. Even if the objection might have been overruled for informality, no prejudice could have resulted from the exclusion of the writing.

2. The appellant complains of errors in the portion of charge which stated the issues, with respect to certain dates. The petition alleges that the sum of $43, referred to, was received "prior to January 23, 1891," while the charge represents the plaintiff's claim to be that it was received "prior to January, 1891," omitting the day of the month. No prejudice is suggested as likely to have arisen from this error, and we think it was immaterial. The petition alleged that Hartsook entered upon the discharge of the duties of his agency, and continued in the work thereof "until about the 1st day of March, 1890." The charge alleged that the defendant denies "that Hartsook continued in the employ of the plaintiff after March 1, 1891." The plaintiff complains that this made it appear that he claimed and had asserted that Hartsook remained in his employment until that date. Although he did not make that claim in his petition, he stated, as a witness, that the contract of agency had never been terminated. If there was error in the charge in the respect claimed, it was beneficial to the plaintiff; but the charge followed the answer on that point exactly, and is not open to the objection made.

3. In the fifth paragraph of the charge the court instructed the jury that "the mere taking of a note as evidence of the amount due from the defendant Hartsook to the plaintiff, Smith, would not release defendant Jackson, nor would it bind him to pay the interest provided in the note, nor attorney's fees." By the sixth paragraph the jury were told that if the $346 note given by Hartsook was in full satisfaction of all claims under the bond, and the plaintiff at the time agreed to return the bond, the plaintiff could not recover. It is insisted that the sixth paragraph is erroneous, and that both cannot be correct. The fifth was in the interest of the plaintiff, and he has no ground to complain of it. We are of the opinion that the portion of the sixth objected to is correct. The note referred to was payable on demand, but provided for interest at the rate of 8 per cent. per annum, and for an attorney's fee in case of suit. It appears that there was some dispute in regard to the amount due. That was settled by the giving of the note. A higher rate of interest than could have been demanded before was provided for, and also the fees of an attorney in case of suit. We think this was sufficient as a consideration for the release of the bond. Whether the note of Hartsook alone was more valuable than the claim against his bondsmen was a question for the parties, and not for the courts, to determine.

4. The appellant complains of the refusal of the court to give an instruction as follows: "(1) You are instructed that under the evidence herein you cannot allow any amount as traveling expenses to Hartsook. The claim of defendant Jackson that some or all of the $346 note was for traveling expenses is not sustained." Hartsook testified that he did not consider that the $346 note was for a just debt, because it was virtually for traveling expenses, which he says the plaintiff had verbally agreed to allow. No objection was made to this testimony, although it was not relevant to any issue presented by the pleadings. It was necessarily excluded from the consideration of the jury, but not specially referred to in the charge given. The jury were instructed that money advanced or loaned to Hartsook for the purpose of paying his traveling expenses while following the business of the agency, or in any way to assist him in carrying out the business of the agency, would come within the terms of the bond, and would be sums for which the defendant would be liable. This was all the plaintiff was entitled to ask on the point to which it referred, and, with other portions of the charge, clearly defined the duty of the jury with respect to traveling expenses.

5. It is said the verdict is not sustained by the evidence. That was conflicting, and, on some vital issues, more witnesses testified for the plaintiff than for the defendant. But testimony was given which, if credible, fully sustains the verdict, and it was within the province of the jury to determine the value of the evidence given for each party. We are not authorized to set aside the judgment for want of evidence, and do not find any ground for disturbing it. Affirmed.

EAGLE IRON WORKS v. TOWN OF GUTHRIE CENTER.

(Supreme Court of Iowa. Jan. 31, 1896.)

CONTRACT—CONSTRUCTION—GUARANTY OF QUANTITY—INTERPRETATION.

Plaintiff's guaranty to furnish a certain quantity of water per day, from wells to be con-

structed for defendant, was not controlled by defendant's specifications, containing statements as to the distance and depth of the water-bearing strata, and a requirement that the wells should be sunk to a certain average depth,—such statements being merely for the information of bidders, and not meaning that any number of wells would produce the specified quantity,—where it also appeared that plaintiff, after abandoning the work, acknowledged its obligation to furnish said quantity, and there was evidence that, if the wells had been properly constructed to said average depth, the said quantity would have been obtained.

Appeal from district court, Guthrie county; J. H. Henderson, Judge.

Action at law to recover a balance alleged to be due to the plaintiff upon a contract to construct waterworks for the defendant. There was a trial by jury, and a verdict and judgment for the defendant. Plaintiff appeals. Affirmed.

Bishop, Bowen & Fleming, for appellant. E. R. Sayles and F. O. Hinkson, for appellee.

ROTHROCK, J. 1. It is conceded that the defendant has not paid the full contract price for constructing the waterworks. The defense is founded upon the claim that the plaintiff did not perform its agreement. This involves a construction of the written contract. The defendant had plans and specifications prepared, and invited bids from contractors. The plaintiff was the successful bidder. It is not necessary to set out the specifications and contract in full. It is conceded that the works put in by the plaintiff did not and would not meet the requirements of the specifications, for the reason, mainly, that the supply of water was insufficient to meet the stipulated requirements; and we will set out that part of the writings which has reference to the sufficiency of the water supply. That part of the specifications which refers to that subject is as follows: "The contractors for the well or wells will furnish their own specifications and plans of the system which they propose to use, said system to furnish at least 500,000 gallons of good water per 24 hours, actual test. Said system will be at an average depth of 35 feet (the depth of the water-bearing strata is about 25 feet, and wells driven in the locality have driven about 15 feet below this depth without passing through the strata, indicating that the depth of the water vein is at least 15 feet). The test of the well or wells will be of the same duration as the test of the pumping machinery. The contractor for the water supply is to guaranty the supply. The working of the well or wells will be subject to the same condition as shown in the general remarks at the end of the specifications on pumping machinery. * * *" The stipulation in the contract with reference to the water supply is as follows: "Said second party [the plaintiff] also agrees to furnish a system of wells which said second party shall guaranty to furnish a supply of at least 500,000 gallons of good water per 24 hours for fire and culinary purposes."

It is argued on behalf of the plaintiff that its guaranty to furnish a sufficient supply of water is controlled by that part of the specifications which we have above set out. We do not concur in such a construction of the contract. The specifications do not undertake to give the capacity of the water-bearing strata. That part of the specifications is no more than a statement for the information of bidders. The representation that drive wells had been put down in that locality, and water obtained, was not an undertaking that any number of drive wells would supply 500,000 gallons of water daily; and we suppose that the guaranty was exacted because the securing of the water supply was a matter of doubt. The plaintiff abandoned the work without furnishing a sufficient supply of water, and the defendant refused to accept the work as a completed job. The thought that the plaintiff had complied with its contract did not occur to its officers until some time after it ceased to do any work on the plant. The defendant insisted that it should be completed, and in several letters, written afterwards, the plaintiff in the most positive terms acknowledged its obligation to furnish a sufficient supply of water to fulfill its guaranty. To make its obligation and promise emphatic it used the following language in one of its letters: "We have determined to give you a half million gallons of water a day if we have to run a pipe from Des Moines to do it. As soon as we are ready, we will put on force enough to make the changes in a very short time, and without the least inconvenience to your water supply." Plaintiff's counsel claim that the contract should receive that construction which will best effectuate the intention of the parties, and they cite Clark on Contracts, 590, 591, as follows: "Greater regard is to be had to the clear intent of the parties than any particular words which they may have used in the expression of their intent. If the meaning is not clear, the court will consider the circumstances under which the contract was made, the subject-matter, the relation of the parties, and the object of the agreement, in order to ascertain their intention, and for this purpose parol evidence is admissible." If we should apply these rules, it is very plain that the proper construction of this contract is that the plaintiff's guaranty was absolute.

Complaint is made of the refusal to give instructions to the jury asked by the plaintiff, and for instructions given by the court on its own motion. In the view we take of this contract, there was no error prejudicial to plaintiff in the matter of the charge to the jury. It appears that the court gave some force to that part of the specifications which we have above set out, and instructed the jury that, if the plaintiff sunk the wells to an average depth of 35 feet, it was a

compliance with the contract. We think this was more favorable to the plaintiff than was warranted by the contract; but, even under that instruction, the evidence supported the finding of a verdict that, if the plaintiff had properly constructed wells to that average depth from the surface of the ground, the supply of water would have been sufficient. The supply was attempted to be obtained by a number of drive wells. While one of them might furnish sufficient water for the ordinary purpose of a dwelling house, when all of them were connected with the steam pump the water pumped was mixed with sand so that it injured and damaged the pumping machinery. The town, being without an adequate supply of water, sunk four open wells, which relieved the situation to some extent.

There was evidence tending to show that the proper manner to obtain a supply of water was to sink a well about 25 feet in diameter, and wall it, part of the depth, with brick laid in cement, to keep out quicksand; and a witness was asked to estimate the cost of such a well. The plaintiff objected to this evidence, and the objection was overruled, and we think the ruling was right. There are other questions made by counsel which we do not think demand special consideration. We discover no error, and the judgment of the district court is affirmed.

GUYAR et al. v. MINNESOTA THRESHER MANUF'G CO.

(Supreme Court of Iowa. Jan. 31, 1896.)

APPEAL—ASSIGNMENT OF ERRORS—WHEN TOO GENERAL.

1. An assignment of error that the trial court erred in sustaining a demurrer is not sufficiently specific to be considered.

2. An assignment that the court erred in sustaining a motion for default and judgment, and to strike an amended and substituted petition, is not sufficiently specific.

Appeal from district court, Polk county; C. P. Holmes, Judge.

Action at law to recover commissions for the sale of a threshing machine and engine. A demurrer to the original petition was sustained on the 20th day of October, 1894, and plaintiffs were given 15 days in which to further plead. On October 27th they filed an amended and substituted petition. The defendant thereupon moved to strike the amended and substituted petition from the files, and for a default and judgment on the cause of action set out in the original petition. This motion was sustained, and judgment was entered dismissing the petition, at plaintiffs' costs, and plaintiffs appeal. Affirmed.

John McLennan, C. C. Dowell, and E. G. Albert, for appellants. St. John & Stevenson for appellee.

DEEMER, J. In the original petition the plaintiffs state that they are entitled to a commission for the sale of a thresher and engine to one Fred Wolfe, under and by virtue of a certain written contract made and entered into by and between the plaintiffs, on the one part, and by the defendant, through its agent, W. S. H. Brady, on the other. A demurrer to this petition, based upon three distinct grounds, was sustained, and plaintiffs were given 15 days to further plead. Thereafter they filed what was denominated "an amended and substituted petition," in which they pleaded that they were entitled to a commission for the sale of the machine to Wolfe, under and by virtue of a parol contract entered into between themselves and the defendant through its agent, Brady, after the written contract referred to in the original petition was executed. The defendant thereupon filed a motion for a default and judgment on the cause of action stated in the original petition, and to strike the amended and substituted petition from the files. This motion was based upon three grounds, as follows: First, the amendment was not filed in time; second, the substituted petition is in no sense an amendment, but an endeavor to state an original and different cause of action; third, the substituted petition is not an amendment to the original cause of action, but is irrelevant thereto. This motion was sustained, and plaintiffs appeal. The first assignment of error is as follows: "The court erred in sustaining defendant's demurrer to the petition." This assignment is not sufficiently specific to enable us to consider any question with reference to the ruling. Town of Waukon v. Strouse, 74 Iowa, 547, 38 N. W. 408. If the assignment was sufficient, there was no error because the plaintiffs elected to plead over, thus waiving the ruling on the demurrer. The second assignment is: "The court erred in sustaining defendant's motion for a default and judgment, and to strike plaintiffs' amended and substituted petition." It will be noticed that the motion was a double one,—First, for default and judgment on original petition; and, second, to strike the amended and substituted petition,—and that there were three grounds for the motion. Under repeated rulings of this court, the assignment is not sufficiently specific. State v. Harbach, 78 Iowa, 475, 43 N. W. 272; Leekins v. Nordyke & Marmon Co., 66 Iowa, 471, 24 N. W. 1, and authorities cited. Indeed, the statute itself is plain on this point. Code, § 3207: "* * * Among several points in a demurrer or in a motion * * * it must designate which is relied upon as an error. And the court will only regard errors which are assigned with the required exactness. * * *" Should we hold, however, that the questions argued by counsel are correctly presented, we are not prepared to say that the court so abused its discretion that we ought to interfere. The rule is that the discretion lodged in the trial court with reference to allowing rejecting amendments will only be interfered with when substantial

prejudice has resulted to the party complaining. Fulmer v. Fulmer, 22 Iowa, 230. It is not enough to simply show error in a ruling of this kind; prejudice must also appear. There is no showing of substantial prejudice in this case. True, the plaintiffs were compelled to pay the costs of the proceeding, but this they might have been compelled to do had the amendment been allowed to stand. The third assignment is as follows: "The court erred in entering judgment against the plaintiffs for costs." This is insufficient. Tomblin v. Ball, 46 Iowa, 190. The remaining assignment is that the "court erred in striking plaintiffs' amended and substituted petition from the files." From the authorities cited, it is apparent that this does not prevent any question for our consideration. As none of the assignments of error are sufficiently specific to "point out the very error objected to," the judgment of the lower court is affirmed.

SMITH et al. v. FARMERS' TRUST CO.

(Supreme Court of Iowa. Jan. 31, 1896.)

CONTRACT—PERFORMANCE.

A contract to make the excavation for a building under the instructions of an architect is performed, if the work is done as required by the architect, and to his approval, whether in conformity to the drawings made or not.

Appeal from district court, Woodbury county; Scott M. Ladd, Judge.

Action at law to recover an amount alleged to be due for an excavation made for the defendant. There was a trial by jury, and a verdict and judgment for the plaintiffs. The defendant appeals. Affirmed.

Lohr, Gardiner & Lohr, for appellant. Marsh & Henderson, for appellees.

ROBINSON, J. On the 17th day of June, 1893, J. W. Smith, one of the members of the plaintiff firm, entered into an agreement in writing, in which he undertook to remove dirt from ground designated, "under the instructions from J. W. Martin, architect, removing the dirt and leaving the ground ready for putting in the walls of the building to be erected on said ground, also excavating for the location of boiler and engine," for the sum of 30 cents per cubic yard. Under this contract 1,335 cubic yards of earth were excavated. The plaintiffs claim that the contract was entered into by Smith for their benefit, and that they performed the work, and are entitled to recover the amount of the contract price remaining after allowing certain credits due the defendant. The defendant admits that work was done to the amount claimed, but avers that Smith, when he entered upon the performance of the contract, was furnished a diagram by the architect which enabled the plaintiffs to determine the quantity of dirt that should be excavated, but that he carelessly and negligently removed 146 cubic yards of dirt more than was required by the diagram, and that the excess should be deducted from the amount which the plaintiffs are entitled to recover. The defendant, by way of counterclaim, states that, in consequence of the excessive part of the excavation, brick and stone work of the value of $183.62, in addition to the regular contract price of the building for which the excavation was made, became necessary, and that it was provided and paid for by the defendant. Credit for the amount so paid, in the sum stated, is asked. The verdict and judgment for the plaintiffs was for the amount of their claim.

1. The defendant asked the court to instruct the jury as follows: "It is immaterial whether J. W. Martin, the architect in charge, accepted as satisfactory the work done by the plaintiffs, under the contract in controversy, if you find from the evidence that the work was carelessly and negligently done, and not according to the contract, and if you further find that said acceptance was made by the architect in ignorance, on the part of the defendant, that the work was not done according to the contract." The instruction asked was refused, and of that ruling the defendant complains. The instruction was erroneous in virtually stating that the acts of the architect performed in the line of his duty were not binding upon the defendant. The plaintiffs were required to do the work under the instructions of Martin, and were required to do what he demanded. If they did what he instructed, and he approved what was done, the contract was performed on their part, and the defendant will not be heard to complain. So far as the plaintiffs were concerned, it was immaterial whether the architect required the excavation to be made according to the plans prepared for the building or not. Therefore, ignorance on the part of the defendant that the architect had sanctioned a departure from the plans would not release it from liability. We conclude that the instruction was properly refused.

2. On the trial of the cause a diagram known in the record as "Exhibit 1" was offered in evidence by the defendant. We understand that the diagram was of the required excavation, and that it showed the depth to which the excavation should have been carried in various places. The defendant claimed that the diagram was furnished to the plaintiffs for their use in doing the work, and that by reason of carelessness they wrongfully failed to comply with the diagram and made the excavation too deep in places, to the injury of the defendant as stated. The plaintiffs deny that they were furnished the diagram as stated, and claim that they were required to work according to a sketch of the excavation, which was not sufficiently specific to show to what depth the earth should be removed. There was evidence which tended to support each of these conflicting

claims. The court, upon its own motion, submitted to the jury several special interrogatories. In response to the first, the jury found that Exhibit 1 was not furnished to the plaintiffs. In response to the third, it found that the plaintiffs did not remove more dirt than was called for by that exhibit. In response to the fourth, it found that the plaintiffs had knowledge as to the different depths to which they were required to dig from the sidewalk grade throughout the excavation, but had no means of knowing the sidewalk grade. In response to the fifth special interrogatory, the jury found that the number of cubic yards of dirt the plaintiffs were required by the contract to excavate was 1,335; and in response to the sixth, it found that no extra brick or stone work was required in the foundation on account of the removal of too much dirt. The appellant contends that some of these findings are contrary to the evidence, and that some are in irreconcilable conflict with each other. There was much evidence tending to show that Exhibit 1 was not furnished to the plaintiffs, and that the sketch which they had referred to the grade of the sidewalk as a guide, but did not fix that grade. These findings must be regarded as fully supported by the evidence. The facts in regard to the third special finding are not so clear. It refers to Exhibit 1 only, while a civil engineer testified that, in making an estimate of the excavation required, he used that exhibit and another, marked "Exhibit 2," and from them ascertained that the number of cubic yards required to be taken out was but 1,189. Neither of these exhibits is before us, but if it be conceded that Exhibit 1 furnished sufficient information to warrant the conclusion of the engineer, and that the special finding was erroneous, it does not follow that the judgment should be set aside. As we have seen, the plaintiffs were required to do the work under the instructions of the architect, and not in accordance with Exhibit 1. It was, therefore, wholly immaterial whether more dirt was removed than that diagram required, if the architect did not instruct the plaintiffs to follow it. The fact to which the special interrogatory was directed was not controlling, and prejudice could not have resulted from the error, if any, in the view the jury took of the evidence with regard to it. It is insisted that the fifth special finding is erroneous. Whether it is, depends upon the contract referred to in the interrogatory, and that must have been the one into which Smith entered, the plaintiffs were not interested in any other contract; and if they excavated the number of cubic yards of earth which the architect required, and no more, the fifth special finding is correct, and the same is true of the sixth. For, if the plaintiffs removed no more earth than was required by the architect, they did not remove too much, and extra brick and stone could not have been required by any fault on their part. This view of the fifth and sixth special interrogatories is authorized by the record, and is the one which the jury appear to have taken. If this be true, and we must presume that it was, their answers were authorized by the evidence.

3. We do not find any ground for concluding that the special findings and verdict of the jury were the result of passion or prejudice, as suggested by the appellant. There was much and irreconcilable conflict in the evidence on most of the material issues in the case, and we think the conclusions of the jury with respect to all important issues were fully warranted. There was considerable evidence tending to show that the bottom of the excavation was too low in places, and that in one part it had been partially filled with loose dirt. But the work was done under the personal supervision of the architect, and there was evidence to the effect that he directed and approved it. In most respects, the variations between the bottom of the excavation and the desired levels were inconsiderable, and some of the evidence tended to show that the ground had been in part filled in or made by deposits of loose earth or rubbish of various kinds, and that the plaintiffs were not responsible for the condition of the places where such deposits were found. After a careful reading of the entire record, we conclude that there is no sufficient reason for disturbing the judgment of the district court, and it is affirmed.

HUBBELL v. AVENUE INV. CO. et al.

(Supreme Court of Iowa. Jan. 31, 1896.)

RECEIVERS—APPOINTMENT BY STIPULATION.

1. Code, § 2903, providing for the appointment of a receiver, under certain conditions, in foreclosure actions, during the pendency of the action, does not prevent the appointment of a receiver under stipulation of the parties, during the period for redemption.

2. A stipulation in a mortgage for the appointment of a receiver, in case of foreclosure, to receive the rents and profits during the period for redemption, to be applied on the mortgage debt, is valid.

3. Such a stipulation is binding on a subsequent grantee of the mortgaged premises.

Appeal from district court, Polk county; S. F. Balliett, Judge.

Action to foreclose a mortgage, and for the appointment of a receiver. Judgment for plaintiff, and the defendants appealed. Affirmed.

C. C. & C. L. Nourse, for appellants. Read & Read, for appellee.

GRANGER, J. The action is to foreclose a mortgage given by L. W. Goode on real estate in the city of Des Moines, to secure the sum of $16,000, with interest. Prior to the commencement of this action, the real estate was conveyed to the Avenue Investment Company. The following is a provision of the mortgage: "In case of a foreclosure of

this mortgage under any of its provisions, it is hereby agreed that, on filing the petition for such foreclosure, a receiver shall be appointed to take charge of the mortgaged premises at once, and to hold possession of the same until the debt is fully paid and the time of redemption expires, and all rents and profits derived from said premises shall be applied on the debt secured hereby." The plaintiff, on the filing of the petition, asked for the appointment of a receiver, and, upon a showing made, a receiver was appointed. A judgment was entered for plaintiff for the amount due on the note against L. W. Goode and the Avenue Investment Company, which had assumed payment of the notes in its purchase, and a decree was entered for the sale of the real estate. The decree also continued the appointment of the receiver until the debt was paid, or during the period of redemption. The question for our consideration is as to the validity of the order continuing the receiver. The showing for the continuance of the receiver, aside from the stipulation in the mortgage, was by affidavit, of which the plaintiff filed six, each fixing the value of the property at $15,000. The defendant filed eight affidavits, in which the value was fixed at from $33,000 to $35,000. The mortgage was given to secure a part of the purchase price of the property, the purchase price being $19,000. The amount of the judgment entered was $17,633.83. The land had been sold for the taxes of 1892, and the amount was included in the judgment. The defendant Goode is conceded to be insolvent, but there is no showing as to the investment company that had assumed payment of the notes. It will be seen that it was a matter of dispute, and, we think, of doubt, whether the property would be sufficient to pay the judgment, independent of the rents and profits, which were pledged as part of the security. Appellants' main contention against the action of the court is based on section 2903 of the Code, which is a provision reciting facts and conditions under which the court may appoint a receiver to take charge of and control property, under its direction, "during the pendency of the action"; and it is claimed that the action is pending, within the meaning of the section, only till the judgment is entered. We think a controlling fact in the case is the contract of the parties. The section permits this appointment, independent of the agreement of the parties, if the facts exist under which such an appointment is authorized. There is nothing in the section to restrict the right of parties, pending an action, to stipulate for the appointment of a receiver, or of the court to appoint one on such stipulation. Nor is there anything in the section intended to deny any right to the court or to the parties, as to a receiver, that would have existed had the section not been adopted. Now, we think it is not to be seriously questioned that, without the section, the court could, by a stipulation of the parties, place the property in the hands of a receiver, to be held under its direction. And it seems to us equally clear that the parties could, by contract, when the property was pledged as security, settle the conditions on which it should be preserved and applied. The parties, in making the contract, seem to have been in such doubt, as to the sufficiency of the property as security, as to provide that if proceedings to foreclose should be commenced a receiver should take the rents and profits, and apply them, and otherwise preserve the property, under the direction of the court. We see nothing in such a contract that is unconscionable or against public policy; nor do we see why it should not be enforced as the parties intended. The investment company took the property burdened with the incumbrance and its conditions. The judgment is affirmed.

CLARK v. RAYMOND et al.

(Supreme Court of Iowa. Feb. 1, 1896.)

GARNISHMENT—CONFLICTING CLAIMS—PRIORITIES.

Plaintiff, a judgment creditor, obtained a decree setting aside, as fraudulent, a deed by the debtor, and adjudging that the rents of the property so conveyed (which accrued in 1890 and 1891) were subject to plaintiff's judgment, "if taken by due process of law," but that plaintiff had no lien thereon. Subsequently plaintiff garnished W., in whose possession the rents were. D. intervened, claiming the fund on the ground that he had recovered judgment against defendant in 1892, and had garnished W. before the notice was served in plaintiff's case: but he failed to show whether he became a creditor of defendant before or after the fraudulent deed was made, or that the same was invalid as to him. *Held*, that plaintiff's claim was entitled to priority over that of D.

Appeal from district court, Harrison county; F. R. Gaynor, Judge.

This is a proceeding to subject certain money alleged to belong to John M. Raymond to the payment of a judgment against him in favor of the plaintiff. The money is in the hands of John W. Woods & Sons, and they were garnished, and the matter was tried upon the answer of the garnishees, and upon the claims of other creditors of Raymond who intervened in the action. The case was heard by the court, and the money in the hands of the garnishee was awarded to the plaintiff, and the interveners appeal. Affirmed.

S. H. Cochran, for appellants D. Tucker and L. H. Tucker. J. S. Dewell, for John W. Woods & Sons, garnishees, and appellants Lucius Raymond and Rebecca Raymond. Roadifer & Arthur and J. W. Barnhart, for appellees.

ROTHROCK, J. This is a contest between creditors of J. M. Raymond for the rents of certain lands formerly owned by him, and which at one time he conveyed to his son

L. H. Raymond. The controversy is really supplementary to the case of Clark v. Raymond, 86 Iowa, 661, 53 N. W. 354. We need not copy the opinion in that case here, but this opinion will not be understood by the reader without reference to the opinion on the other case. Pending that case the rents of the land in controversy were placed in the hands of John W. Woods & Sons, who, we understand, are bankers. The money was for a time held by them as security or indemnity to sureties on a supersedeas bond. It appears, however, that the sureties are no longer liable on the bond; and the appeal, as to the garnishees, is without any merit now, if it ever had any. It is claimed in behalf of appellants that they should have been allowed attorney's fees and expenses incurred in the case. We think the facts show that they are not entitled to such claims. The proposition demands no discussion. And the same may be said of the appeal of Rebecca Raymond and Lucius Raymond. They are clearly shown to have no right to the fund. It appears in the main case, above cited, that they were fraudulent grantees of John M. Raymond. S. H. Cochran is a party. His claim to the sum of $600 of the money is no longer matter of dispute, and need not be considered.

The only real controversy in the case arises between the plaintiff, on one side, and the interveners D. Tucker and Lucius Tucker, on the other side. After the main case was determined in this court, the plaintiff caused an execution to issue on her original judgment against John M. Raymond, and John W. Woods & Sons were garnished as debtors of the defendant in execution. At about the same time, D. Tucker caused an execution to issue upon a judgment which she held against John M. Raymond, and Lucius Tucker caused execution to issue in his favor upon a judgment against said John M. Raymond. Woods & Sons were garnished on these two executions, and the notices of garnishment were served before the notice was given in the plaintiff's case. There is no dispute that if the money was the property of John M. Raymond, and the plaintiff and the two Tuckers were ordinary judgment creditors, the Tuckers would be first in right. But it is claimed in behalf of L. W. Clark that she acquired a right to the fund because she was plaintiff in the main action, and she refers to the opinion in that case as supporting her contention. We think the decision in that case not only does not give the plaintiff a lien on the fund, but it expressly denies that right. It is necessary only to quote the following from the opinion: "The rents and profits of the real estate, the conveyances of which are set aside, are subject to the payment of the judgment, if taken by due process of law, but the plaintiff has no lien upon them." If the judgment of the district court can be sustained, it must be upon some other ground than that above considered. It appears that the rent of the land in controversy accrued in the years 1890 and 1891. The judgments of D. and Lucius Tucker against Raymond were rendered in 1892. But there is not one word in this whole record showing whether the Tuckers were creditors of Raymond when the fraudulent deed was made. And there is no showing that the fraud had any reference to any claim held by Tuckers against Raymond. For aught that appears, the debts were contracted after the conveyance. This was the record and evidence which the court below was called to pass upon, and it was held that the plaintiff was entitled to priority,—we suppose, upon the ground that she was an existing creditor, and the Tuckers, being interveners, failed to show when their debts were contracted, and that as to them the conveyance of the land was valid. This question is urged in argument by counsel for appellees and the subject is not mentioned in the argument in reply. Under these circumstances, we are not disposed to disturb the judgment of the district court, and it is affirmed.

CHICAGO, M. & ST. P. RY. CO. v. STARKWEATHER, Street Commissioner, et al.

(Supreme Court of Iowa. Feb. 1, 1896.)

EMINENT DOMAIN—RIGHT TO TAKE DEPOT GROUNDS FOR STREET.

Under Code, § 1270, authorizing cities and incorporated towns to take private property for streets, a town may extend a street across the depot grounds of a railway company, where such taking, though it interferes with, does not deprive the railroad company of, the right to operate its road.

Appeal from district court, Sioux county; George W. Wakefield, Judge.

This is a certiorari proceeding for the review of the action of the council of the incorporated town of Boyden in extending a street across the depot grounds of the plaintiff. There was a trial on the merits, and a judgment dismissing the petition. The plaintiff appeals. Affirmed.

Milt. H. Allen, for appellant. Boies & Roth, for appellees.

ROBINSON, J. The plaintiff owns and operates a railway which extends from the city of Milwaukee, in the state of Wisconsin, westward, through Iowa, to Chamberlain, in South Dakota. The incorporated town of Boyden is on that line, in Sioux county; and the defendants are the mayor, trustees, and street commissioner of that town. The railway extends from east to west through the town, and separates that part which contains most of the inhabitants, and which is north of the depot grounds, from the part which is south of it. Main street extends from north to south on each side of the depot grounds, but prior to Sep-

tember, 1892, was not opened through them. In that month the council passed an ordinance which, in terms, extended the street through the grounds; appropriating for that purpose a strip of land 80 feet wide, which connected the two parts of the street, and, when opened, will make it continuous. Proceedings were then had, under section 1244 of the Code, for the assessment of the damages to the plaintiff which the opening of the street would cause. They were assessed at $50. That sum was paid to the sheriff for the use of the plaintiff, and in December, 1892, a resolution was adopted by the council opening the street. In November, 1892, the plaintiff filed its petition in this case; alleging that the proceedings which had then been taken were illegal and void, for several reasons, and asking that they be annulled. A writ of certiorari was issued. A return thereto was made, and amendments to the petition, and an answer, were filed. A demurrer to the answer was overruled, and a trial was had, with the result already stated.

1. The plaintiff discusses the right of the defendant in a proceeding by certiorari to set out in an answer matters which do not relate to the jurisdiction to take the action of which complaint is made in the petition. We do not find it necessary to determine the question thus presented, for the reason that nothing material was set out in the answer in this case, of the character suggested, which could have prejudiced the plaintiff. We therefore express no opinion in regard to issues which may be presented by answer in certiorari proceedings. The important questions involved in this case were presented by the petition, the return, and the evidence.

2. It is claimed by the appellant that depot grounds are essentially public property; that they may be acquired by the exercise of the right of eminent domain, when they cannot be otherwise obtained; and that for these reasons they cannot be taken by means of that right. It is undoubtedly true that the railway and station grounds are operated and used in part for public purposes. The right of eminent domain rests upon the theory that property taken by virtue of it is to be used for the benefit of the public, and it cannot be exercised for any other than a public object. Stewart v. Board, 30 Iowa, 19, 1 Redf. R. R. 228; 6 Am. & Eng. Enc. Law, 515. But it is not true that property devoted to one public use cannot be subjected to any other. It is within the power of the general assembly to make the same property subservient to different public uses, or even to take it from one public use and devote it to another. Thus, the streets of a town or city may be used for the purposes to which streets are ordinarily devoted, and also for railway purposes. Milburn v. Cedar Rapids, 12 Iowa, 256; Cook v. City of Burlington, 30 Iowa, 105. It was said in Evergreen Cemetery Ass'n v. City of New Haven, 43 Conn. 234, to be unquestionable "that the legislature has the power to authorize the taking of land already applied to one public use, and devote it to another." That doctrine is sustained by numerous authorities, among which are the following: City of Bridgeport v. New York & N. H. R. Co., 36 Conn. 255; Inhabitants of Springfield v. Connecticut River R. Co., 58 Mass. 71; Boston Water-Power Co. v. Boston & W. R. Corporation, 23 Pick. 360; In re City of Buffalo, 68 N. Y. 170; In re Boston & A. Railroad Co., 53 N. Y. 576; Hickox v. Hine, 23 Ohio St. 523; Chicago W. D. Ry. Co. v. Metropolitan W. S. El. R. Co., 152 Ill. 519, 38 N. E. 736; St. Louis, H. & K. C. Ry. Co. v. Hannibal Union-Depot Co. (Mo.) 28 S. W. 483; In re Mayor, etc., of New York, 135 N. Y. 253, 31 N. E. 1043; Old Colony R. Co. v. Framingham Water Co. (Mass.) 27 N. E. 662; Cincinnati, S. & C. R. Co. v. Village of Belle Center (Ohio) 27 N. E. 468; City of Seymour v. Jeffersonville, M. & I. R. Co. (Ind. Sup.) 26 N. E. 188; 6 Am. & Eng. Enc. Law, 533; City of Ft. Wayne v. Lake Shore & M. S. Ry. Co., 132 Ind. 565, 32 N. E. 215.

The doctrine is subject to the modification, however, that the power to take the property for the second public use, when such an appropriation would supersede or defeat the first one, must be given expressly or by necessary implication; and stress is placed on that modification by most of the authorities to which we have referred. The use of the strip of ground in question for railway-depot purposes is in part for the public benefit, and therefore public. The use for which the town of Boyden appropriated it is also public; but the plaintiff has occupied and used it for railway purposes for many years, and its rights are prior, in point of time, to any which the town has acquired. It is true, the grounds were not obtained for the plaintiff through the exercise of the right of eminent domain, but by a conveyance from its owner; but it may be conceded, for the purposes of this case, that the method by which title was acquired is immaterial, so long as the use made of the land is a public one. The question remains to be determined whether, under the statutes of this state, the town was authorized to extend its street in the manner attempted, against the will of the plaintiff. It is said in Suth. St. Const. § 388, that "there is a broad distinction between acts which subvert or essentially impair a prior franchise or appropriation to a public use, and acts which permit a taking for a new public use, not involving an entire deprivation or diversion from the first use, but a joint use, so that after the second taking the same property serves still the original purpose, as well as the new, and the two uses are consistent. Under a general power to lay out and establish a railroad or highway, other railroads or highways may be crossed." Cities and incorporated towns of this state "have power to lay off, open, widen, * * * extend, estab-

lish and light streets, * * * and to provide for the condemnation of such real estate as may be necessary for such purposes." Code, § 464. They also have power to "purchase or condemn, and pay for out of the general fund, and enter upon and take any lands within or without the territorial limits of such city or town for the use of public squares, streets," and certain other purposes. Code, § 470. Section 1244 of the Code provides a method by which railroad corporations may take and hold real estate necessary for their use; and section 1270 permits cities and incorporated towns to proceed in the same manner to take "private property for streets, alleys and market house sites." The town of Boyden proceeded, under the two sections last cited, to appropriate the land in question; but it is said that no rights were acquired by so doing, for the reason that section 1270 permits the taking of "private" property for the purposes stated, and it is insisted the property in question is not private, but public. This is not correct. It is true that the railway property is held for the public use, and, for many purposes, is subjected to legislative control; but the title thereto is vested in a private corporation, for the benefit of its stockholders and other private persons. To that extent the property is private (Whiting v. Railroad Co., 25 Wis. 167; Railroad Co. v. Commissioners, 103 U. S. 4), and its use for the benefit of the public will not be materially affected by the taking in question. The extension of the street as proposed will cause some inconvenience to the plaintiff, in the operation of its trains, and will interfere with a platform of cinders which was constructed across the strip of land in question after the ordinance appropriating it was passed. But the inconvenience thus caused will be inconsiderable, as compared with the benefit to the public which will result from the opening of the street. The depot grounds are 1,400 feet in length by 300 feet in width. They are traversed by the main railway track and two side tracks of the plaintiff. The depot is near the middle of the grounds, measuring from east to west, and the proposed street will cross the grounds near the west end of the depot. No established street now crosses the right of way and the track of the plaintiff within the territorial limits of the town, although a crossing at the point in controversy was maintained and used for several years before the action in question was taken, and there is no ground for holding that the action of the council in deciding that the public interest requires the opening of the street is not conclusive. Town of Cherokee v. Sioux City & I. F. T. L. & L. Co., 52 Iowa, 280, 3 N. W. 42. We are of the opinion that the statutes of this state to which we have referred authorized the opening of the street as proposed. They do not in terms provide for the taking of property already devoted to public uses, but the taking sought by the defendants would not exclude the plaintiff from its property, nor interfere materially with its use, the operation of its trains, and the transaction of its business. The exclusive right to use the railway as such will remain in the plaintiff, and the public will have the right to cross it at proper times, and by suitable means.

Our conclusion has support in the authorities. In St. Paul Union-Depot Co. v. City of St. Paul (Minn.) 15 N. W. 684, it was held that the city could not take for a street real estate which the depot company had acquired for its use, where that use was necessarily exclusive, and it would be practically subverted by the proposed taking and use for the street. But it was said that "the power to extend streets and highways across railway tracks at suitable and convenient places is necessarily implied in the general authority conferred on cities and towns for such purposes, without express provisions on the subject. In like manner, railroads necessarily cross streets and highways on their routes. An adjustment of the two public uses is thus demanded by public convenience and necessity, wherever practicable, and may well be presumed to be contemplated in the legislation authorizing such improvements, and by corporations in accepting or acting under such legislation." See, also, Railroad Co. v. Dayton, 23 Ohio St. 510; Morris & E. R. Co. v. Central R. Co., 31 N. J. Law, 213; Chicago & N. W. Ry. Co. v. Chicago & E. R. Co., 112 Ill. 589; Bradley v. Railroad Co., 21 Conn. 305.

The views we have expressed dispose of the controlling questions in the case. There does not appear to be any substantial ground for disturbing the judgment of the district court, and it is affirmed.

HOLLIDAY et al. v. HILDEBRANDT et al.

(Supreme Court of Iowa. Feb. 3, 1896.)

SCHOOL-DISTRICT BONDS—INCREASE OF INDEBTEDNESS—PURCHASER—ACTION TO ENJOIN—PARTIES—BURDEN OF PROOF.

1. A school district is not an indispensable party to an action by citizens and taxpayers of the district against the officers of such district, the county board of supervisors, auditor, and county treasurer, to enjoin the payment of and to cancel certain bonds of the district, on the ground that they are void. Turner v. Cruzen, 30 N. W. 483, 70 Iowa, 202, and Moore v. Held, 35 N. W. 623, 73 Iowa, 538, distinguished.

2. Where a school district issues bonds for the purpose of taking up outstanding bonds, when it is at the time indebted 10 times the 5 per cent. on the assessed valuation of its taxable property allowed by Const. art. 11, § 3, in an action to enjoin the payment of and to cancel such bonds, the burden of showing that the proceeds of any one or more of such bonds were in fact applied to a legal debt is on the defendants.

3. Where, in an action to enjoin the payment of bonds issued by a school district when it was indebted largely in excess of the consti-

tutional limit, it is shown simply that such bonds were issued for the purpose of taking up outstanding bonds, but it does not appear that the proceeds were in fact used for such purpose, it appears that the indebtedness was increased by the issuance of such bonds.

4. Purchasers of school-district bonds are bound, at their peril, to take notice of the constitutional limitation of the power of such corporations to become indebted, and of such facts as the authorized official assessments disclose touching the valuation of all taxable property within the limits of such district.

Appeal from district court, Lyon county; George W. Wakefield, Judge.

Action in equity to enjoin the payment and for the cancellation of certain school-district bonds. Decree for plaintiffs, and the defendants appeal. Affirmed.

A. R. Brown, for appellants. McMillan & Dunlap, for appellees.

KINNE, J. 1. This action is brought in the names of five citizens and taxpayers of the independent districts of Allison and of Jackson, in Lyon county, Iowa, for themselves, "and for the benefit and use of all taxpayers" of said districts. The defendants are the officers of said districts, the board of supervisors of said county, the county auditor, the county treasurer, and certain other persons, who are the holders and owners of the bonds, the payment of which is sought to be enjoined. The case was submitted to the district court upon an agreed statement of facts, from which, and from the pleadings, it appears that prior to 1885 the territory now constituting the independent districts of Allison and of Jackson was known as, and in fact constituted, the "Independent District of Riverside," which said district was organized in 1872; that the assessed valuation of all property within the independent district of Riverside, as shown by the state and county tax lists for the several years, was as follows:

For the year 1872.....	$41,426 00
For the year 1873.....	68,307 00
For the year 1874.....	56,187 00
For the year 1875.....	69,873 64
For the year 1876.....	70,127 76
For the year 1877.....	56,312 00
For the year 1878.....	60,064 00
For the year 1879.....	47,220 00
For the year 1880.....	44,571 00
For the year 1881.....	44,033 00

From July, 1877, up to March 12, 1882, said independent district of Riverside had issued its negotiable bonds in an amount in excess of $160,000. It is conceded that, prior to the issuance of any of the bonds above referred to, said district had an outstanding indebtedness of $50,000; that none of the bonds involved in this action were issued for the purpose of paying judgments or judgment indebtedness, but all of them were refunding bonds, issued for the purpose of taking up prior outstanding bonds, issued ostensibly for the purpose of building schoolhouses; that said district never received any actual consideration for the bonds, but the same were fraudulently issued to take up old bonds, and no part of the proceeds was used to make public improvements in said district; that at and prior to the issuance of said bonds the affairs of said district were managed with the most reckless extravagance and fraud on part of its directors, who issued bonds and appropriated the proceeds to their own use. It is also conceded that the present holders of the bonds bought them in open market, before due, and paid a consideration therefor, and had no notice of any illegality in their issuance, except such knowledge as was disclosed by the records of said district and county, and by the constitution and laws of the state. The district court found that all of the bonds in suit were issued through fraud, and without consideration; that they were past due; that the holders took them with knowledge that they were issued in violation of the constitution and laws of the state,—and decreed all of them to be void, and canceled them, and enjoined the owners of them from selling, assigning, or transferring said bonds or coupons, or from proceeding in any manner to collect the same, and enjoined the officers of said districts and of the county, and their successors, from certifying, levying, or collecting any taxes to pay any part of the principal or interest of said bonds, and affording other relief.

2. It is insisted by the appellants that the school districts are indispensable parties to this action; therefore the decree of the district court should be reversed. Counsel rely upon the cases of Turner v. Cruzen, 70 Iowa, 202, 30 N. W. 483, and Moore v. Held, 73 Iowa, 538, 35 N. W. 623. These cases differ so radically from the case at bar that discussion of them seems unnecessary. In this action it is sought to prevent a threatened wrongful act of the district and county officers, in attempting to collect an illegal tax. While the district in such a case might be made a party, it is not a necessary party. Anderson v. Insurance Co., 88 Iowa, 586, 55 N. W. 348.

3. The constitutional provision touching indebtedness by such corporations is as follows: "No county or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount, in the aggregate, exceeding five per centum on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax lists previous to the incurring of such indebtedness." Const. art. 11, § 3. Appellants insist that no relief can be afforded plaintiffs in this action unless they show that all the bonds in controversy are void. The contention is that although it is conceded that these bonds are, in a large part, illegal, still no relief can be granted unless plaintiffs show just what part or portion of each particular bond is illegal. It is said that there is no evidence touching the

character of the original indebtedness of the district, or in the manner of its inception or creation, and that it must be assumed that it was created for a lawful purpose; that, for aught that appears, a portion of the original indebtedness was within the constitutional limitation, and hence a valid obligation against the district, and as to such portion the district could legally refund such debt; that, for all that appears in this record, some of the bonds canceled by the decree of the district court were taken in exchange for bonds which were in fact issued within the constitutional limitation. To sum up the argument of appellants on this point, we quote from their brief: "It does not affirmatively appear that any particular bond in controversy was issued in excess of the constitutional limit, or that the same is invalid in the hands of the present holder, or that it, at the time it was issued, increased the indebtedness of the district beyond five per cent. of the taxable valuation of the property within the limits of the independent district of Riverside." It appears that none of these bonds were issued to pay judgments or judgment indebtedness, and that when they were issued the district was indebted in a sum exceeding $50,000,—10 times the amount it might legally be indebted, under the constitutional limitation. The same question here presented was discussed in Anderson v. Insurance Co., supra. It was there held that, if the claim that a part of the proceeds of the bond in controversy were in fact applied to a legal debt was available, the burden of so showing would be with the holder of such bonds. There is no pretense that the appellants in this case, the holders of the bonds, have shown any facts which would enable us to say that the proceeds of any particular bond or bonds were in fact used to discharge an indebtedness of the district which was legal. The admitted facts do not show that any of the proceeds of the bonds in controversy in fact were used to take up outstanding bonds. It does appear that that was the purpose of their being issued, but further than that the record is silent.

4. It is contended that the issuance of the bonds in controversy did not increase the indebtedness of the district, but simply changed the form of the indebtedness then outstanding. If it appeared that the proceeds of the bonds in controversy had in fact been used to take up and cancel a valid indebtedness then existing, there might be some reason for claiming that the indebtedness had not been increased by their issuance. However, we are not called upon to determine the question which would be thus presented, as there is no evidence that, as a matter of fact, a single dollar realized from the sale of the bonds in controversy was used in payment or satisfaction of any prior indebtedness of the district, legal or otherwise. The evidence, so far as it shows anything relating to the proceeds derived from the sale of the bonds in controversy, is to the effect that such proceeds were converted by the officers of the district to their own use. It is manifest, therefore, that the indebtedness of the district, which then exceeded the constitutional limit, was increased by the issuance of the bonds in controversy.

5. Finally, it is said that the purchaser of the bonds had a right to act upon the presumption that the officers of the district had done their duty under the law. Purchasers of such bonds are bound, at their peril, to take notice of the constitutional limitation upon the power of such corporations to become indebted, and of such facts as the authorized official assessments disclose touching the valuation of all taxable property within the limits of the corporation. Buchanan v. Litchfield, 102 U. S. 278; Dixon Co. v. Field, 111 U. S. 83, 4 Sup. Ct. 315; Lake Co. v. Graham, 130 U. S. 674, 9 Sup. Ct. 654; Township of Doon v. Cummins, 12 Sup. Ct. 220; First Nat. Bank of Decorah v. District Tp. of Doon (Iowa) 53 N. W. 301; Anderson v. Insurance Co., 88 Iowa, 593, 55 N. W. 348. The decree of the district court is affirmed.

NORTHWESTERN NAT. BANK v. SLOAN et al.

(Supreme Court of Iowa. Feb. 3, 1896.)

MORTGAGES—PAYMENT.

The purchaser of land subject to a mortgage, the payment of which his grantor had assumed, cannot, on purchase of the mortgage and note secured thereby, after maturity, to protect his equity, either by himself or through his assignee, compel the mortgagor to answer back as an obligor on the mortgage, as such purchase, as against the mortgagor, is a payment of the mortgage.

Appeal from district court, Woodbury county; Scott M. Ladd, Judge.

Action for the foreclosure of a mortgage. Judgment for plaintiff, and defendants appealed. Reversed.

Swan, Lawrence & Swan, for appellants. Lewis & Holmes, for appellee.

GRANGER, J. In 1887, the defendants made of the Lombard Investment Company a loan of $5,000 and secured the same by a mortgage on two quarter sections of land. May 17, 1890, the defendants sold the land to Douglas Armstead for a consideration of $48,000. Of the amount $7,000 was paid in hand, a note for $36,000 given to Sloan, secured by mortgage on the land, and an agreement, by Armstead, to pay the $5.000 note to the Lombard Investment Company. May 19, 1890, Armstead conveyed the land to William Gordon, for Gordon and D. T. Hedges. This conveyance was subject to both the Sloan and the Lombard Investment Company mortgages. On the 4th day of May, 1892, Gordon, by written contract, sold to D. T. Hedges his

interest in the land, subject to incumbrances thereon, amounting to $41,000 and six months' interest and taxes. The deed, at the request of D. T. Hedges, was made to W. V. Hedges, as trustee. The Lombard Investment Company note and mortgage is now held by the plaintiff bank, and this action is to foreclose the mortgage, and asks a personal judgment against the defendants Sloan, who alone answer, although others are made defendants. The answer presents a plea of payment, and the issue thereon presents the only question on this appeal, and that question is mainly one of fact.

The particular fact relied on as constituting the payment is that, about August 1, 1892, D. T. Hedges paid to the Lombard Investment Company the amount of the note, and it was delivered to him. This fact is not questioned, but the dispute is as to the legal effect of the transaction, in view of the circumstances under which the money was paid. There is no claim that, in the deed from Armstead to Gordon, or the contract of sale from Gordon to Hedges, there was, in terms, an agreement to pay the note in question. It is, however, claimed that, in each of the two sales, this $5,000 constituted a part of the consideration agreed to be paid for the land. In appellee's argument there is a concession that "if, in such trade, the note was in fact regarded by the parties to the trade as a part of the consideration, that then the note should be considered paid." This brings us to the particular question of what construction is to be placed on the act of Hedges in paying the money to Lombard Investment Company. It is appellants' thought that it was done because it was a part of the consideration agreed upon. Appellee's thought is that the transaction on the part of Hedges was a purchase of the note with a view to protect the equity in the land. It appeared in evidence that, when the deed was made by Gordon to W. V. Hedges, trustee, D. T. Hedges anticipated the formation of a syndicate that would take the land and plat and sell it; that he purchased the land with that in view; and that he had agreed to protect the land from the liens thereon. It is said that he took up the mortgage for that purpose. No syndicate was ever formed, and the legal title to the land is in W. V. Hedges, in trust for D. T. Hedges. It seems to us that there is no reasonable view of the evidence to warrant a conclusion but that both Gordon and D. T. Hedges bought this land subject to the $5,000 note and mortgage as a part of the consideration. It sometimes happens that land is bought subject to an incumbrance thereon, when the incumbrance is not regarded as a part of the consideration or purchase price; but, when that occurs, it is because of facts that plainly show the reasons for so doing, as, where there are other interests to be protected, in whole or in part, by such a course. But, if A. buys land of B. with no other motive than to own the land for the uses to which it is adapted, or for sale, and B. has given his note to C., secured by mortgage thereon, and A. takes the land subject to the mortgage, the legitimate inference is that the mortgage debt was intended as a part of what he should pay for the land, because, from the facts, no other reason could be assumed for his taking the land thus burdened. In this case the facts are not essentially different. Hedges is removed a step or two from being the immediate purchaser from Sloan. When he and Gordon made the purchase from Armstead, no reason appeared why they should take the land, burdened with the mortgage in question, and be compelled to pay it to protect what they purchased, except that it was a part of what they intended to pay for the land. We do not think that there is any escape from such a conclusion. The full title passed to Hedges, with the facts the same as when it was purchased from Armstead. The fact that he purchased anticipating a syndicate could make no difference as to the purpose in taking the land with the incumbrance. Now, let us carry the illustration a little further as to A., B., and C. Suppose that, when the mortgage given by B. to C. falls due, it is presented to A., and he pays it; or, to bring it closer to the claimed facts of this case, suppose he takes an assignment of it as a purchaser. Can he, then, recover from B., as the maker? If not, why not? There is but a single reason, and that is, that in the payment of the amount of the note, to remove the burden from the land, he has done just what he agreed to do in order to have his title clear. His agreement was to protect his title against the mortgage, and he cannot, by any method of doing that, make B. liable to him for his expenditure. If he cannot do that, can he, after the assignment, transfer the note and mortgage to D., and he recover from B.? In such a state of facts we have, practically, this case. This plaintiff took the notes when overdue, and it is not contended that it can recover if the transaction of Hedges was a payment. We do not think that it makes any difference what Hedges intended in paying the money. He admits that he did it to protect the title which he took subject to such a burden. Now, if Sloan, who, in selling, contracted that his grantees should protect their title against this incumbrance, and when they have done just the act necessary to, and intended for, that purpose, and no other, can be made liable for the expenditure in doing it, we have a strange state of of the law. Mr. Jones, in his work on Mortgages (volume 1, § 751), in such a case, says: "If the mortgage debt be afterwards paid by the mortgagor, equity will compel the purchaser, by way of subrogation, to refund the money so paid, or give up the property." It is further said: "Whenever the mortgage debt forms a part of the consideration of the purchase, although the purchaser has not entered into any covenants or agreements to pay it, he is bound,

to the extent of the property, to indemnify the grantor." The same rule is stated in Wood v. Smith, 51 Iowa, 156, 50 N. W. 581. This rule is not questioned. In any view of this case, after the conceded facts that Hedges paid or obtained the mortgage to protect his title, he cannot, either by himself, or his assignee, compel Sloan, who, by his contract, under the authorities, is indemnified against such payments, to answer back as an obligor on the note or otherwise. There is no claim of any equities to protect Hedges. The equities are all with the defendants. The petition should be dismissed. Reversed.

HARRISON v. PUSTEOSKA.

(Supreme Court of Iowa. Feb. 3, 1896.)

AGENCY FOR SALE OF REALTY—ACTION FOR COMMISSIONS—BURDEN OF PROOF.

Where the complaint, in an action for commissions for procuring a purchaser for land, alleged an express oral promise by defendant to pay a reasonable commission, but defendant denied the promise, and testified that he merely told plaintiff, if he found a purchaser, to send him around, and "I will do as much for you," it was proper to charge that plaintiff must prove the promise.

Appeal from district court, Tama county; John R. Caldwell, Judge.

Action at law to recover compensation for services alleged to have been rendered in securing a purchaser for real estate. There was a trial by jury, and a verdict and judgment for the defendant. The plaintiff appeals. Affirmed.

W. H. Stivers, for appellant. Struble & Stiger, for appellee.

ROBINSON, J. The plaintiff alleges that in September, 1892, he was engaged in business at Toledo, in this state, as a real-estate agent, and that the defendant was the owner of a meat market, with a two-story brick building, and other buildings, yards, tools, and horses and wagon, used to carry on a butchering and meat business in Toledo. That the defendant left the property with the plaintiff as a land agent and broker, to find a purchaser for the property for the sum of $7,000, and orally agreed to pay the plaintiff, if he should furnish or procure a purchaser for the property at the price stated, a reasonable commission therefor. The plaintiff further alleges that he furnished a purchaser for the property at the price stated, and is entitled to $200 as compensation for the services rendered, and he asks judgment for that amount. The defendant denies that the plaintiff is entitled to any compensation for services rendered, and by way of counterclaim seeks to recover $23.30 as balance due on account, and the further sum of $400 on account of lots in the town of Griffith, in the state of Indiana, purchased by the defendant through the plaintiff under an alleged guaranty by the latter in regard to the profit which should be made from the investment. The balance alleged to be due on account is not denied, and the verdict and judgment in favor of the defendant were for that amount.

1. It is shown, without conflict, in the evidence, that the plaintiff found a purchaser for the property the sale of which the defendant is alleged to have authorized, and the latter admits that he sold and agreed to convey it to the purchaser thus found for the sum of $7,000. It is also shown that the sale was not carried into effect, for the reason that the defendant could not convey a perfect title to the property. But the defendant states that he did not agree to pay the plaintiff for finding a purchaser; that he merely told the plaintiff, "If you hear of any one that wants to buy and go into the butcher business, send him around, and I will do as much for you," to which the plaintiff said, "All right." The evidence in regard to the alleged contract of agency was conflicting, and the court instructed the jury as follows: "If you find from a preponderance of the evidence that the defendant, H. Pusteoska, left his property with the plaintiff, R. J. Harrison, as a land agent and broker, to find said Pusteoska a buyer therefor, for $7,000.00 cash, for which service he agreed to pay said Harrison a reasonable commission; that said plaintiff procured one J. F. Klespie as a purchaser for said property; and that, after the said Klespie had entered into a contract of sale of said property with defendant, the defendant refused or was unable to carry out the terms of said contract of sale,—then the plaintiff is entitled to a commission from defendant for said services." The plaintiff complains of this portion of the charge, on the ground that it required him to show that the defendant agreed to pay him a reasonable sum for the services rendered, although it is the law that proof of services rendered by one for the benefit of and accepted by another authorizes a presumption that payment for the services rendered was to be made. The plaintiff did not seek to recover on an implied, but upon an express, agreement, and the charge followed the averments of the petition. The defendant had virtually admitted that the plaintiff was authorized to find a purchaser, but claimed that by the terms of his authority he was not to receive any compensation for doing so, excepting that the defendant was to "do as much" for him. We think that, as applied to the pleadings and the claim of the parties, the objection made to the charge is not well founded.

2. It is urged that the verdict was contrary to the evidence. We need not set it out at length. It was conflicting, and some of it tended to support the claims of the defendant. The jury were authorized to find that there was no agreement to pay any definite, or even a reasonable, compensation for the finding of a purchaser; that the defendant

did not expect to pay anything for such service, and that the plaintiff knew the fact before he had rendered it. They were also authorized to find that the plaintiff was not authorized to fix any price or terms of sale, and that when he brought the purchaser to the defendant the latter stated that he wished to sell, but did not think he could give a clear title to the property on account of the condition of his wife, who, it is said, was insane. If the evidence for the defendant is credible (and the jury evidently found that it was), there was no express agreement to pay the plaintiff for finding a purchaser, and no implied obligation was created by what the plaintiff did. The judgment of the district court appears to be correct, and it is affirmed.

RICE et al. v. MOYER et al.

(Supreme Court of Iowa. Jan. 30, 1896.)

WILLS—CONSTRUCTION—ESTATE CONVEYED.

Under a will providing that "I * * * will and bequeath to my wife * * * my brick store building * * * and the proceeds arising therefrom, and all the loose property, at her death it goes to her daughter, A.," the wife takes only a life estate in the house.

Appeal from district court, Tama county; John R. Caldwell, Judge.

Proceeding for the construction of a will. Judgment, from which the plaintiffs appealed. Affirmed.

Struble & Stiger, for appellants. W. H. Stivers and S. M. Endicott, for appellees.

GRANGER, J. Alfred Rice died testate in 1890, and the following is his will: "Traer, Iowa, July 21st, 1890. Know all men by these presents, that I, Alfred Rice, being of sound mind, do will and bequeath to my wife, Betsey Rice, my brick store building, situated on lot 31-32, block 14, in Traer, and the proceeds arising therefrom, and all the loose property, at her death it goes to her daughter, Adell Moyer. And to my nephew, Bruce Rice, house on lot 16, block 24, in Traer. And to my nephew Willie Stone, sum of $100.00 in cash, to be left in the care of R. H. Moore until he becomes of age. The rest of the property to be equally divided among my children, Earl D. Rice, O. J. Rice, H. M. Rice, Arch Rice. And I appoint Adell Moyer and Charlie Moyer administrators of my estate. Alfred Rice." Betsey Rice died in 1892, and this proceeding presents the single question of whether the devise to her of the brick building in Traer is a fee or life estate. It is not questioned but that, as to "all the loose property," her interest was a life estate, with a remainder to the defendant Adell Moyer. It seems to us that the same construction is applicable to the real estate. The entire bequest is made in a single sentence, and it is a single bequest as much as it could be with the specification of more than one class or kind of property. It is a grant of the store building and all of the loose property. We know of no rule of construction by which the pronoun "it" is to refer to one part of the property granted more than to the other. We regard it as a single grant of property of different kinds. It is a gift of property, one part of which is loose and the other not. The two designations are essential to identification. No case coming to our notice is like it. We are referred to such cases as In re Will of Burbank, 69 Iowa, 378, 28 N. W. 648, and cases cited therein, wherein it is held that the effect of words which would amount to a devise of a life estate is so changed by words granting a right of absolute disposition of the property as to make the devise one of an estate in fee. That rule has no application to this case. No one provision of this will is repugnant to another. In this case we are only to determine the effect of the remainder granted. The case of Andrews v. Schoppe, 84 Me. 170, 24 Atl. 805, is quite instructive on the subject of construing wills, and we quote as follows: "It has been well said that it is extremely difficult to construe one will by the light of decisions upon other wills framed in different language. Unless the words used are very similar, they are more likely to mislead than to assist in coming to a correct conclusion." The language is especially applicable to this case. Except as to announcing the well-known rule that the intent of the testator is to control, the cases do not aid us; for they are so different as to make the language quoted applicable to them. It is not important to say more. The case, because of its singularity, calls for our judgment as to the meaning of the language employed by the testator. Our view accords with that of the district court, and its judgment is affirmed.

KELLEHER v. CHICAGO, ST. P. & K. C. RY. CO.

(Supreme Court of Iowa. Feb. 1, 1896.)

STATUTE OF LIMITATIONS—DAMAGES TO ABUTTING PROPERTY OWNER—SETTLEMENT.

1. Limitations did not begin to run to an action to recover damages for the construction of an approach to an embankment leading to a railway crossing, which approach extended to and abutted on plaintiff's premises, from the time the embankment was made, though the approach may have been a part of its plan; a right of action accruing to plaintiff only from the construction of the part abutting on his property.

2. An action to recover damages for the construction of an embankment was settled by defendant's paying to plaintiff a stipulated sum, and orally agreeing to build an approach to such embankment. *Held*, that such settlement was a bar to the maintenance of an action by plaintiff to collect damages for injury to his property by reason of such approach, when built, its proper construction being conceded.

Appeal from district court, Polk county; S. F. Balliett, Judge.

Action at law, in which plaintiff seeks to recover damages from defendant for constructing an approach to an embankment erected by the railway company to afford a crossing over its tracks from a certain alley in the city of Des Moines, which is in the rear of the plaintiff's property. The defendant pleaded the statute of limitations, and a settlement had with the plaintiff prior to the bringing of this action. A demurrer to the answer was overruled, and, plaintiff electing to stand thereon, judgment was rendered against him, from which he appeals. Affirmed.

Henry S. Wilcox, for appellant. Cummins & Wright, for appellee.

DEEMER, J. It is alleged in the petition that the embankment was constructed adjacent to plaintiff's lots in the year 1885, and that in the year 1891 the defendant extended the embankment by building an approach thereto in the rear of plaintiff's lots, so that they now abut, and ever since have abutted, upon the portion of said embankment which is constructed as an approach. The first division of the answer pleads the statute of limitations. The second pleads that in 1890 plaintiff brought suit against the defendant for negligently constructing the embankment in such a manner as to obstruct the flow of water, and for neglecting to construct approaches to the embankment so that plaintiff could cross over the same, and asked damages for the sum of $600; that issue was duly joined in this suit, and thereafter, and on or about June 3, 1891, plaintiff and defendant orally settled and compromised the same, and all matters of difference, and claims or demands relating to the same, in which settlement plaintiff agreed to receive, in full satisfaction and discharge of the alleged claims and demands, the sum of $200, with the costs of suit, and, as a further consideration for said discharge and satisfaction, plaintiff demanded and defendant agreed that within a reasonable time it would build the approach in question, as part of its embankment; that the building of the approach was one of the things which the plaintiff demanded to be done as a part consideration for the settlement. And defendant further pleaded that, in accordance with this agreement of settlement, it paid plaintiff the $200 and the costs of the suit, and, within a reasonable time thereafter, constructed the approaches, as required by the terms of the agreement of settlement. The plaintiff demurred to each division of this answer,—to the first because the statute of limitations would not begin to run until the embankment was completed to such an extent as that plaintiff's property abutted thereon; and to the second because it appears that the claim sued upon in this action did not exist at the time of the settlement, and was not included in the said settlement. The demurrer was overruled as to each count of the answer, and, plaintiff electing to stand thereon, judgment was rendered against him.

1. As to the first division of the answer, we think the demurrer should have been sustained. The construction of the embankment adjacent to plaintiff's lots did not give him a right of action for the taking of his property. His right accrued when the approach was built so as to abut upon his premises. It was the construction of the approach which caused the damages here sought to be recovered, not the building of the embankment. And the fact that the approach was contemplated when the embankment was made does not change the rule.

2. The demurrer to the second division of the answer presents the question of settlement. And, before discussing this, it may be well to say that in the action originally brought by plaintiff against defendant, settlement of which is relied upon as a defense, plaintiff, in an amendment to his petition, pleaded that: "When defendant built the embankment, it put sewer pipes at the sides of the streets where they were crossed by said embankment, but soon after the council of the city of Des Moines, by resolution, directed and required the defendant to construct approaches to its embankment, and to extend the sewer pipes so as to serve proper drainage; but defendant neglected to comply therewith, so far as said pipes were concerned, and built the approaches so as to cover the pipes and prevent the flow of water through them, and has ever since neglected to keep them open and put them in condition fit for use;" and "that the council of the city of Des Moines, by resolution passed about September 16, 1887, directed and required the defendant to construct an approach to its embankment where it crossed said alley." We are then to determine whether the settlement of this cause of action in manner and form as pleaded in the answer bars plaintiff of his right to recover. It will be noticed that according to the pleading the plaintiff, as a part of the settlement, required defendant to build the very approach of which he complains. Can he now say that, by reason of its having been constructed, he is entitled to more compensation than defendant gave him in settlement? We think not. The plaintiff says that the defendant merely undertook to do what the law required of it. It may be this is true, but is the defendant to be mulcted in further damages because it did what the plaintiff required of it as a condition of the settlement of the matter? Manifestly, this would be a most harsh and inequitable rule. He requested, and, in a sense, compelled, the defendant to do the very thing of which he complains, and at the same time received $200 in money for the damages claimed to be due him by reason of the construction of

the embankment; and he cannot now be heard to say that he suffered additional damages by reason of the construction of the approach, which he concedes was properly, not negligently, erected. It is contrary to every known principle of law for one to recover damages for the doing of an act which he insists upon being done as a condition to the settlement of a claim for not doing the thing complained of. The court was in error in overruling the demurrer to the second division, but, as the third division is decisive of the case, no prejudice resulted, and the judgment is affirmed.

PETERSON v. WALTER A. WOOD MOWING & REAPING MACH. CO.

(Supreme Court of Iowa. Feb. 1, 1896.)

SALE — CONTRACT — CONSTRUCTION — WARRANTY — WAIVER OF CONDITIONS — AUTHORITY OF AGENT — APPEAL.

1. Assignments of error that do not point out the specific grounds of objection will not be considered.

2. Testimony of a defendant's breach of a contract is not rendered inadmissible because at the time it is offered plaintiff has not yet proven his own compliance with its terms.

3. A compliance with the provision of a written contract for the sale of a harvester, requiring immediate notice in writing to be given by the buyer to the seller or its local agent in case the machine fails to work well on being started, is useless and unnecessary, where the local agent who sold the machine is present when it is started, and knows it fails to work well.

4. A written contract for the sale of a machine, containing a warranty, also provided that "no one has any authority to add to, abridge, or change this warranty in any manner." *Held*, that such provision, if literally construed, would be unreasonable and void, not permitting even the parties by mutual consent to change or waive any of its conditions, but that, under a reasonable construction, the seller being a corporation which could act only through its officers and agents, an agent who had authority to make the contract, sell and start the machine, see that it worked properly, and, if not, to receive it back and return the buyer's notes, would also have authority to waive its formal provisions and agree to a rescission of the sale.

Appeal from district court, Lyon county; Scott M. Ladd, Judge.

Action to recover the price paid for a harvester. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

E. Y. Greenleaf, for appellant. Parsons & Van Wagenen, for appellee.

KINNE, J. 1. Plaintiff ordered a reaping machine of the defendant, which he agreed to purchase subject to the following printed warranty: "All our machines are warranted to be well made and of good material, and to do good work, with proper management, when set up and operated as per printed directions. If, upon starting any of our machines, it should not work well, immediate written notice must be given to the Walter A. Wood Mowing and Reaping Machine Co., at Minneapolis, Minnesota, or the local agent from whom it was purchased, and reasonable time allowed to get to it and remedy the defects, if any (the purchaser rendering necessary and friendly assistance); when, if it cannot be made to do good work, it shall be returned, free of charge, to the place where received, and the payment of money or notes will be returned. Failure to immediately give notice as above, or continued possession of the machine, whether it is kept in use or not, shall be deemed conclusive evidence that the machine fills the warranty. No one has any authority to add to, abridge, or change this warranty in any manner." He claims that there was a breach of said warranty, in that said machine was not made of good material and would not work well. That, in pursuance of the terms of said warranty, he notified the agent from whom he purchased the machine of said defects, and said agent undertook to remedy them, but was unable so to do, with all the assistance which plaintiff could render. That he offered to return the machine to the agent of whom it was purchased, and at the place of purchase, and said agent directed him not to return it, and refused to return to plaintiff his notes given for said machine. That the purchase price of the machine was $175, and that said machine was worthless, and plaintiff had been damaged in that sum. In an amendment filed at the close of the testimony plaintiff stated that at the time of the delivery of the machine to the defendant, at Ellsworth, Minn., the defendant accepted it and promised to return plaintiff's notes, and waived the requirement of the warranty as to written notice, and as to any further trial of the machine. Defendant denies all of the allegations of the petition and amendment thereto not expressly admitted or explained. Avers that the machine was sold to plaintiff for $125; that plaintiff was satisfied with the machine, and executed his notes therefor; that plaintiff did not comply with the terms of the warranty, in that he retained the machine without making complaint; that he failed to give immediate notice to the defendant or its selling agent of the failure of the machine to work, as provided in the warranty; that he gave no time or opportunity to remedy any defects in said machine. Plaintiff, in a reply, denied all allegations of the answer which were inconsistent with the facts stated in the petition. The jury returned a verdict for the amount of the notes and interest, upon which judgment was entered. Defendant appeals. This action is brought by plaintiff to recover the purchase price of the machine,—$125,—and interest.

2. While the evidence is conflicting, yet we think it shows that the machine was purchased of one McRoberts, the local agent of the defendant at Ellsworth, Minn. The machine was taken home by the plaintiff on Thursday, and tried in oats and timothy. That after a very little timothy had been cut, McRoberts told plaintiff if he would

then give him the notes it would save him another trip back; and also told plaintiff if it did not work he would give his notes back. Plaintiff at the time told McRoberts that he was not satisfied with it. Plaintiff thereafter tried the machine in other grain, and it did not work well. It would not bind or elevate the grain. Either Saturday or Monday following, plaintiff went to see McRoberts, but could not find him. He left word with his wife, and returned the machine to the place from which he got it, on Saturday or Monday. After plaintiff had started to haul the machine in, McRoberts went to plaintiff's place, but as he took another road he missed plaintiff. The evidence also shows that when McRoberts took the notes he must have known that the machine was not working properly. The same day the machine was returned. plaintiff demanded his notes of McRoberts, who refused to deliver them to him. Some days afterwards, and when plaintiff was about done harvesting, McRoberts and one Andrews, a general agent of defendant, saw plaintiff, and endeavored to induce him to take the machine back and give it another trial, which plaintiff refused to do. It is conceded that plaintiff never gave any written notice to either the defendant or McRoberts.

3. Many of the questions discussed by counsel cannot be considered, because the assignment of errors is insufficient. This is true as to the 1st, 5th, 6th, 7th, 8th, 13th, and 15th assignments. They require us to examine the testimony in order to determine just what errors are claimed to have been committed in the admission of testimony. They do not point out the specific errors relied upon, as the statute requires. They base error on the overruling of motions generally, which motions contain many separate grounds. The requirements of the statute in this respect are so plain, and the necessity for a reasonable compliance therewith has been so frequently pointed out in repeated decisions of this court, that we deem it unnecessary to again refer to the cases holding that such assignments raised no question for our consideration.

4. We proceed to a discussion of the questions as to which proper assignments of error are made. Plaintiff offered, and read in evidence against defendant's objection, the depositions of Magnus Larsen and Nels Rasmussen. Defendant objected to the reading of these depositions, because, as he claimed, it had not then been shown that plaintiff had complied with the terms of the warranty. These depositions tended to show that McRoberts was present when the machine was first started, that it did not work well, and that McRoberts admitted that fact. Now, the fact, if such it was, that plaintiff had not then shown such a compliance on his part with the conditions of the warranty as would authorize a recovery, was no reason for excluding these depositions. Plaintiff had not finished his case, and the court might well assume that, if any fact remained to be established to entitle plaintiff to recover, evidence of it would be thereafter introduced. Furthermore, the order of the introduction of evidence is so largely a matter within the discretion of the trial court that we should not interfere with the rulings relating thereto unless it clearly appeared that the court had abused its discretion in that respect. Kinne, Pl. Prac. & Forms, § 484, and cases cited. There was no abuse of discretion in these rulings.

5. Error is assigned in the giving of paragraph 2 of the court's charge to the jury. It is said it improperly submitted to the jury the question of notice being given as to defects in the machine; also that it was wrong in submitting the question as to whether plaintiff immediately returned the machine after discovering the defects; and that it erroneously assumed that it was the duty of the purchaser to immediately return the machine. This instruction was based upon the pleadings, as well as the evidence, and that fact is to be remembered; and when the entire instruction is read in connection with all of the charge, we do not think it is fairly open to the criticism made.

6. Paragraph 3 of the charge is objected to, because it is claimed that in it the jury were told that, if McRoberts, defendant's agent, received the machine, there was a waiver. Paragraph 4 is objected to, because it assumes that McRoberts had authority to agree to surrender the notes and to waive the requirements of the contract of warranty. We may consider all of these objections together. There was evidence showing that, after the machine was returned, McRoberts agreed to return the notes; and from that fact it is fair to assume that, if McRoberts had the power so to do, he waived the written notice called for by the contract of warranty, and also any further trial of the machine. The theory upon which the court submitted the case to the jury was that if the machine did not work as required by the warranty, and was not accepted as so doing by the plaintiff when he gave his notes for it, and it was returned to the place of purchase to McRoberts immediately upon discovering that it would not work, and that McRoberts, as agent for the defendant, received the machine upon its return, and accepted it for defendant, and promised to return plaintiff his notes, then the jury should find for the plaintiffs. Now, appellant's contention is that while McRoberts, as agent of the defendant, might in a proper case waive the return of the machine, he had no authority as such agent to bind his principal by waiving the conditions of said warranty as to written notice; as to the trial of the machine; nor had he authority to enter into a binding agreement, outside of the terms of the warranty, to deliver to the plaintiff his notes. While the parties are bound by the contract of warranty, still it cannot be doubted that either party

might waive the provisions contained therein so far as they were for his benefit. This contract required that when the machine was started, if it should not work well, immediate written notice should be given to defendant or to the local agent from whom it was purchased, and a reasonable time allowed to remedy the defects. Now, no written notice whatever was given. In this case, however, the agent who sold the machine was present when it was started; he knew it did not work well. He could not have been more fully in possession of all of the facts touching its failure to work properly, if the written notice had been given. Every purpose of that provision of the contract had been accomplished by the personal presence of the agent, and the knowledge obtained by him of its operation. Under such circumstances, to have required a written notice was to compel the plaintiff to do a useless act, which would convey to the agent the very information he already possessed. There is no good reason for requiring notice under such circumstances. Nor have we any doubt that an agent authorized to sell such a machine, and to set it up, and to see that it works properly, may waive such a written notice, when by his personal presence he is in possession of knowledge of every fact which such notice could give him. It may be said that the contract provides "no one has any authority to add to, abridge, or change this warranty in any manner." If full effect should be given to this language, the defendant is powerless to even change or alter its contract, no matter though plaintiff should consent thereto. Such a provision in the contract, if held binding, is a prohibition for all time, and under all circumstances, against any change in the contract. It is inconceivable that the defendant ever intended to tie its hands in such a manner. A corporation can only act through its agents, and some agent must always have power to represent and act for it. Doubtless, such a prohibition upon the power of certain of its agents to change or abridge the contract would be good, but the one in controversy, which prohibits action in any event by the corporation, is unreasonable. Under this provision of the contract, its provisions could not be waived, changed, or abridged, even if it should appear to be for the interest of all the parties to it to do so. Such an agreement is not binding, and any competent agent could bind the parties by waiving the provisions of the warranty. D. M. Osborne & Co. v. Backer, 81 Iowa, 378, 47 N. W. 70. Did the agent have authority to agree with plaintiff for a return of the notes? It appears he had authority to sell, to set up, and to see that the machine worked properly. There is no question as to his authority to have received the machine back, when he discovered that it did not work properly, unless he could remedy the defect, which he did not do. It seems to us, under such circumstances, his right to agree to restore that which plaintiff had given for the machine is not to be doubted. Everything that McRoberts, the agent, did, touching the setting up and operating the machine, and the promise to return the notes, was in the line of an attempt to complete the sale, and within his authority. Thresher Co. v. Kennedy (Ind. App.) 34 N. E. 859. Under the facts disclosed in this record, we think the instructions were proper. Affirmed.

GRAY v. FARMERS' MUT. LIVE-STOCK INS. ASS'N et al.

(Supreme Court of Iowa. Feb. 3, 1896.)

CONTRACTS—PARTIES.

That the duly-appointed agents of an insurance company entered into a contract to divide the separate earnings of each equally among themselves is no defense to an action by one against the company to recover for services rendered by him.

Appeal from district court, Calhoun county; Charles D. Goldsmith, Judge.

The defendant is a corporation duly organized under the laws of this state, and is engaged in the insurance of live stock. The plaintiff brought this action to recover for services rendered to the defendant as its agent. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals. Affirmed.

Read & Read, for appellant. Stevenson & Lavender, for appellees.

ROTHROCK, J. The case requires very brief consideration. It appears that the plaintiff was duly appointed agent of the company. He held a certificate as such from the auditor of state, and in pursuance of his employment he solicited insurance and adjusted losses and claims against the company. There is no real question as to the amount of compensation to which the plaintiff is entitled for his services. The defendant insists that it was under no obligation to pay him anything. In its answer it set up a written contract signed by S. W. Johnson, W. J. Beaman, George Lochrie, and the plaintiff, by which it appears that said parties undertook to do most, if not all, of the business for the company. They were to "devote their time, talents, and ability" to the business of the corporation, and each one was to recover for said services an equal amount with each other, provided the time employed was the same. The contention of the defendant is that this contract is a defense to the action. The court below did not concur in that view, and we think the ruling of the court on that question was right. The written contract is quite lengthy, and need not be set out in this opinion. It is sufficient to say that the defendant was not a party to the contract. It was in no way bound by it. Its liability to its agents for their services was in no way affected by it. It was a contract between the four

agents who signed it, by which the separate earnings of each was to be added to the others, and each was to have one-fourth of the aggregate amount. Other questions are discussed by counsel, which we do not think require special consideration. We discover no error, and the judgment of the district court is affirmed.

In re FENTON'S WILL.

(Supreme Court of Iowa. Feb. 4, 1896.)

WILLS—TESTAMENTARY CAPACITY—EXPERT TESTIMONY—HYPOTHETICAL QUESTIONS—REVIEW ON APPEAL.

1. One under guardianship for insanity is, prima facie, incapable of making a will.

2. In a will contest, an adjudication in proceedings setting aside a guardianship over testatrix, declaring her to be of sound mind, is not conclusive evidence of mental capacity up to the date of its entry.

3. A stenographer who was for two hours engaged in taking testatrix's statements for a deposition, and who testified that she hesitated in her answers, and was frequently prompted by another, could state that, in his opinion, she was feeble-minded.

4. On an issue as to testatrix's mental capacity, evidence of how she acted when her mental condition was spoken of in her presence was admissible.

5. On an issue as to the mental capacity of testatrix, error, if any, in admitting testimony outside the issue, as to when witness heard of her death, was harmless

6. On an issue as to testatrix's mental capacity, where there was evidence that she had a habit of picking at her dress with her fingers, and tapping on the arms of her chair, an objection that a hypothetical question, which recited that she "would keep picking her dress, and continuously peck on the arms of her chair," was not based on the evidence, because of the want of evidence to show that she "continuously kept picking at her dress," without cessation, was without merit.

7. A statement, forming part of the basis of a hypothetical question, that testatrix "would not engage in any conversation, but appeared to be in a study," was not objectionable, as authorizing an inference that she would not talk at all.

8. Where the decision in a will contest that testatrix was without testamentary capacity was fully supported by the evidence, the fact that a further finding that the will was procured by undue influence was not supported by evidence, will not authorize a reversal

Appeal from district court, Appanoose county; W. D. Tisdale, Judge.

Proceedings for the probate of the will, with objections on the ground of undue influence, and that the testatrix was of unsound mind. The probate of the will was refused, and the proponent appealed. Affirmed.

Eichelberger & Taylor, for appellant. Payne & Sowers and George D. Porter, for appellees.

GRANGER, J. The will of Lucy Fenton, deceased, was presented for probate, and upon objections being filed the issues were tried to a jury, that returned a verdict for contestants. The sole legatee in the will was one Mary E. Dooley, a daughter of the testatrix, who is the proponent. The contestants are grandchildren of the testatrix. The grounds of contest are that, because of age, bodily and mental infirmities, the testatrix was incapacitated to make a will, and that the will was procured by fraud and undue influence of Mary Dooley and her husband. The jury returned special findings that the testatrix was not of sound mind, and also that the will was procured by undue influence.

1. This cause was tried in September, 1893. Some time prior to August, 1892, Lucy Fenton had been adjudged of unsound mind, and a guardian had been appointed for her. Thereafter, in a proceeding by her to have said guardian removed, issues were made involving her soundness of mind, and upon the trial, in September, 1892, she was adjudged of sound mind, and relieved from guardianship. On the trial of this case, the testimony bearing on the soundness of mind of the testatrix antedated the judgment setting aside the guardianship, and, after the close of the evidence for the contestants, the proponent put in evidence the record of the proceeding to set aside the guardianship, and then moved the court to strike out all the evidence with regard to the condition of the testatrix's mind prior to such adjudication, which motion the court overruled; and in its instructions to the jury, referring to such evidence, the court said: "Such records are only prima facie evidence of her mental condition at the time such proceedings were had, and not conclusive upon you in this case." This action of the court is assigned as error, appellant's contention being that the adjudication of soundness of mind is conclusive to the date of its entry. We do not find that the question has ever been passed upon in this state, and hence its determination is important. The question bears a close relation to adjudications resulting in judicial determinations of insanity or unsoundness of mind. Appellant's claim is that the judgment is either conclusive of her mental capacity at the time of its entry or of no effect at all. It is only necessary that we determine whether or not it was conclusive; for, if of no effect, the holding of the court is not prejudicial to appellant, but, on the other hand, to her advantage. The holdings are numerous to the effect that persons under guardianship are, prima facie, disqualified to make a will. In re Johnson's Estate, 57 Cal. 529; Hamilton v. Hamilton, 10 R. I. 538; Brady v. McBride, 39 N. J. Eq. 495; Breed v. Pratt, 18 Pick. 115; In re Gangwere's Estate, 14 Pa. St. 417; McGinnis v. Com., 74 Pa. St. 245; Lucas v. Parsons, 23 Ga. 267; Woerner, Adm'n, § 27; Schouler, Wills, §§ 81, 82. In Leonard v. Leonard, 14 Pick. 280, in speaking of a person "non compos mentis under guardianship," where it is held that, as to a payment to the ward, by one

knowing of the guardianship, it was conclusive evidence of an unsound mind of the ward, the court says: "We are of opinion that, as to most subjects, the decree of the probate court, so long as the guardianship continues, is conclusive evidence of the disability of the ward, but that it is not conclusive as to all. For example, the ward, if in fact of sufficient capacity, may make a will; for this is an act which the guardian cannot do for him." In Rice v. Rice, 50 Mich. 448, 15 N. W. 545, the proceeding was for the probate of a will, and the objection was on the ground of the insanity of the testator, who was, shortly after the making of the will, and on the same day, adjudged "mentally incompetent to have the charge and management of his property," and placed under guardianship. The contestants contended that the order appointing a guardian was prima facie evidence of a want of capacity to make the will, and the court (Mr. Justice Cooley delivering the opinion) denied even the prima facie effect of such an order, but said that, if the proceeding for the guardianship had involved the question of testamentary capacity, such a rule would have obtained. That the question of testamentary capacity was involved in the adjudication upon which the guardianship was revoked in this case is, to say the least, doubtful. But it is not important that we should decide that, for the Michigan case is in line with the other authorities as to the prima facie effect of the guardianship. Against this conclusion is a line of authorities to the effect that a judgment can be nothing less than conclusive; that it can never be used "as tending to prove given facts." See Black, Judgm. § 505. The rule thus announced is a very general one and obtains where the subject-matter of the litigation and the parties are such as to invoke it. It is then binding upon parties and their privies, as contended by appellant. These undisputed and numerous authorities clearly recognize a distinction in these cases, and it is to be said that the facts to authorize or control the appointment of a guardian are not essentially, nor do we think they are generally, the same as those on which incapacity to make a will is based. The conditions of mind that would show a person incompetent to care for and preserve property, so as to authorize a guardian, might in no sensible degree show a condition of mind to incapacitate one for making a will. The two duties may require widely different considerations and capacities of mind and body. Harrison v. Bishop, 131 Ind. 161, 30 N. E. 1069, was a case where the only question involved was "whether a person who has been adjudged to be a person of unsound mind, at any time, and for whom a guardian has been appointed, and as to whom such adjudication of mental unsoundness has never been set aside in the manner provided by statute, can, while such adjudication and guardianship exist, make a valid will devising real estate." In the opinion it is said: "In our opinion, therefore, one's mental powers may be so far impaired as to incapacitate him from the active conduct of his estate, justifying the appointment of a guardian for that purpose, and yet he may have such capacity as will enable him to direct a just and fair disposition of his estate." We think it may be safely said that the issues in this case are not such that the rule as to conclusive judgments can obtain. Under any authority known to us, and upon reason, the rule adopted by the court is not error against the appellant. We may reserve the question whether, in such a case, the record was available to show even prima facie soundness of mind.

2. There is something of a general complaint as to the admission of evidence showing the opinion of nonexpert witnesses, based on facts disclosed by them as to the conduct and appearance of Mrs Fenton. It is not important that we notice all the complaints in this respect. One is given in argument "as an illustration," and we notice it. A Mr. Davis, who was a stenographer, officiated at the taking of Mrs. Fenton's deposition, which consumed two hours. The following are his statements of fact on the direct examination, on which the opinion was based: "Reside in Bloomfield, Iowa. Was present at Moulton, Iowa, September 5th, when Mrs. Lucy Fenton's deposition was taken, and acted as shorthand reporter. Was two hours in taking the deposition. Mrs. Mary E. Dooley was sitting close to Mrs. Fenton most of the time, and conversed with her in an undertone five or six times. At that time Mr. Payne, one of the attorneys present, objected to Mrs. Dooley's talking with her mother while she was giving her testimony. Up to the time of the objection, Mrs. Dooley spoke to her almost every answer of importance. Mrs. Fenton would hesitate in answering before looking at Mrs. Dooley. How I happened to notice that, I was sitting at the table, and waiting for the answer, and seeing Mrs. Dooley have her mouth close to her mother's ear, and talking to her. I took the answer down in the words which Mrs. Fenton used. Mrs. Dooley was looking intently at her mother in the face. She hesitated a good while before answering." The deposition was taken a year before the trial of this case. The witness was asked to state, from his observations of her at that time, and her answers, conduct, and actions, whether or not, in his opinion, she was of sound mind. His answer was: "I think she was feeble-minded." It comes within the rule of the Norman Case, 72 Iowa, 84, 33 N. W. 374, and State v. Winter, 72 Iowa, 627, 34 N. W. 475. The witness here observed her conversation, actions, and manner, for two hours, under circumstances to indicate her condition as to mental capacity The situa-

tion was such as to afford something of a practical test as to her strength of mind and memory. C. E. Fenton, a son of the testatrix, was a witness, and was asked to state any occasion when his father said anything in the presence of his mother in regard to her mental condition, and he said: "Well, there are several times that I cannot bring to memory. I will commence with one that I do remember. It was just a while before they moved her from the old homestead. Father says: 'We are going to Moulton. Mother is going, and I am going along with her, for you know her mind is not right; and I am going along and stay with her.'" He was then asked to state what effect such statements had on his mother. He answered that they had no effect that he could discover. There was no error in the admission of such evidence. It was proper for the jury, in fixing upon her condition of mind, to know how she was affected by such a statement made in her presence. We can all appreciate how persons of sound mind would accept such a statement, made as to them. Some of the witnesses were permitted to state, against objection, when they heard of Mrs. Fenton's death. There was no error in this, although it could not well bear upon the issue as to capacity. It was an incidental fact, such as are disclosed in nearly all trials, and entirely harmless. Such a latitude, in the discretion of the court, is permissible. In one of the cases the question seems to have been asked in connection with the time when the witness last saw Mrs. Fenton alive. It is not necessary to follow these complaints further. In some cases no exceptions were taken, and in none do we see reversible error.

3. A somewhat extended hypothetical question was asked the experts, and complaint is made of it, because it had not support in the evidence. It recites facts as to Mrs. Fenton's physical and mental condition, as that she was 84 years of age; that in her early married life she was cheerful and sociable; that her family relations were pleasant; that about 15 years since she was known for the first time to be melancholy,—claimed that her neighbors had turned against her; that her memory began failing some 9 or 10 years before; that she had fainting spells and epileptoid attacks; did not recognize her grandchildren; her pulse ran down to 30 or 40; that her arteries were hardened, conflicting with her heart's action, and that this continued in progressive degrees until 5 years before her death, gradually growing worse, and 3½ years before her death she had severe sinking spells, and would become unconscious from five minutes to an hour; that she could do no work, and could only get around with assistance of others; would forget where she placed things around the house but a few minutes before; would keep picking at her dress, and continuously peck on the arms of her chair where she was sitting, or on the stove; would not engage in any conversation, but appeared to be in a study; was morose and melancholy, and would accuse members of the family, without cause, of stealing; was confined mostly to her bed, and constantly growing weaker and emaciated; that she suffered more or less from disease and illusions; and that her physical condition with respect to feebleness constantly grew worse. The physicians, as experts, were asked to state, from such facts, the condition of her mind as to being sound or unsound. It is said, in argument, that there was no evidence that she "continuously kept picking at her dress, or arm of her chair, or on a stove." The argument is a slight misapprehension of the question. The question is, not that she continuously kept picking at her dress, but that she would keep picking at her dress, and continuously peck on the arm of her chair. In view of the claims in argument, the distinction is somewhat important. The argument assumes the question to mean that she kept doing the thing continuously, without stopping. With that view, the fact is without support in the evidence. But the statement that she would "keep picking her dress" does not convey that idea. As used, such a statement means the doing of the thing for so much of the time as to be unusual. To no one would it convey the idea of being literally continuous. The same may be said of her continuously pecking at the arm of her chair or the stove. The thought is, not that she did so at all times, but that she did it as a habit or unusually. As thus understood, the facts have support in the testimony. To the part of the question that she "would not engage in any conversation, but appeared to be in a study," it is said that there is no evidence to show that she would not engage in any conversation. It is true that she would answer questions, and talk some, but the term "conversation" means more. It means familiar intercourse,—an exchange of thoughts or sentiments; and that is evidently the import of the word in the question. The question in this respect is not faulty.

4. At the close of the testimony the proponent asked the court to withdraw from the jury the issue as to undue influence, on the ground that it was entirely without support in the evidence, which the court refused, and complaint is made of the ruling. It will be remembered that the jury found for the contestants, both as to the want of capacity and undue influence. If the finding as to either has support, the cause could not be reversed on the evidence. Not saying that we agree with appellant as to the evidence on the question of undue influence, it is sufficient for us to say that we are so well satisfied with the evidence to support the finding that Mrs. Fenton was not of sufficient mental capacity to make a will that we need not consider the other question. The hypothetical question, somewhat fully set out, indicates

the facts having support in the evidence, and the verdict as to a want of capacity is well sustained. The judgment is affirmed.

WELLS et al. v. ANDERSON et ux.

(Supreme Court of Iowa. Feb. 4, 1896.)

HOMESTEAD—PAYMENT OF MORTGAGE FROM BUSINESS ASSETS—RIGHTS OF CREDITORS.

Where a homestead belonging to the wife is mortgaged to secure a debt of the husband, the proceeds of which had gone into his business, and were in no way connected with the acquisition or improvement of the homestead, the payment of such debt out of his own resources does not place unsecured creditors in place of the mortgagee.

Appeal from district court, Lyon county; A. Van Wagenen, Judge.

The defendants are husband and wife. The wife is the owner of a homestead. The plaintiffs in this action are creditors of the husband, and they seek to subject the homestead, to the extent of $2,000 and interest, to the payment of the husband's debts. There were several cases of other creditors, involving the same questions, and all of them were consolidated and tried at the same time in the district court, and they are all presented on one record in this court. The district court denied the relief prayed for in the several petitions, and the plaintiffs appeal. Affirmed.

McMillan & Dunlap, for appellants. E. Y. Greenleaf, for appellees.

ROTHROCK, J. The defendant C. G. Anderson was for several years engaged in the retail dry-goods business at Rock Rapids, in Lyon county. On the 6th day of January, 1892, he made a general assignment of all his property for the benefit of all of his creditors, without preference. He commenced the business in the year 1884, or thereabouts. The plaintiffs are wholesale merchants, and in the year 1891 they sold goods on credit to Anderson. They claim that Anderson obtained credit for the goods by fraudulent representations as to his ability to pay for them. And the evidence shows that when he made the assignment he was indebted for goods purchased in an amount far exceeding the value of the property then owned by him. We do not think it is necessary to state further facts in relation to the manner in which he obtained credit, nor as to the cause of his failure in business, for the reason that we believe that the rights of the parties must be determined upon the facts connected with the ownership of the homestead.

It appears that the homestead was acquired in the year 1884. It was paid for with the money of the husband, and the title was held in his name. The family, consisting of the husband, wife, and minor children, have occupied the homestead from the time it was acquired until the trial of the cases in the court below. It was incumbered until some time before the failure of the husband, when he borrowed the sum of $2,000 from a brother-in-law named Dunlap. It does not clearly appear when he borrowed this money. There is evidence tending to show that it was several years before he made the assignment. After this transaction, and on the 20th day of July, 1891, Anderson conveyed the homestead to his wife. And after that time the husband and wife joined in a mortgage on the homestead to secure the payment of the debt to Dunlap. On the 21st day of October, 1891, Anderson paid $1,000 of the debt secured by the mortgage, and in November, following, he paid the balance due to Dunlap. The money borrowed of Dunlap was used by Anderson in his business, and it was paid from money drawn out of the business. It does not appear that Anderson had any other source from which to pay his debts. And there is no claim that the money was borrowed to purchase or improve the homestead, or to pay a debt incurred in its acquisition. Under this state of facts, no interest in or part of the value of the homestead is liable for the husband's debts. The conveyance of the homestead by the husband to the wife was no fraud upon the creditors, because it was not liable for their claims; and the payment by the husband of a debt due to one of his creditors before he made an assignment was nothing more than the payment of a just obligation, and we can discover no reason why the other creditors should complain. Appellants' contention is that the homestead should have been subjected to their claims, under the decisions of this court in the cases of Croup v. Morton, 49 Iowa, 16; Id., 53 Iowa, 599, 5 N. W. 1093; and Hamill v. Henry, 69 Iowa, 752, 28 N. W. 32. In Croup's Case it was held that a homestead held in the name of the wife, to the purchase and improvement of which the husband has contributed, may, to the extent of his contributions, be subjected to the payment of his debts contracted prior to its purchase, and the case of Hamill v. Henry is to the same effect. The distinction between the case at bar and the cited cases is so obvious that discussion cannot make it plainer. The statement of the above facts is sufficient. The payment of a just debt by the husband—the debt being in no way connected with the acquisition of the homestead, and having no connection with the homestead, except that it was mortgaged to secure the debt—cannot be held to allow other creditors to put themselves in the place of the mortgagee. The case demands no further consideration, and the decree of the district court is affirmed.

GILCREST et al. v MACARTNEY et al.

(Supreme Court of Iowa. Feb. 1, 1896.)

MUNICIPAL CORPORATIONS — ASSESSMENT FOR STREET PAVING—DISCRETION OF BOARD OF PUBLIC WORKS.

Acts 25th Gen. Assem. c. 7, § 2, provides, when the paving of any street is directed, for contracts either for the entire work in one contract, or for parts in separate sections, as may seem best. Section 20 provides that any part of any street may be improved, as well as the entire street, and the cost of the whole or any part of the improvement included in any contract may be levied at one time, and under one plat and notice, when such action will allow the just proportion of the entire cost to be assessed uniformly to each front foot of the abutting lots. *Held*, that such statute does not require the assessments to be absolutely uniform as to each front foot throughout the entire improvement, but the board can levy a certain amount per front foot on lots abutting on part of the improvement, and a different amount on lots abutting on another part, if a just proportion of the entire cost is assessed uniformly.

Appeal from district court, Polk county; W. A. Spurrier, Judge.

The plaintiffs are owners of lots abutting on West Locust street in the city of Des Moines. The defendants are members of the city council of said city, and the clerk thereof, and as such member they constitute a board for the assessment of property for public improvements in said city. In June, 1894, the board of public works of said city entered into a contract with the Des Moines Brick Manufacturing Company to pave West Locust street from the east line of Tenth street to the west line of the alley in block 47 of J. Lyon's addition, and to pay therefor $1.39 per square yard. The street was paved in pursuance of the contract, and the defendants, as the board of assessors, made the assessment for the improvement in two parts, by assessing to the owners of lots from "east line of Tenth street to one-half of Twelfth street" at the rate of $4.77 per front foot, and from the one-half of Twelfth street west at the rate of $3.07 per front foot. The petition shows that, because of this division in making the assessment, there is assessed, east of Twelfth street, $1.70 more per foot front than there is west of Twelfth street; and because of such proceeding it is said that the board has exceeded its jurisdiction, and is acting illegally, and a writ of certiorari is asked, which issued, and also an order restraining proceedings on the part of the board. The board made its return to the district court showing that the contract for the paving was made as alleged in the petition; that the assessment was in two parts, as therein alleged; that in making such assessments separate plats were filed with the city clerk; that the line of street included in the contract is "in fact and substantially two different streets," having entirely different width between the curb lines; that said street, from West Tenth street to West Twelfth street is in fact 42 feet between the curb lines, and west of Twelfth street only 34 feet between the curb lines. The return shows other facts not important to be noted. The cause was submitted on the petition, return, a demurrer to the petition, and a motion to dissolve the injunction or restraining order; and the district court sustained both the demurrer and motion, and dismissed the petition. The plaintiffs appealed. Affirmed.

Bishop, Bowen & Fleming and Barcroft & McCaughan, for appellants. J. K. Macomber, Guernsey & Bailey, and C. H. Sweeney, for appellees.

GRANGER, J. The authority of the city council to make the improvement and assess the costs to the abutting property is found in chapter 7, Acts 25th Gen. Assem. Section 10 of the act provides: "When any such improvement shall have been completed it shall be the duty of the council to ascertain the cost of the improvement, and also what portion of such cost may be by law assessable on abutting or adjacent property, and the portion of such costs so assessable shall then be assessed as provided by law, or by ordinance of such city, upon the property fronting or abutting on, or adjacent to said improvement." Appellants' complaint of the action of the board in making the assessment, or the matter wherein the board is claimed to have acted illegally, is stated in the following language: "The error, if any, was in dividing the entire work embraced in the entire contract, for the purpose of assessment only into two sections, and assessing the front feet in them at different rates, instead of assessing the entire cost to the entire length, assessing uniformly each front foot of the lots abutting on the paving." The claim of error or illegality in the assessment is based on section 20 of the act, which will be cited hereafter. The section is somewhat difficult of construction. Appellants urge that the meaning of the section is that the assessment must be "uniformly to each front foot, or square foot in area," throughout the entire length of the improvement. Appellees attach importance to the words, "just and true proportion of the entire cost," and argue, in effect, that the words so modify the other language of the section as to justify different assessments of the entire work, so as to impose on each lot its just and true proportion of the cost. The record presents an ordinance of the city regarding such improvements, but its provisions do not appear important to the question before us, and nothing is claimed because of it. It in terms provides for the assessment of the costs of such improvements to the owners of abutting property. Section 2 of the act cited provides that: "When the council of any such city shall direct the paving of any street, or streets, * * * such council, or the board of public works, in case such board shall exist, shall make and enter into

contracts, for furnishing labor and material * * * either for the entire work in one contract, or for parts thereof in separate and specified sections, as to them may seem best." In this connection we quote section 20 of the act, as the two sections are closely related to the question we are to consider. It is as follows: "Sec. 20 Any part of any street, or streets, may be improved under this act, as well as entire street, or streets, and the cost of the whole, or any part of the improvement included in any resolution or contract, or contracts, may be levied at one time and under one plat and notice, when such action will allow the just and true proportion of the entire cost to be assessed uniformly to each front foot, or square foot area, of the lots or lands abutting on, or adjacent to such improvement."

It should be borne in mind that, to sustain appellants' claim as to the illegality of the proceedings of the board, the requirements of the law must be absolute that the assessment must be uniform as to each front foot throughout the entire improvement. If the board had a discretion there is no claim that it was so exercised as to render its acts illegal. Appellants' claim is based on the absolute requirement of the law. We do not understand appellants to claim but that the board could have improved the street for the length that it did, and have done it under two contracts, so as to have made the same division in the line as was made in the assessment. Section 2 of the act in terms permits the board to exercise its discretion as to making improvements by awarding such contracts in specified sections. If this is true, there is nothing, in the fact that the entire length was improved at one time, that gives the right to have the assessment uniform throughout, but the fact that it was done under one contract. It seems to be appellants' view that what is done under one contract is an "improvement," within the meaning of the section; and the assessment is "to be to each front foot * * * abutting on or adjacent to such improvement." It is said, in argument, "the contract is not divisible." This means that an assessment of work done under one contract is not divisible. In fact, that is especially claimed. It will be seen that one contract may include different streets. At least, there is nothing to prohibit a contract for paving several streets, and the law in terms provides for the levy of the cost at one time and under one plat and notice, when that method will allow the entire cost to be assessed uniformly. It will also be seen that an "improvement" may consist of more than one contract, for it is said that "the cost of the whole, or any part of the improvement included in any * * * contract, or contracts, may be levied at one time." Again, it appears that "any part of the improvement included in any * * * contract * * * may be levied at one time," etc. Neither of these, however, is permitted, unless it can be done so as to allow the just and true proportion of the entire cost of the improvement to be assessed uniformly. We think it clearly appears that the term "improvement" is not, at all times, what is included in a contract, but that it may embrace two or more contracts, or it may be a part of what is included in a contract. This must be so where different streets are improved under one contract, for the lots against which the assessments are to be made would not abut on or be adjacent to the improvement on both streets, and they must so abut or be adjacent to be subject to the assessment. We think the claim that a contract for such an improvement is not divisible for purposes of assessment cannot be sustained. Stress is placed on the words, "the entire cost to be assessed uniformly." These words are immediately preceded by the words "just and true proportion of," and it seems to us that appellants' construction renders these last words nugatory. Appellants' view is certainly better sustained without than with them. The limitation, as to levying the cost, applies as much to the whole as to part of the improvement; that is, that way is prohibited that will not permit the just and true proportion of the entire cost to be assessed uniformly. In view of the different provisions of the act, we think that a contract may embrace more than one improvement for purposes of assessment, when, to treat it otherwise, would defeat the levy of the costs in just and true proportions. The act seems to invest the board with the determination of what is a just and due proportion of the costs, and we are of the opinion that, to meet such requirement, whether the contract embraces work on one or more streets, the board may so divide it for the purposes of assessment as, in the exercise of a sound discretion, may seem necessary to attain such an end. With it settled that the board may so divide the work for the purpose of assessment, the mere fact that, in making the division, it erred in judgment, if such a fact could be found, would not constitute an illegality, for which its acts could be avoided in this proceeding. The judgment is affirmed.

GIVEN, J., took no part in this case.

LITCHFIELD v. SEWELL et al.

(Supreme Court of Iowa. Feb. 6, 1896.)

ADVERSE POSSESSION—WHAT CONSTITUTES—RUNNING OF STATUTE—INTERRUPTION.

1. Defendant received a quitclaim deed to the land in suit from an occupant whom he knew had no title, under the belief that it was government land, and that, on termination of the litigation between plaintiff's grantor and the government, he would be able to secure title thereto. Defendant did not pay taxes on the land, record his deed, or claim title thereunder until the litigation was decided in favor of plaintiff's grantor. *Held*, that defendant's possession prior thereto was not adverse.

2. An offer, by an occupant of land which he is holding adversely, to purchase it from the

owner within the statutory period, not made to settle any real or threatened litigation, is a recognition of the owner's title, and will interrupt the running of the statute.

Appeal from district court, Webster county; D. R. Hindman, Judge.

Suit in equity to quiet the title to certain lands which were included in what is known as the "Des Moines River Land Grant." The defendants pleaded the statute of limitations, and claim title by adverse possession. They also interposed a counterclaim, asking that the title be quieted in them. The plaintiff denied the adverse possession, and pleaded that defendants' possession had at all times been with open recognition of plaintiff's title and ownership. The cause was tried to the court, and a decree was rendered quieting the title to one 40 acres in dispute in plaintiff, and the other in defendants. Plaintiff appeals.

Gatch, Connor & Weaver, for appellant. R. M. Wright, for appellees.

DEEMER, J. It is practically conceded that plaintiff is the owner of the patent or paper title to the land in controversy by virtue of certain mesne conveyances from the United States government through the Des Moines Navigation & Railroad Company, and that he is entitled to a decree quieting his title unless the defendants have established a title thereto through adverse possession; and the only question for our determination is whether defendants have established their defense as to one 40 acres of land, known as the "North 40." There is no question that defendants had been in possession of this land for more than 10 years prior to the commencement of this suit, and that their possession was actual, open, and notorious. It is argued on behalf of appellant, however, that their possession was not adverse, for that it was neither under color of title nor claim of right, and that, if they had color of title to occupy the land as of right, they, upon two occasions, during the last 10 years, disclaimed ownership to plaintiff's representatives, and without reservation offered to purchase the land, and openly recognized plaintiff's title. The evidence shows that defendant received a quitclaim deed for the 40 in dispute from one G. Y. Boyd, in June, 1880, the consideration being a mare and $25 in money. At the time defendant purchased the land there were some improvements upon the land, which had been erected by Boyd at an expense of more than $80. Boyd says he went upon the land, supposing it was government land, and that he transferred his interest in the land to Sewell, "as it might appear," and that the deed was drawn up in that way. Boyd says he claimed the land under the head of a homestead, and that he expected to get his title from the government. Sewell did not record his deed, and has never paid any taxes on the land. He says that he understood the land was in litigation when he purchased from Boyd, and that he thought the government would get it, and then he would get title. When Boyd sold to Sewell he explained to him that he thought it was government land, and that it was in litigation, and that he expected in the end to get title from the government, as he believed the settlers would win; and he transfered to Sewell, he (Boyd) says, the improvements and Boyd's chance to get title to the land from the government. Thus matters stood until the decision of the supreme court of the United States in January, 1892, confirming the title in the land company.[1] It then became apparent that Sewell could not get title from the government, and he wrote to an attorney with reference to his rights in the land, and was advised that he could hold the land by virtue of his possession under the deed from Boyd. He then claimed the land under the Boyd deed. Before this time Sewell did not claim to own the land, but expected to stay on it as long as he could, and to get title to it from the government if it was successful in its litigation with the land company. Sewell did not disclose to any one the fact that he had a deed from Boyd until after the decision of the supreme court of the United States, and frequently and to many persons disclaimed having any interest in the land, other than as a squatter, until he heard from the attorney to whom he wrote some time early in the year 1892. In the year 1889 Sewell tried to purchase the land from the representatives of the appellant. He offered, at one time, $800 for the 80 acres, and $1,000 at another. This last amount was near, if not quite, the value of the land at the time the offer was made. Litchfield did not wish to sell the land at these prices, however, and the offers were refused.

We have stated our conclusions from the evidence, rather than the testimony from which they are derived, as the ultimate facts only are material to a proper determination of the case; and we turn now to the law which should be applied to these facts. It may be stated, as a general rule, "that the law is stringent in requiring strict proof of the facts requisite to constitute adverse possession. Among these is the material and essential one that the occupancy must have been with the intention to claim title. In other words, the fact of the possession, and the quo animo with which it was commenced and continued, are the true and only tests; and, as showing this intent, it is clearly competent to show, by the declarations of the occupant, that he did not hold adversely. McNamee v. Moreland, 26 Iowa, 96. We have seen that Sewell, when he took the deed from Boyd, knew that Boyd had no title; that he thought the land was government land, and expected to get title from the government. Now, while it is true that a void deed, or one given without right or title by the grantor, or even a tax

[1] U. S. v. Des Moines Nav. & Ry. Co., 12 Sup. Ct. 308.

deed void on its face, may be sufficient to give color of title, yet, such a rule has no application to one who actually knows that he has no claim, or title, or right to a title. Adverse possession must be in good faith. Jones v. Hockman, 12 Iowa, 101; Close v. Samm, 27 Iowa, 503; Smith v. Young (Iowa) 56 N. W. 506; Snell v. Mechan, 80 Iowa, 53, 45 N. W. 398. It seems to be well settled that there can be no such thing as adverse possession where the party knows he has no title, and that, under the law, he can acquire none by his occupation. Deffenback v. Hawke, 115 U. S. 403, 6 Sup. Ct. 95. Moreover, it appears to us that Sewell did not rely upon the Boyd deed as giving him title until after the decision of the supreme court of the United States. He, as we think, expected the government to be successful in its litigation with the land company, and then expected to get title from the government. That such was his position with reference to the south 40 cannot be doubted; and, in view of the testimony showing that he knew Boyd was a squatter, and had nothing to convey unless the government was successful in its litigation with the land company, and the fact that Sewell was making no claim under his deed, but was attempting to purchase the land from Litchfield, we think he stood in the same position with reference to the land in dispute.

We have heretofore announced that doctrine that, "where a party relies upon color of title in support of the statute of limitations, he must rely upon his color of title, and hold possession under it." Moore v. Antill, 53 Iowa, 612, 6 N. W. 14. The whole doctrine of adverse possession rests upon the presumed acquiescence of the party against whom it is held. 3 Washb. Real Prop. (3d Ed.) p. 123. If, then, the intention is wanting of claiming against the true owner, the possession will not be adverse, nor, however long continued, bar the owner's right of entry. Jones v. Hockman, supra; Wright v. Keithler, 7 Iowa, 92. The evidence shows that Sewell did not record his deed, did not pay any taxes upon the land, and did not claim title under his deed until after the decision of the supreme court of the United States. As he made no claim of title under the Boyd deed, but expected to procure the land from the government after a decision in its favor, there was no occasion for plaintiff to assert his rights. He did not, by delay, acquiesce in any hostile claim made by appellee. Whenever the matter was spoken of by Sewell, to any agent or representative of Litchfield, prior to the year 1892, he stated that he expected to get his title from the government, after the litigation between the government and the land company was ended. He did not disclose his deed to these agents until after the decree was rendered for the land company, and then declared that he did not intend to claim under the deed until he was informed by an attorney to whom he wrote that he could get title by prescription. Manifestly, there was, under such a state of facts, no such acquiescence by the owner as will prevent him from asserting his title. Any other holding would unjustly deprive plaintiff, who has been guilty of no wrong or laches, of the title to his land, and confer it upon one whose claim thereto under the Boyd deed was but for a few months prior to the institution of this suit.

But, aside from all this, it clearly appears from the testimony that, prior to the year 1892, and some time in the year 1889, the defendant offered to purchase the land in dispute from Litchfield. He first offered to pay $800 for it, and afterwards increased the offer to $1,000, and said he was willing to pay what the land was worth. He also stated that he would sell his improvements for actual cost, and give up the land, if he could not buy. It is true that Sewell makes equivocal denial of these offers, and his counsel insist that, even if made, they are not binding, and should not be considered, because they were given in an effort to buy his peace, or to settle the difficulties between the parties. We are satisfied that these offers were made to an agent of the appellant, and that they should not be excluded because of being made to settle any real or threatened litigation, and that they constituted a recognition of appellant's title. When these offers were made, Sewell, as we have said, was not claiming in hostility to Litchfield, except as he might get title from the government, if the government was successful in its litigation. He made no assertion of right under the Boyd deed, and was not negotiating for a settlement of any controversy between himself and the appellant. It seems to be well settled that an offer by defendant to purchase the property, which he is holding adversely, from the plaintiff, within the statutory time, is a clear recognition of plaintiff's title, and will interrupt the running of the statute. Davenport v. Sebring, 52 Iowa, 364, 3 N. W. 403; Jackson v. Britton, 4 Wend. 507; Jackson v. Croy, 12 Johns. 427; Lovell v. Frost, 44 Cal. 471; Wood, Lim. Act. § 270; and cases cited in 1 Am. & Eng. Enc. Law, p. 272.

Our conclusion is that the defendant does not hold title to the land by prescription, and that the decree should have been for plaintiff as to the north, as well as to the south, 40. The cases of McCamy v. Higdon, 50 Ga. 629, and Saxton v. Hunt, 20 N. J. Law, 487, as well as those heretofore cited, are in support of the doctrines announced in this opinion. We are the better satisfied with the result in this case because it works no hardship to appellee. He gave but $175 for the land, including the improvements, which were worth nearly as much as the consideration paid. He has had possession of the land since 1882, and has paid no taxes thereon. The improvements made by him have been inexpensive, and up to this time he has paid

no rent. It is, then, no injustice to apply to this case the rule first announced, requiring strict proof of the facts requisite to constitute adverse possession. Plaintiff should not be deprived of his land, under such circumstances, without full proof of all the facts essential to sustain the plea. We do not think such proof is furnished in this case, and the decree of the district court is reversed.

FRANKLIN v. STATE.

(Supreme Court of Wisconsin. Jan. 28, 1896.)

CRIMINAL LAW—INSTRUCTIONS—PRESUMPTION OF INNOCENCE.

On a criminal trial it is error to refuse to instruct that the law presumes every man innocent, and a conviction cannot be had if any juror has a reasonable doubt of the defendant's guilt, though an instruction has been given that they could not convict unless the evidence left no reasonable doubt of defendant's guilt.

Error to municipal court, Milwaukee county; Emil Wallber, Judge.

Joseph Franklin was convicted of theft, and brings error. Reversed.

J. H. Stover, for plaintiff in error. W. H. Mylrea, Atty. Gen., and J. L. Erdall, Asst. Atty. Gen., for the State.

CASSODAY, C. J. The plaintiff in error was charged and convicted of having, at Milwaukee, April 2, 1894, found on and stolen from the person of one Joseph Fountain $11 in money, then and there belonging to Fountain and of the value named, contrary to the statutes (section 4413, Sanb. & B. Ann. St.), and he is now serving his sentence of three years in the house of correction of Milwaukee county. We cannot say that such conviction was contrary to the evidence. Error is assigned because, on the trial, the court refused to give the following instruction: "The law presumes every man innocent, and desires no conviction if the jury, or any one of them, entertains a reasonable doubt of his guilt; for while the jury, or any one of them, entertains a reasonable doubt as to the guilt of the defendant of the crime charged, he cannot, without a great violence to his conscience and sense of right, agree upon a verdict of conviction." We are constrained to hold that the refusal to give such instruction, or its equivalent, was error. "The true rule is that the burden of proof is upon the state to prove the guilt of the defendant, and that he is presumed innocent unless the whole evidence in the case satisfies the jury, beyond a reasonable doubt, that he is guilty." Crilley v. State, 20 Wis. 232; Baker v. State, 80 Wis. 421, 50 N. W. 518; Fossdahl v. State, 89 Wis. 482, 486, 62 N. W. 185. This rule was sanctioned by Shaw, C. J., in Com. v. Kimball, 24 Pick. 366, 374. See, also, State v. Flye, 26 Me. 312; State v. Tibbetts, 35 Me. 81; Ogletree v. State, 28 Ala. 693. Thus, it was held error to refuse an instruction to the effect that the presumption of innocence prevails throughout the trial, and that it is the duty of the jury, if possible, to reconcile the evidence with this presumption. Farley v. State, 127 Ind. 419, 26 N. E. 898. True, the court charged the jury to the effect that they could not convict unless, from all the evidence, there was left in their minds no reasonable doubt of the guilt of the accused. But this is not equivalent to the instruction refused. People v. Macard (Mich.) 40 N. W. 784; People v. Potter (Mich.) 50 N. W. 994. The judgment of the municipal court for Milwaukee county is reversed, and the cause is remanded for a new trial. The official in charge of the plaintiff in error will surrender him to the sheriff of Milwaukee county, who will hold him in custody until he be discharged, or his custody changed, by due course of law.

SCHUBERT v. RICHTER.

(Supreme Court of Wisconsin. Jan. 28, 1896.)

SLANDER—COMPLAINT—DEFAMATORY LANGUAGE—NECESSARY ALLEGATIONS.

A complaint for slander which fails to allege the particular defamatory words spoken is insufficient.

Appeal from superior court, Milwaukee county; J. C. Ludwig, Judge.

Action by Joseph P. Schubert against August Richter, Jr., for slander. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

The complaint alleges, in effect: That, March 1, 1894, the firm of Richter, Schubert & Dick, then conducting a general real estate, loan, and insurance business, in Milwaukee, as copartners, made their promissory note in writing, bearing date on that day, for $2,274.33, payable one year after date, to one Joseph Flanner, with interest, and thereupon delivered the same to said Flanner for full value. That thereafter, and before maturity of said note, said Flanner sold and delivered the same to this plaintiff. That, August 1, 1894, said partnership expired by limitation, and thereafter the plaintiff and defendant, respectively, entered into business for himself in the same line of business as had formerly been conducted by the firm. That, to supply capital therefor, the plaintiff had negotiated with the First National Bank of Milwaukee for a loan upon said note to the amount thereof. That the defendant, with intent to injure and impair the business credit of the plaintiff, and to prevent him from obtaining credit on said note, warned the cashier of said bank not to discount or purchase said note from the plaintiff,—thereby giving the cashier to understand that he repudiated his obligation on said note; that the possession thereof by the plaintiff was wrongful and felonious; that the plaintiff was not entitled to sell, assign, or transfer said note to the bank. That the defendant gave the cashier to understand,

by inference and by direct charge, that said note was without value, and that the plaintiff had no right to the possession thereof, and no property therein, and that he was attempting to obtain the money of said bank fraudulently. That, in consequence of such warning, the bank refused to accept said note, or to advance any money thereon, or to extend any credit to the plaintiff. That, by reason thereof, the credit of the plaintiff was ruined at said bank and other money institutions in Milwaukee, and hence he was unable to obtain capital with which to conduct business. That, by said act, the defendant intended to injure the business reputation of the plaintiff. That such acts were done, and such warnings and statements made, by the defendant falsely and maliciously, and with intent to injure the plaintiff, and by reason whereof the plaintiff was injured in his business and reputation, and for which he claims damages. From an order sustaining a demurrer to such complaint for insufficiency, the plaintiff brings this appeal.

Henry W. Dunlop and Winkler, Flanders, Smith, Bottum & Vilas, for appellant. Austin & Fehr, for respondent.

CASSODAY, C. J. (after stating the facts). The complaint entirely fails to state or allege what particular words were spoken by the defendant which the plaintiff claims were defamatory. It merely states the pleader's inferences or conclusions, drawn from something supposed to have been said, but not alleged. "The words in which the slander is conveyed must be stated in the complaint, in order that the court may judge whether they constitute a ground of action, and also because the defendant is entitled to know the precise charge against him, and cannot shape his case until he knows. It is not sufficient to set forth the tenor or effect of the words used by the defendant." 13 Am. & Eng. Enc. Law, 456. This is not only elementary, but has frequently been sanctioned by this court. Zeig v. Ort, 3 Pin. 30; K. v. H., 20 Wis. 239; Simonsen v. Herold Co., 61 Wis. 626, 21 N. W. 799; Pelzer v. Benish, 67 Wis. 291, 30 N. W. 366; Schild v. Legler, 82 Wis. 73, 51 N. W. 1099. It follows that the demurrer was properly sustained. The order of the superior court for Milwaukee county is affirmed.

OEFLEIN v. ZAUTCKE.

(Supreme Court of Wisconsin. Jan. 28, 1896.)

FAILURE TO REPLACE GATES IN RAILROAD FENCES —PENAL STATUTE—STRICT CONSTRUCTION.

1. Rev. St. § 1811, providing that any one willfully taking down a fence or cattle guard built by a railroad company as required by section 1810, or failing to replace or close gates therein after having lawfully passed through, shall forfeit not more than $50, in addition to damages, being penal, should be strictly construed.

2. Defendant's team ran away, and destroyed a gate erected by a railroad company, under Rev. St. § 1810, for defendant's use at a farm crossing, and defendant failed to rebuild the gate. Plaintiff's horse strayed from a highway to defendant's premises, passed through the opening, and was killed by a locomotive. *Held*, that the case was not within Rev. St. § 1811, allowing recovery against one who shall "willfully" take down a fence or cattle guard erected by a railroad company as required by section 1810, or "allow" the same to be taken down, or, having lawfully opened gates therein "for the purpose of passing through the same," shall not immediately replace or close them.

Appeal from superior court, Milwaukee county; J. C. Ludwig, Judge.

Action by F. G. Oeflein against F. O. Zautcke. From a judgment entered on a nonsuit, plaintiff appeals. Affirmed.

Fiebing & Killilea and C. H. Van Alstine, for appellant. Wells, Brigham & Upham, for respondent.

CASSODAY, C. J. This action was brought to recover the value of the plaintiff's horse, which strayed from the highway onto the defendant's premises, and from thence through an open gate at the defendant's railway crossing onto the portion of the track of the Chicago, Milwaukee & St. Paul Railway, which ran over and across the defendant's farm, and while there was struck and killed by a passing locomotive of the company. The undisputed evidence is to the effect that the company had, a long time prior to the accident, erected on both sides of its railway, crossing said farm, good and sufficient fences, with gates therein at the farm crossing of the railroad, made for the use of the defendant in crossing the railroad from one part of his farm to another; that some two weeks prior to the accident the defendant's team, being driven by his employé, ran away, and right into the gate at the farm crossing mentioned, and broke it all to pieces, and the defendant allowed it to remain so broken down until the plaintiff's horse passed through the same to the railroad track, and was there killed by a locomotive, as mentioned. At the close of the evidence on the part of the plaintiff, the court granted a nonsuit, and from the judgment entered thereon the plaintiff brings this appeal.

It is conceded that prior to the time when the gate was broken down by the defendant's team running away, as mentioned, the company had properly constructed the fences and gate in question, as required by the statute (Rev. St. § 1810). The liability here claimed is predicated upon the failure of the defendant to reconstruct the gate after it was so broken down by his team. The statute does provide that "any person who shall wilfully take down, open or remove any such fence, cattle guard or crossing, or any portion thereof, or allow the same to be taken down, opened or removed, or who, having lawfully taken down bars or opened gates in such fences for the purpose of passing

through the same, shall not immediately replace or close the same, shall forfeit not less than ten nor more than fifty dollars, and in addition be liable to the party injured for all damages resulting from such act or omission." Rev. St. § 1811. Assuming that the gate was a portion of "such fence, cattle guard or crossing," still it is very obvious that the defendant did not willfully take it down, nor open, nor remove it; and it is equally obvious that he did not "allow the same to be" so "taken down, opened or removed," since to allow it to be done would imply his consent or permission in the doing of it, whereas the gate was destroyed by the runaway team, without the consent of any one. It is equally clear that the defendant did not "lawfully" take down or open the gate, "for the purpose of passing through the same." The only plausible reason for the contention of the plaintiff is that the defendant, for two weeks after his team had so broken down the gate, neglected to reconstruct the same. Had the defendant's horse during that time passed through the gate onto the railway track, and been so killed by the locomotive, and the defendant had sued the company therefor, then the defendant's contributory negligence in so leaving the gate down might, under the repeated adjudications of this court, have been a defense. Jones v. Railroad Co., 42 Wis. 306; Curry v. Railway Co., 43 Wis. 665; Richardson v. Railway Co., 56 Wis. 347, 14 N. W. 176; Martin v. Stewart, 73 Wis. 553, 41 N. W. 538; Peterson v. Railroad Co., 86 Wis. 206, 56 N. W. 639. But in the case at bar the plaintiff suffered his horse to go at large upon the highway, and to escape therefrom onto the premises of the defendant, and from thence onto the railway track. The case of Pitzner v. Shinnick, 39 Wis. 129, is quite similar, and, in principle, against the plaintiff's recovery in this action. Active vigilance was not required of the defendant to prevent the plaintiff's horse from trespassing upon his premises. Klix v. Nieman, 68 Wis. 271, 32 N. W. 223; Walsh v. Railroad Co., 145 N. Y. 301, 39 N. E. 1068. Besides, the statute, as here sought to be applied, is penal, and must be strictly construed. The judgment of the superior court for Milwaukee county is affirmed.

GERMANIA SPAR & BAU VEREIN v. FLYNN et al.

(Supreme Court of Wisconsin. Jan. 28, 1896.)

CORPORATIONS—OFFICERS—TERM OF OFFICE—ACTION ON BOND—PLEADING.

1. Rev. St. § 1776, providing that directors of a corporation shall be elected annually, does not limit the term of office of an attorney, appointed by the directors, to one year, it being also provided, in such section, that the terms of other officers may be prescribed by the articles of incorporation or the by-laws.

2. An allegation, in an action on a bond of an attorney, that he was appointed the attorney of plaintiff corporation by its board of directors, "and held under said appointment for the term of two years," sufficiently alleges that his term of office was for two years.

3. A complaint which alleges that plaintiff corporation was authorized to loan money to members on real-estate security; that arrangements were made to loan a certain sum to a member, that R., the duly-appointed attorney of plaintiff, "by virtue of his office," was given a check payable to his order, to be delivered to the borrower as soon as the latter should execute a satisfactory mortgage; and that R. converted the check, during his term of office,—states a good cause of action against the sureties on R.'s bond.

Appeal from superior court, Milwaukee county; J. C. Ludwig, Judge.

Action by the Germania Spar & Bau Verein against Lytton Flynn and another, on a bond. From an order overruling a demurrer to the complaint, defendants appeal. Affirmed.

This is an action upon a bond. A demurrer to the complaint was overruled. The allegations of the complaint, so far as necessary to be set forth, are as follows: "The said plaintiff alleges that it is a corporation, organized under the laws of the state of Wisconsin, for the purpose of creating a mutual savings fund from dues of its members, and making loans to its members on real-estate security, and has been such corporation ever since the year 1887, and that the office of said plaintiff corporation is now, and at all times since its organization has been, in the city and county of Milwaukee, state of Wisconsin. The plaintiff alleges that its by-laws provide that the board of directors shall elect or appoint and discharge all officers of the association, and fix the compensation of such officers, and shall also appoint an attorney. The plaintiff alleges that, under the provisions of said by-laws, one Peter Rupp, an attorney at law, on or about the 15th of May, 1888, was duly appointed the attorney of said plaintiff by its board of directors, and held under said appointment for the term of two years, or until about the middle of May, 1890, and at said last date was reappointed such attorney, and held under said last appointment until about the 29th day of September, 1891, when he was removed by the board of directors. The plaintiff alleges that, upon the 29th day of May, 1888, the above named Peter Rupp, as principal, and the defendants Lytton Flynn and F. Seibel, as sureties, executed to the said plaintiff a joint and several bond in the penal sum of one thousand dollars ($1,000.00), good and lawful money of the United States of America, conditioned that, whereas, the said Peter Rupp was, on the 15th day of May, 1888, duly elected attorney for said Germania Spar & Bau Verein, now, therefore, if the said Peter Rupp shall well and truly perform all the duties of his said office, and shall pay out to the proper parties all moneys which may come into his hands by virtue of said office, all without fraud or delay, then this obligation to be void,—otherwise, to be and remain in full force; a copy of which bond is hereto annexed, marked 'Exhibit A,' and

made a part of this complaint. The plaintiff alleges that its articles of association provide that loans may be made to its members upon real-estate security, and that one Peter Henry Jessen was a member of said corporation during the years 1889, 1890, and 1891, and that he made arrangements with said plaintiff, prior to the month of August, 1889, for a loan of two thousand nine hundred and ninety dollars ($2,990.00) on his real estate. The plaintiff alleges that, on or about the 1st day of August, 1889, the said Peter Rupp, by virtue of his office as attorney of said plaintiff, was given a check by plaintiff for the sum of two thousand nine hundred and ninety dollars ($2,990.00) on Merchants' Exchange Bank, Milwaukee, Wisconsin, payable to the order of the said Peter Rupp, and in favor of said Peter Henry Jessen, which check the said Peter Rupp was to deliver to the said Peter Henry Jessen as soon as the said Peter Rupp obtained a satisfactory mortgage upon the real estate of the said Peter Henry Jessen, to secure a repayment of the money represented by said check, unless said check was recalled by the board of directors." The complaint then alleges conversion of the check by Rupp, on or about August 1st, aforesaid, and concealment of such conversion until September, 1891; also, that Rupp committed suicide in the spring of 1892; that demand was made on the appellants, before action, for the payment of $1,000, the penal sum of the bond, which was refused,—and judgment is demanded for the penalty of the bond, with interest.

Howard & Mallory, for appellants. Williams & May, for respondent.

WINSLOW, J. (after stating the facts). The appellants contend that, because directors of a corporation are to be elected annually (Rev. St. § 1776), therefore the term of office of the attorney of the corporation must terminate with the year, and, consequently, that the defendants are not responsible for a defalcation occurring more than two months after the expiration of their principal's term of office. The position is not tenable. Directors, if classified as provided in section 1772, Rev. St., may hold office for three years, and, furthermore, under the provisions of section 1776, supra, the term of the other officers of the corporation may be prescribed by the articles of incorporation or the by-laws, and such term is plainly not limited to a single year. The complaint distinctly alleges that Rupp was appointed and held under said appointment for the term of two years. This must be held a sufficient allegation that his term was for two years. This point being decided adversely to the appellants, there seems no doubt that the complaint states a cause of action. It is alleged that the check was delivered to and received by Rupp "by virtue of his office" as attorney, and this may well be so. At least, it cannot be said, in view of the allegations of the complaint, that it was not so received. Order affirmed.

COMMERCIAL BANK et al. v. McAULIFFE.

(Supreme Court of Wisconsin. Jan. 28, 1896.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—VACATING ORDER SETTLING ASSIGNEE'S ACCOUNT—WHEN PROPER—REFERENCE.

1. Under Rev. St. § 2832, giving the court power, in its discretion, to vacate a final order settling the account of an assignee for the benefit of creditors, and allow objections to be filed, where the failure of a creditor to appear on the hearing arose "through mistake, inadvertence, surprise or excusable neglect," it is proper to vacate such order where a creditor failed to appear on the final hearing because he received no notice and did not know of such hearing.

2. The court is not prevented from vacating such order, for good cause shown, by Rev. St. § 1701, providing that such final order shall be "conclusive upon all parties."

3. Where a court vacates an order settling the account of an assignee for the benefit of creditors, and allows a creditor to file objections to the account, it may refer the hearing of such objections, regardless of whether Rev. St. § 2864, allowing references, applies to actions, only, or also to special proceedings.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Petitions by the Commercial Bank and the J. H. Silkman Lumber Company for the vacation of a final order settling and allowing a final account of John J. McAuliffe as assignee under a voluntary assignment of William Bormann. From an order vacating the order settling such account, and allowing the petitioners to file objections to the account, and referring the hearing of such objections to a referee to hear, try, and determine the same, the assignee appeals. Affirmed.

The appellant is the assignee under a voluntary assignment of one William Bormann, and the respondents, the bank and J. H. Silkman Lumber Company, are two creditors of said Bormann who have duly proven their claims. The final account and report of the assignee was allowed February 2, 1895; no objection being made thereto, and an affidavit being filed showing the mailing of notice of the filing of such accounts to all creditors of the assignor. On the 5th day of February, 1895, the respondent bank filed a petition and made a motion for the vacation of the order allowing the final account, to be permitted to file objections to the account, and have a hearing thereon. On the 16th day of February the J. H. Silkman Lumber Company made a similar petition and motion, and the two motions were heard together. By the Silkman petition it appeared that no notice of the filing of the final account, or the application for the assignee's discharge, had at any time been received by the company or its officers, and that they did not know of it until after the account had been allowed. By the petition of the

bank it appeared that notice of the application for settlement of the account had been received, but that it had been mislaid and overlooked until after the allowance of the account. In both petitions a number of serious objections to a number of items of the account were set forth, which it is unnecessary to notice further than to say that they are, on their face, very proper subjects of investigation. Both petitions were heard together (no opposing affidavits being filed), and on the 16th day of March, 1895, an order was made vacating the order settling the account of the assignee, and allowing the petitioners to file objections to the account, and referring the hearing of such objections to John F. Harper, Esq., to hear, try, and determine the same. From this order the assignee appealed.

Van Valkenburgh & Kershaw, for appellant. Timlin & Glicksman and Elliott, Hickox & Groth, for respondents.

WINSLOW, J. (after stating the facts). Under section 2832, Rev. St., the court had power, in its discretion, to vacate the final order, and allow objections to be filed, if it appeared that the failure to appear on the hearing arose "through mistake, inadvertence, surprise or excusable neglect." Certainly it is very clear that the failure of the Silkman Company to appear arose from the fact that they did not receive any notice of the final hearing, and did not know of such hearing. This clearly justified the court in vacating the order and opening the default.

Nor does the fact that the statute (Rev. St. § 1701) provides that such final order shall be "conclusive upon all parties" prevent the court from vacating it for good cause shown. The word "conclusive," as here used, means simply that while it stands unreversed it binds all parties to the proceeding, just as a judgment is "conclusive" because it binds all parties to the action. It has never been supposed that, because a judgment is conclusive upon all parties, it was beyond the power of the court to vacate upon a proper showing.

Objection is made to that part of the order providing for a reference of the objections to the account, and it is said that the general statute authorizing references (Rev. St. § 2864) only applies to actions, whereas this is a special proceeding. Even if this be so (which we do not decide), the reference is proper. In administering the trusts under a voluntary assignment, the circuit court exercises its inherent powers as a court of chancery of general jurisdiction under the constitution, as well as the powers directly prescribed and defined in the assignment law. Const. Wis. art. 7, § 8; revisers' note to section 1683, Rev. St. The power of a court of chancery to refer issues such as the one before us, when they arise in actions or proceedings, is too ancient and well established to be now questioned. Order affirmed.

WURDEMAN v. BARNES.

(Supreme Court of Wisconsin. Jan. 28, 1896.)

PHYSICIANS—ACTION FOR COMPENSATION—CROSS-EXAMINATION—MALPRACTICE—EVIDENCE.

1. In an action by a physician for services there was no dispute as to the number of his visits or items of charges. Plaintiff testified as to the value of his services, the nature of his treatment, and that they were worth the amount charged. *Held*, that it was not error to refuse to permit defendant to cross-examine him as to the amount charged for particular visits, and what they were worth, where the court offered to permit defendant to examine him as to what he had done, and show that his services were not worth anything.

2. In an action by a physician for services rendered in treating defendant's son, defendant filed a counterclaim for damages on account of unskillful treatment. There was evidence that the son got worse under plaintiff's treatment, and got better after plaintiff had been discharged. It appeared that other physicians were in attendance on the son, but their evidence was not produced, and no medical witness was called to show that the treatment was improper or negligent. *Held*, that there was no evidence to support the counterclaim, or entitling defendant to have the question of damages submitted to the jury.

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by H. V. Wurdeman against James Barnes for professional services rendered by plaintiff as a physician and surgeon in which defendant filed a counterclaim for damages for negligent and unskillful treatment. From a judgment for plaintiff, defendant appeals. Affirmed.

This was an action for professional services by the plaintiff as physician and surgeon, alleged to have been rendered in treating the defendant's son, and of the alleged value of $83, and issue was taken by the defendant as to the value of the services; and he also interposed a counterclaim for damages caused by the alleged negligent and unskillful treatment of the patient, whereby the defendant had been put to great expense and otherwise damaged, etc. At the conclusion of the evidence the court directed a verdict in favor of the plaintiff for $87, the amount claimed and interest, for which judgment was given, with costs, against the defendant, and from which he appealed.

Williams & May, for appellant. J. A. Eggen, for respondent.

PINNEY, J. (after stating the facts). 1. The plaintiff was called as a specialist to treat the eyes and ears of the defendant's son, who had sustained serious injury by the explosion of a dynamite cartridge. The plaintiff testified as to the value of his services, the circumstances under which they were rendered, and the nature of his treatment; that the services were worth $83, and that the rates were less than usually charged for such services. There was no evidence to the contrary. The account consisted of a large number of items for visits,

etc. The defendant's counsel proposed to cross-examine the plaintiff as to the amount charged for particular visits, and what they were worth. On objection, the court ruled that the plaintiff might be examined as to what had been done by him, but as to how much he had charged for each visit was immaterial; that if the defendant proposed to make the defense that the services were not worth anything, he could make it, and the jury would pass upon it. There was no dispute as to the number of visits or items, and we see no reason for thinking that the defendant was prejudiced by the ruling. He had reasonable latitude for cross-examination and defense as to the value of the services, and there is no reason to suppose that he was prejudiced by the ruling of the court. He did not offer to produce any evidence on the subject, and he has lost nothing except the privilege of making a lengthy and useless cross-examination as to each visit by way of contrasting the value of one or more visits with the others. There was no claim that the charges were above the usual rate for such services, and therefore there was no question for the jury as to the plaintiff's demand.

2. The evidence wholly fails to support the counterclaim. It is claimed that the defendant's son grew worse under the plaintiff's treatment, and that he grew better after the plaintiff had been discharged, but this does not show that the plaintiff was guilty of negligence or unskillfulness in treating him. In particular, it is claimed that the plaintiff improperly applied and used a tube of hot water over the nose to cure the ailment or injury to his eyes; that the heat was so great as to be injurious. Other physicians were in attendance on the patient, but their evidence was not produced. No surgical or medical witness was called by the defendant to say that the treatment was improper or negligent in the least degree, whatever uneducated persons or non-experts might conjecture upon the subject. The plaintiff could not be convicted of malpractice on such evidence. He could not be held responsible simply because he failed to cure the defendant's son, nor for mere misjudgment in treating him, if the treatment was such as physicians and surgeons of ordinary knowledge and skill would apply. Quinn v. Higgins, 63 Wis. 664, 24 N. W. 482. The general rule of law is that a physician or surgeon who holds himself out as such, in treating a patient, must exercise such reasonable care and skill in that behalf as is usually exercised by physicians or surgeons in good standing, of the same system or school of practice, in the vicinity or locality of his practice, having due regard to the advanced state of medical or surgical science. Nelson v. Harrington, 72 Wis. 597, 40 N. W. 228. There was an entire absence of competent evidence to go to the jury under the counterclaim to sustain a verdict finding the plaintiff guilty of negligence or want of proper skill in treating the defendant's son, and it could not be left to the jury to find a verdict upon mere conjecture. The court properly directed a verdict for the plaintiff. The judgment of the superior court is affirmed.

DEISENRIETER v. KRAUS-MERKEL MALTING CO.

(Supreme Court of Wisconsin. Jan. 28, 1896.)

MASTER AND SERVANT—INJURY OF SERVANT—SPECIAL VERDICT—NECESSARY INTERROGATORIES—HARMLESS ERROR.

1. In an action by an employé of a malt company for injuries caused by his falling on machinery near which he was working on being overcome by fumes of sulphur burned in another part of the building, and which entered the room, the question whether defendant knew that the fumes would pervade the whole building and might overcome employés exposed to it, and whether, knowing this fact, defendant used proper care to prevent accidents, and whether sulphur, as used by defendant, created a real danger to the employés, should be submitted to the jury for determination in ordering a special verdict.

2. In an action for personal injuries, conflict in the answers of a special verdict relative to the defense of contributory negligence is harmless error on the plaintiff's objection, where the special verdict shows no liability of defendant.

Appeal from superior court, Milwaukee county; J. C. Ludwig, Judge.

Action by Martin Deisenrieter against the Kraus-Merkel Malting Company for personal injuries. From a judgment for defendant, plaintiff appeals. Reversed.

The defendant is a domestic corporation engaged in the business of malting grains. It had and operated a malting house at Milwaukee. On the third floor of that malting house was a machine which, in part, consisted of shafting and gearing, the latter being known as friction gear, consisting of two rollers working in contact with each other for the purpose of turning or regulating a spool, on which was wound a rope which was used to operate a scraper on the floor, for the purpose of stirring the malt upon the floor so that the air should pass through it, and of removing it to the elevator. The shafting and gearing were left open and unguarded, and were so located as to be in the front and in view of the person operating the machine. They were about four feet above the floor and about one foot in front of a lever which was used to regulate their use. They might be dangerous to the operator if he should become oblivious of their existence and situation, or if, by any misfortune, he should fall against them while in motion. In the process of malting barley, sulphur and salt are burned in the kiln room, with the purpose to have the fumes permeate the mass of the barley, for bleaching it and fitting it better for its ultimate use. These fumes penetrated to all parts

of the building, and came to this room on the third floor through holes in the walls for the passage of belts, through crevices, and open doors. The operations in this room create dense dust as the barley is delivered into the room by carriers, is stirred upon the floor, and swept from the room by the scraper. The plaintiff was a brewer of beer, 42 years old. He had worked several months in this building and in the general business there carried on. He knew the building, and the processes of carrying on the business. He had worked in the different rooms and on the different floors. He was employed for general work about the business. Though he had been mostly engaged in moving the grain, on the floor, with a shovel, in the process of drying it, he had at least once been employed in operating this very machinery. On the day of his injury he was operating the machine described. The fumes of the sulphur and the pervasive dust became more intense and persistent of a sudden, so that, in a short time,—he thinks in about 10 minutes,—he was overcome by them, and fell. In falling his hand fell upon or was pressed against the rollers, was drawn in between them, and was crushed. These are, in brief, the facts which the evidence tends to establish. There was a special verdict, as follows:

"Special Verdict.

"First question: Was the plaintiff, while in the employ of the defendant, injured in defendant's malt house, on July 28th, 1892? Answer by Court: Yes. Second question: Was the plaintiff overcome by fumes of burning sulphur and salt, by reason whereof he attempted to support himself on a chain, and when reaching for the chain put his hand into the rollers? Answer: Yes. Third question: If you answer the second question in the affirmative, did such sulphur fumes escape from the defendant's kiln into the place of accident? Answer: Yes. Fourth question: Did sulphur fumes escape from the kiln into the third story of the malt house, to the place of accident, in sufficient quantity to become dangerous to a person working there at the time of the accident? Answer: Yes. Fifth question: If you answer the second question in the affirmative, was there more fumes of sulphur at the time and place of the injury than was there usually, prior to the injury, while the plaintiff worked at the barley? Answer: Yes. Sixth question: If you answer the fourth question in the affirmative, did the plaintiff know the dangers resulting from the sulphurous fumes at the time and place of the accident? Answer: No. Seventh question: If you answer the fourth question in the affirmative, ought the plaintiff, in the exercise of reasonable care and prudence, to have known the dangers resulting from the sulphurous fumes at the time and place of the accident? Answer: Yes. Eighth question: If you answer the fourth question in the affirmative, were the dangers arising from the sulphurous fumes at the time and place of the accident one of the ordinary risks of plaintiff's employment? Answer: Yes. Ninth question: If you answer the eighth question in the negative, did the plaintiff assume the risk of the dangers resulting from the sulphur fumes at the time and place of the accident? Answer: ——. Tenth question: Was the plaintiff guilty of a want of ordinary care which contributed proximately to the injury? Answer: No. Eleventh question: Was the plaintiff guilty of a want of ordinary care in not abandoning the work he was engaged in at the time and place of the accident in time to avoid injury? Answer: Yes. Twelfth question: If you answer the fourth question in the affirmative, did the defendant know that sulphurous fumes escaped from the kiln into the third story of the malt house at the time of the accident? Answer: No. Thirteenth question: If you answer the fourth question in the affirmative, ought the defendant, in the exercise of ordinary care and caution, to have known that sulphurous fumes escaped from the kiln into the third story of the malt house? Answer: Yes. Fourteenth question: If you answer either the twelfth or thirteenth questions in the affirmative, did the defendant know that the sulphurous fumes escaping from the kiln into the third story of the malt house at the time of the injury were dangerous to a person at work at the place of the accident? Answer: No. Fifteenth question: If you answer either the twelfth or thirteenth questions in the affirmative, ought the defendant, in the exercise of ordinary care and caution, to have known that the sulphur fumes escaping from the kiln into the malt house at the time of the accident were dangerous to a person working at the place of accident? Answer: No. Sixteenth question: Who did the burning of the sulphur at the time of the accident? Answer by Court: Adolph Piton. Seventeenth question: Was the person burning the sulphur at the time of the accident guilty of a want of ordinary care in the performance of his work? Answer: No. Eighteenth question: If the court should be of the opinion that plaintiff is entitled to judgment, at what sum do you assess his damages? Answer: ($4,000) Four thousand dollars. Edgar H. Martin, Foreman."

On this verdict a judgment for the defendant was entered from which the plaintiff appeals.

Wheeler & Wheeler and O. T. Williams, for appellant. Winkler, Flanders, Smith, Bottum & Vilas, for respondent.

NEWMAN, J. (after stating the facts). It is manifest that the special verdict, as rendered, would not warrant or support a judg-

ment against the defendant. It does not determine sufficient of the material questions of fact against the defendant to show that, as matter of law, it is liable to the plaintiff for his damages. So that, on the verdict as rendered, no judgment other than the one rendered was justifiable or possible. The judgment is right upon the verdict. If the case was properly tried and submitted, so that the verdict can be sustained, there should be affirmance. But if the case against the defendant was not properly tried and submitted, then the plaintiff's motion for a new trial should have been granted upon some of the several grounds alleged, and the judgment must be reversed. So the general question to be considered upon this appeal is whether the issues involved in the trial were fairly to the plaintiff submitted to the jury. In the examination of this question, first in importance and logical sequence seems to be the question whether the special verdict, as submitted, comprehends all the material issues involved which bear upon the question of the defendant's negligence. The questions relating to this branch of the case are Nos. 12, 13, 14, and 15. By No. 12 it is found that the defendant did not know that the fumes of burning sulphur escaped to the room where the plaintiff was at work, at the time of the accident; by No. 13, that the defendant ought to have known it; by No. 14, that the defendant did not know that the sulphurous fumes which were escaping to the room where the plaintiff was working, at the time of the injury, were dangerous to a person at work at that place; and by No. 15, that it was no part of the defendant's duty to know it. These questions seem to have been infelicitous and inadequate to elicit conclusions of the more important issues of fact involved in the case. The more obvious criticism is that they all relate exclusively to the defendant's knowledge, or obligation to know, of the plaintiff's actual situation and danger at the precise time and place of the accident, limiting the scope of inquiry, and suggesting to the jury that, in the mind of the court, knowledge, or the obligation to know, at that very time, was the crucial test in the case. Whereas the test of the defendant's liability rested rather upon its knowledge and responsibility for a train of causes which culminated, at that time, in the plaintiff's accident. The questions themselves were well fitted to divert the consideration, both of the court and the jury, from the more important and controlling considerations to those of mere incidental or minor importance. It would have been more to the purpose to have inquired if the defendant knew, or ought to have known, that the fumes of sulphur, burned as part of the process by which its business was carried on, would be pervasive of the whole building, and might become so dense and strong as to produce suffocation of employés who were exposed to it, and whether, knowing such danger, it used proper care to prevent accidents by warning its employés or otherwise. It might have been well, too, to have asked some question calling for a determination of this fact: whether, in the manner in which sulphur was used in the defendant's business, it did create real danger to the defendant's employés. The defendant could not, apparently, be liable, unless it was operating its works in a manner, or with appliances, which create a real danger, and it must have been a danger imminent, to such a degree, at least, that it would have been negligent not to have warned employés who were ignorant of its existence. The defendant could not be liable for accidents which it could not reasonably anticipate as likely to happen, or from the operation of causes of which it was excusably ignorant. Atkinson v. Transportation Co., 60 Wis. 141, 18 N. W. 764; Barton v. Agricultural Society, 83 Wis. 19, 52 N. W. 1129. And whether there was danger in this process, and so great danger that it was want of ordinary care not to warn employés against it, is not so clear upon the evidence that the inference may be drawn by the court. For it does not appear that like harm has ever before befallen from a like cause in a similar business. Something equivalent to these suggested questions should have been submitted. But there is nothing which is substantially equivalent. There is no finding that the process was dangerous, nor anything found from which it can be inferred. In the seventh finding it is found that the plaintiff ought to have known "the dangers resulting"; in the fifteenth, that there was no duty on the defendant to know that the fumes were dangerous. This falls far short of finding that the fumes were dangerous. Something equivalent to an explicit finding on that point seems to be indispensable. So, too, was it negligence not to warn? That depends, in a degree, on the degree of danger. There is some danger in most employments. Negligence bears some relation to the degree of danger. It was a question for the jury under this evidence. These four questions, with their answers, are not, indeed, inharmonious, but they contain little which tends to illuminate the ultimate question whether the defendant is responsible for the plaintiff's damages. The plaintiff excepted to the submission of the several questions which were submitted in the special verdict, and requested the submission of others, which were refused. Among the questions which he asked to have submitted were these, in substance: Whether the defendant was negligent in permitting the fumes of burning sulphur and salt to come into that part of the room where the plaintiff was at work. What was the proximate cause of the plaintiff's injury? These questions were pertinent to the issue. Perhaps they were not sufficiently full or definite. But, in some

form, the questions suggested by them should have been submitted to the jury.

It is said that several answers of the special verdict relating to the defense of contributory negligence are in conflict with each other. Especially No. 8 is said to conflict with No. 10, and No. 10 is said to be at variance with No. 11. It looks so. But that does not interest the plaintiff upon this appeal. If all that part of the verdict was ignored or stricken out, or was all in his favor, he would still be as far as ever from the judgment which he desires. For the reasons stated, there must be a new trial. The judgment of the superior court of Milwaukee county is reversed, and the cause remanded for a new trial.

FORD et al v. HILL.

(Supreme Court of Wisconsin. Jan. 28, 1896.)

CORPORATIONS—AUTHORITY OF PRESIDENT—POWER TO CONFESS JUDGMENT—SEAL—INSOLVENCY—TRUST-FUND THEORY—EQUITABLE RELIEF.

1. Though the president of a corporation had no authority to bind it by the execution of a power of attorney to confess judgment, still equity will not intervene to set aside a judgment taken pursuant to it; the claim under the judgment, if not a legal one, being just and equitable.

2. The mere insolvency of a corporation does not convert its property into a trust fund, so as to prevent preferences.

3. The president of a corporation, given by the articles of incorporation power to generally represent it in matters of more than ordinary importance, who, with the secretary and another, constituted the board of directors, and to whom and the secretary, by general consent of the directors, the entire control and management of the corporation was intrusted, will be *held* to have had power to execute a power of attorney to confess judgment against the corporation; all the directors having knowledge thereof at the time, and making no objection.

4. The seal of a corporation is not essential to the validity of a power of attorney to confess judgment against a corporation.

Appeal from circuit court, Milwaukee county: D. H. Johnson, Judge.

Action by John S. Ford and others against Robert Hill. Judgment for defendant. Plaintiffs appeal. Affirmed.

The Lappen Furniture Company, a corporation, was organized in the city of Milwaukee, in December, 1892, for the purpose of carrying on a furniture business. Frank A. Lappen was president; A. T. Tanner, secretary and treasurer; and they two, with Joseph Bub, constituted the board of directors, from the time of the organization of the company up to and during all the transactions to which this action relates. The entire management of the corporation was intrusted to the president and secretary. During all the time of the existence of the corporation, they, from time to time, made notes, drafts, and other written instruments, with the knowledge of and acquiescence of the third director. In fact, the sole control and management of the corporation was, by general consent of the directors, left to the president and secretary. The articles of incorporation contained the following: "The principal duties of the president shall be to preside at the meetings of the board and of the stockholders, and to generally represent the corporation in matters of more than ordinary importance." On the 24th day of December, 1892, Tanner, as secretary of the corporation, executed and delivered to the Wisconsin National Bank of Milwaukee, Wis., a note for $20,000, payable in four months after date; and at the same time Frank A. Lappen, president, in the name of the corporation, executed a power of attorney, in writing, though not under the seal of the corporation, authorizing judgment by confession upon the note, which power of attorney was delivered to the bank with the note. Lappen was not authorized to execute such instrument by any action of the board of directors, but he presented to defendant Robert Hill, who was president of the bank and acted in its behalf, what purported to be certified resolutions of such board giving him such authority; but in fact no such resolutions were ever adopted at any meeting of such board. Hill, acting as president of the bank, in good faith, relied upon the proofs before him, believing that Lappen had been authorized by corporate act, in the regular way, to execute the power of attorney, and, so believing, received the note and power of attorney, and, on behalf of the bank, delivered to the officers of the corporation the sum of $20,000. On the 2d day of May, 1893, the bank, for value, indorsed the note over to Hill. He, thereafter, on the 12th day of May, 1893, took judgment thereon by confession, pursuant to the power granted by the power of attorney delivered with the note as aforesaid. At the time the note was given the corporation was solvent. It then possessed assets of the value of $75,000, and was indebted in the sum of about $5,000. At the time the judgment was taken the corporation was insolvent. After the entry of judgment, plaintiffs also obtained a judgment against the corporation, and thereafter brought this action, as judgment creditors, to sequestrate the property of the corporation and wind up its affairs, making defendant Hill a party for the purpose of testing the validity of his judgment. The result in the court below was in favor of defendant, and judgment was entered accordingly, from which this appeal was taken.

Turner, Bloodgood & Kemper, for appellants. Quarles, Spence & Quarles, for respondent.

MARSHALL, J. (after stating the facts). The question presented here, at the outset, is not whether the president of a corporation, without having been specially authorized thereunto by the board of directors, but by reason of the general and ordinary powers pertaining to his office, can bind the cor-

poration by the execution of a power of attorney to confess a judgment. There is no controversy but that the note was taken by the bank in good faith; that it loaned the $20,000 on the faith of the note and the accompanying power of attorney, and that it supposed, and had good reason to suppose, that the president, Lappen, was duly authorized to execute such power of attorney; that the corporation received the full benefit of the money loaned, and that it was borrowed in furtherance of its regular business; that it was then solvent, having a large amount of property in excess of its liabilities; and that, if the claim under the judgment is not legal, it cannot be said that it is inequitable. In this state of the case, ought a court of equity to interfere to set aside such judgment? That is the question at the threshold of this case, and we conclude that such question must be answered in the negative. It has been held, by a long line of decisions in this state, that courts of equity will not enjoin judgments at law, on grounds showing that the judgment creditor had no right to take the same even where there was no jurisdiction in the court to enter it, if the party seeking such relief can say nothing against the justice of the judgment. When the party is so circumstanced, equity will let him contend against the judgment as best he can at law. Stokes v. Kuarr, 11 Wis. 389; Crandall v. Bacon, 20 Wis. 639; Bonnell v. Gray, 36 Wis. 574; McCabe v. Sumner, 40 Wis. 386; Pirie v. Hughes, 43 Wis. 531; Rogers v. Cherrier, 75 Wis. 54, 43 N. W. 828; Marshall & Ilsley Bank v. Milwaukee Worsted Mills, 84 Wis. 23, 53 N. W. 1126; Knox v. Harshman, 133 U. S. 152, 10 Sup. Ct. 257; Walker v. Robbins, 14 How. 584.

It is said in the brief of counsel for appellant that the complaint in this case has already been before the court, and that it has been held that, if there was fraud in the entry of the judgment against the corporation, it can be properly set aside in this action; referring to Ford v. Bank, 87 Wis. 363, 58 N. W. 766. But the difficulty is, in applying what the court there said, that there is no fraud shown here on the part of the judgment creditor. The bank acted in good faith, and its assignee, Hill, as well, from the beginning to the end. Hill v. Lumber Co. (N. C.) 18 S. E. 107, and Atwater v. Bank (Ill. Sup.) 38 N. E. 1017, cited by counsel to the effect that this proceeding may be maintained because the judgment has the effect to give the judgment creditor a preference over the other creditors of the corporation, have no application here. In the jurisdiction where those cases were decided, the mere fact of insolvency of the corporation converted the property into a trust fund for the benefit of all the creditors; and for that reason it was held that the corporation could not confess the judgment, nor give any preference, but that rule does not obtain here. The mere fact of insolvency of a corporation, in this state, does not convert the corporate property into a trust fund, so as to prevent preferences. Ballin v. Bank, 89 Wis. 278, 61 N. W. 1118. The case of Ford v. Bank, to which counsel refers, is authority only for the maintenance of such an action as this where the circumstances are such as to show fraud, either upon the corporation or the other creditors, in the entry of the judgment. The case goes no further, as is sufficiently explained in the opinion of Mr. Justice Winslow in Ballin v. Bank, supra.

But we think the judgment must be sustained upon another and a broader ground. It appears that the president, by the articles of organization, was expressly clothed with extraordinary powers in managing the business of the corporation. The course of business, from the beginning to the end, shows that he exercised such extraordinary powers; that his acts in that regard, and particularly the act here challenged, were known to all the directors of the corporation, and no objection was made thereto at any time. Now, while many cases might be cited that restrict the powers of the president of a corporation, which he may exercise merely as such, within very narrow limits, they should be relied upon with caution; for the circumstances of each individual case are likely to have, within certain limits, controlling force. While it is true that in all cases an act done by the president, in order to be binding upon the corporation, must be shown to be within the scope of his authority, that does not necessarily mean that such authority must be shown by the record. The power may exist, as to innocent third parties, and may be shown to exist by acquiescence, and the nature and course of business which the president transacts for the corporation. In Sherman v. Fitch, 98 Mass. 59, it was held that the authority of the president to mortgage corporate property may be presumed, so as to bind the corporation, by the course of business and by acquiescence. Mr. Justice Wells, speaking for the court, said: "It is not necessary that authority should be given by a formal vote. Such an act by the president and general manager of the business of the corporation, with the knowledge and acquiescence of the directors, or with their subsequent and long-continued acquiescence, may properly be regarded as the act of the corporation. Authority in the agent of the corporation may be inferred from the conduct of its officers, or from their knowledge and neglect to make objection, as well as in case of individuals." Emerson v. Manufacturing Co., 12 Mass. 237; Melledge v. Iron Co., 5 Cush. 158; Lester v. Webb, 1 Allen, 34. To the same effect is Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. 428, where it is said by Mr. Justice Harlan, in effect, that the authority of the officer of a corporation may be implied from acquiescence,—from the course of business as it has been carried on for a

considerable length of time without objection,—and in such cases his act will be taken to be the act of the corporation, where those who have had, for a long time, the right to object, with knowledge of the facts, have neglected to do so. The same principle is recognized in Stokes v. Pottery Co., 46 N. J. Law, 237, cited by appellants, and referred to in Thompson on Corporations, to the point that the act of the president to confess judgment must be specially authorized, where a corporation appeared in the action, and moved to set aside a judgment taken by confession, as in this case, on the ground that the president had no authority to execute the warrant of attorney. The court there referred with approval to the long line of cases in which the powers of officers of corporations were held to have been enlarged beyond the ordinary powers inherent in the officers, from the assent of the directors, proved by their consent and acquiescence, in permitting the officers to assume and direct the control of the business; but the court did not apply the rule of such cases, because it was held that the facts were not sufficient to warrant such application. But such is not the case here, where it is shown conclusively, not only that extraordinary power was vested in the president, under the articles of organization, but that he exercised practically the whole power of the corporation, with the knowledge and concurrence of all the directors and persons directly interested, whose duties required them to object if he was exceeding his authority, and that they neither objected to the general conduct of the president before the act complained of, nor to such act after they had knowledge of it. Under such circumstances, where the act is manifestly for the benefit of the corporation, in pursuance of its legitimate business, and it has the benefit, as against those who acted in good faith, relying upon the apparent authority of the officer to act in the particular case, such act must be held to be the act of the corporation, and binding upon it and its creditors as well.

This is not inconsistent with the law as laid down by this court, that corporations are fictitious bodies, and act through directors (Ford v. Bank, supra), but goes upon the principle that responsibilities will be laid upon the principal for the acts of the agent done within the apparent scope of his authority, according to the course of business as ordinarily carried on, and that the doctrine of estoppel, by the conduct of the principal, applies to corporations the same as to individuals. These principles have been more and more recognized in such cases, and applied with greater liberality for the protection of those who do business with corporate officers, in matters in furtherance of the general purposes of the corporations, as the business of the country has drifted more and more into the hands of such artificial bodies. The extension, or, rather, more liberal recognition, of such principles, has not changed the law, as the same has been settled for a long period of time by the weight of authority, that the president of a corporation cannot, by virtue of his ordinary powers, execute a valid warrant of attorney to confess a judgment so as to bind the corporation, but, to do so, must be specially authorized by the board of directors. The tendency has been, as between the corporation and a person dealing with its president in good faith, in a matter in furtherance of the business of such corporation, under the circumstances mentioned, to hold, as a presumption of fact, from the course of business as carried on with the knowledge and permission of the directors, that such president was so specially authorized, and thereby, and also by the application of the doctrine of estoppel, to protect the innocent party. McDonald v. Chisholm, 131 Ill. 273, 23 N. E. 596, and Atwater v. Bank, 152 Ill. 605, 38 N. E. 1017, are conspicuous examples and they meet with our approval. They are both cases where it was sought to avoid the effect of judgments by confession, as in this case. The doctrine is there laid down as follows: "When a private corporation allows its managing officer to so conduct himself in his dealings and transactions on behalf of the company as to lead the public, or those dealing with him, to reasonably believe he possesses certain powers, the company will not be allowed to question such apparent authority, as against one relying in good faith on the same; and, where the general manager of a corporation makes a judgment note in the course of the general business of the corporation, he will be presumed to have acted within the scope of his powers, even though no resolution of the directors is shown. A stranger dealing with him, without notice of want of authority, will be protected." Thus, the principle of law contended for by the appellants is maintained; yet, by the evolution, we may properly say, of equitable principles, and their more liberal application as well, rather than by the discovery of any new ones, the effectiveness of the whole body of the law is preserved to accomplish justice in dealing with business conditions as they now are, when corporations exist, not created by special grant, and few in number, for purposes of more or less public concern, as formerly, but organized under general and very liberal acts, for all kinds of legitimate business, which concern the individual at every turn in the ordinary affairs of everyday life.

In this discussion we have not noticed the fact that the power of attorney in this case was not sealed with the seal of the corporation, because we do not deem that fact of any special importance. The seal would only be presumptive evidence that the execution of the instrument was a corporate act. If it be such in fact, or if the circumstan-

ces be such that defendant Hill had a right to rely upon it as such, then the absence of the seal makes no difference; the seal was not essential to the validity of the instrument. Ang. & A. Corp. 282; 4 Thomp. Corp. § 4630. The old doctrine that corporations can act only by deed or instrument under seal has been very much modified. It has given way to the pressure put upon it by the great growth of corporate transactions, and the necessity for greater freedom in their operations, for the convenience of business. Such bodies may now act without a seal, very much as individuals can, except when otherwise provided by statute or their articles of organization. It follows from the foregoing that the judgment of the circuit court must be affirmed. The judgment of the circuit court is affirmed.

CASGRAIN et al. v. HAMILTON.

(Supreme Court of Wisconsin. Jan. 28, 1896.)

REFERENCE — ACTION ON CONTRACT — RECORD ON APPEAL—COSTS.

1. Where a complaint for conversion does not allege it to have been wrongful or unlawful, the action is on contract, and therefore referable.
2. The allowance by a referee of items of account will not be disturbed where there is no certificate in the bill of exceptions that it contains all the evidence.
3. In actions on contract, costs, exclusive of disbursements, are limited, under Rev. St. § 2921, to $25

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by Marie V. D. Casgrain and another against Charles H. Hamilton. Judgment for defendant, and plaintiffs appeal. Modified.

Action to recover money. The complaint charged that the defendant, by virtue of a power of attorney authorizing him so to do, had collected the sum of $8,418.75, being the amount of a judgment recovered by plaintiffs against Milwaukee county, and had failed to pay over the sum of $505.92 of such amount, though demand had been made on him for said sum, "and that he did then and there convert to his own use, and has ever since retained, the said sum of $505.92, to these plaintiffs' damage $505.92." Judgment is demanded for said sum and costs. The defendant, by answer, admitted the receipt by him of the amount charged in the complaint, viz. $8,418.75, and alleged that he had paid therefrom, at plaintiffs' request, the following sums: To the plaintiffs, $5,000; to Turner & Timlin, attorney's services, $2,750; to W. H. Austin, attorney's services, $300; to himself, for services and expenses, $113,—being a total of $8,163. The answer further alleges that it was agreed between himself and the plaintiffs that he should retain the balance of $255.75 for his services. By way of counterclaim the defendant pleaded an account for professional services as attorney for plaintiffs, containing 16 items, the balance due upon which was alleged to be $676.29. The plaintiffs' reply denied any services by defendant for plaintiffs, save certain services in the action against Milwaukee county, amounting to $113, which had been paid. Upon affidavit of defendant, showing that the trial of the issues arising on the counterclaim involved the examination of a long account, the court referred the action to a referee, to hear, try, and determine, to the making of which order the plaintiffs objected and excepted. After hearing the evidence, the referee found that the defendant retained in his hands, of the amount collected, $255.75, belonging to the plaintiffs, but that he was entitled to recover on his counterclaim $311.29 (the balance of his counterclaim being disallowed), and that he was entitled to judgment against the plaintiffs for the net balance of his counterclaim over and above the amount of money retained in his hands, to wit, $55.54. The report of the referee was confirmed by the court, and judgment thereon was rendered in favor of the defendant, with costs, taxed at $95.35, of which $79.93 was attorney's fees. Objection and exception was duly taken to the taxation of more than $25 costs, exclusive of disbursements, for the reason that the action was upon contract. From this judgment plaintiffs appealed.

Eschweiler & Carpenter, for appellants. Austin & Hamilton, for respondent.

WINSLOW, J. (after stating the facts). The appellants' first contention is that the action is not referable. Under the decisions of this court the complaint must be held to state a cause of action upon contract, and not in tort. Although conversion is alleged, it is not charged to be wrongful or unlawful. This exact question was decided in Manufacturing Co. v. Richards, 69 Wis. 643, 35 N. W. 40, and discussion is not necessary. The complaint being upon contract, the case is identical, in all essential particulars, with the case of Van Oss v. Synon, 85 Wis. 661, 56 N. W. 190, in which an order of reference was held proper. Upon the merits of the case it is contended that several of the items allowed to the defendant by the referee should not have been allowed. We are unable, however, to review these questions, because the bill of exceptions is nowhere certified to contain all of the evidence. The taxation of costs, however, was erroneous. This was an action at law upon contract, and in such an action the costs are limited to $25, exclusive of disbursements. Rev. St. § 2921. The excess of costs, which was improperly taxed, is $54.93, and as to this the judgment is erroneous. The judgment for damages is affirmed, and the judgment as to costs is reversed as to $54.93 thereof, and affirmed as to the balance, without costs to either party, except that defendant must pay the fees of the clerk of this court.

GUETZKOW BROS. CO. v. ANDREWS et al.

(Supreme Court of Wisconsin. Jan. 28, 1896.)

SALE—BREACH BY VENDOR—EXTRAORDINARY PROFITS—DAMAGES—FINDINGS—REVIEW.

1. Where goods as specially ordered by a vendee, have no established market value, and the vendor, knowing that they were purchased by the vendee to enable him to fulfill his contracts with third persons, delivers goods not according to contract, whereby the vendee receives a less price than his contracts called for, the measure of damages is the difference between the price actually received, and a price which would yield him a reasonable profit, which would be the price such third person had contracted to pay, unless such price would yield an extraordinary profit, in which case it would control only if the vendor, when contracting, had knowledge of it.

2. An order refusing to set aside a referee's findings of fact will not be reviewed, unless the findings were clearly against the preponderance of evidence.

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by Guetzkow Bros. Company against A. H. Andrews & Co. for the price of goods sold and delivered. From a judgment for plaintiff, defendants appeal. Affirmed.

This case was brought by plaintiff to recover $1,978, alleged to be due from the defendants for show cases and other articles manufactured for them, which articles they had contracted to furnish exhibitors at the World's Fair. The answer of defendants contained a denial of liability, and set up as a defense that the articles were not constructed or furnished according to the contract, and were not reasonably worth the contract price, or as much as the payments that had been made. They counterclaimed for the amount of the overpayments, and also for damages, claiming as such damages the loss of profits they would have made if plaintiff had fully complied with the contract, and placing such damages at the difference between the price they agreed to pay plaintiff, and the amount they were to receive from the exhibitors; the advance being from 100 to 150 per cent. The case was tried by a referee, who found that the goods were all manufactured and furnished substantially in accordance with the contract, except in some small particulars, for which a rebate of the purchase price was allowed. The evidence shows that the goods were manufactured for a special purpose, that there was no market price for such goods, and that plaintiff knew, when it contracted with defendants, that they were under contract to furnish the goods to exhibitors at the World's Fair, and that the contract was made by them with plaintiff to enable them to carry out the contract previously made by them with such exhibitors. The findings of the referee were confirmed by the court, and judgment was entered in plaintiff's favor, from which this appeal was taken.

Cary & Cary and Sylvester & Scheiber, for appellants. Eschweiler & Carpenter, for respondent.

MARSHALL, J. (after stating the facts). There is no controversy but that the findings of fact warrant the judgment that was entered, and it seems clear that, waiving the question of whether they are supported by the evidence, in respect to the determination that the contract between the parties was substantially complied with, appellants are not entitled to prevail on this appeal, unless the rule for which they contend—that is, that they are entitled to recover the loss of profits, amounting to from 100 to 150 per cent.—should have been adopted by the trial court. The evidence was taken on appellants' theory, but at the close of the trial was stricken out; the referee holding that the rule contended for would not be applied to the case. He said: "The decided weight of authority is in favor of the exclusion from consideration, on the question of damages, the profits the original contractor might have made under his contract; that such damages—possible profits—are uncertain, speculative, and too remote to affect the plaintiff, and the testimony in relation to the same should be excluded." Looking at this ruling in the light of the evidence and appellants' contention, we assume the court did not hold, or intend to hold, that lost profits are not recoverable in a proper case, but that the rule contended for by appellants could not be applied, and that the evidence did not tend to establish damages under any other rule. On this subject the learned counsel for appellants say: "We say, frankly, that if, in the light of the facts of this case, the referee decided that proposition correctly, the judgment should be affirmed." So we may properly consider this subject at the outset in determining the case, and, in doing so, shall take into consideration the evidence that was stricken out. If, notwithstanding such evidence, the court could not, on the whole case, have allowed loss of profits as damages, then the error in striking out such evidence, if it was error, did not prejudice appellants; hence, does not constitute reversible error. There is no controversy but that the difference between the contract price for the goods to appellants and what they were to receive was unusually large. To say that such increased price to the exhibitors was extraordinary, in a superlative degree, would be fully justified. It also appears beyond controversy that respondent's officers knew, when the contract was made with appellants, that the goods were intended for a special purpose. They had reason to know that there was no established market price for such goods. They knew that defendants were under contract to furnish the goods to the exhibitors, but it does not appear that they had any notice of the contract price such exhibitors were to pay; and it is in the light of these facts that we must determine the question presented. As stated, in effect, by this court in Wright v. Mulvaney, 78 Wis. 89, 46 N. Y. 1045, it is sometimes difficult to determine

when the rule of prospective profits should be applied, and when not, and such determination must be largely governed by the special circumstances in each particular case; and, as often said by this court, in terms or in effect, such profits are at best conjectural and uncertain, and, when allowed, are likely to, or necessarily do, operate unjustly and oppressively. Wright v. Mulvaney, supra; Milling Co. v. Howitt, 86 Wis. 270, 56 N. W. 784; Bierbach v. Rubber Co., 54 Wis. 208, 11 N. W. 514; Anderson v. Sloane, 72 Wis. 566, 40 N. W. 214. Therefore, before the rule should be applied to any given case, such case should be brought clearly within the authorities on the subject, leaving no reasonable controversy in respect to it. To be sure, in this case, the element of uncertainty, as the term is commonly used, was in some respects not present, because the contract between the appellants and the exhibitors relieved it in a measure of that difficulty; but uncertainty still remained, quite prejudicial to respondent, in that it was not known to its officers, at the time of the making of the contract, that the price appellants were to obtain from the exhibitors would yield an extraordinary profit. Where there has been a previous sale, or where there has not, the fundamental principle to be observed is that the damages for the breach complained of must be confined to such as may be fairly considered to arise, according to the usual course of things, from such breach, or such as may reasonably be supposed to have been in contemplation of the parties at the time of making the contract as the probable result of the breach of it. Hadley v. Baxendale, 9 Exch. 341; Cockburn v. Lumber Co., 54 Wis. 619, 12 N. W. 49. Hence, it is held that, in order to make applicable the special rule of damages,—that is, loss of profits,—it must be shown that the special circumstances, by reason of which the party invokes such application, were brought clearly home to the knowledge of both parties at the time the contract was made, and it is only applicable in so far as such circumstances were so brought home.

All rules for the assessment of damages for the breach of contracts are supposed to be founded upon principles of natural justice, the intention being to keep strictly within such principles. It is on that ground that the general rule established for the assessment of damages for the breach of an executory contract to sell and deliver property, i. e. the difference between the contract price and the market value at the time and place of the delivery, in order to work out natural justice in case of special circumstances, must necessarily be broadened out to fit such circumstances, but only when such special circumstances are shown to have been brought home to the knowledge of both parties at the making of the contract. The leading case of Hadley v. Baxendale, supra, states the rule applicable to a case of this kind, and it has been repeatedly approved by this court. It is thus stated, in the language of Anderson, B.: "Where two parties have made a contract, which one of them has broken, the damages which the other ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i. e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to defendants, and thus known to both parties, the damages resulting from the breach of such contract which they would reasonably contemplate would be the amount of the injury which would ordinarily follow from a breach of contract under these special circumstances, so known and communicated; but, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and, in the great majority of cases, not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for a breach of contract by special terms as to the damages in that case." To the same effect are Borries v. Hutchinson, 18 C. B. (N. S.) 445; Messmore v. Lead Co., 40 N. Y. 422; Booth v. Mill Co., 60 N. Y. 487; McHose v. Fulmer, 73 Pa. St. 365; Poposkey v. Munkwitz, 68 Wis. 322, 32 N. W. 35; Cockburn v. Lumber Co., 54 Wis. 619, 12 N. W. 49, and substantially all the authorities on the subject; and if all were collated no more light could be thrown on the general principle involved.

But the question arises whether the price to the first vendee must be communicated to the second vendor in order that he may be charged with the special rule of damages at the suit of his vendee, in case of a breach on the part of such second vendor; and upon the precise point here presented the authorities are not numerous. In Cockburn v. Lumber Co., supra, Mr. Justice Lyon said: "To bind the defendant by a price stipulated for on a resale, he must have had notice of such resale when the contract was made, though, perhaps, not of the contract price." But it must be observed that, in the case then under consideration, the circumstance of extraordinary profits was not present; that is, the evidence did not disclose but that the profits were such as were reasonable, and might reasonably have been in contemplation by both parties to the transaction when the contract was made. The question has been many times considered in the courts of England, and

may be said to have been long settled, that the second vendor is only bound by the terms of the contract with the second vendee, so far as communicated to him, or he had reasonable ground to know the same, by inference from facts brought to his knowledge. All of the cases refer to and are founded upon the general principle laid down in Hadley v. Baxendale, supra. In Borries v. Hutchinson these circumstances were present: There was a Russian contract between the plaintiff and a third person as his vendor. The fact of the contract was made known to defendant, but not its terms. He knew the goods were to be delivered in Russia, to be transferred there by rail. He was familiar with the fact that freight rates and insurance rates were higher there in winter than in summer. He agreed to deliver the goods in summer, but did not deliver till later, so that the winter rates of freight and insurance applied. It was held that he was bound to know, under the circumstances, at the time he made the contract, that the late delivery would necessitate a loss on the plaintiff, by reason of increased freight and insurance charges. Hence, he was charged with such loss, because so much of the contract was made known to him as charged him with knowledge that the loss, by increased freight and insurance rates, would naturally follow such late delivery. Plaintiff was liable to his Russian vendee for certain penalties for failure to deliver the goods at the time agreed upon; but defendant was not held liable for such penalties, because knowledge of the terms of the Russian contract in that regard was not brought home to him, nor facts that would reasonably have suggested that element of probable damages in case of a breach. To the same effect are Ellbinger Actien-Gesellschafft v. Armstrong, L. R. 9 Q. B. 473; Grebert-Borgnis v. Nugent, 15 Q. B. Div. 85. In this last there was a contract between plaintiff and a third person, as his vendee, for goods of a particular kind, which contract was made known to him. The contract was the same as between plaintiff and defendant, except as to price. The latter contract was broken. There was no market price for the goods. There was no question but that the difference in price was no more than a reasonable profit. He was held liable for such profits as one of the natural consequences of the breach of so much of the contract as was made known to him. Brett, M. R., stated the rule thus: "It seems to me, according to what has been cited, that the original vendor in such a case is only liable, in case of a breach, for the natural consequences of so much of the subcontract as was made known to him. If he were told, for instance, that the contract was that, if I do not supply my purchaser with the goods which I ordered for him, my vendor, I shall have to pay my purchaser £4 a ton for every ton which I do not deliver; then, if there be a breach of the contract, the original vendor would have to pay the £4 a ton. But, supposing there was the subcontract between myself and my purchaser, not only that I should pay £4 a ton, but, besides that, I should be liable to a penalty of £5 a day; although this is a subcontract, yet if that part of it was not known to the original vendor, for that reason, and because it is not a natural consequence of his bargain, he would not be liable to pay the penalty of £5 a day. It seems to me that the case established that the original vendor is to be liable to so much of the subcontract as was made known to him, but only to that extent." To the same effect are the American authorities, all substantially adopting the rule of Hadley v. Baxendale. They are numerous, and it is sufficient to refer to Poposkey v. Munkwitz, supra, and Cockburn v. Lumber Co., supra, in our own court. Differences may be found in the interpretations which courts have put on the rule of Hadley v. Baxendale; but they generally hold that the price in the first contract need not be communicated, as intimated in Cockburn v. Lumber Co., in this court. They proceed upon the principle, all of them, that knowledge of the first contract is sufficient to bring home to the second vendor, as an inference of fact, knowledge that the price in the first contract is sufficiently in advance of the price in the second contract to allow a reasonable profit to the second vendee. We venture to say that no case can be found, where the price was out of all proportion to anything that might be considered reasonable in order to give a fair profit, that the court has held that such unreasonable profits may be recovered as damages, where knowledge of such unreasonable profits, as a special circumstance, was not known to both parties at the time of the making of the contract. The most that is held in Booth v. Mill Co., 60 N. Y. 487, cited with confidence by appellants, is that the second vendor is bound by the price his vendee is to receive, unless it is shown that such price is extravagant, or of an unusual or exceptional character. That is as far as the New York courts have gone. Church, C. J., said: "There is considerable reason for the position that, where the vendor is distinctly informed that the purchase is made to enable the vendee to fulfill a previous contract, and he knows there is no market price for the article, he assumes the risk of being bound by the price named in such previous contract, whatever it may be." But no such rule was adopted, and no case was there cited to support such a rule, and we are unable to see wherein such reason exists. It could only be consistent with the theory that the law aims at complete compensation for all losses, including gains prevented as well as losses sustained, without the important condition, requisite to give the rule the basic foundation upon which all rules for the as-

sessment of damages are supposed to rest, that of natural justice, which condition must always be considered in order that the true rule may be correctly stated. That is, that the damages must be such as can be fairly supposed to have entered into the contemplation of both parties.

Further discussion of the subject might be interesting, but is not necessary to a decision of this case; and the only excuse for extending it thus far is the fact that it does not appear that the precise question here presented has heretofore been decided by this court. We state the conclusion arrived at thus: When the vendor is informed that the purchase is made to enable the vendee to fulfill a contract which he has theretofore made with a third person, and such vendor furnishes the goods, but not according to contract, and there is no market price for such goods, and the purchaser furnishes such goods to such third person, but is not able to recover of him the price stipulated in the contract with such third person, by reason of the breach of the contract committed by such vendor, in determining the damages for such breach, such vendor is bound by the price his vendee was to receive from such third person, whether such price was communicated to him at the time of the making of the contract with his vendee or not, unless the price was such as to yield an extraordinary and unusual profit, which could not reasonably have been presumed to have been in contemplation by him at the time he made his contract. In such a case he would not be bound beyond such sum as would yield a reasonable and fair profit to his vendee. Ordinarily, the price to the first vendee would, presumptively, be held to be a reasonable price; but if the facts in any given case are such as to show such price to yield an extravagant or extraordinary profit, the second vendor will not be bound by such price, in the absence of evidence of previous knowledge, as before stated; and, in order to assess the damages, the court must be put in possession of sufficient evidence to enable it to arrive at a conclusion in respect to what would amount to a reasonable profit on the transaction. It follows from the foregoing that there was no evidence before the referee by which he could have assessed in plaintiff's favor damages for loss of profits for the breach of the contract between it and the defendant, if there was a breach.

After a careful examination of the evidence, we are unable to conclude that the trial court erred in refusing to set aside the referee's findings of fact on the question of whether the contract was substantially complied with or not. Under repeated decisions of this court, to warrant setting aside findings of fact as against evidence, it must appear that they are against the clear preponderance of the evidence. Briggs v. Hiles, 87 Wis. 438, 58 N. W. 752; Bacon v. Bacon, 33 Wis. 147; Lord v. Devendorf, 54 Wis. 491, 11 N. W. 903; Messersmith v. Devendorf, 54 Wis. 496, 11 N. W. 906. Moreover, it is doubtful whether the bill of exceptions is sufficiently certified to enable the court to review the question of whether the evidence supports the findings or not. It follows, from the foregoing, that the judgment of the superior court should be affirmed. The judgment of the superior court is affirmed.

DAVEY et al. v. FIRST NAT. BANK OF DEADWOOD.

(Supreme Court of South Dakota. Jan. 27, 1896.)

USURIOUS INTEREST—RECOVERY FROM NATIONAL BANK—PAYMENT.

1. To entitle a party to recover usurious interest under the provisions of section 5198, Rev. St. U. S., such interest must have actually been paid either in money or its equivalent; and the mere charging of such interest in a running account is not a payment of the same within the meaning of that section.

2. Neither will the including of such usurious interest in a promissory note entitle the maker to recover it, until such note is in fact paid.

(Syllabus by the Court.)

Appeal from circuit court, Lawrence county; A. J. Plowman, Judge.

Action by John H. Davey and Frank J. Davey against the First National Bank of Deadwood. Judgment for plaintiffs, and defendant appeals. Reversed.

Moody & Washabaugh, for appellant. Wm. R. Steele and W. L. McLaughlin, for respondents.

KELLAM, J. The respondents, as plaintiffs, brought this action against defendant, a national bank, to recover the statutory penalty provided in section 5198, Rev. St. U. S. It is alleged that from the 25th day of August, 1882, to the 23d day of November, 1883, the plaintiff paid to the defendant certain sums of money as usurious interest, upon contracts not in writing. During the time named the defendant bank carried upon its books an open account in the name of John H. Davey, but in which it is conceded both parties plaintiff were interested. The evidence tended to show that the plaintiffs were carrying on a large mining, milling, and smelting business, and were constant borrowers of the defendant bank; that the sums so borrowed and advanced were generally paid on checks drawn against the account. It also seems to have been the custom that, when plaintiffs had bullion ready for shipment, it was delivered to the bank, and credit given the account for its estimated value. When refined, and its exact value ascertained, the difference between its supposed and its ascertained value was credited or charged to the account, as the case might be. Generally the account was overdrawn,

and interest charged upon the overdraft. This was done by the use of memorandum checks made by the officers of the bank, the amount of the same being charged upon the books of the bank like other checks, entered upon plaintiffs' pass book as often as balanced, and returned to them with and in the same manner as other checks drawn by themselves and paid by the bank. Several times the plaintiffs executed their notes to the bank, covering a part or all of the overdraft, and received credit therefor. Once or twice the notes so given exceeded the overdraft, so that when thus credited the account showed a balance in plaintiffs' favor. On one occasion the plaintiffs procured accommodation notes signed by another person, and indorsed by plaintiffs to the bank, and received credit therefor on the account. On the 23d day of November, 1883, the plaintiffs' indebtedness to the defendant bank and to the Lead City Bank amounted in round numbers to $79,000, for which amount plaintiffs made their notes, secured by mortgages to O. J. Salisbury, president of defendant bank, as trustee for it and the said Lead City Bank. These mortgages were subsequently foreclosed, but after the commencement of this action. Upon the trial the plaintiffs recovered judgment, and the defendant bank appeals.

The main questions are two: Whether the facts proved show that the amounts so charged as interest were ever in fact paid by plaintiffs, and whether the interest charged can be justified on the theory that there was an express contract in writing fixing the rate of interest. Simply charging interest against plaintiffs' account, thereby enlarging their overdraft, obviously would not entitle plaintiffs to recover the penalty sued for in this action; for that is recoverable only "in case the greater rate of interest has been paid." Rev. St. U. S. § 5198; Brown v. Bank, 72 Pa. St. 209; Hall v. Bank, 30 Neb. 99, 46 N. W. 150. If this interest so charged to plaintiffs was ever actually paid by them, it was either through their deposits of bullion or by their notes, for these were the only credits claimed or proved. We do not think the bullion deposits could have had this effect, for the fair meaning and force of the undisputed evidence is that, by a well-understood arrangement between the plaintiffs and the bank, the advance credits upon the bullion were anticipated and appropriated when made. Mr. McPherson—an officer of the bank, to be sure, but plaintiffs' witness—testified very fully upon this point. He says: "In almost every instance where these credits were thus given, it was under an arrangement that he could draw against his credit, notwithstanding this overdraft, which might be large at the time. * * * Whenever Mr. Davey had any bullion to ship, he would usually deliver it to us or to the express company with a statement of what it was and an estimate of its probable value. Taking that as a basis, we would advance him credit on our books for sometimes a little less and sometimes the full value, perhaps, for the bullion, so that he could anticipate the returns and draw against it. * * * It was an invariable rule during the course of this whole business, between the dates specified in this case, the advances made upon his bullion were predicated upon his necessities at Galena. It was almost invariably the case that he either anticipated his bullion product, or that he drew immediately after the bullion was delivered for his current expenses. Indeed, his expenses were always more than his bullion. * * * During this whole period there was a very large overdraft generally, and if we made an advance to him, say of $10,000 or of $6,000, that very credit would still leave an overdraft; but the understanding with Mr. Davey always was, of course, on his solicitation, that we would pay his checks, notwithstanding his current overdraft against his bullion, against the credit we had given upon this bullion. That was invariably the case." This evidence satisfies us that, so far as the advances or credits on account of bullion shipments were concerned, there was no appropriation, either by the plaintiffs or by the bank, to the payment of these interest charges, but, on the contrary, that the plaintiffs turned it over to the bank, and the bank received it, with the understanding that the credits arising therefrom should be used for other purposes, to wit, to pay the current expenses and demands of plaintiffs' milling business. Neither do we think that the putting of a part, or all, of this overdraft, including interest charges, into notes, constituted a payment of such overdraft. It simply changed the evidence of the indebtedness from a book account into promissory notes, and was no payment until the notes were paid. It does appear, however, that in one instance, January 10, 1883, there was a definite appropriation of a bullion credit to the payment of two certain notes. Mr. McPherson testifies: "In one case, when there was an advance of $17,000 made, that was appropriated to the payment of two notes, on the 10th day of January, 1883. These two notes were paid on the 10th day of January, 1883,—one note for $8,000 and one of $8,500. They were renewed. They were originally given in November, perhaps, of a previous year, and renewed about the first of the year, and paid on the 10th of January, 1883." Again, referring to the same transaction, he says: "There were two notes, one of $8,000 and one of $8,500, which were charged up against the bank,—$17,000,—in January, 1883. Those two notes were paid from the returns. They were paid from the advance made upon the bullion." From these very explicit statements of Mr. McPherson, who was the cashier of the bank, we understand that these two notes of $8,000 and $8,500 were actually paid out

of the $17,000 deposit of bullion, so that whatever interest those notes represented was paid by the plaintiffs and received by the defendant. If we understand the meaning of the witness, this would be the legal effect of his testimony. We have studied this entire record carefully, and have endeavored to give thoughtful attention to every question discussed by counsel, but if we were to multiply words we could only state as our final conclusion that, upon the facts disclosed, the only interest shown to have been actually paid was whatever was paid by the bullion credit of January 10, 1883, and that upon such amount, whatever it is found to be, the plaintiffs' recovery must be predicated. There are one or two other questions which I should feel inclined to discuss and pass upon, but as the judgment must be reversed for reasons stated, and it is not certain that the same questions will arise in another trial, the majority of the court think it better to withhold expression upon them. This being our view of the effect of the evidence, we cannot do otherwise than reverse the judgment, and remand the case for a new trial, the plaintiffs being entitled to recover only on account of such illegal interest, if any, as was contained in the two notes—one of $8,000 and one of $8,500—which were paid January 10, 1883. The judgment is reversed, and the case remanded for a new trial.

LEQVE v. STOPPEL et al.

(Supreme Court of Minnesota. Feb. 7, 1896.)

FRAUDULENT CONVEYANCES—SUFFICIENCY OF CONSIDERATION—BONA FIDES.

Held, in an action brought to set aside, as a fraud upon creditors, certain conveyances and transfers of real and personal property by a father to his sons, that certain findings of fact—in effect, that the conveyances and transfers were made in pursuance of a previously made and valid oral agreement, in good faith, and without any intent to hinder, delay, or defraud the father's creditors—were supported by the evidence, and justified the conclusions of law.

(Syllabus by the Court.)

Appeal from district court, Olmsted county; Thomas S. Buckham, Judge.

Action by Jacob Leqve against Franz J. Stoppel and others. Judgment for defendants. From an order refusing a new trial, plaintiff appeals. Affirmed.

Chas. C. Willson, for appellant. Chas. E. Callaghan, H. A. Eckholdt, and George J. Allen, for respondents.

COLLINS, J. This was an action to have certain deeds, transfers, sales, and mortgages of the property, real and personal, of defendant Franz Joseph Stoppel, an insolvent, adjudged fraudulent and void as to his creditors, and the property recovered and marshaled as part of his estate, the plaintiff being his assignee in insolvency. On the findings of fact made by the court below, judgment was ordered in favor of all defendants. This appeal is from an order denying plaintiff's motion for a new trial of the issues made with the defendants Stoppel only; no question being raised as to the correctness of the findings with reference to defendant Coon, who was mortgagee of a part of the real estate, and Union National Bank, a judgment creditor of the copartnership hereinafter mentioned. The deeds, sales, and transfers attacked by the complainant were dated and made on April 14, 1890. Defendant Franz Joseph Stoppel was then about 78 years of age, a farmer, and the father of defendants Charles, William, and Frank Stoppel. In May, 1889, he had entered into a partnership with five other persons—all farmers—for the purpose of operating a creamery at Rochester, Minn., with such outlying or "skimming" stations as might be found necessary; and the business was being carried on, and was about to be extended, April 14, 1890. He had owned for many years a farm of 358 acres, valued at $11,000, including his homestead of 80 acres, valued at $3,500. His personal property at and about the farm was worth $1,400, and although it is asserted by counsel that, of this, articles of the value of $553 were exempt, we find no evidence, and there was no finding by the trial court, to justify the claim. Several years prior to the date last mentioned the real estate had been mortgaged to secure the payment of $7,000. At this time—April 14, 1890—his wife was living, and there were five sons and two daughters. Three of his sons had always lived with him upon the farm, and were then aged as follows: Charles, 33 years; William, 30 years; and Frank, 28 years. Some years before the formation of the partnership the father had orally agreed with these three sons that if they would remain at home after they severally became of age and work the farm,—help to carry it on and to pay off this mortgage of $7,000,—he would, when it was fully paid, convey all of the real estate and turn over all of his personal property to them. These three sons remained at home,—carried on the farm,—one for about 12 years, another some 9 years, and the third about 7 years; and the incumbrance was fully paid off some time in January, 1890, and the father then announced that he was ready to fulfill the agreement in respect to his property. April 14, 1890, he and his wife executed and delivered deeds whereby all of the real estate was conveyed to the sons in parcels, and according to a division agreed upon by them. The personal property was also turned over to them. The deeds were recorded on the same day. The sons have since had possession of their respective tracts or farms, and of the personal property, and have made valuable improvements on the land. As a part of the transaction of April 14th, Charles and

Frank Stoppel agreed orally with their father and mother that they would pay to the latter, or to the survivor, in case one should die, the sum of $1,500, in semiannual installments of $75, commencing April 1, 1891, and would furnish them, so long as either should live, two living rooms in the house then on the homestead, or in a separate house, all provisions, except groceries, needed by them, all fuel and necessary aid and assistance in sickness. These two sons also agreed to pay to a sister $500 by April 1, 1892; to another sister, $300, by April 1, 1893; and to a brother, John, $100, at the same time. December 31, 1890, this agreement was duly reduced to writing, signed and acknowledged by the parties, in which writing it was stipulated that all of the promises therein contained should be a lien and charge on the land theretofore conveyed to Charles and Frank. The appellant challenges, by his assignments of error, those findings of fact by which it was found that on April 14, 1890, the copartnership was solvent, and that the father and his sons and the Union Bank believed it to be solvent, and that it would continue so, and have assets enough to pay all liabilities; and the finding that the father made a valid oral contract with his three sons to convey to them his real and personal property, if they would remain at home, as before stated; and also the finding that the conveyances of the real property and the transfer of the personalty to the sons were made in good faith, and without any intent to hinder, delay, or defraud creditors. The other assignments are directed to the conclusions of law, and it seems to be admitted, in effect, that, if all of the material findings of fact are supported by the evidence, the conclusions of law are correct.

1. There seems to be an abundance of evidence upon which to rest the finding that the copartnership was solvent on April 14, 1890. It had been a going concern for about one year; was in a prosperous condition,—about to extend its operations; was indebted about $3,000, and of this over $500 was due to defendant Franz Joseph Stoppel; and its reputation for solvency was first-class. Its assets were largely in excess of its liabilities, and, of the debts before mentioned, a large part was thereafter paid in due course of business. The credit of the concern at the Union Bank was then good, for it had already loaned money to it, and continued so to do for more than one year afterwards. After April 14th, two or three responsible members of the firm sold out to their associates, and were formally released by the bank from all liability on the partnership notes then held by it. After that time defendants Charles and Frank Stoppel loaned money to the firm to the amount of $1,900, while the latter indorsed its notes in a sum exceeding $6,000. The firm and its then members did not assign until November 16, 1893,—about 2½ years after the transactions now assailed were had,—and up to the time of the assignment the partnership seems to have been doing business. It would seem that the father and the sons and the bank were fully warranted in considering the firm solvent on the day in question, and for some months afterwards, and well able to liquidate its obligations as they matured.

2. There was also an abundance of proof to support the finding that Franz Joseph Stoppel made the oral agreement with his three sons as claimed by them. Not only did they testify to it, but all of the circumstances tend to corroborate and establish their statements. Such contracts are a very common thing among people of his nationality. When Charles became of age, his father must have been about 65 years old, and he was not far from 70 when the younger of the three attained his majority. In his declining years, at an age when most men are past their years of usefulness, he found his farm incumbered by a mortgage of $7,000. Burdened with this large indebtedness, the prospect for the sons, in so far as the farm was concerned, could not have been very flattering, even with the offer in question, and without their assistance the outlook for the father must have been very discouraging. There were other children,—four in number,—and, should these three boys remain at home after becoming of age, there was no assurance that their efforts to cancel the debt would be of any more benefit to them than to the children who had gone or would go out for themselves. What more natural, under these circumstances, than that the arrangement and agreement claimed should have been entered into? Again, these three sons remained at home after becoming of age,—one for 12 years, another for 9 years, and the younger for 7 years, prior to 1890,—all working for the one object of freeing the farm of a very large incumbrance. When we find so uncommon and unexpected an occurrence, we ought not to be surprised when informed that there was an agreement, of many years' standing, that the sons were to be rewarded in the manner alleged in this case. In fact, we should be surprised if told that no arrangement or agreement had been entered into whereby the latter were to be compensated for their years of hard work.

3. The important finding that the transfers and conveyances were made in good faith, and without any intent to hinder, delay, or defraud the father's creditors, is also well supported by the evidence. We have referred at length to the facts which preceded the making of the deeds and the actual transfer of the property, on April 14, 1890, and the matters which actually furnished the consideration therefor. The good faith of the transaction, and the intent of the parties, are to be determined from all of the circumstances,—starting out with the ascertained fact that an oral agreement had been entered into, years before, to do just what was done,

except that it was understood that the property was to be transferred and conveyed without conditions; that the sons had worked faithfully year after year upon the farm, so that it might be free of the incumbrance; that their work and labor were worth, at a fair price, all that they received for it; that their efforts to pay off the debt had been crowned with success about three months before the deeds and transfers were made; and that these instruments were executed and delivered as soon thereafter as was convenient. Let us look at the circumstances as they seem to have existed April 14, 1890. At that time Franz Joseph Stoppel had no individual creditors. The firm of which he was a member owed for machinery, and for money borrowed from defendant bank with which to pay for machinery, and it owed Stoppel $527; but its assets exceeded in value, by quite a sum, the amount of its liabilities, and it was doing a flourishing business. No person, either in or out of the concern, had reason to suppose that it would become insolvent, and it did not make an assignment for 2½ years afterwards. Its credit and standing were such that two of the sons loaned it money, and one indorsed its notes, long after the day of which we speak. Nor did Stoppel convey and dispose of all of his property except such as was beyond the reach of his creditors under the exemption laws of the state,—a thing frequently done by embarrassed debtors. He transferred a valuable homestead and all of his exempt personal property,—a wholly unnecessary act, if he designed a fraud upon his creditors. He reserved his interest in the partnership business, which was then regarded as of some value, and subsequently he added to this interest as other parties retired. He also retained the debt of $527 due to him from the firm, and regarded as perfectly good. It was also stipulated that two of his sons should pay him $1,500, in semiannual installments of $75, and this agreement was reduced to writing in December, following. It is far from being a case where a debtor, insolvent, or in anticipation of being insolvent, conveys that part of his property which is subject to seizure upon execution, and, as to the balance, relies upon, and is protected by, our exemption laws. Nor is it a case where concealment indicates a bad motive. The deeds were put upon record on the day of their execution and delivery, and the grantees took immediate possession. The agreement, reduced to writing December 31, 1890, that two of the sons should furnish their parents with two living rooms and various articles, and should pay them $1,500, in semiannual installments of $75, was also recorded within three days after it was signed. It was also shown that as early as December, 1890, the cashier of defendant bank was personally informed by one of the sons of what had been done. The whole affair was conducted openly and above board, in every detail. There was a valid and adequate consideration. There was no evidence of a fraudulent intent, but, to the contrary, the proofs well established the bona fides of the transaction. We need not refer particularly to the rules of law which are applicable here, and which justified the conclusion of the court below. Several are stated in the recent case of Wetherill v. Canney (Minn.) 64 N. W. 818. See, also, Dunlap v. Hawkins, 59 N. Y. 347; Neuberger v. Keim, 134 N. Y. 35, 31 N. E. 268; Davis v. Howard (Sup.) 26 N. Y. Supp. 194; Howard v. Rynearson, 50 Mich. 307, 15 N. W. 486; Ware v. Purdy (Iowa) 60 N. W. 528.

4. It is urged by counsel for plaintiff that, if the deeds and transfers cannot be declared fraudulent as to creditors, his client is at least entitled to have them so held as to such parts of the purchase price as were provided for in the agreement made by two of the sons on December 31, 1890, and remained unpaid when this action was brought. The beneficiaries of that agreement, which was really an afterthought, and wholly gratuitous, were the father, the mother, two sisters, and a brother. There are several reasons why the claim of counsel is without merit, but it can be disposed of by saying that neither of the sisters are parties herein, nor is the brother, and that there is no finding on which to base an order for the partial relief asked by counsel. Order affirmed.

GILFILLAN v. SCHMIDT et al.

(Supreme Court of Minnesota. Jan. 29, 1896.)

SURFACE WATERS — DEEPENING NATURAL DRAINAGE—OVERFLOWING ADJOINING LANDS.

1. The lands of the defendants were situated immediately north of those of the plaintiff, those of both parties sloping to the south at a grade of nine feet to the mile The north part of defendants' lands formed a watershed, the surface waters from which naturally drained into a large pond or marsh, which was fed entirely by surface water. This pond or marsh had a natural outlet at its south end, whence, in the wet seasons of the year, its waters flowed, through a fairly well defined channel or waterway, southerly to and across plaintiff's land, into a small lake, and thence into Lake Minnetonka. This was the natural and only feasible drainage of defendants' lands In wet seasons the pond or marsh on defendants' lands filled with surface waters from the surrounding watershed, covering 30 or 40 acres, but at other seasons ran off, evaporated, or was absorbed by the soil, until the water only covered a few acres, to the depth of from two or three feet down to only a few inches. Much of the adjacent land, although wet and marshy, was susceptible of valuable improvement by drainage, but the waters stood on them so late in the season as to render them valueless. About 15 years ago, the defendants, for the purpose of draining these lands, deepened the outlet of this pond or marsh and the natural waterway thence south towards plaintiff's land about two feet, thus draining and reclaiming much land which would otherwise be valueless. They did not divert any of the water from its natural course, but merely aided the natural system of drainage. Neither have they done anything more than was necessary in

the interests of good husbandry. In July, 1892, there was a very unusually heavy rainfall, which filled up the pond or marsh on defendants' lands, from which the waters flowed in great volumes through the outlet and channel deepened by the defendants; and, when it reached the north side of plaintiff's land, large quantities of this water left its natural course, and overflowed, in another direction, upon plaintiff's meadows, greatly damaging his crop of hay. There is no evidence that the water has thus overflowed either before or since, or that it is likely ever to occur, except under exceptional circumstances, in case of unusual rainfalls. Assuming that this overflow was caused by defendants' deepening the natural line of drainage, it does not appear that plaintiff cannot protect himself against its recurrence at small expense compared with the benefits resulting to the defendants by reason of the improved drainage of their lands. *Held*, that the evidence does not justify the conclusion that the overflow and consequent damage to plaintiff were caused by the acts of the defendants in deepening the natural outlet and way for these waters.

2. But even if such acts will, in case of unusually heavy rains, render the water more liable to overflow, or to cause greater quantities of it to overflow upon plaintiff's meadows, yet, under the modified common-law rule as to the disposition of surface waters adopted in this state, and within the rules laid down in Sheehan v. Flynn (Minn.) 61 N. W. 462, the defendants had a right to do what they did in the reasonable improvement of their own lands. Start, C. J., and Buck, J., dissenting.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Robert D. Russell, Judge.

Action by John B. Gilfillan against Anton Schmidt and others. Verdict for plaintiff. From an order refusing a new trial, defendants appeal. Reversed.

Welch & Hayne, for appellants. Gilfillan, Willard & Willard, for respondent.

MITCHELL, J. The findings of the trial court are very long, mainly descriptive of the situation, and largely consisting of statements of what may be called "evidentiary facts." For this reason it is somewhat difficult to state wherein they are, and wherein they are not, sustained by the evidence. An examination of the record, however, shows that there is no real conflict in the evidence. It discloses substantially the following state of facts:

The lands of the two defendants Schmidt constituted a watershed, which naturally drained from the east, north, and west into a large marsh, slough, or pond, indicated on defendants' plat, situated mainly on the lands of the Schmidts, but extending a short distance into the north side of the lands of defendant Classen. The lands of the defendants in the immediate vicinity of this slough or pond were naturally wet and marshy, by reason of the spongy nature of the soil, their proximity to the pond, and the fact that they were only slightly elevated above the ordinary level of the water in the slough or pond; but they were capable, by drainage, of being rendered dry and valuable grass lands. This slough or pond was not fed by any springs or natural streams, but entirely by surface waters from the adjacent watershed. In the wet seasons of the year, this large marsh or slough filled with surface water from the surrounding watershed, covering from 30 to 40 acres, presenting the appearance of a large pond or small lake, from 6 to 8 feet deep in its deepest part, but, in the dry seasons, frequently covering only a few acres, to the depth of from 2 or 3 feet in its deepest part down to only a few inches in its shallowest places. The natural outlet for the waters which thus collected in this slough or pond was at its south end, whence, in wet seasons, they flowed in a large stream southerly, through a fairly well defined course, on substantially the line of the ditch indicated on defendants' plat, into a pond or bog in the north part of plaintiff's land; thence, through a depression or outlet on the west side of this pond or bog, first, westerly, and then southerly, as indicated on the same plat, into Gleason's Lake, which, in turn, flowed into Lake Minnetonka. In brief, the natural drainage of the large marsh or pond on defendants' lands, and of the watershed tributary to it, was substantially as indicated on defendants' map; and throughout its entire course the flow of this water was through a fairly well defined natural depression in the soil. The slope or fall of the lands was to the south, and about nine feet to the mile.

As already stated, at certain seasons of the year the flow of water was quite large, while at others it would diminish, and, finally, in the dry portions of the year, entirely cease; leaving, however, a considerable quantity of water in the big marsh or pond on defendants' land, the effect of which was to leave the lands adjacent to this pond either covered or saturated with water so late in the season as to render them practically valueless. The lowest point on the east or southeasterly side of the pond or bog on plaintiff's land was some three feet higher than the outlet on the west side, already described. Hence the water in this pond or bog would have to rise about three feet above the level of this outlet on the west before any of it would overflow to the east or southeast. Such was the condition of things before the defendants committed any of the acts complained of.

About 15 or 16 years ago, the defendants, or their grantors, for the purpose of draining their lands, dug a ditch from the south end of the big marsh or pond down to about the third or lowest stone culvert marked on defendants' map. This ditch commenced at the natural outlet of the marsh, and substantially followed the natural waterway. Practically, what defendants did consisted of deepening the outlet and waterway about two feet. While this ditch has been repaired and cleaned out at different times, it still remains of substantially the same depth as when first dug. Subsequently, and for the same general purpose, the defendants extended this ditch through Classen's land, down to the bog or pond in the north side of plaintiff's land, also following substantially the line of the natural

waterway. This part of the natural waterway seems to have been more clearly defined than the part up next to the big marsh or pond, and what defendants did on it consisted mainly in straightening it, and removing local obstructions, but not greatly deepening it. The defendants Schmidt have also extended the ditch up through the big marsh or pond, and likewise dug some short lateral ditches, as indicated on their plat, to aid the natural drainage of their lands into this large or central pond or marsh; but these acts are not important in the determination of this case. Of course, the effect of deepening the outlet and natural waterway south of the big marsh or pond is to cause more of the water to flow out, and to leave less of it to stand in the marsh, thereby so far relieving defendants' lands of the burden of these waters as to render much of them valuable meadow lands, which would otherwise be valueless. There is no evidence that defendants have done anything more than is necessary in the interests of good husbandry, or than they might lawfully do in the reasonable use of their own lands, provided they are not thereby casting a burden on plaintiff's lands which they have no right to do. In July, 1892, there was an unusually heavy rainfall, from the effects of which the big marsh or pond on defendants' land rapidly filled with water, which flowed in great volumes through the ditch cut by defendants, into the slough or bog on the north of plaintiff's lands, and filled it up to so high a level that large quantities of water flowed out southeasterly, as indicated on plaintiff's map, and spread over his meadows, and either found its outlet into Parker's Lake, or else remained on the meadows until absorbed or evaporated, thereby causing serious damage to plaintiff's crop of hay. To secure protection against a recurrence of this injury, plaintiff brought this action for a preventive injunction, forbidding the defendants from maintaining the ditch across their lands. There is no evidence and no claim that the digging of the ditch—that is, the deepening of the outlet and waterway of the big marsh or pond on defendants' land—imposes any additional burden upon, or does any injury to, plaintiff's land, unless it be by causing the water to overflow to the southeast, over his meadows. Neither is there any evidence that it ever did thus overflow either before or since the ditch was dug, except on this occasion, in July, 1892, after this unusually heavy rain. So far as appears, on all other occasions the water did not flow down any faster or in any greater volume than could find its outlet through its natural course into Gleason's Lake. The court finds that originally the natural flow of the water from the slough or bog on the north side of plaintiff's lands was southeasterly, down into Parker's Lake. In view of the topography of the country, this was probably so; but this is wholly immaterial in view of the fact, also found by the court, and supported by the evidence, that this had ceased long before the settlement of any of the lands in the vicinity, since which time the natural flow has been to the west, as already stated. There was no evidence as to whether it was practicable for plaintiff to adopt means to guard against the danger of this overflow eastward upon his meadows, or, if so, at what expense. The situation, however, would seem to indicate that a feasible preventive would be to either widen and deepen the outlet to the westward, or raise the easterly bank of the bog or pond. The trial court granted a mandatory injunction requiring the defendants to fill up the ditch to the depth of two feet, from the south end of the big marsh or pond down to the third or lowest culvert, and thus restore the condition of things as it existed before any artificial excavations were made.

It will be seen from the foregoing statement of facts that the defendants have not diverted any of these waters from their natural course. All that they have done was in aid of the natural and only system of drainage. The only effect of their acts in deepening the natural outlet of this marsh or pond is to cause more of these waters to flow out, and thus leave less of them standing on their lands than would have remained there had things continued in their natural condition. In view of the topography of the country, it is also apparent that this was the only means by which defendants could have drained their lands. It is also to be noted that the object and effect of what they did was not simply to drain and reclaim the bed of a permanent and well-defined lake, but to lower the water in a marsh or pond of variable size, so as to drain the adjacent low and swampy lands, and thus render them fit for use as pastures or meadows.

The decision of the trial court seems to be mainly predicated upon the assumption that it was the deepening of the outlet and natural waterway of the big pond or swamp which caused the water to overflow to the southeast, over plaintiff's meadows. It is far from clear that this assumption is correct. Of course, the effect of thus deepening the outlet and channel would be to cause more water to flow out of the swamp or pond. But this overflow would commence sooner. It would commence whenever the water in the marsh rose to the level of the outlet, and continue until it fell to that level. After the marsh or pond was once filled, if the rains continued, the overflow would be the same whether the outlet remained at its original level or was lowered two feet by artificial excavations. So far as appeared, the water had never before overflowed easterly, over plaintiff's meadows; and, for anything that appears, the overflow on this occasion might have occurred, as the result of the unusual and extraordinary rainfall, even if the outlet and waterway had been left in their natural condition. It would seem self-evident that this might occur if

the rains were sufficiently heavy and continued long enough. Therefore, it does not seem to us that the evidence furnishes any sufficient basis for the assumption of fact upon which the decision of the court must be sustained, if at all; for, unless the deepening of the natural waterway was the efficient and proximate cause of the overflow easterly, upon plaintiff's meadows, the plaintiff would not, under any view of the law, have a cause of action. No innovation or change in the distribution of water from a superior to an inferior tenement is material or the subject of condemnation, unless it works injury to the inferior estate. Peck v. Goodberlett, 109 N. Y. 180, 16 N. E. 350.

But we shall concede (which is the most that can be claimed for the evidence) that, so long as the natural channel for this water on plaintiff's land is left in its present condition, the acts of the defendants in deepening the channel on their lands will, at rare intervals, in case of extraordinary or unusual rainfalls, render the water more liable to overflow to the east, upon plaintiff's meadows, or to flow there in larger quantities, than they otherwise would. Still, under the modified common-law rule adopted in this state, defendants have done nothing but what they might lawfully do in the reasonable improvement of their own lands. The small inland lakes of this state are in some respects sui generis. Some of them are fed mainly by surface waters, and yet are permanent and well-defined lakes. We do not wish to be understood as holding that such lakes continue to be surface waters. But, on the facts of the present case, we hold that the waters which collected on the defendants' lands never lost their character as surface waters. This so-called "pond" or "lake" was merely a large marsh, in which large quantities of surface water collected at certain seasons of the year, and mostly disappeared at others, but remained long enough to render the lands upon which they rested, and the adjacent lowlands, unfit for use. What defendants have done amounted merely to aiding the natural drainage of these waters. They have done nothing more than was reasonably necessary in the interests of good husbandry. They have adopted the only feasible or possible means of draining their lands. In doing this, they have inflicted no unnecessary injury upon the plaintiff. The benefit to them appears to be very great as compared with any injury likely to result to plaintiff from their acts. There is nothing to indicate that plaintiff might not readily protect himself from any injury liable to result from defendants' acts.

The case is more than covered by Sheehan v. Flynn (Minn.) 61 N. W. 462. It is true that in that case the collection of surface water was less than in the present case; also, that there the water entirely dried up in the summer; while here, in the natural condition of things, some of the water stood the year round in the lowest part of the marsh. But, on the other hand, in the Sheehan Case none of the water overflowed upon the plaintiff's land until the ditch was dug, and it then had no outlet from plaintiff's land, but rested there; while here the waters had a natural outlet and channel to and across plaintiff's land, and thence into Gleason's Lake, and finally into Lake Minnetonka. This whole question of the disposition of surface waters has been so recently and so fully considered in the Sheehan Case that it is unnecessary to discuss the question here at any length.

Much can be said both for and against the common-law rule on the subject. An argument often used, and at first sight plausible, is that a man ought not to be permitted to cast upon his neighbor's land a burden which nature has imposed upon his own. But the maxim that a man must use his own so as not to injure another is only true in a limited and qualified sense. No person has the absolute and unqualified legal right to the use of his own property unaffected by the reasonable use by his neighbor of his property. The use by my neighbor of his property in a particular way may discommode and injuriously affect me in the enjoyment of my property; but, if his use is a reasonable one, I must submit to any resulting inconvenience. The question, after all, is really one of reasonable use; and the common-law rule as to surface water is but an application of the universal rule, perhaps somewhat enlarged in the interests of agriculture and the improvement of lands.

Under the facts of this case, the plaintiff ought not to be allowed to stand in the way of defendants' reasonable improvement of their lands, by aiding nature in their drainage. Order reversed, and new trial granted.

START, C. J. I concur in the result, on the ground that the evidence fails to establish plaintiff's claim that the deepening of the ditch was the proximate cause of the overflow easterly upon his meadows. I dissent from so much of the foregoing opinion as approves of the doctrine of Sheehan v. Flynn (Minn.) 61 N. W. 462.

BUCK, J. While concurring in the result arrived at in the majority opinion, upon the same grounds as stated by the CHIEF JUSTICE, yet I feel that the doctrine laid down in the case of Sheehan v. Flynn (Minn.) 61 N. W. 462, ought not to be adhered to. When that case was under consideration in this court, I reluctantly assented to the rule there adopted; but, upon reflection and more mature deliberation, I think that rule unsound. I do not think that the private proprietary rights of one individual should be subject to the personal interests of another individual in the manner stated in that case. It seems to me that it permits the taking of private property for private use, and that in its prac-

tical operation it will lead to endless litigation, if not great injustice. From such doctrine I therefore dissent.

LARSON v. KELLY et al.

(Supreme Court of Minnesota. Jan. 31, 1896.)

JUSTICE OF THE PEACE—NEGLECT TO ENTER JUDGMENT—LIABILITY ON BOND.

1. Where a justice of the peace neglects to enter a judgment in his docket within three days after the action is submitted to him for decision, and damages thereby result to the prevailing party to the action, the justice and the sureties on his bond are liable therefor, this being a ministerial duty, which the justice is required by statute to perform.

2. The words "judicial duties," in a bond given by a justice of the peace for the faithful performance of his duty, construed as meaning "official duties."

(Syllabus by the Court.)

Appeal from district court, Norman county; Frank Ives, Judge.

Action by Andrew B. Larson against W. A. Kelly and others. From an order overruling a demurrer to the complaint, defendants appeal. Affirmed.

Calkins & Sharpe and N. T. Moen, for appellants. M. A. Brattland, for respondent.

BUCK, J. This action is brought against the defendant Kelly, as a justice of the peace, and his sureties on his official bond, for his neglect to enter in his docket two judgments rendered by him in favor of this plaintiff, and against one Lars B. Foss, whereby it is alleged that the plaintiff lost his debts, and was thereby damaged in the sum named in the complaint. It is alleged that on the trial of the action, and after the case was submitted to the justice of the peace, he announced his decisions, but neglected and omitted to enter them in his docket, at which time, and when the transcript thereof was filed in the clerk's office, the defendant Foss had property out of which the judgment might have been satisfied, but thereafter Foss became insolvent, and, as the judgment had not been perfected by entry of the same in the justice's docket, the plaintiff was not able to enforce the collection thereof. The allegations in the complaint are very indefinite, but are in substance as we have stated them. There was a demurrer interposed to the complaint as to portions thereof by the appellants, and it is upon the questions raised by the demurrer that the case is brought here.

The demurrer admits the neglect of the justice of the peace to enter the judgments in his docket, and, as this was an omission upon his part of a ministerial duty, he and his bondsmen were liable therefor, unless there is a fatal defect in the bond, as claimed by his bondsmen. The condition of the bond is that Kelly, as such justice of the peace, would faithfully discharge his "judicial" duties as such justice, instead of faithfully discharging his "official" duties. This question is one of construction, and it must be determined by the light afforded by the bond itself, and by the law requiring a justice of the peace to give one for the faithful performance of his official duties. Part of section 957, Gen. St. 1894, relating to a justice of the peace giving a bond before entering upon the discharge of his official duties, reads as follows: "He shall also execute a bond to the board of supervisors, with two or more sufficient sureties, to be approved by the chairman, in the penal sum of * * * $1,000, conditioned for the faithful discharge of his official duties. Said chairman shall endorse thereon his approval of the sureties named in such bond, and such justice shall immediately file the same, together with his oath of office, duly certified, with the clerk of the district court of the proper county, for the benefit of any person aggrieved by the acts of said justice; and any person aggrieved may maintain an action on said bond in his own name against said justice and his sureties." The defendant Kelly was a justice of the peace of the village of Halstad, and his bond was approved by the president of the village council of that village, in accordance with the law relating to justices of that village, and it was duly filed in the office of the clerk of the district court of the county of Norman, wherein the village of Halstad is situated. The bond recites the fact that W. A. Kelly was on the 14th day of March, 1893, duly elected justice of the peace in and for the village of Halstad, in the county of Norman, for the term of two years, and was about to enter upon the duties of said office, and that this bond was to be void if he faithfully discharged all of his "judicial duties"; otherwise, to remain in full effect. Reading the bond and the requirements of the law together, in the light afforded by what was required and intended, it is quite evident that we have a key and guide to what was the intention of the parties, and what object they intended to accomplish when they executed the bond. Kelly was duly elected as justice of the peace for the period of two years; took the oath to support the constitution, and to faithfully and impartially discharge the duties of his office. Only one thing remained to be done, and that was to execute a bond to faithfully discharge these duties. All of these matters were well known to the sureties, and, in aid of Kelly's completing all of the required conditions, they executed the bond; so that there cannot be any question raised as to the intent of the parties. The insertion, therefore, of the word "judicial," instead of "official," in the bond, was clearly a mistake, as evidenced by the bond itself and the purposes for which it was given under the law. In Parsons on Contracts (volume 2, p. 631) it is said "that an inaccurate description, and even a wrong name, will not defeat an instrument. * * *"

We think the law would permit correction of the error by construction where the instrument, as a whole, showed certainly that it was an error, and also showed with equal certainty how the error might and should be corrected. See, also, Richmond v. Woodard, 32 Vt. 833. In Sutherland on Statutory Construction (page 341) it is said that "where one word has been erroneously used for another, or a word omitted, and the context affords the means of correction, the proper word will be deemed substituted or supplied"; citing numerous authorities to sustain this position. The meaning of the bond is that the sureties were bound for the faithful performance by the justice of the duties pertaining to the office, or else it was utterly worthless. He would not be responsible to the plaintiff for a neglect to perform a judicial duty, but he and his sureties would be for his omitting a ministerial duty, which the law required him to perform, and where the condition of the bond required the performance of his official duties faithfully.

This construction of the bond is the only one which will effectuate the evident intention of the parties, and also subserve private and public rights. The order of the trial court overruling the demurrer is therefore affirmed.

BANK OF ADA v. GULLIKSON et al.

(Supreme Court of Minnesota. Feb. 6, 1896.)

LIEN OF MORTGAGE—RECORD AS NOTICE—MISTAKE IN DESCRIPTION.

1. The constructive notice imported by the record of an instrument is strictly limited to that which is set forth on its face; and if, in a deed or mortgage as recorded, the particular land in controversy is not so described as to identify it with reasonable certainty, the record is not notice to subsequent bona fide purchasers or judgment creditors. Bailey v. Galpin, 40 Minn. 319, 41 N. W. 1054, followed.

2. Certain lots by mistake were described in the plaintiff's mortgage as being in block 13 in the First addition to the village of Ada, but in fact the lots intended to be mortgaged were located in the original plat of the village. There was no block 13 in the First addition. The first one therein was number 21, and the last one in the original plat was number 20. The defendant had no actual notice of the mortgage, and, before it was corrected and re-recorded, he duly recovered, and docketed, a judgment against the mortgagor. *Held*, that the lien of the mortgage was subject to that of the judgment.

(Syllabus by the Court.)

Appeal from district court, Norman county; Frank Ives, Judge

Action by the Bank of Ada against Gullik O. Gullikson and others. Judgment for plaintiff, and G. Gilbertson appeals. Modified.

M. A. Brattland (O. J. Vaule, of counsel), for appellant. Calkins & Sharpe, for respondent.

START, C. J. This is an action commenced January 14, 1895, to reform a real-estate mortgage by correcting a mistake in the description of the premises, and to foreclose it as reformed. Judgment for the plaintiff reforming and foreclosing the mortgage, and further adjudging that a judgment in favor of the defendant Gilbertson against the defendant mortgagor, Gullikson, is a subordinate lien on the mortgaged premises to that of the plaintiff's mortgage. From this judgment the defendant Gilbertson appealed.

The facts are undisputed, and the only question in the case is whether the facts found by the trial court justify its conclusion and judgment that the lien of the plaintiff's mortgage is superior to that of the defendant Gilbertson's judgment. The facts, so far as here material, are that on January 21, 1892, the defendant Gullikson and wife executed, to the plaintiff, a mortgage to secure the payment of $800, in which the premises were described as "lots numbered six (6) and seven (7) in block numbered thirteen (13) in the First addition to the town (now village) of Ada, in Norman county, Minnesota." This mortgage was duly recorded January 21, 1892. There is an original plat of the village of Ada, and also a First addition to the village of Ada. The blocks in the former are numbered consecutively from 1 to 20, and in the latter from 21 upward; consequently there is no block 13 in the First addition, but there is in the original plat. The lots intended to be described in this mortgage were lots 6 and 7 in block 13 in the town (now village) of Ada. The plaintiff alleges in its complaint that, in fact, the description contained in the mortgage does not describe any premises whatever, and to make it pass any premises to the plaintiff, and to conform to the intention of the parties, it is necessary that the description should be changed by striking therefrom the words "First addition to." The court found the allegations of the complaint true, and so reformed the mortgage. On February 21, 1894, another mortgage was made by the same parties who made the previous one, to the plaintiff, for the purpose, as alleged in the complaint, of correcting the error in the description contained in the former mortgage. The second or corrected mortgage was duly recorded on February 21, 1894. The defendant Gilbertson, however, recovered and duly docketed his judgment in the proper county against the mortgagor Gullikson on February 2, 1894, or 19 days before the plaintiff's corrected mortgage was recorded, and the court expressly found that the defendant had no actual notice of plaintiff's mortgages.

A judgment creditor, without actual notice, is in the same position as a bona fide purchaser, and the lien of his docketed judgment takes precedence over the equities of a grantee or mortgagee to have his deed or mortgage reformed. Welles v. Baldwin, 28 Minn. 408, 10 N. W. 427; Wilcox v. Bank, 43 Minn. 541, 45 N. W. 1136. The judgment creditor

in this case having the rights of a bona fide purchaser, without actual notice, it is difficult to see how the plaintiff is in a position to claim that the lien of his mortgage is superior to that of the judgment, in view of the allegation in its complaint, which was found to be true, to the effect that the description in the original mortgage did not describe any land. The claim made by the counsel for the plaintiff in this court is that the description in the original mortgage was sufficient to pass the title to the premises intended to be included in the mortgage, and, therefore, that the record of the mortgage was constructive notice to the defendant of the plaintiff's lien on the premises intended to be mortgaged. Conceding, without so deciding, that the plaintiff is in a position to urge the claim now made, we hold that the lien of the defendant's judgment on the premises in question is superior to that of the plaintiff's mortgage. The lots intended to be described in the mortgage were lots 6 and 7 in block 13 in the town (now village) of Ada, but the actual description was lots 6 and 7 in block 13 of the First addition to the town (now village) of Ada. The plaintiff's claim is that the land intended to be described in the mortgage can be located and identified by following out the description, which is complete if the false particular locating the lots in the First addition to the village of Ada be eliminated by rejecting therefrom the words "the First addition to," thereby locating the lots in the original plat.

The plaintiff, in support of its claim, relies upon the case of Thorwarth v. Armstrong, 20 Minn. 464 (Gil. 419). The lots in the case cited were described as being in McCloud's subdivision of block 2 in Vanderburghs' subdivision of block 2 in Vanderburghs' addition, but there never was any subdivision of block 2 except McCloud's. This description located the lots in block 2 in Vanderburghs' addition and in McCloud's subdivision thereof. There was no uncertainty as to the block or addition in which the lots were to be found, or in the fact that they were in McCloud's subdivision of the block; and, as his was the only subdivision of the block, the description on its face indicated the false particular thereof, which should be rejected as surplusage. But in the case at bar there was in fact a First addition to the village of Ada, hence the case relied upon is not in point. The fallacy of the plaintiff's claim lies in the assumption that the description in the mortgage on its face discloses in what particular it is false, and what should be corrected in or eliminated therefrom in order to describe the lots intended to be mortgaged. It is impossible to tell from the face of the description whether the mistake therein is in locating the lots in the wrong plat or block or village. If the mistake was in locating the lots in the wrong block, and block 23 was intended, then, if 23 was substituted for 13, the description would be correct. Conceding that a person reading the description would be charged with notice that there was no block 13 in the First addition, yet it does not, as we have suggested, charge him with notice that the mistake was in locating the lots in the wrong plat, and not in the wrong block or village. If the defendant had had actual notice of the plaintiff's mortgage, and of the fact that there was a block 13 in the original plat, we might have a different case to consider. But the defendant had no actual notice in the premises, and he is chargeable only with constructive notice of what appeared on the face of the mortgage, as recorded at the time he docketed his judgment. The constructive notice imported by the record of an instrument is strictly confined to that which is set forth on its face; and, if in the deed or mortgage as recorded the particular land in controversy is not so described as to identify it with reasonable certainty, the record is not notice to subsequent bona fide purchasers or judgment creditors. Bailey v. Galpin, 40 Minn. 319, 41 N. W. 1054. In the case cited, the distinction between actual notice as respects ulterior inquiry and constructive notice implied from the fact of registration was clearly pointed out, and need not be here repeated. The defendant in this case had constructive notice only of what appeared upon the face of the record of the mortgage and the description of the premises therein. This description, on its face, did not identify the lots intended to be mortgaged, or advise the defendant as to the particulars wherein it was defective; and it must be held that he had no notice, actual or constructive, that the plaintiff had a mortgage on the lots in question. The lien of the defendant's judgment, therefore, is superior to that of the plaintiff's mortgage, and this case must be remanded, with direction to the district court to modify the judgment appealed from so as to adjudge the lien of the plaintiff's mortgage to be subordinate to that of the defendant's judgment. So ordered.

CANTY, J., took no part.

MINNEAPOLIS, ST. P. & S. S. M. RY. CO. v. HOME INS. CO.[1]

(Supreme Court of Minnesota. Feb. 6, 1896.)

APPEAL—ASSIGNMENT OF ERRORS—AMENDMENT—REVIEW — PLEADING — DEPARTURE—INSURANCE—VALIDITY—LOSS—WAIVER OF PROOFS—ADJUSTMENT.

1. The assignment of errors cannot be amended by the appellant, after his time for serving them has passed, without the consent of the respondent or leave of the court.

2. An order allowing an amendment of the complaint, made before the trial, and not as a part of it, cannot be reviewed on appeal from an order denying a motion for a new trial. City of Winona v. Minnesota Ry. Const. Co., 6 N.

[1] Rehearing denied.

W. 795, 8 N. W. 148, and 27 Minn. 415, followed.

3. This action is upon a contract by defendant to insure the plaintiff, a common carrier, to the extent of its liability as such, for loss by fire on grain in its elevator at its terminal station. The complaint set out the contract: also, a common-law contract of carriage of the grain of certain shippers, with the obligation to safely deliver it, at such station, to the connecting carrier; that while it was awaiting, in such elevator, such delivery, in the usual course of its carriage, the grain was lost by fire; and that the plaintiff had paid the shippers therefor,—but did not in express terms allege that the fire was due to the negligence of the carrier. *Held*, that the complaint stated a cause of action.

4. The answer alleged that the contract of carriage was evidenced by a bill of lading containing stipulations modifying the plaintiff's common-law liability, and that the fire was not due to its negligence. The reply admitted the bill of lading, and affirmatively alleged that the fire was caused by plaintiff's negligence. *Held*, that the reply was not a departure in pleading.

5. *Held*, that the carrier may lawfully insure against liability for loss of goods carried, though occasioned by the negligence of his own servants.

6. Evidence considered, and *held* to sustain the findings of the court, to the effect that the fire which caused the loss of the grain was due to the negligence of the plaintiff, and that the defendant waived the furnishing of the proofs of loss within the time limited by its policy.

7. The plaintiff had other insurance on the grain, payable to itself, for the benefit of the shippers, in a sum equal to the amount named in the defendant's policy, which provided that the defendant should not be liable for a greater proportion of any loss than the amount insured should bear to the whole insurance. The trial court held the defendant liable for one-half of the loss. *Held*, that the court committed no error, as against the defendant.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Seagrave Smith, Judge.

Action by the Minneapolis, St. Paul & Sault Ste. Marie Railway Company against the Home Insurance Company. There were findings for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

S. E. Hall and McVey & Cheshire, for appellant. Kitchel, Cohen & Shaw and A. H. Bright, for respondent.

START, C. J. This is an action upon the insurance policy construed by this court in its decision, on a former appeal in this case, reported in 55 Minn. 236, 56 N. W. 815. After the cause was remitted to the district court, and before a new trial was had, the plaintiff, by order of the court, was permitted to amend its complaint. The cause was tried by the court without a jury, resulting in findings of fact and conclusions of law, in favor of the plaintiff, to the effect that it was entitled to recover of the defendant the sum of $28,607.28. From an order denying its motion for a new trial the defendant appealed.

1. The 50 proposed additional assignments of error, presented by the appellant on the hearing of the case, and objected to by the respondent, must be disregarded; for the appellant cannot, without leave of the court, or consent of respondent, amend his assignment of errors after his time for serving them has passed. The case must be disposed of upon the original assignments. Greene v. Dwyer, 33 Minn. 403, 23 N. W. 546. The defendant's first alleged error is that the court erred in permitting the plaintiff to amend its complaint. The order allowing the amendment was made previous to the trial, and not as a part of it, and it cannot be reviewed on this appeal, which is from an order refusing a new trial. City of Winona v. Minnesota Ry. Const. Co., 27 Minn. 415, 6 N. W. 795, and 8 N. W. 148. The remedy is an appeal from the judgment. City of Winona v. Minnesota Ry. Const. Co., 29 Minn. 68, 11 N. W. 228.

2. The next error claimed is that the court erred in holding that the amended complaint stated a cause of action, for the reason that the only ground of recovery by the plaintiff, if any there be, is omitted from the complaint, and stated for the first time in the reply, which is a departure. We are unable to discover, from an examination of the record, that the trial court was ever requested to, or did, pass upon the proposition that the complaint did not state a cause of action. Where the objection that the complaint does not state a cause of action is raised in this court for the first time, it should not be allowed to prevail, if the complaint can be sustained by any reasonable intendment. We are of the opinion that the complaint does state facts constituting a cause of action, and that the claim that the reply is a departure is equally untenable. It is claimed, however, by defendant, that the decision of the court on the former appeal is not only conclusive in its favor upon this question of pleading, but also upon its claim, hereinafter to be considered, that the bills of lading, made a part of its answer, with all their provisions, conditions, and exemptions, are valid and binding upon the parties, and that in no view of the case can the plaintiff maintain this action. It will simplify a decision of this appeal if, at the outset, we settle just what was decided by the court on the former appeal. The cause of action attempted to be alleged in the original complaint was based upon the same insurance policy as the one upon which the cause of action alleged in the amended complaint rests. But the original complaint was framed upon the theory that the plaintiff's liability to shippers for the grain destroyed by fire while in its elevator at Gladstone, Mich., depended upon a collateral agreement with the shippers to insure the grain, and that such liability to them was covered by the policy. On the first trial of the case the plaintiff was permitted to prove such contract by parol evidence. The first question for the consideration of the court on the former appeal was a construction of the terms of the policy, and it was decided that the policy only insured

the plaintiff to the extent of its liability as a carrier and warehouseman to the owners of the grain in its elevator lost by fire. The only other question was whether such liability included the liability of the plaintiff to its shippers, by virtue of its contract with them to insure the grain for their benefit, and it was held that it was not. Hence, the collateral contract to so insure was wholly immaterial, even if it was competent to prove it by parol. These were the only questions involved, and what is said in the opinion as to the admissibility of parol evidence to prove the collateral contract, though abstractly correct, was unnecessary to a decision of the case. The question of the validity of the conditions and exemptions in the bills of lading was neither involved in the case, as it then stood, nor decided. The statement of the court, at the conclusion of the opinion, that "under no view of the case can the plaintiff recover," had reference only to the record of the case then before the court; and the claim of the plaintiff, made in its complaint as it then stood, that its liability to its shippers, by virtue of its contract with them, was covered by the policy, and constituted its cause of action. The decision of the former appeal, to the effect that the policy covered only the liability of the plaintiff as a carrier and warehouseman for the grain of its shippers destroyed by fire while it was in the elevator, and that such liability did not include plaintiff's liability to shippers under its contract to insure, is the law of this case, and concludes the parties as to the liability covered by the policy; but, other than this, it has absolutely nothing to do with the questions involved in the present appeal. All that is necessary, in connection with this statement as to the scope of the former decision, to support our conclusion that the amended complaint states a cause of action, and that the reply is not a departure, is a brief analysis of the pleadings.

The amended complaint alleges that the plaintiff is a common carrier operating a line of railway from the city of Minneapolis, this state, through the state of Wisconsin, to the port of Gladstone, in the state of Michigan, where it owned and used a grain elevator for transferring wheat and other grain from its railway to vessels, and for storing the same while waiting to be delivered to such vessels in the usual course of carriage from the port of Gladstone to other lake ports; that the defendant duly executed to it the insurance policy in question, a copy of which is made a part of the complaint; that the plaintiff received, at Minneapolis, from certain owners and shippers, a given number of bushels of wheat, for carriage over its railway to Gladstone, thence by water to Buffalo, by any lake carrier whose vessels should first call for it at Gladstone, and agreed with each of such owners to carry his wheat by its railway from Minneapolis to Gladstone, and there safely deliver it, for carriage, to the lake carrier whose vessels should first call for it; that on November 29, 1891, and during the life of the policy, the wheat was in the elevator, waiting, in the usual course of carriage, for delivery by plaintiff, in accordance with its agreement, to the lake carrier, and was on that day destroyed or damaged by fire to the extent of $57,214.57; that the plaintiff has paid the owners of the wheat the damages sustained by them by the loss of the wheat by fire. The complaint also alleges that the plaintiff made and served due proofs of its loss under the policy, and complied with its conditions in this respect. There are other allegations showing that the contract of carriage was one of interstate commerce, and that the provisions of the law relating thereto had been complied with; but, in the view which we take of this case, these last allegations are not material. The reason assigned by the defendant why the complaint does not state a cause of action is that it contains no allegation that the plaintiff was guilty of any negligence in reference to the fire which caused the loss. But the complaint sets out a common-law contract of carriage, with an obligation to safely deliver the wheat to a connecting carrier, and a breach of such contract, and the loss of the wheat by fire, while awaiting such delivery, in the plaintiff's elevator. In an action against the plaintiff by the shippers, proof of these facts would establish a prima facie right to recover; for proof of the loss of the wheat while in the possession of the carrier raises the presumption that it was negligent, and the burden is upon it to show, if it claims that the contract for carriage was a qualified one, exempting it from its strict common-law liability, that the cause of the loss was within the terms of the exemption, and that it was not due to its negligence. Shriver v. Railroad Co., 24 Minn. 506; Lindsley v. Railway Co., 36 Minn. 539, 33 N. W. 7; Shea v. Railway Co. (Minn.) 65 N. W. 458. The complaint, then, sets forth facts showing the liability of the plaintiff as a carrier to the shipper for the loss of the grain. This brings the case within the terms of the policy, and therefore the complaint states a cause of action. The answer admits that the plaintiff entered into contracts of carriage with the shippers, but alleges that the contracts were evidenced by bills of lading, which are made a part of the answer, and contain restrictions and exemptions limiting the plaintiff's common-law liability as a carrier. After a statement of these restrictions in the bills of lading, and that there was a consideration for them, the answer alleges that the plaintiff was not guilty of negligence in causing the fire which destroyed the grain, and that the plaintiff was not liable therefor to the owners of the grain as a carrier or warehouseman. The reply denied that there was no negligence of the plaintiff in the premises, and also al-

leged, affirmatively, that the fire was caused by the negligence of its foreman of the elevator, setting up the facts constituting such negligence. These allegations as to the plaintiff's negligence are claimed by the defendant to be a departure, and an attempt to set up in the reply, for the first time, a cause of action. The claim is not defensible. The complaint states facts showing the plaintiff's liability for a breach of a common-law contract of carriage. The answer confesses, and seeks to avoid, this contract by alleging that, for a consideration moving to the shippers, the common-law liability of the plaintiff was restricted by exemptions in the bills of lading, and that the plaintiff was free from negligence in the premises. The reply simply meets the new matter, alleged in the answer, as to the absence of any negligence on the part of the plaintiff, by a denial and an affirmative allegation of its negligence in the premises. This was not a departure. Rosby v. Railway Co., 37 Minn. 171, 33 N. W. 698.

3. The trial court found the allegations of the complaint true, and also that the plaintiff executed and delivered to the shippers and owners of the grain bills of lading as alleged in the answer, which were accepted by them. The court further found that each bill of lading contained, among others, the following conditions and restrictions: "It being distinctly understood that this railway company shall not be liable as a common carrier for said goods while at any of their stations awaiting delivery to connecting carrier, but shall be liable only as a warehouseman." "There shall be a complete delivery of the grain, if delivered at an elevator where delivery is made of the largest shipment of grain, or where it is made to be transshipped. Whenever any property shall arrive at the depot or place of delivery of the terminal carrier, at the place at which it is above agreed to be delivered, its carriage shall be complete." "That said grain, twenty-four hours after arrival, shall be held at the sole risk of the shipper, and that the plaintiff should not be liable, on account of the fire, unless the same shall affirmatively and without presumption be proven to have been caused by the negligence of the person, party, or vessel sought to be made liable." The court also found, in this connection, that there was no consideration for the limiting of the common-law liability of the plaintiff in the bills of lading; that the plaintiff did deliver the grain, prior to the fire, to its elevator at Gladstone, to be transshipped; that it had been in the elevator 24 hours prior to the fire, but that "the plaintiff had not, at the time said elevator was destroyed by fire, notified the shippers or the consignee of said wheat of the arrival of the same at Gladstone; that no vessel or boat had arrived at Gladstone, which could have taken said wheat from there to Buffalo, from the time of the first arrival of said wheat on the plaintiff's cars, and the time of the burning of said elevator." It is further found, as a fact, by the court, that the fire which destroyed the elevator and the grain in question was caused by the negligence of the plaintiff's servants in charge of the elevator. It is claimed by the defendant, in effect, that the bills of lading exempt the plaintiff from loss for the grain by fire, even if caused by its negligence, when in its possession as a warehouseman, and that it was holding the grain as a warehouseman when it was destroyed. There is nothing in the bills of lading that can be reasonably construed as exempting the plaintiff, as a warehouseman, from liability for losses due to its negligence, and, of course, as a carrier it could not do so. Therefore, if the finding of the court that the fire and consequent loss of the grain was due to the negligence of the plaintiff is sustained, it is immaterial whether the plaintiff was then holding the grain as a carrier or a warehouseman, for, in either event, it would be liable for the loss. We have considered the evidence, and find that it fully sustains the finding of the trial court that the fire was caused by the negligence of the plaintiff's servants. The defendant insured the plaintiff to the extent of its liability as a carrier and warehouseman to the shippers of the grain in the elevator lost by fire, and the plaintiff must show, in this action, that it was thus liable to the shippers; and, in doing so, it stands in their place, while the defendant stands in that of the railway company. Now, in an action by the shippers against the railway company, a finding of the court that the loss was due to the negligence of the company or its servants would, as a matter of law, be a conclusive answer to all of the subtle conditions, exemptions, and restrictions in the bills of lading, and establish the liability of the railway company as a carrier or warehouseman to the shippers, and we have no occasion to pass upon the question of their validity. In like manner this finding of the court establishes, in this case, the liability of the plaintiff, as a carrier and warehouseman, to the shippers, for the loss, and brings the case within the terms of the policy.

4. The defendant asserts that it is contrary to public policy to permit the plaintiff to indemnify itself by a contract of insurance against its own negligence, and to plead and prove it as a ground of recovery. The plaintiff is a corporation, and the negligence of a corporation must always be that of some agent or servant, and there can be no reasons of public policy why corporations ought not to be permitted to insure against liability due to such negligence. Such insurance by a carrier does not lessen its own responsibility, but rather increases its means of meeting the responsibility. A carrier may lawfully insure against liability for loss of goods carried, though occasioned by the negligence of its own servants. Phœnix Ins.

Co. v. Erie & W. Transp. Co., 117 U. S. 312, 6 Sup. Ct. 750, 1176; California Ins. Co. v. Union Compress Co., 133 U. S. 387, 10 Sup. Ct. 365. Such a contract of insurance being valid, it follows that a breach thereof may be established by pleading and proving a liability of the carrier to the shipper for losses due to the negligence of the carrier's servants.

5. A recovery in this case is resisted on the further ground that no proofs of loss were served on the defendant within the 60 days, as provided by the policy. The trial court found that proofs of loss were made and delivered to Gale & Co., the agents of the defendant at Minneapolis, within the 60 days, who procured the insurance; that such agents retained the proofs until 1 day after the expiration of the 60 days, and then forwarded them by mail to Durand, the chief adjuster of losses for the defendant, who had charge of the adjustment of the losses caused by this fire; that the proofs were received and retained by the adjuster, without objection that they were not served or received in time, until after the commencement of this action; "and that there was a waiver by the defendant (if the statement of loss was not received by it, except by its agents Gale & Co., and Durand, as aforesaid, within the 60 days) of an omission on the part of the plaintiff in not sending it direct to the company within that time." The court does not find that Gale & Co. were authorized to receive for the defendant the proofs. The evidence, however, would justify, if not require, such a finding, as it shows that they were something more than mere local agents, and that they had been, prior to this loss, accustomed to receive proofs of loss with the approval of the defendant, and that it was customary to refer small losses to them for adjustment. The finding of the court is to the effect that, if Gale & Co. were not authorized to receive the proofs of loss, the service of them was waived by the defendant. This finding is well sustained by the evidence, for it shows that the proofs were retained by the chief adjuster without objection that they were not received in time, and that the defendant denied any liability under the policy within the time for the service of proofs of loss. The evidence does not justify the claim of the defendant that a magistrate's certificate as to the loss was demanded and refused.

6. It is alleged in the answer, and the court so found, that the plaintiff had other insurance upon the property destroyed, payable to itself, as trustee, for the benefit of the shippers, in the aggregate amount of $50,000, making its total insurance, including the defendant's $50,000 policy, $100,000. The defendant's policy provided that it should not be liable under its policy for a greater proportion of any loss than the amount insured should bear to the whole insurance. The amount of the defendant's policy was one-half of the whole insurance, and the court ordered judgment against the defendant for one-half only of the loss. The defendant claims that this was error, for the reason that the total amount of the other insurance should be deducted from the amount of the loss, and that it is liable, if at all, only for the balance. The reason assigned for this claim is that it insured the plaintiff only to the extent of its liability as a carrier or warehouseman, and, the plaintiff having insured the grain lost for the benefit of the shippers to the extent of $50,000 in the other companies, its liability to the shippers as a carrier was then just that much less. But such other insurance, while it may give to the shippers cumulative indemnity, yet it in no other way affects the liability of the plaintiff as a carrier to them for the loss of their grain. The liability of the defendant to the plaintiff is coextensive with the latter's liability as a carrier to the shippers, not exceeding $50,000. The decision of the court in treating the other companies as coinsurers was as favorable to the defendant as it had any right to demand, and was strictly in accordance with the claim made in its answer. Order affirmed.

FIRST NAT. BANK OF DEVILS LAKE v. MANCHESTER FIRE ASSUR. CO.

(Supreme Court of Minnesota. Feb. 6, 1896.)

FORFEITURE OF INSURANCE POLICY—WAIVER—AUTHORITY OF ADJUSTER.

1. After a loss on a fire insurance policy, which was subject to forfeiture for a breach of a condition therein against incumbering the property, the defendant, by its adjuster, without knowledge of such breach, took possession of and sold the salvage by virtue of a claim under the policy; but after learning, on the next day after the sale, of the breach, it took no steps at any time to rescind the sale, or to provide for the payment of the purchase price to the assured, or to do any act to restore to him what it took from him under the policy. *Held*, that it thereby waived its right to treat the policy as forfeited.

2. Evidence considered, and *held*, that the defendant's adjuster had authority to waive the breach in the condition of the policy by his action and conduct in reference to the salvage.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Charles E. Otis, Judge.

Action by the First National Bank of Devils Lake against the Manchester Fire Assurance Company. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Affirmed.

Kueffner, Fauntleroy & Rice and S. E. Hall, for appellant. Bunn & Hadley, for respondent.

START, C. J. This is an action to recover upon an insurance policy issued by the defendant to the Devils Lake Mill Company, covering grain, flour, bran, and seeds, and assigned to the plaintiff after the loss by fire

of the property insured. The defense is that, prior to the fire, certain chattel mortgages were placed upon the property, within the prohibition of the policy. It is admitted by the plaintiff that at the time of the fire the policy had become subject to forfeiture, because of the execution of the chattel mortgages; but it claims that the defendant waived the forfeiture after the fire by the action of its adjuster. There was a verdict for the plaintiff, and the defendant appealed from an order denying its motion for a new trial. Two questions are raised by the assignment of errors: First, that what the adjuster did or omitted to do in the premises did not constitute a waiver of the forfeiture; and, second, that the plaintiff failed to show that the adjuster had any authority to waive it.

1. The evidence as to what the adjuster did in fact do, and the purpose for which it was done, is conflicting, but there was evidence tending to establish the following facts: That Mr. Cobben, the adjuster of the defendant, and Mr. French, an adjuster for other insurance companies which had policies covering the same property as that of the defendant, went to the place of the loss five days after it occurred, and had an interview with the manager of the mill company, Mr. Schmidt, with reference to the loss, in which they asserted the right of the insurance companies to the salvage; that is, to some 1,500 bushels of wheat damaged by the fire, which was a part of the property insured. This right was asserted under a provision in the policies to the effect that, in case of loss by fire, it was optional with the insurance companies to take the residue of the insured property not destroyed at an appraised valuation or at a valuation agreed upon by the parties, but the manager of the assured protested, and insisted that the salvage belonged to his company. The adjusters, however, insisted upon exercising the option, and notified the manager that they proposed to sell the wheat. Thereupon he acquiesced in the sale, and the wheat was accordingly sold by the adjuster French, for the benefit of all of the insurance companies, to a Mr. Martin, for the sum of $305. The defendant's adjuster, Cobben, was present during the whole transaction, and consulted with French concerning the sale, and took part therein. Neither of the adjusters knew until the next day after the sale that the chattel mortgages had been given, and that for this reason the policies of their respective companies were subject to forfeiture, but each of them learned that the mortgages had been given on the day following the sale, and each of them then abandoned the adjustment of the loss, and departed without taking any action to procure a rescission of the sale, or to recall any action they had taken in the premises, or attempting to restore the assured to its position before the sale, and without saying anything to the assured about the salvage or the chattel mortgages. The defendant's adjuster simply notified the manager of the assured that he was not going to do anything further about adjusting the loss. The purchaser at the sale took possession of the salvage wheat, and shipped it away; and neither he nor the defendant nor any other company or person has ever offered to return the salvage to the assured, or to pay the purchase price thereof to it. There is no evidence in the case that the defendant ever received any part of such purchase price, or that it or any of the other insurance companies ever directed the same to be paid to the assured. There was evidence on the part of the defendant tending to show that the sale was not made for the benefit of the insurance companies, but that the salvage was sold by agreement for whom it might concern,—that is, for the benefit of the party who should be found entitled to the salvage; also, that some six months after the sale the purchaser tendered the money to the manager of the assured. But, under the evidence and the charge of the court, the jury must have found the facts substantially as we have stated them. If, then, the defendant adjuster was authorized to do what he did do, he thereby waived for the defendant the right to elect to treat the policy as forfeited on account of the chattel mortgage. If the adjuster had taken possession of the salvage with knowledge of the existence of the chattel mortgages, there could be no question but that his act would have been a waiver of the forfeiture, for there was no claim or pretense of any right to the salvage except by virtue of the option given to the defendant by the terms of the policy. The taking and selling of the salvage was an express recognition and assertion that the policy was in force. But, when this was done, the adjuster had no knowledge that the policy was subject to forfeiture on account of the mortgages; hence this act, standing alone, did not constitute a waiver, which necessarily implies knowledge of the existence of the right which is relinquished, where conditions do not exist constituting an estoppel. Insurance Co. v. Parsons, 47 Minn. 352, 50 N. W. 240.

But having taken and sold the salvage under the policy, and thereby deprived the assured of it, the defendant's adjuster was bound to do all that could reasonably be done to place the assured in the position it was in before the taking and selling of the salvage. If he would relieve the defendant from the consequences of his acts in the premises, he was bound to do all that he reasonably could to undo his act, and to place the assured in its former position before he acted; and his failure to make any effort to do this after he was fully advised of the rights of the defendant was an affirmance and ratification of his previous acts, and the case stands precisely as if the acts had been originally

done with knowledge of the mortgagees, and the defendant's right to elect to treat the policy as forfeited was waived.

The assured, after protest, assented to the sale of the salvage by the adjusters for the benefit of the defendant and the other companies, by virtue of the claim made by them under the policy, and the title passed to the purchaser, and the right to the purchase price accrued to the companies, and not to the assured. But before the salvage was removed by the purchaser, and on the next day after the defendant's adjuster learned that its policy was subject to forfeiture, he, instead of making any efforts to procure a rescission of the sale or to place the assured in its former position, simply abandoned the work of adjustment, and departed, without notifying the assured of the election of the defendant to forfeit the policy. The conduct of the adjuster after he learned that the policy was subject to forfeiture is radically inconsistent with the claim now made that the policy is forfeited. The case of Schreiber v. Insurance Co., 43 Minn. 367, 45 N. W. 708, holds that an act done in recognition of the validity of a policy in ignorance of the fact that it is subject to forfeiture will be ratified, and constitute a waiver, by a failure to promptly restore that which was obtained by virtue of the policy. In the case cited, the policy was subject to forfeiture on account of the assured's misrepresentations as to incumbrances; but the insurance company, without knowledge of the fact, collected the premium note of the assured by suit, and never returned or offered to return him the amount so collected after it learned of the breach in the condition of the policy; and it was held that the company, by its failure to act after it was advised of its rights, waived its right to treat the policy as forfeited, for it was the company's duty, as soon as it learned of the breach of the condition in the policy, to determine whether it would abide by the policy, and retain the money collected, or restore it, and elect to avoid the policy. So, in the case at bar, the defendant having failed to return the salvage or its purchase price to the assured, it must be held to have elected to abide by its assertion of the validity of the policy made by it in taking and selling the salvage by virtue thereof.

2. We have thus far assumed the authority of the defendant's adjuster in the premises, but, upon a consideration of the evidence, we hold that his authority was established prima facie, at least. The defendant offered no evidence as to his actual authority, and prima facie his powers were coextensive with the business intrusted to his care. He was intrusted with the adjustment of the loss in question. This is the reasonable inference from the unqualified admission of the defendant upon the trial that he was its adjuster and the uncontradicted evidence given on the trial. An adjuster is he who determines the amount of a claim, as a claim against an insurance company. And. Law Dict. The adjuster, Mr. Cobben, testified that he was at the place of the loss as the adjuster of the defendant, and that no other person was present who had authority to act for it except himself, and that in what he there undertook to do he acted for it; and, further, that, where grain in elevators is destroyed, it is customary for the assured and the companies to agree the first thing to dispose of the débris, for whomsoever it may concern. The policy in this case also provided for dealing with the salvage under certain conditions in the adjustment of the loss. That the adjuster of the defendant did undertake to act in the matter of the adjustment of this loss, and did deal with the salvage, is shown by the evidence. If, in anything which he did, he exceeded his authority, it was a matter within the exclusive knowledge of the defendant; and, in the absence of any evidence on its part that he did exceed his authority, it is clear that his authority in the premises was prima facie established by the evidence. Swain v. Insurance Co., 37 Minn. 390, 34 N. W. 738; Insurance Co. v. Shryer, 85 Ind. 362; Insurance Co. v. Maguire, 51 Ill. 342. Order affirmed.

COLES v. CITY OF STILLWATER.

(Supreme Court of Minnesota. Feb. 6, 1896.)

EMINENT DOMAIN—RIGHT TO COMPENSATION—PROOF OF OWNERSHIP.

The charter of the defendant, relating to the condemnation of land for public purposes, provides that before payment of the award to the landowner he shall furnish an abstract of title showing his right thereto, and on his failure so to do the city council shall pay the award to the city treasurer for the owner, or, in case the city attorney shall certify that the title is doubtful, the award shall be paid to the clerk of the district court for such persons as show themselves entitled to it. *Held*, that these provisions are valid, and that, in an action against the defendant to recover the amount of the award, the complaint does not state a cause of action if it fails to show a compliance with them on the part of the plaintiff, or any reason for not so doing.

(Syllabus by the Court.)

Appeal from district court, Washington county; W. C. Williston, Judge.

Action by Margaret Coles against the city of Stillwater. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

J. N. Searles, for appellant. H. H. Gillen, for respondent.

START, C. J. This is an appeal by the plaintiff from an order sustaining a demurrer to her complaint. The action is for the recovery from the city of Stillwater of the amount of two awards made for the taking by it, under condemnation proceedings, of certain land for a public street, which the plaintiff claims to own. The complaint al-

leged that the plaintiff was the owner of the land, the condemnation proceedings, the amount of the awards, the taking possession of the land by the city, a demand for payment of the awards to her, and the refusal of the city to pay them. But the complaint did not allege that she had ever furnished to the city an abstract of title to the land, showing herself entitled to the awards, as required by the provisions of the charter of the city, or allege any reason why she had not complied therewith, or that the city had not complied with the provisions of the charter on its part as to the awards. The trial court sustained the demurrer because of such omissions in the allegations of the complaint. The decision was correct. The provisions of the charter of the city referred to, so far as here material, are as follows: "Before payment of such award, the owner of such property, or the claimant of the award, shall furnish an abstract of the title showing himself entitled to all of the compensation and damages claimed. In case of neglect to furnish such abstract, or if there shall be any doubt as to who is entitled to such compensation or damages, or any part thereof, the amount so awarded shall be by the city council appropriated and set apart in the city treasury for whoever shall be entitled thereto, and be paid over whenever any person shall show clear right to receive the same. * * * This action shall apply to all cases of appropriation of private property for public use provided for in this chapter." Sp. Laws 1881, c. 92, subc. 10, § 5. "Whenever, after examination of the abstracts of title, of any land or real estate taken, injured or appropriated, * * * the city attorney shall certify to the city council that he is unable for any reason, to determine who is the owner of such land or real estate, and entitled to receive such compensation or damages, said city council shall thereupon cause such compensation * * * to be paid over to the clerk of the district court of Washington county, for the benefit of such persons as may show themselves entitled thereto." Sp. Laws 1887, c. 6, § 41. "The city council shall thereupon cause to be paid to the owner of such property or to his agent, the amount of damages over and above all benefits which may have been awarded therefor, or as soon as a sufficient amount of the assessment shall have been collected for that purpose or other funds are available therefor; but the claimant shall in all cases furnish an abstract of title, showing himself entitled to such damages, before the same shall be paid." Sp. Laws 1891, c. 50, § 2. It is urged in behalf of the plaintiff that these provisions are unreasonable, if they are to be construed as barring, unless complied with, the right of the owner of the land to bring an action for the compensation awarded for the taking of his land for public purposes; that, if such a construction be given to these charter provisions, they are unconstitutional, in that they deprive the landowner of that certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character as guarantied by our bill of rights. Const. art. 1, § 8. The provisions of the charter, which in effect require that any person claiming the award shall furnish an abstract of his title to the property taken, to the end that the city officers charged with that duty may intelligently investigate and determine his right to the award, and, in case of doubt as to the title, further require that the city council shall appropriate and pay over to the city treasurer or clerk of the district court the amount of the award for the owners of the land, are not only reasonable, but are necessary for the protection both of the city and such owners. After the amount of the award is so appropriated and paid over, the custodian thereof holds the fund in trust for such owners. The plaintiff's right to take appropriate proceedings, to which the custodian and all other claimants, if any there be, are parties, to have the fund paid to her, is not impaired by these provisions. Upon the failure of plaintiff to furnish the abstract showing herself entitled to the award, or on the certificate of the city attorney that he was unable to determine who was the owner of the land, it was the duty of the council to pay over the amount of the award to such custodian. And to permit the plaintiff to recover in this action from the city an amount equal to the award, without showing a compliance on her part with the charter, or a failure on the part of the city so to pay over to the custodian such fund, might result in the city's having to pay for the land twice. A judgment in favor of the plaintiff in this action would not be a bar to proceedings by other claimants against the custodian to have the fund paid to them. The provisions of the defendant's charter here in question are reasonable, of practical value, and valid; and the complaint, failing to show either a compliance therewith by the plaintiff or any reason for not so doing, does not state a cause of action. Order affirmed.

SCHULTZ v. BOWER.

(Supreme Court of Minnesota. Feb. 6, 1896.)

ADJOINING LANDOWNERS — LATERAL SUPPORT — DAMAGES—INSTRUCTIONS.

1. The defendant made an excavation on his land, which caused the soil of the adjoining land of the plaintiff to fall into it. *Held*, following Schultz v. Bower (Minn.) 59 N. W. 631, that the measure of the plaintiff's damages is not the depreciation of her land by reason of the existence of the excavation on the defendant's land, but the diminution of the value of the plaintiff's land by reason of the falling, caving, or washing of the soil of her land as the natural result of removing its lateral support.

2. *Held*, further, that the trial court in this case correctly applied this rule in its rulings up-

on the admission of evidence and in its charge to the jury.

3. *Held*, following Davidson v. Railway Co., 24 N. W. 324, 34 Minn. 51, that it is not error to refuse to give instructions, though correct, at the request of a party, when they have been amply covered in the general charge, and that for this reason the special requests of the defendant in this case were properly refused or modified.

4. Evidence considered, and *held* to sustain the verdict.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Robert Jamison, Judge.

Action by Katherine Schultz against John S. Bower. Verdict for plaintiff. From an order refusing a new trial, defendant appeals. Affirmed.

Little & Nunn, for appellant. M. C. Brady, for respondent.

START, C. J. This action is for the recovery of damages sustained by the plaintiff by reason of the defendant's removal of the lateral support of her soil from the adjacent land. The law of this case, including the measure of damages, was settled by the decision of this court on the former appeal of the case. Schultz v. Bower, 59 N. W. 631. Upon a new trial of the cause in the district court, the liability of the defendant was conceded, but he insisted that the damages were only nominal. Only the question of damages was litigated, which were assessed by the jury in the sum of $450. The defendant appealed from an order denying his motion for a new trial.

1. The defendant's assignments of error Nos. 1 and 2 are to the effect that the court erred in overruling his objections to a question to the witness Goldsborough, and also one to the plaintiff, for the reason that neither question excluded any depreciation of the plaintiff's land by reason of the fact of the existence of the excavation on the defendant's land. The question to Goldsborough was, "What would be the market value of this land at the time, if there had been no caving or washing or sloughing off of the soil into the pit of defendant's land?" It is plain upon the face of this question that it does not include any depreciation in the plaintiff's land by the mere fact of the existence of the excavation on the plaintiff's land. And, further, when the objection was made, the court in its ruling said, "Taking into consideration the fact that the pit was there, he may answer." This left no possible doubt as to the scope of the question, and the ruling was correct. The question to the plaintiff was in these words: "Q. Now, you may state, Mrs. Schultz, what the value of that land would be now, provided there wasn't any washing away or caving away of your land, as described here, into the pit dug on defendant's land? A. $2,000 per acre. Q. Well, what do you say is its market value in the condition it is now, taking into consideration the washing away and the state your land is in, with the excavation on defendant's land?" (Objected to as incompetent, irrelevant, and immaterial. Overruled. Exception.) "A. About $1,900 per acre." This question was technically objectionable, but it is manifest from the subsequent questions and answers to and by the plaintiff that she did not include in her estimate of the depreciation of her land any diminution in its value caused by the existence of the pit on the defendant's land except as it was the cause of the caving or washing of her own land; hence the ruling complained of was, at most, harmless error. These questions and answers are as follows: "Q. How much did you consider that that excavation depreciated the value of the property? A. Well, as long as it didn't interfere with my land— Q. Well, never mind, I am talking of the present time. A. $100." Redirect examination: "Q. In answering that question, you may explain what you mean when you say the excavation depreciates the property; explain to the jury what you mean by that. A. From breaking down my land, — from my land breaking down. Q. Dispossess your mind, Mrs. Schultz, of any depreciation in the value of your property that is caused or that is attributable directly to the excavation on the defendant's land; how much, then, would you say that your land was depreciated in value solely by the falling of this soil,—the loss of this soil? A. Well, the loss of the soil is $100 an acre. Q. That is, you mean to say, Mrs. Schultz, that by the falling of this little strip of soil it would depreciate the market value of your property just $100 an acre? A. Yes, sir."

2. The defendant's assignments of error 3 to 7, inclusive, relate to instructions given to the jury by the trial court, and to its refusal to give the defendant's third and fourth requests, and to the modification of his fifth request. These assignments are evidently based upon a misapprehension of the instructions actually given by the trial court, for the objection which the defendant's counsel makes to them is that they did not eliminate from the assessment of the damages to plaintiff's land the depreciation caused solely by the existence of the excavation on the defendant's land. The record answers the defendant's complaint. We quote the here material portions of the charge of the court: "Where one, by digging in his own land, causes the adjoining land of another to fall, the actionable wrong is not the excavation, but the act of allowing the other land to fall. Hence, the measure of damages is the diminution in the value of the land by reason of the falling of the soil, and it is immaterial whether this falling be called 'caving' or 'washing,' provided it is the natural and proximate result of removing the lateral support. So, applying that rule in this case, you will determine what the value of the plaintiff's land was with the excavation there, before

there had been any breaking off or caving of her land, and then you will determine the value of the plaintiff's land with the excavation there after the breaking off and caving of her land, and the difference between the two will be the measure of her damages." In reply to a question by a juror, the court further said to the jury: "You are to determine what the value of the property is in its present condition, then you are to determine what is the value with the excavation there, without any caving or falling of the plaintiff's land, and the difference would be the measure of damages. I think the jury understand. [The plaintiff is entitled to recover for the act of the defendant in excavating, if the lateral support was removed and, as a consequence of the removal of the lateral support, her land was precipitated into the excavation.]" The part in brackets was excepted to by the defendant. The charge as to the plaintiff's damages, taken as a whole, was a concise and correct statement of the law as laid down by this court upon the former appeal. The third and fourth requests of the defendant, which were refused, and the part omitted by the court in the fifth, were to the effect that in assessing the damages the jury should exclude any depreciation in the plaintiff's land caused solely by the existence of the excavation on the defendant's land. This proposition was included in the general charge of the court, and so much of the defendant's requests as he was entitled to have given were substantially given in language quite as clear as that of the requests. The trial court is not bound to repeat its instructions, or give requests, although they correctly state the law of the case, in their exact language. To do so, in many cases, would tend to confuse and mislead a jury, instead of helping them. It is not error to refuse a special request for instructions to the jury, if it has been substantially and fairly covered by the general charge of the court. Davidson v. Railway Co., 34 Minn. 51, 24 N. W. 324. The trial court did not err, either in its charge or refusal to charge.

3. The remaining assignments of error are to the effect that the verdict is not sustained by the evidence. The contention of the defendant is that, under the evidence, the plaintiff was entitled only to nominal damages. The evidence warranted the jury in giving substantial damages, and the verdict is not so manifestly against the weight of the evidence as to justify us in interfering with it. Order affirmed.

VELINE v. DAHLQUIST.

(Supreme Court of Minnesota. Feb. 6, 1896.)

RES JUDICATA.

A former judgment against the defendant and in favor of the plaintiff considered, and *held* to be a bar to this action.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; John W. Willis, Judge.

Action by Nils J. Veline against Andrew Dahlquist. Judgment for defendant. From an order denying a new trial, plaintiff appeals. Affirmed.

Humphrey Barton, for appellant. John H. Ives, for respondent.

START, C. J. On the 16th day of February, 1894, the parties hereto entered into a written contract whereby the defendant agreed to sell and convey to the plaintiff, upon the performance by him of the conditions of the contract on his part, the following described personal property: "All the wooden furnitures, mirrors, bedclothes, linen, chamber furniture, all kitchen furnitures, dishes, silverware, stoves, everything except furnitures and other articles now in the two private rooms of the said party of the first part, and according to inventory list hereto attached, all now being in the building numbered 387 Sibley street, St. Paul, Minn.; also, all the bar fixtures, wooden fixtures, safe, cash register, etc., according to inventory list hereto attached, all now being in the one-story brick building numbered 385 Sibley street, St. Paul, Minn.; also, liquors, cigars, coal, wood, eatables, to the wholesale value of seven hundred fifty ($750.00) dollars, now stored at the above-mentioned places." April, 1894, the plaintiff brought an action against the defendant for the recovery of the possession of all of the above-described personal property, or for its value in case a delivery thereof could not be had, and in his complaint alleged that he was and ever since March 21, 1894, had been, the owner and entitled to the immediate possession of all of the personal property, describing it as set forth in the contract, and that the value of the "liquors, cigars, coal, wood, and eatables" was the sum of $750, and that the balance of such property was of the value of $1,000. The complaint further alleged that the plaintiff became the owner of the property by virtue of such contract, a copy of which, marked "Exhibit A," was made a part of the complaint, and that he performed all the conditions thereof on his part on March 21, 1894, and thereby became the owner of all the personal property in the contract mentioned, and then in the possession of the defendant; that he demanded all of the property from the defendant, which was refused. Attached to the complaint was an itemized list of a part of such property, marked "Exhibit B." The "liquors, cigars, coal, wood, and eatables" were not described in such list; but the complaint alleged that the exhibit did not itemize all of the articles of personal property, and did not contain all of the same, for the reason that the plaintiff was unable to more particularly describe the property. The complaint also alleged that the plaintiff

had been damaged by reason of the refusal of the defendant to turn over to him the personal property in the sum of $500, and concluded with a prayer for judgment, in these words: "Plaintiff demands judgment for the immediate possession of said property, and all of the same, and that, in case the same cannot be delivered to this plaintiff, that then this plaintiff have judgment against the defendant for the value of said property, or, in case of delivering of part only, then plaintiff have judgment for the value of the part so not delivered; that plaintiff also have judgment against the defendant for the sum of five hundred dollars damages, in addition to the value of said personal property, if the same is not turned over to plaintiff; that plaintiff have such other and further relief as to the court shall seem just and equitable, and for his costs and disbursements herein." The answer of the defendant to this complaint admitted that he signed the contract, a copy of which was attached to the complaint, but alleged that he was induced to do so by the fraud of the plaintiff. It also admitted the demand for the property, and put in issue the other allegations of the complaint. Upon a trial of the issues thus formed, the plaintiff, on June 1, 1894, obtained a verdict to the effect that he was the owner and entitled to the possession of all the property described in List B, attached to the complaint, and that the value thereof was $1,000. Judgment was entered upon this verdict, in favor of the plaintiff, September 11, 1894. On August 16, 1894, the plaintiff commenced the present action, and alleged in his complaint that the parties entered into a contract for the exchange of certain property. A true copy of this contract, marked "Exhibit A," is made a part of the complaint, and is the identical contract, a copy of which was made a part of the complaint in the former action. The complaint also alleges that the plaintiff has performed all of the conditions of the contract on his part, but that the defendant refused to set apart for and deliver to the plaintiff the "liquors, cigars, coal, wood, and eatables" described in the contract; that he has demanded the same of the defendant, who has refused to deliver them, or any part thereof, to the plaintiff. It further alleges the value of the property, the plaintiff's damages in the premises, and demands judgment accordingly. The defendant, by his original and supplemental answers, alleged that the cause of action alleged in the complaint in this case is a part of the cause of action in the former suit, and set up the former action and judgment as a bar to this action. Upon the trial it was admitted that the contract referred to in the pleadings in this case is the same contract referred to in the pleadings in the former action, and that before the commencement of the first action a demand was made for each and all of the property, and at one time and place, and there was a general refusal to give any and all. The judgment in the former action was admitted, and the defendant gave in evidence the judgment roll therein, including the complaint, answer, reply, verdict, and judgment; also, a satisfaction of the judgment. Other than this, neither party gave any evidence as to what was actually litigated in the former action. The trial court found the allegations of the original and supplemental answers to be true, and ordered judgment for the defendant on the merits. From an order denying his motion for a new trial, the plaintiff appealed.

A judgment on the merits constitutes an absolute bar to a second suit for the same cause of action, and is conclusive between parties and privies, not only as to every matter which was actually litigated, but also as to every matter which might have been litigated, therein. Bazille v. Murray, 40 Minn. 50, 41 N. W. 238; Swank v. Railway Co. (Minn.) 63 N. W. 1088. Thus, a former judgment in replevin is a bar to an action in trover for the same property, and conversely. Hardin v. Palmerlee, 28 Minn. 450, 10 N. W. 773; Hatch v. Coddington, 32 Minn. 92, 19 N. W. 393. That the claim of the plaintiff in this action for damages because the defendant did not set apart for and deliver to him the "liquors, cigars, coal, wood, and eatables" described in the contract of the parties, was included in, and was a part of, his claim in the original action, is perfectly patent upon a comparison of the complaints in the two actions. The contract upon which the plaintiff's claim in both cases rests is the same. There was but one demand and refusal for the entire property described in the contract, and in the first action the plaintiff claimed to recover possession of the entire property, or its value, and his damages by reason of the defendant's breach of his contract. There was no objection in the first case that there was any misjoinder of causes of action, but an answer to the merits was served. There is nothing upon the face of the record in the former action to show that the plaintiff's entire cause or causes of action growing out of the contract were not litigated. It is true that the jury did not give the plaintiff a verdict for all that he claimed in his complaint, but this does not change the issues in the former case, or prove that the plaintiff's claim in that action for the "liquors, cigars, coal, wood, and eatables," or their value, or his damages for the defendant's refusal to deliver them to him, was not, or might not have been, litigated therein. The plaintiff asserts in his brief that the court in the first action held that the plaintiff could not recover for the items of property involved in this action, but there is no evidence in this case that such was the fact, or that the claim was not submitted to the jury. The trial court in this case correctly

held, upon the record herein, that the judgment in the former action was a bar. Order affirmed.

FIDELITY & CASUALTY CO. OF NEW YORK v. LAWLOR et al.

(Supreme Court of Minnesota. Feb. 7, 1896.)

FIDELITY INSURANCE—COUNTER BOND—STATUTE OF FRAUDS—DISCHARGE OF SURETIES.

1. *Held* in this case that the counter bond sued upon was a continuing one, and bound the defendants to indemnify plaintiff against loss by reason of its guaranty to the elevator company of the fidelity of L., not only for the original time of one year, but for any renewal or extension thereof.

2. The appointment of L. as receiving agent at Kindred was a special one, as to place; but when the defendants were notified of the change of place of the service of L. to Clifford, and consented thereto by their letter expressing their willingness to remain on the bond, they became liable thereon.

3. A promise of A. to indemnify C. against loss by becoming responsible for D.'s faithful performance of his duty to E. is not within the statute of frauds.

4. The case of Casualty Co. v. Eickhoff (Minn.) 65 N. W. 351, followed, to the effect that the complaint alleges a default in the condition of the bond.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; C. B. Elliott, Judge.

Action by the Fidelity & Casualty Company of New York against W. L. Lawlor and others on a bond. From a judgment overruling a demurrer to the complaint, defendant M. Breslauer appeals. Affirmed.

A. D. Smith, for appellant. Van Fossen & Frost, for respondent.

BUCK, J. On or about the 6th day of August, 1891, the Cargill Elevator Company, intending to employ one W. L. Lawlor as its agent in receiving grain at its elevator and warehouse at Kindred, N. D., for one year, beginning on the 5th day of August, 1891, the Fidelity & Casualty Company of New York, for a consideration paid to it, gave a bond of indemnity to the Cargill Elevator Company against all acts involving fraud or dishonesty on the part of said Lawlor. To indemnify the Fidelity & Casualty Company for its liability incurred by giving such bond, the defendant W. L. Lawlor as principal, and the appellant and another person as sureties, on the 19th day of August, 1891, executed a counter bond to the Fidelity & Casualty Company, which is set forth in the complaint in full, and which indemnifies the Casualty Company for its liability incurred by giving such bond. There is no limit of time specified, in express terms, as to when the liability of the defendants herein should cease. The premium was paid by the Cargill Elevator Company to the Fidelity & Casualty Company for one year from August 6, 1891. It is further alleged in the complaint that at the end of that year, the defendant W. L. Lawlor having requested the Fidelity & Casualty Company to renew its bond of indemnity for Lawlor, in his capacity as such receiving agent for the elevator company at Clifford, N. D., for a year, commencing August 6, 1892, the Fidelity & Casualty Company notified the defendant sureties of said request, and they signified their intention, by letter to this plaintiff, to continue on the counter bond to the Fidelity & Casualty Company. The complaint also contains similar allegations as to the subsequent year. We think the counter bond sued upon is a continuing one, and bound the defendants to indemnify plaintiff against loss by reason of its guaranty to the elevator company of Lawlor's fidelity, not merely for the original time of one year, but also for any renewal or extension thereof; and therefore, if Lawlor had continued to act in his capacity as receiving agent of the elevator company at Kindred, the defendants would be liable on the same bond for Lawlor's default. Davis v. Wells, 104 U. S. 159. We also think that Lawlor's appointment as receiving agent at Kindred was a special one, as to place, but the defendants were notified of the change of place of Lawlor's service, and consented thereto by their letter expressing their willingness to remain on the bond. The defendants' promise to indemnify the plaintiff against loss by becoming responsible for Lawlor's faithful performance of his duty to the elevator company is not within the statute of frauds. Goetz v. Foos, 14 Minn. 265 (Gil. 196); Browne, St. Frauds, 161, 162. As the defendants consented to continue on the counter bond after Lawlor's transfer from Kindred to Clifford, it constituted a waiver of any right they might otherwise have had to claim that they were released by reason of the change in Lawlor's place of service. That the complaint alleges a default in the conditions of the bond is conclusively determined in the case of Casualty Co. v. Eickhoff (Minn.) 65 N. W. 351. The order overruling the demurrer is therefore affirmed.

BOARD OF COM'RS OF HENNEPIN COUNTY v. STATE BANK et al.[1]

(Supreme Court of Minnesota. Feb. 7, 1896.)

COUNTY DEPOSITARY—ACTION ON BOND—DEFENSE.

The defendant bank executed a bond to the plaintiff, with its codefendants as sureties, in which it was recited that the bank had applied to be designated a depositary of county funds. The condition of the bond was that if the bank was designated such depositary, pursuant to the statute, it should pay on demand all funds deposited with it pursuant to such designation. The board of county commissioners designated the bank such depositary, accepted and approved the bond, which was duly recorded; and the county treasurer, pursuant to such designation and bond, deposited county funds with the bank, as a county depositary. *Held*, in an action upon the bond, that the answer of the sureties that the board of county auditors never considered the application of the bank, and never

[1] Rehearing denied.

designated it as a county depositary, and that they never knew that the bond had been approved, or that the funds had been deposited with the bank in reliance thereon, does not state a defense.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Seagrave Smith, Judge.

Action by the board of county commissioners of Hennepin county against the State Bank and others. From an order overruling demurrers to the separate answers of two of the defendants, plaintiff appeals. Reversed.

Frank M. Nye and James A. Peterson, for appellant. John F. McGee and Rea, Hubachek & Healy, for respondents.

START, C. J. Appeal by plaintiff from an order overruling its demurrers to the separate answers of two of the defendants. The action is against the defendant bank, as principal, and its sureties upon its bond as a depositary of county funds. The here material allegations of the complaint may be summarized as follows: That the plaintiff (that is, the board of county commissioners of Hennepin county), on May 23, 1892, duly designated the defendant bank a depositary of the funds of the county, pursuant to the statute; that the defendant agreed, among other things, to pay interest on all such funds deposited with it, and credit such interest on monthly balances, and hold all such funds and interest subject to draft and payment on demand; that, to secure the performance of this agreement by the bank, it, with its codefendants as sureties, executed the bond required by the statute in such cases made and provided, in the sum of $100,000, to the plaintiff, a copy of which bond, marked "Ex. A," is made a part of the complaint; that the bond was duly approved by the plaintiff, and filed and recorded as required by law. The recitals and conditions of the bond are in these words: "The condition of the above obligation is such that whereas, the above-abounden, the State Bank of Minneapolis, has made application to be designated a depositary of the funds of said county, and has offered to pay interest on such funds of said county as shall be deposited with it, at the rate of one and one-half per cent. per annum upon the monthly balances of such deposits, such interest to be credited monthly to said county: Now, therefore, if the above-bounden, the State Bank of Minneapolis, upon being designated as such depositary pursuant to chapter 124 of the General Laws of Minnesota, 1881, shall well and truly credit such interest on such monthly balances to said county, and shall well and truly hold such funds, with accrued interest, subject to draft and payment at all times on demand, and shall well and truly pay over on demand, according to law, all of such funds which shall be deposited in said bank pursuant to such designation and said chapter 124, as amended by an act of the legislature of said state approved March 3rd, 1883, entitled 'An act to amend section one of chapter one hundred and twenty-four of the General Laws of 1881, relating to the deposit of public funds,' and all of the interest so to be credited, then the above obligation to be void, otherwise to remain in full force and virtue." The complaint further alleges that after such designation of the bank and the execution of the bond, and pursuant thereto, the county treasurer deposited with the bank certain public funds of the county, and on June 27, 1893, there was on deposit by the county treasurer, in the bank, pursuant to such designation and agreement, the funds of the county to the amount of $64,703.10; that payment thereof was duly demanded on that day, of the bank, and refused. The answer of each defendant is the same, and contains no denials, but alleges that the board of auditors of the county of Hennepin never acted upon any application of the bank to be designated a depositary of county funds, and that the bank never was designated by such board as such depositary. The answer admits the execution of the bond, but alleges that the defendant executed it upon the express agreement that it was not to become operative until the bank was designated a depositary of county funds, and that the defendant never knew that the bond was accepted or approved, or was being acted upon, or that county funds were deposited with the bank in reliance upon the bond.

The bond is a part of the complaint, and recites that the bank has made application to be designated a depositary, and has offered to pay interest on the county funds; and, if it had further recited that the bank had been so designated, this case would be ruled by that of Commissioners v. Butler, 25 Minn. 363, in which it was held that the recitals in the bond estopped the sureties from denying that there was no such designation. The complaint, including the recital in this bond, is to the effect that the bank applied to be designated a depositary; that the bond was given to secure the faithful discharge, by the bank, in case it was so designated, of its duties and obligations as such; that it was designated by the board of county commissioners; that the bond was accepted, approved, and recorded, and pursuant to such designation and bond the county treasurer deposited the funds of the county with the bank. These allegations are admitted by the answer, and the affirmative fact alleged that the board of auditors—the only body that could legally appoint the bank a depositary—never did designate the bank as such. The demurrer admits this fact, and the question for our decision is whether such fact, taken in connection with the facts alleged in the complaint, constitutes a defense in favor of the

sureties on the bond. We answer the question in the negative. In the case of Board v. Gray (Minn.) 63 N. W. 635, we held, in an action upon a bond similar to the one here in question, that the provisions of the statute relating to the designation of county depositaries were for the benefit of the public, and not for the sureties, and that, where the depositary was actually designated by the board of auditors, a failure to comply with the requirements of the statute in making such designation would not affect the liability of the sureties; or, in other words, if the principal in the bond was a de facto depositary of the county funds, recognized as such by the treasurer and other county officers, and the county funds were actually deposited with the principal, as such depositary, in reliance upon the bond, the sureties were liable, in case of default in the conditions in the bond, although, in law, the principal was never designated as a depositary. Public interests would be seriously jeopardized if the sureties upon a county depositary bond could exonerate themselves from liability by showing that he was not such de jure. It is true, the condition of the bond is that, if the principal shall be designated a depositary pursuant to the statute, the sureties shall be liable for its default; but the regularity or legality of the designation is not of the substance of the condition, for its substance is that if the funds of the county are deposited with the principal, as a depositary, it shall pay over the money on demand. Depositaries of county funds, under the statute, are quasi public officers. They are financial agents of the county, and hold its funds in place of the treasurer. The allegations of the complaint show that the bank was a de facto depositary, and was recognized as a lawful depositary by the board of county commissioners and the county treasurer, and the public funds deposited with it in reliance upon its official bond; but it was not a de jure depositary, because it was designated by the board of county commissioners, and not by the board of auditors. In principle, this case falls within the rule that the sureties upon an official bond, by virtue of which the officer has been inducted into office, cannot, when called upon to answer for his official defaults, escape liability upon the ground that their principal was not duly elected or appointed, or did not legally qualify. Mechem, Pub. Off. § 341; 2 Brandt, Sur. § 521; State v. Bates, 36 Vt. 387; People v. Evans, 29 Cal. 430; Byrne v. State, 50 Miss. 688; Taylor v. State, 51 Miss. 79. In the last case cited the officer's appointment was void, and it was held that the sureties, when sued on his official bond, could not set up the illegality of the appointment as a defense. So, in the case at bar, the designation of the principal in the bond as a county depositary was absolutely void, because made by the board of county commissioners, and not by the board of auditors; still it was in fact a depositary, and was inducted into office, and the county funds deposited with it, in reliance upon the bond, and the fact that it was not designated such depositary by the proper board does not exonerate the sureties on the bond. Order reversed.

HOLMES v. CALHOUN COUNTY et al.

(Supreme Court of Iowa. Feb. 14, 1896.)

INJUNCTION — ADEQUATE REMEDY AT LAW — SURFACE WATER—DRAINAGE.

1. Injunction will lie to restrain the wrongful maintenance of a drain, whereby an unusual amount of surface water is cast on plaintiff's premises, though defendant is fully responsible financially.

2. The fact that an alleged unlawful structure was completed pending an action to enjoin its construction and maintenance does not affect the right of the court to enjoin its maintenance.

3. The maintenance of a tile drain by a county along a highway, which has the effect of discharging on plaintiff's premises surface water which would not otherwise have flowed over them, and casts water on his land in a different manner from that in which it flowed before, to his injury, is actionable, and will be enjoined.

Appeal from district court, Calhoun county; Charles D. Goldsmith, Judge.

Stevenson & Lavender, for appellants. J. C. Kerr, for appellee.

KINNE, J 1. Plaintiff, a landowner in Calhoun county, Iowa, brings this action to enjoin the county, its auditor, treasurer, and board of supervisors, from constructing a tile drain upon and along the highway adjacent to his premises. He avers that the board of supervisors had entered into a contract with a party to construct such a drain along the south line of his land; that the same is so planned as to drain, not only the highway, but also to carry off the water which accumulates on the land lying south of the highway; that the construction of the drain, as planned, will accumulate immediately opposite plaintiff's land, on said highway, a much larger amount of water than would naturally accumulate at that place, and would empty all of said water, suddenly and in large and unusual quantities, upon his land; that said drain will change the natural flow of the water, and discharge the water upon his land, to his damage. He further avers that there is no lawful authority to improve the highway, as there is no fund which can legally be used to pay therefor. He asks that an injunction issue, restraining the entering into the contract for the construction of said drain, the issuing of a warrant to pay therefor, and the payment of any such warrant, and for other equitable relief. The answer avers that the construction of the drain was necessary to render the highway passable; that it would empty the water into the natural outlet; that its construction would not damage plaintiff; that

the county road fund was not in debt; that the tile for said drain had been paid for, and the work of putting in the drain provided for; that plaintiff has an adequate remedy at law. The cause was tried to the court, and a decree entered enjoining the defendant county, and its board of supervisors and their successors, from constructing or maintaining said drain, or any similar drain, "whereby the surplus water will be cast artificially on the premises of plaintiff, and said defendants are enjoined and prohibited from permitting the water from said drain from flowing upon said land of plaintiff." The auditor was also enjoined from issuing any warrants on the bridge fund of said county in payment for said drain; and the treasurer, from paying any such warrants. Defendants appeal.

2. It is difficult to describe the location of the drain, with reference to plaintiff's premises, and the land to be drained, so as to make the situation clear, in the absence of a plat of the premises. Plaintiff's dwelling house and other buildings are situated upon a public highway, which runs east and west. The ground immediately surrounding them is high and dry. Southeast of plaintiff's premises, and south of the highway, there is a tract of ground from which surplus water flows through a culvert under the highway, and passes over plaintiff's land, flowing to the east. From plaintiff's east line, and extending in a west and northwesterly direction, are connected ponds or marshes, through which the water from quite a territory west, southwest, and northwest of his buildings naturally flows through his land north of his buildings, and after it passes them it takes a southeasterly course until it leaves his premises. Without quoting from the evidence, it may be said it satisfactorily establishes the fact that this title drain would run water upon portions of plaintiff's land which does not go there naturally; that more water would pass over the land east of the house than would without the drain; that it would spread over, and render practically valueless, about three acres of plaintiff's ground. The evidence also tends strongly to show that, while more or less water in these ponds is not drawn off through the present natural outlet, this drain would take off some of this water, which, without it, would stand in the ponds, and be taken up by evaporation, or would percolate into the earth.

3. It is contended that plaintiff had an adequate remedy at law; that the county was solvent, and hence the plaintiff might recover any damages he might sustain, and therefore was not entitled to the aid of a court of equity. When this action was commenced, the drain had not been constructed. Between that time and the time of the trial below, the drain had been completed. It follows, then, that, unless the defendants were enjoined from permitting the water to through said drain, it would continue so to flow, and to run over plaintiff's land. We need not determine whether the drain was, in its character, permanent. If permanent, then plaintiff had the right to have the continued flow of the water restrained; and, if it be considered temporary, then he should not be put to the vexation and expense of bringing a suit for every fresh injury. In either case an injunction was proper, to restrain the continuance of that which amounted to a nuisance. The following authorities abundantly sustain the holding that in such a case an injunction is a proper remedy: Morgan v. Miller, 59 Iowa, 482, 13 N. W. 643; Ladd v. Osborne, 79 Iowa, 94, 44 N. W. 235; Troe v. Larson, 84 Iowa, 650, 51 N. W. 179; Bolton v. McShane, 67 Iowa, 207, 25 N. W. 135; Grant v. Crow, 47 Iowa, 633.

4. It is contended that an injunction should not have been granted, because the drain had in fact been constructed before the decree was entered in the district court, and the warrants issued and paid. It it be conceded that the decree, in so far as it prohibits the auditor from issuing warrants in payment for the construction of the drain, and the treasurer from paying the same, was ineffectual, still, in so far as it prohibited the defendants from maintaining the drain, or any similar drain which would cast surplus water on plaintiff's premises, and from thus casting the water upon his premises, it was proper, as staying the continuance of the nuisance which by their wrongful acts they had created.

5. We come now to the merits of this case. We shall not enter upon a discussion of the evidence. We think it should be found from it that the drain conveyed water over a portion of plaintiff's premises, which, without the drain, never flowed over his lands; that its effect was to drain water from ponds, some of which, in the absence of this drain, would stand in them until evaporated; that it cast the water upon plaintiff's land in a different manner from what the same would naturally have flowed upon it, to his injury. In such a case the law is well settled in this state that the injury is actionable. In view of the many cases wherein this subject has been discussed, we need not elaborate it. Vannest v. Fleming, 79 Iowa, 641, 44 N. W. 906; Dorr v. Simerson, 73 Iowa, 91, 34 N. W. 752; Livingston v. McDonald, 21 Iowa, 160; Wharton v. Stevens, 84 Iowa, 107, 50 N. W. 562; Collins v. City of Keokuk (Iowa) 59 N. W. 200; Williamson v. Oleson (Iowa) 59 N. W. 267; Stinson v. Fishel (Iowa) 61 N. W. 1063. It is urged that this case is, in its facts, like Williamson's Case, in which this court affirmed the action of the lower court in dismissing the plaintiff's petition. In that case slight, if any, damage was shown, and it was held plaintiff was bound by a settlement he had made. In this case no settlement is claimed, and all of the testimony shows that the discharge of the water from the drain would substantially damage plain-

tiff's land. Some question is made as to the right of the county to pay for this drain, because there was no money in the proper fund. As, in our view of the case, the evidence justified a decree for the plaintiff, irrespective of this contention, we give it no consideration. The decree of the district court is affirmed.

DENZLER v. RIECKHOFF et al.

(Supreme Court of Iowa. Jan. 29, 1896.)

PLEADINGS—AMENDMENT—DEED—DELIVERY—EVIDENCE.

1. Where plaintiff claimed land by a deed from his father to himself, which had been delivered to a third person until his father's death, and by an oral agreement whereby he was put in possession of the land, and defendant claimed part of the land as grantee of the other heirs, alleging that said deed to plaintiff was void for want of delivery, it was proper to refuse to permit defendant to amend her pleadings at the trial to allege that the land was the homestead of plaintiff's father and his wife, and that the deed and parol agreement were void for that reason, as Code, § 2689, permits amendments only when they do not substantially change the claim or defense.

2. Where the person to whom a deed was delivered testified that the grantor deposited the deed with him to be delivered to the grantor's son after the grantor's death, and the grantor's wife, who had joined in the deed, disclaimed any interest in the land, and a large number of witnesses testified that the grantor declared that he absolutely disposed of the property to his son, there was sufficient evidence to prove a legal delivery.

Appeal from district court, Iowa county; M. J. Wade, Judge.

This is a suit in equity to quiet the plaintiff's title to certain real estate. The defendant Emily L. Rieckhoff filed an answer and cross petition in which she claimed to be the owner of two-fifths of the property, and she demanded a partition of the same. There was a full hearing on the merits, and a decree was entered for the plaintiff, as prayed in the petition. Defendant Emily L. Rieckhoff appeals. Affirmed.

Struble & Stiger and Hedges & Rumple, for appellant. James H. Feenen, Baker & Ball, and S. H. Fairall, for appellees.

ROTHROCK, J. 1. The parties are children and grandchildren of Jacob Denzler, deceased, who was a farmer, and resided in Iowa county. He accumulated quite a large estate. He died in the year 1889, and left surviving him his widow, Verona Denzler, and five children. The children were the plaintiff herein, Jacob Denzler, and Henry Denzler, John Denzler, Caroline Schild, and Verona Rieckhoff. It will be observed, from the names of the daughters, that they were married before the death of their father. Some years before his death, Jacob Denzler divided his real estate among some of his children. He and his wife executed deeds of the land he intended for his sons Henry and John, and delivered the same directly to them. They also executed a deed to the plaintiff herein for the land it was intended for him to have, and at the same time he made a will, in which he provided a support for his wife in case she survived him, which support was to be the income or interest of $16,000 during her life. It appears that the widow and the sons Jacob B. and John and the daughter Caroline Schild have been at all times satisfied with the disposition their father made of his property. The son Henry does not appear to have made any open resistance to it, but he and his sister Mrs. Rieckhoff conveyed what they thought was their interest in the land claimed by plaintiff to the appellant Emily L. Rieckhoff, who is a daughter of Mrs. Rieckhoff, and she claims that the land in controversy was not at any time conveyed by Jacob Denzler or Verona Denzler to the plaintiff, and that, because it was undisposed of, she is now the owner of an undivided two-fifths of it. It will be observed that the whole controversy turns on the question whether the ancestor of these parties made a valid conveyance of the land to his son, the plaintiff herein. It is proper to say here that no claim is made that Jacob Denzler was in any way incapacitated by mental infirmity, from making such a disposition of his property as he thought proper. And there is no dispute that he and his wife executed a deed to the plaintiff for the land. We do not overlook the fact that counsel for appellant claims that the deed was void on account of an inaccuracy of the scrivener who wrote the deed, in the orthography of the wife's name. This is of such slight importance that it is unnecessary to set it out here. The deed, on its face, is a valid instrument.

2. The only real question in the case is whether there was a delivery of the deed. At the time it was prepared, signed, and acknowledged, Denzler made his last will and testament. Both instruments were left for some time with the scrivener who prepared them, when Denzler called for them, and took them to a bank, of which James H. Branch was president, and handed them to Branch, who put them in an envelope, sealed it, and it remained there until after Denzler died, when Branch took the envelope to the office of the clerk of the district court, where it was opened, and the clerk filed the will as he was required to do by law, and Branch filed the deed for record in the recorder's office. It should further be stated that the plaintiff claimed to be the owner of the property by a verbal agreement made with his father before the deed was executed, under which agreement possession was given to the plaintiff, and improvements made on the land. After the trial had proceeded for two or three days, and the evidence had all been introduced, the appellant asked leave to file an amendment to her pleadings; setting up that the property in controversy was the homestead of Jacob Denzler and his wife, and that the verbal agreement and deed were void for

that reason. The plaintiff objected to the amendment, and the objection was sustained. This ruling is the subject of complaint. The right to make the amendment was founded on section 2689 of the Code, under which amendments to the pleadings may be made at any time to conform the pleadings to the facts proved, when the amendment does not change substantially the claim or defense. The objection made to the amendment was that it did change the defense. We think the objection was well taken, and that the ruling of the court was correct. No mention had been made in any pleading as to the homestead right in the land, until it was sought to be claimed by this amendment. While it is true that the residence of Jacob Denzler and his wife was incidentally referred to in the evidence, yet whether, after the alleged oral contract and deed were made, and possession given to the plaintiff, it was such a residence as constituted a homestead, was not a question in the case. Indeed, even the incidental reference to their remaining on the farm, in the family of the plaintiff, would render it very questionable whether the homestead existed at any time after possession was given to the plaintiff. The amendment was not founded upon facts which were not discovered by the plaintiff when the original pleadings were filed. We do not determine that the facts in evidence showed that the homestead was abandoned, but surely it would have been the right of the plaintiff to have introduced evidence upon that question, if the amendment had been allowed. The claim of the defendant that all the evidence upon that question had been introduced cannot be entertained. Counsel for defendant tried only one side of the case. There was no abuse of discretion in the ruling of the court. We will not cite cases. Citations would be mere repetition. Reference to the digests is sufficient. It is said that the deed is invalid on its face, because the wife merely released her dower interest. She did more than that. She joined her husband in the granting clause, and that was sufficient to convey the homestead.

3. We have now come to what we have said is the question in the case, and it requires very brief consideration. It was sought to show on the trial that the deed was not delivered, because it was not deposited with Branch to be delivered to the plaintiff after the death of Jacob Denzler. Upon this question of fact, we have no hesitancy in holding, with the learned district judge, that the position of the defendant is overthrown by a clear preponderance of the evidence. Branch testified, as a witness, that the deed was deposited with him for that purpose. It is true that he does not undertake to give the language of Denzler when he delivered the deed to him, and no witness of ordinary memory would undertake to give the exact language of such an interview, after the lapse of a number of years. Branch was cross-examined at great length about this brief interview. Without question and answer, and as abstracted, the cross-examination extends over some seven or eight pages; and afterwards Branch was called for further cross-examination, and after that it was proposed to cross-examine him again. When this proposition was made, the plaintiff objected, and the objection was sustained, and properly so. It is said that the defendants desired to cross-examine him the third time, so that they might lay the foundation for introducing an impeaching witness. Nearly the whole scope of the cross-examination was for that purpose, and the claimed conversation with the impeaching witness had already been referred to in the cross-examination. Whatever doubt may have been raised as to the truthfulness of the testimony of Branch, by supposed contradictory statements, it is all dispelled by the acts and conduct of the grantors in the deed. The widow not only concurred in the disposition of the property, but she joined her son in this suit by disclaiming any interest in the land. A large number of witnesses testified to facts showing unmistakably that Jacob Denzler intended that the conveyance to the plaintiff was an absolute disposition of the property. It is true, he did not state, in so many words, to any witness, that he had deposited the deed in the bank for his son; but he repeatedly stated that he had given the farm to the plaintiff, and he always spoke of it as an unconditional transaction. That a deposit of a conveyance with such an intention operates as a delivery of the instrument is not questioned. See Trask v. Trask, 90 Iowa, 318, 57 N. W. 841.

4. Objection is made because the court ordered the costs in the case taxed to the appellant. The objection is overruled. All the costs, except the filing fees, were occasioned by what the court determined was an unfounded defense to the action. Affirmed.

KINNE, J., took no part.

DICKSON et al. v. DRYDEN et al.

(Supreme Court of Iowa. Jan. 31, 1896.)

PARTNERSHIP—POWER OF PARTNER TO BIND FIRM—SUFFICIENCY OF EVIDENCE.

1. One partner has the same right to execute in the firm name a note in settlement of a claim arising out of the firm business as he would have to pay the amount due in cash out of the firm funds.

2. In an action on notes, it appeared that defendant was a member of the firm of D. Bros., cattle dealers, and that in 1885 his partner D. went away, the business being continued by defendant and his father in the old firm name; that D. returned in a few months, and formed a partnership with M., under the style of M. & D., for dealing in cattle; that though defendant claimed the partnership between himself and D. was dissolved when the latter left, in 1885, no notice of dissolution was ever given to plaintiffs or published; but that, long after the alleged dissolution, defendant and his father drew drafts on plaintiffs against consignments of stock shipped in the name of D. Bros. Plain-

tiffs testified that, after 1886, the accounts of the two firms, both of which shipped stock to plaintiffs, were, by mutual arrangement, all kept in the name of M. & D., and his testimony was supported by the fact that, though drafts were drawn by D. Bros. against plaintiffs as late as the fall of 1887, no settlement was made, nor any statement rendered D. Bros. by plaintiffs. The notes in suit were given in September, 1887, for a balance due on the M. & D. account, and bore that firm's signature and the signature of D. Bros., the latter being signed by D.. without any express authority from defendant. *Held*, that D. Bros. and defendant were liable on the notes.

Appeal from district court, Monona county; G. W. Wakefield, Judge.

Action on notes. Trial to the court. Judgment against all of the defendants. Dryden Bros. and T. N. Dryden appeal. Affirmed.

Mackenzie & Ross, for appellants. McMillen & Kendell, for appellees.

KINNE, J. 1. Plaintiffs are commission men residing in Chicago, Ill. They brought suit upon two promissory notes, for $3,000 each, dated September 20, 1887, and due January 1, 1888, and May 1, 1888, respectively, and signed by McMaster & Dryden, Dryden Bros., and W. A. Dryden. Dryden Bros. and T. N. Dryden answered, in substance denying that W. H. Dryden and T. N. Dryden were partners under the firm name and style of Dryden Bros.; admit that such a partnership was formed in 1880; but aver that the partnership was dissolved in 1885; aver that no person had authority to sign said notes with the name of Dryden Bros.; that said notes were not given for any firm debt of said Dryden Bros.; and that the name Dryden Bros. was not signed thereto by T. N. Dryden, and, if so signed by W. H. Dryden, it was long after the partnership ceased to exist, and without any authority therefor. The cause was tried to the court, and a judgment entered against all of the defendants, from which Dryden Bros. and T. N. Dryden only appeal.

2. The several assignments of error all relate to the same question; that is, the alleged error of the court in finding that Dryden Bros. and T. N. Dryden were liable on the notes. The evidence in some respects is not as clear as we could wish, but from it we gather the following facts: In 1880 or 1881, T. N. Dryden and W. H. Dryden formed a partnership under the firm name and style of Dryden Bros. From 1881 to 1883 the firm was engaged in the mercantile business. In 1883 they began farming and buying and shipping stock. In 1885, W. H. Dryden, for a few months, went to Shenandoah to school. During his absence, his father, W. A. Dryden, and his brother, T. N. Dryden, continued the business under the same firm name, and until, at least, June or July, 1887. When W. H. Dryden went away to school, it is said the original firm was dissolved, and the business settled. No notice, however, of such dissolution was ever given plaintiffs. It also appears that the father had the permission of T. N. Dryden to use the name Dryden Bros. in his business until the fall of 1887, and did so. After W. H. Dryden returned from school, in the summer of 1886, he went into partnership with one McMaster, under the firm name of McMaster & Dryden. This latter firm was engaged in merchandising and buying and shipping stock, and continued in the stock business until the fall of 1888. Now, it seems that Dryden Bros. and McMaster & Dryden most of the time shipped their stock to plaintiffs at Chicago, Ill. Sometimes W. A. Dryden shipped with McMaster & Dryden, and divided the profits and losses of the venture. It is not disputed that the name Dryden Bros. was signed to the notes sued upon by W. H. Dryden, and the testimony tends to show that he had no express authority from T. N. Dryden to so sign that name. W. H. Dryden, who had been a member of the firm of Dryden Bros., on cross-examination testified: "I was not in the habit of signing Dryden Brothers' name to the different papers as they came along. I signed the first one because Mr. Lott wanted more security. I deliberately put down some one else's name, that I had no authority to put down. I have the effrontery to go before a court, and admit that. I did that only once or twice. I had no authority whatever. I was not prosecuted for that offense. I never informed T. N. Dryden of it. I was not then a member of the firm of Dryden Brothers. * * * The firm of Dryden Brothers was dissolved in 1885. I did not publish notice of dissolution. I did not inform Dickson & Lott that we had dissolved. * * * I signed the name of Dryden Brothers to one other note before that." It appears, also, that, as late as 1887, W. A. Dryden was shipping cattle to plaintiffs, part of the time in his own name, and a part of the time in the name of Dryden Bros., with the knowledge and consent of T. N. Dryden, and as a part of the business of Dryden Bros. W. A. Dryden testifies that he worked for and with the firm of Dryden Bros.; that "we were all in together"; and that there were no profits, but a loss. Now, several of the defendants testify that, upon the business done with plaintiffs by Dryden Bros., whatever losses there were, were adjusted and settled in June or July, 1887, with the Dunlap Bank; and that no part of the sum represented by the $6,000 in notes sued upon was an overdraft by T. N. Dryden or Dryden Bros.; nor did said sum, or any of it, grow out of the business of T. N. Dryden or Dryden Bros.; that it was a balance due against McMaster & Dryden alone. The testimony on the part of the defendants tends strongly to show that in 1886, and thereafter, the accounts of Dryden Bros. and McMaster & Dryden were all kept together under the name of McMaster & Dryden, and that this was done in pursuance of instructions from W. A. Dryden, expressly assented to by McMaster & Dry-

den; the Dryden of the latter firm being the same Dryden who had been a member of the firm of Dryden Bros. It does not appear that T. N. Dryden had actual notice of this arrangement regarding the keeping of the accounts, though the evidence, we think, shows that, long after the claimed dissolution of the firm of Dryden Bros., T. N. Dryden and his father drew drafts on the plaintiffs against consignments of stock shipped them in the firm name of Dryden Bros., and that T. N. Dryden shipped stock in the firm name, which went into this McMaster & Dryden account. It is not disputed that this $6,000 in notes, sued upon in this action, was the correct balance due plaintiffs upon the McMaster & Dryden account; and, as we think, such account embraced the transactions of Dryden Bros., as well as McMaster & Dryden, since some time in 1886. There is evidence tending to show that Dryden Bros., McMaster & Dryden, and W. H. Dryden were all buying stock and working together, and all shipping to plaintiffs.

We arrive at the conclusion, from all the testimony, that, so far as plaintiffs were concerned, there was no dissolution of the firm of Dryden Bros. If, in fact, there was a dissolution of that firm in 1885, no notice of it was ever given to plaintiffs, and no notice published. Furthermore, it is apparent that the firm continued to exist for two years or more thereafter, as we find that business was being conducted in the firm name, and with the knowledge of both of its members, and for most of that time with the express consent of T. N. Dryden. Neither of the members of the firm of Dryden Bros. took any steps whatever to make such a dissolution of the firm as would avoid their liability to third parties. It must be found, also, from the testimony, that the accounts of Dryden Bros. and McMaster & Dryden were kept as one with the assent of T. N. Dryden and of Dryden Bros. Some facts supporting this theory, other than the testimony of plaintiffs and McMaster, appear in the record. Notwithstanding the claimed settlement in 1885, business was conducted in the name of Dryden Bros., consignments of stock were made to plaintiffs until the fall of 1887, and drafts drawn against them; yet it appears that no settlement was made between plaintiffs and Dryden Bros., nor any statement rendered said firm by plaintiffs. We consider this a circumstance also tending to sustain the testimony of plaintiffs and McMaster that both the accounts were kept in the name of McMaster & Dryden by mutual arrangement, and hence the balance due appeared against the latter firm. We cannot further review the evidence. From the facts stated, and many others appearing in the record, it is clear that Dryden Bros. and T. N. Dryden are liable for any balance due plaintiffs on the account thus kept in the name of McMaster & Dryden.

3. It is insisted that, even if the partnership of Dryden Bros. still existed, yet one of the partners had no right to sign the firm's name to negotiable paper. Now, the case we have is this, as we think the record shows: Dryden Bros. were liable on the McMaster & Dryden account for the $6,000, for which the notes in suit were given. Plaintiffs insisted upon a settlement of this liability, and one member of the firm, in settlement of this claim made upon them, and arising out of the business of the firm, signs the firm's name to these notes. He would have had the undoubted right to have paid the amount due on the account in cash, out of the firm's funds, if it had had money; and his right to execute, in the firm name, a note in settlement of the firm debt, is equally clear. The case of Brayley v. Hedges, 52 Iowa, 625, 3 N. W. 652, is directly in point. The decree below seems to us to be warranted by the testimony, and it is therefore affirmed.

LEIPIRD v. STOTLER.

(Supreme Court of Iowa. Feb. 3, 1896.)

ACTION AGAINST SURVIVING HUSBAND ON WIFE'S NOTE—EXECUTOR DE SON TORT—EVIDENCE—PRACTICE—HARMLESS ERROR.

1. In an action against a surviving husband, on his wife's note, it is proper to admit in evidence the verbal promise of the husband, made after her death, to pay the note, to be followed by further evidence that he has appropriated her estate without administration.

2. Where evidence has been properly admitted over objection, subject to being made competent by further evidence, the objector cannot urge the nonproduction of further evidence as error, unless he called the attention of the court to the omission.

3. Code, § 3639, prohibiting the examination of any person interested in an action as to any communication or transaction had with a person then deceased, does not, in an action against a surviving husband (who has appropriated his wife's estate without administration) on a note of his wife, preclude the plaintiff from testifying to a conversation in which plaintiff took no part, and in which defendant's wife stated that she wanted him to give plaintiff a home.

4. The admission of evidence which could not affect the result of an action is harmless error.

5. In an action against a surviving husband, on his wife's note, evidence of the amount of property which the wife had when she married defendant is proper, where it appears that she died 18 months after marriage, and that he is in possession of her estate, without administration.

6. In an action against the surviving husband of a deceased sister, on her note, where plaintiff has testified that her mother was worth $3,000 when she died, and that defendant's wife received nearly all of it, she may, after cross-examination as to her means of knowledge, testify that, on death of her mother, her heirs approximated her estate at $3,000, though defendant was not present when the approximation was made.

7. Refusal to strike the answer of a witness as to what defendant meant by a certain statement is proper, where it appears that the answer was a correct conclusion to be drawn from the entire conversation, which had previously been testified to.

Appeal from district court, Cedar county; J. H. Preston, Judge.

Action at law to recover from the defendant the amount of a promissory note executed by his wife prior to her death, and upon account for work and labor performed by plaintiff at defendant's instance and request. Trial to a jury. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

Wheeler & Moffit and R. G. Cousins, for appellant. Charles W. Kepler, for appellee.

DEEMER, J. The action is brought to recover from the defendant the amount of a promissory note executed by his wife in her lifetime, and which, it is alleged, has been lost and stolen since the decease of the wife, and for certain work and labor performed by plaintiff as housekeeper for defendant since the death of his wife. It is alleged that the defendant's wife died possessed of a large amount of money, notes, household and kitchen furniture, and a large amount of other property, aggregating in value the sum of $5,000; that no administration was had upon her estate, but that defendant took possession of all of said property, and converted it to his own use. And it is further averred that, after the death of his wife, defendant promised and agreed to pay his wife's note. In the second count of the petition, plaintiff alleged that she performed work and labor for defendant, at his instance and request, from August 16, 1889, up to the middle of November, 1889, the reasonable value of which was $75. The defendant, in answer, states, on information and belief, that some such note as plaintiff describes was executed by his wife during her lifetime, but states that he never saw it, and denies liability thereon; admits that no administration has been had on his wife's estate, and avers that she had no property at the time of her decease, save two lots in the town of Mt. Vernon, which were sold by his wife's heirs, and a few household goods, furniture, and piano, which are exempt to defendant, as surviving householder; denies that his wife left a large amount of property, and avers that he received no part of the consideration for the Mt. Vernon lots, and denies that he has converted any property, owned by his wife, to which he was not legally entitled; denies that he promised to pay the note, and denies liability on such a promise, even if made. He further avers that he paid the doctor's bills and funeral expenses for his wife, and since her death has erected a monument to her memory, and that these expenses largely exceed the amount of the property left by her. And he asks that, if any property of his wife be found subject to execution, the action be abated until administration be had of her estate. The defendant denied in toto plaintiff's claim for services, and said that her services were rendered as a mere gratuity, and that he has already paid her in money and property and house rent, more than her services amounted to. He also, in an amendment to his answer, denied the execution of the note by his wife. The plaintiff, in reply, admitted having received from defendant the sum of $30, and further pleaded that she indorsed the same upon the note given her by his wife. These were, in substance, the issues on which the case was tried, and the jury found a verdict for plaintiff for the sum of $224.45. The note on which the action is bottomed was for $200, and was executed some time in May, 1888, and drew 8 per cent. interest from that date. The appellant concedes that there is a hopeless conflict in the evidence, and that there is sufficient, if believed by the jury, to warrant the verdict returned. His complaint is of the rulings made by the court during the progress of the trial. The instructions given by the court are not assailed in argument, and we may observe, in passing, that they are even more favorable to the defendant than he was entitled to.

1. The plaintiff testified that after the death of defendant's wife, who was her sister, she lost the note which is the subject of the suit, after she went to work for the defendant, and that she believed the defendant had taken it; that she accused the defendant of having done so, in answer to which accusation defendant said that "I should have every cent of my money on the note." The defendant objected to the questions which elicited this testimony, and further moved to exclude the answers, "as being incompetent and immaterial, and a verbal promise to pay the debt of another." Thereupon the court made the following record: "Motion overruled, and defendant excepts. The objection is overruled on the theory that it be followed up with other testimony to make it material and competent." This is all of the record made with reference to this testimony. It was not followed up by other testimony, but the defendant did not thereafter renew his motion, or ask for a further ruling on the motion as it then stood. That such testimony might have been produced, is quite evident. If, during the further progress of the trial, it had been shown that this promise of the defendant was made upon a new and independent consideration, to accomplish some purpose of his own,—e. g. to prevent administration of his wife's estate, to save the expense thereof, or for any other reason which promised a benefit or advantage to him,—then the promise would not be collateral. Consequently, the ruling of the court below, at the time it was made, was strictly proper, and it was the duty of defendant's counsel to call the court's attention to the fact that this promised testimony had not been forthcoming. As they did not do this, there was no error.

2. Defendant complains of the ruling of the court in allowing plaintiff to testify as

to certain conversations had by her with her sister before her death. He insists that such conversations were inadmissible, under section 3639 of the Code.[1] We think this complaint is based upon a misapprehension of the record. The plaintiff undertook to detail a statement she heard her sister make to her husband (the defendant), to the effect that she wished defendant to give plaintiff a home. Plaintiff had no part in this conversation, according to the record. Such testimony does not come under the ban of the statute. Even if it did, and its admission was error, it was clearly error without prejudice, for it could not have affected the result in any manner.

3. Complaint is made of the rulings of the court in allowing certain witnesses to testify as to the amount of property and money Mrs. Stotler had when she married the defendant. In view of other evidence showing, or tending to show, that the wife died within 18 months after her marriage to the defendant; that she lived with Stotler as the ordinary housewife, and had no unusual or extraordinary expenses, but, on the contrary, was receiving considerable sums of money during her married life,—we think the testimony was clearly admissible.

4. Plaintiff testified upon her examination in chief that her mother, when she died, was worth about $3,000, and that the defendant's wife received all, or nearly all, of her mother's property. On cross-examination she was pursued quite closely by defendant's counsel as to her means of knowledge. On reexamination she was permitted to testify, over defendant's objection, that after the mother's death the heirs met, and approximated the value of the property she left at $3,000, and that it was agreed between them that the defendant's wife should receive all the property, provided she would pay plaintiff $200. This last testimony was objected to because the settlement and approximation were not had in the presence of the defendant. The objection was clearly untenable, because the evidence was proper as showing the witness' knowledge of the amount of property the mother left. The cross-examination laid the foundation for such an inquiry, and the error assigned on the admission of the testimony is without merit.

5. A witness was allowed to testify in chief for appellee as to what the defendant meant by a certain statement made by him. No objection was interposed to the question which elicited the testimony until after the answer was given, and a motion was then made to strike the answer out, because incompetent and immaterial. No reason is given for not interposing the objection to the question when asked. If counsel concluded to take his chances on a favorable answer, and for this reason did not interpose an objection when the question was asked, he cannot afterwards be heard to complain. But without determining whether this presumption should be indulged, in view of the condition of the record, it is enough to say that, even if the motion to strike should have been overruled, the answer was clearly without prejudice, for it was simply a statement of a conclusion which was manifestly the correct one to be drawn from the entire conversation which had previously been testified to by the witness. We have examined the assignments of error which counsel have seen fit to present in argument, and discover no prejudicial error, and the judgment is affirmed.

[1] Code, § 3639, prohibits the examination of any person interested in an action, as to any communication or transaction had with a person then deceased.

HAWLEY v. EXCHANGE STATE BANK OF STUART.

(Supreme Court of Iowa. Feb. 4, 1896.)

PRACTICE—TRANSFER OF CASE TO EQUITY DOCKET—WHEN PROPER.

In an action against a bank, to recover on a check issued to plaintiff by one S., the petition alleged that S. was indebted to the bank; that defendant and S. agreed that S. should purchase stock, and issue checks in payment (on defendant) for the purchases, which should be paid by defendant, and that S. should sell the stock, and turn the proceeds over to defendant, when realized, and defendant should appropriate an amount sufficient to pay such checks and the expense of handling, and apply the balance on the debt; that S. afterwards purchased plaintiff's stock; that before delivery of the same, and issuance of a check to him, defendant was informed by S. of such purchase, and promised, on presentation by plaintiff of a check for the price, to pay it; that plaintiff accepted the check, and delivered the stock to S., who sold it, and had the proceeds remitted to defendant; that, on receiving such proceeds, defendant, with intent to defraud plaintiff, applied it in payment of S.'s indebtedness to it, and refused to pay such check. The answer was a general denial. *Held*, that it was error to transfer such case to the equity docket.

Appeal from district court, Guthrie county; A. W. Wilkinson, Judge.

Action at law to recover from defendant the amount of a certain check issued to the plaintiff by one W. F. Smith, and which it is claimed the defendant promised and agreed to pay. The defense is practically a general denial. The court, on motion, transferred the case to the equity docket, and plaintiff appeals. Reversed.

F. O. Hinkson and Bishop, Bowen & Fleming, for appellant. White & Clark and Sever & Neal, for appellee.

DEEMER, J. The only question in the case is as to the regularity of the order transferring the case to the equity docket for trial. The determination of the question involves a consideration of the pleadings, and a somewhat extended statement of the issues. The plaintiff alleged, in substance: That in 1894 one Smith was engaged in the busi-

ness of buying and selling stock at and near the town of Stuart, near which town plaintiff resided. That about August 10, 1894, Smith was indebted to the bank in the sum of over $1,500, and on said day defendant and Smith entered into an arrangement or agreement by which Smith was to go out and make purchases of stock, and, in payment therefor, should issue, and deliver to the sellers thereof, his checks, drawn upon the defendant bank, for the amount of his purchases, which checks should be paid by defendant as soon as presented; that the stock so purchased should be put upon the general market by Smith, and sold, and the proceeds turned over to the bank as fast as realized; and that, of the proceeds, the bank should appropriate an amount sufficient to pay the checks issued for the purchase price, and the expense incurred in handling the stock, and the balance should be appropriated by the bank, and applied in satisfaction of the indebtedness due it from Smith. That Smith immediately entered upon the performance of the agreement, and in August, 1894, purchased of plaintiff stock to the value of $1,190.85, for which amount Smith gave plaintiff a check upon the defendant bank. That after the purchase of plaintiff's stock, but before delivery of the same, and before the issuance of the check, defendant was informed by Smith of the purchase, and the defendant thereupon verbally promised and agreed that, upon presentation by plaintiff of a check for the purchase price, it would pay the same. That upon receipt of the check, and relying upon the payment of the same by the bank, the plaintiff delivered his stock to Smith. That Smith immediately shipped the stock to Chicago, and, upon receiving bill of lading for the same, indorsed or assigned it to defendant, and the proceeds from the sale of the stock were remitted to the defendant bank. That the proceeds so received by the bank were largely in excess of the amount of plaintiff's check. That defendant well knew before the shipment of the stock by Smith, and before it received the bill of lading, or the proceeds thereof, that the stock had been purchased of the plaintiff by Smith, that he had given his check for the amount of the purchase price, and that plaintiff would expect payment of the same from the bank. That, upon receiving the proceeds from the sale of the stock, the defendant, with intent to cheat and defraud the plaintiff, purposely and corruptly, and in open and direct violation of the terms of its agreement with Smith, took and appropriated the whole of the money received by it, and applied the same in payment of the indebtedness of Smith to it. That plaintiff presented his check to the bank for payment, but the defendant refused to pay or honor the same. The prayer is for judgment against the bank for the sum of $1,190.85, with interest and costs, "upon the facts hereinbefore alleged." The answer is a denial of all matters, except the receipt of $1,073.06 from Smith, by a remittance from Godair & Son; the alleged indebtedness of Smith to the bank; and the application of the money received from Smith to his indebtedness.

Does this petition present a cause of action at law, upon the alleged contract of the defendant, or is it, in effect, a suit in equity, in which the plaintiff is attempting to follow the proceeds arising from the sale of his stock, as a trust fund? is the question for solution. The defendant contends that the facts stated do not constitute a good cause of action at law, and that, therefore, it must be considered a suit in equity; while the plaintiff insists that it is purely a law action, in which he seeks to recover upon a promise made by defendant to Smith, in which he is the beneficiary, and that, while more may be stated than is necessary, yet these unnecessary and irrelevant allegations should be treated as surplusage. It seems to us that this is not an attempt to follow the specific funds, and impress upon them the character of a trust, but, rather, an action on the alleged promise of defendant to pay the check. Neither is the action upon the check, but, rather, upon a promise to pay the amount of the check. It is said, however, that there was and is no consideration for the promise, if one was made, and that for this reason, if for no other, the suit must be in equity. This position overlooks the fact that, according to the allegations of the petition, the contract has been fully executed by Smith, and the money received by the bank, and the further statement that plaintiff parted with his property relying upon the payment of the check by the bank. It needs no citation of authorities to show that under such circumstances the third person, for whose benefit the promise was made, may recover upon it. The receipt of the proceeds of the goods was a sufficient and completed consideration. It is also familiar doctrine that a third person may maintain an action on a promise made to another for his benefit, although he was not a party to or cognizant of it, when made. Johnson v. Knapp, 36 Iowa, 616. The relief asked in the case is a money judgment. True it is that this judgment is asked upon the facts pleaded. But there is nothing in the petition indicating that plaintiff was seeking equitable relief, except, perhaps, it may be the statement that defendant received the money arising from the sale of the stock, knowing that it was not paid for by Smith, and wrongfully and fraudulently applied it on Smith's debt, with intent to cheat plaintiff out of the purchase price. These allegations, however, do not, even if they be treated as stating a cause of action in themselves, constitute a cause solely cognizable in a court of equity. If they amount to anything, in and of themselves, they show a cause of action for fraud, which would be cognizable either in a court of law or chancery. Moreover, the first of these allegations was irrele-

vant to the action, if it be treated as at law. The statements as to fraud on the part of defendant may, and undoubtedly should, be treated as surplusage. If they are irrelevant, the proper manner of reaching them is by motion to strike, rather than to transfer. If it be conceded that, on any tenable theory, two causes of action are stated,—one at law, and the other in equity,—then the motion to transfer the whole case was erroneously sustained. There is, as we have already said, nothing to indicate that plaintiff was or is attempting to follow the funds arising from the sale of the cattle into the hands of the defendant, and to impress upon them a trust. There is no allegation or claim of trust,—no statement as to the amount received by defendant, except that plaintiff says he is informed and believes it was largely in excess of the price agreed to be paid him therefor. We are well satisfied that the pleading sets forth a cause of action at law, but, if it be conceded that it also contains statements sufficient to justify relief at the hand of a chancellor, yet in either event the motion to transfer should have been overruled. As sustaining our conclusions, see Gribben v. Hansen, 69 Iowa, 255, 28 N. W. 584; Price v. Insurance Co., 80 Iowa, 408, 45 N. W. 1053. The case of Thatcher v. Stickney, 88 Iowa, 454, 55 N. W. 488, does not militate against our views. For the reasons suggested the order of the district court will be reversed.

DES MOINES NAT. BANK v. WARREN COUNTY BANK.

(Supreme Court of Iowa. Feb. 4, 1896.)

CORPORATIONS—TRANSFER OF BANK STOCK—RIGHTS OF TRANSFEREE.

Code, § 1059, subd. 7, authorizes corporations to establish by-laws, and make all necessary regulations. Section 1076 provides that a copy of the by-laws, with the names of the officers attached, must be posted in the principal places of business. Section 1078 provides that the transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company. *Held*, that where an officer of a bank and holder of a certificate of stock which recited that it was "subject to its by-laws and articles of incorporation," and that it was transferable only on the books of the bank, transferred such stock by assignment only, when he was indebted to the bank, and before the bank had posted any copy of its by-laws, and the transferee had no actual knowledge of a by-law providing that the bank should have a lien on all stock as security for any indebtedness to the bank, such transferee took the stock free of any lien for the indebtedness of the stockholder.

Appeal from district court, Warren county; J. H. Applegate, Judge.

Action in equity to recover from the defendant John Cheshire the amount due on a promissory note made by him, and to foreclose a lien claimed by the plaintiff on 30 shares of the capital stock of the defendant the Warren County Bank, pledged to secure the payment of the note. There was a hearing on the merits, and a decree for the plaintiff. The Warren County Bank appeals. Affirmed.

H. McNeil and Gatch, Connor & Weaver, for appellant. Dudley & Coffin, for appellee.

ROBINSON, J. The plaintiff is a corporation duly organized under the laws of the United States as a national bank. The Warren County Bank is a corporation organized and doing business as a bank under the laws of this state. In December, 1891, John Cheshire borrowed of the plaintiff the sum of $3,000. The loan was renewed from time to time until July, 1892, when it was again renewed, and the note in suit, for the sum of $3,000, was given. To secure the payment of this loan, Cheshire transferred to the plaintiff a certificate of which the following is a copy: "No. 72. Share $100.00 each. Shares, 30. Warren County Bank, Indianola, Iowa. This certifies that John Cheshire, of Indianola, Iowa, is the owner of thirty shares of the capital stock of the Warren County Bank, subject to its by-laws and articles of incorporation. Transferable only on the books of said bank in person or by attorney on surrender of this certificate. Indianola, Nov. 25, 1887. [Seal.] John Cheshire, President. J. H. Whitney, Cashier." On the certificate was an indorsement as follows: "For value received, I hereby sell, assign, and transfer to ——, of ——, —— shares of the within-mentioned stock, and appoint —— as my attorney to execute all necessary transfers upon the books of the bank. Dated this —— day of ——, 188–. [Signed] John Cheshire." For more than five years preceding November, 1892, and when the loan was made and renewed, and at the time the certificate of stock was transferred, Cheshire was president of the Warren County Bank. He was also connected with the Swan-Cheshire Land & Cattle Company, which was a large borrower of the Warren County Bank, to which it had given its promissory notes, signed by Cheshire as security, in various sums. Notes of that character to the amount of more than $19,000 were outstanding when this action was commenced, and several of them, aggregating more than $16,000, had been given when the loan to Cheshire was made by the plaintiff. The Warren County Bank denies that the plaintiff has any interest in the capital stock in question, and claims a lien thereon to secure the land and cattle company notes, paramount to any right thereto which the plaintiff may have. That claim is based upon a section of the by-laws of the defendant bank, which is as follows: "Sec. 4. Transfer of Stock. The stock of the bank shall be assignable only on the books of the bank, subject to the provisions and restrictions of the act under which the bank is organized; and

a transfer book shall be kept, in which all assignments and transfers of stock shall be made; and no transfer of stock shall be made without the consent of the board by any stockholder who shall be liable to the bank either as principal debtor or otherwise, and the bank shall have a lien upon all stock owned by any person as security for any indebtedness due the bank. Certificates of stock signed by the president and cashier shall be issued to stockholders upon the payment of the full par value thereof." The district court rendered judgment against Cheshire, and in favor of the plaintiff, for $3,480, attorney's fee and costs, and against Cheshire, and in favor of the Warren County Bank, for $19,476.54, with attorney's fees and costs, and decreed the lien of the plaintiff on the stock in question to be paramount to that of the Warren County Bank, and ordered the sale of so much of it as should be needed to satisfy the judgment of the plaintiff, and directed that the remainder, if any, be applied on the judgment of the Warren County Bank against Cheshire.

It is admitted, or fairly shown by a preponderance of the evidence, that no copy of the by-law upon which the appellant relies was posted in its principal places of business or elsewhere until after the 22d day of September, 1892; that no officer or agent of the plaintiff who was concerned in making its loan to Cheshire had any actual knowledge or notice of the by-law when the loan was made; and that actual notice of the by-law was not given to any agent whose knowledge is chargeable to the plaintiff prior to the day stated. Some claim is made to the effect that the plaintiff should be charged with knowledge of the by-law because it had for several years before the transfer to it of the stock in question held other stock as collateral security, and had voted it, and otherwise treated it as owner. It is true it had held such stock as security for loans made, and had received dividends on it, but the evidence does not satisfy us that such stock was voted before the loan to Cheshire was made by the plaintiff. We do not find sufficient ground for concluding that the plaintiff had any actual notice of the by-law until noon of September 22d. We are not unmindful of the fact that persons who had been officers of the plaintiff had also been connected officially with the Warren County Bank, and knew of the by-law. But it does not appear that any of those persons had anything to do with the making of the loan in question, and there is nothing in the record that would justify us in holding that the knowledge they at one time had should be imputed to the plaintiff when the loan to Cheshire was made. On the 21st day of September, 1892, John Cheshire was insolvent, and gave to the appellant security for the amount he owed it personally, and then for the first time informed several of its directors that he had transferred the stock in question to the plaintiff. During the next day some of the directors informed the plaintiff of the by-law, and of the claims made under it. Prior to that time the plaintiff had not caused the transfer to it of the stock to be entered on the books of the appellant, but, in the afternoon or evening of that day, an entry was made upon the stub of stock certificate No. 72 in the stock book of the appellant, as follows: "Indianola, Iowa, September 22, 1892. I hereby accept notice that the Des Moines National Bank, of Des Moines, Iowa, holds this certificate, transferred to them as collateral security. [Signed] F. H. Cheshire, Cashier." This was the first formal notice of the transfer given by the plaintiff, but it was known to the cashier of the appellant when first made. It does not appear that any other officer of the appellant excepting John Cheshire knew of the transfer until informed of it in the evening of September 21st, as stated. In October following, certificate No. 72 was surrendered, and certificate No. 94 was issued in lieu of it, to the "Des Moines National Bank, Trustee," but dated September 22, 1892. The new certificate, like the old one, showed that the stock was held subject to the articles of incorporation and by-laws of the appellant. The board of directors of the appellant never consented to the transfer of the stock, and some of the directors, in the evening of September 21st and in the morning of the 22d, before the notice of the transfer was entered by the cashier, directed him not to transfer, on the books of the bank, stock of any shareholder who was liable on any indebtedness to the bank. We do not consider the transactions which occurred after December, 1891, when stock certificate No. 72 was transferred to the plaintiff, entitled to much weight in determining the rights of the parties to this appeal. The material question is what interest in the stock which the certificate represented was acquired by the plaintiff at the time of the transfer?

The laws of this state under which the Warren County Bank was incorporated gave to it the power "to establish by-laws and make all rules and regulations deemed expedient for the management of their affairs in accordance with law." Code, § 1059, subd. 7. The articles of incorporation of that bank do not in terms authorize a by-law like the one in question, but contain the following: "The board of directors shall have power to make and adopt such by-laws as may be necessary for the proper conduct of the business of this corporation." Much is said in argument in regard to the power of the board of directors to establish the by-law in question. What its general effect upon stockholders who do not have actual knowledge of it would be we need not determine. John Cheshire was a director of the bank, and was present at the meeting of the board of directors at the time the by-law was adopted, in March, 1884. He was, at the same

meeting, elected president, and held that office until after the transaction in question occurred. He must therefore be held to have had knowledge of the by-law when the indebtedness for which he became surety and when that to the plaintiff were incurred. It was held in Bank v. Haney, 87 Iowa, 106, 54 N. W. 61, that a by-law which provided that no transfer of stock should be made by any stockholder who should be liable to the bank, as principal debtor or otherwise, without the consent of the board of directors, and a certificate of stock which recited that it was transferable only on the payment of all liabilities, together constituted a valid contract, by which the bank was given an equitable lien upon the stock for the liabilities of the stockholder to whom the certificate was issued. The certificate in question did not in terms refer to liabilities of the person to whom it was issued, but recited that it was subject to the articles of incorporation and by-laws of the bank. As Cheshire had actual knowledge of the by-law under consideration, the effect of that and the certificate was to make a contract by which the bank was given a lien upon the stock which the certificate represented valid, as between the bank and Cheshire, for liabilities incurred after the certificate was issued. See Jennings v. Bank, 79 Cal. 323, 21 Pac. 852; Van Sands v. Bank, 26 Conn. 144; Morgan v. Bank, 8 Serg. & R. 73; Ang. & A. Corp. § 342.

Section 1078 of the Code provides that "the transfer of shares is not valid, except as between the parties thereto, until it is regularly entered upon the books of the company, so as to show the name of the person by and to whom transferred, the number or other designation of the shares, and the date of the transfer." This provision is for the benefit of the corporation. Bank v. Wasson, 48 Iowa, 339. It is also for the benefit of any one who may desire to inspect the record for which it provides. Ft. Madison Lumber Co. v. Batavian Bank, 71 Iowa, 273, 32 N. W. 336. The transfer of shares is valid as between the parties to it, and the general rule applicable to such transfers is that the transferee takes the stock free from all liens of which he has no actual knowledge and no actual or constructive notice. Driscoll v. West Bradley & Cary Manuf'g Co., 59 N. Y. 101; Bank v. Pinson, 58 Miss. 421; Brinkerhoff-Farris Trust & Sav. Co. v. Home Lumber Co. (Mo. Sup.) 24 S. W. 129. Certificates for such shares of stock are not negotiable instruments. Clark v. American Coal Co., 86 Iowa, 446, 53 N. W. 291; Hammond v. Hastings, 134 U. S. 401, 10 Sup. Ct. 727. But shares are transferred in the ordinary course of business substantially as was the certificate in controversy. Courtright v. Deeds, 37 Iowa, 509. That certified that John Cheshire was "the owner of thirty shares of capital stock of the Warren County Bank, subject to its by-laws and articles of incorporation." No statute of this state gave to the bank a lien upon the stock for liabilities of the stockholder. There was nothing in the certificate to apprise the plaintiff that such a lien was authorized or might be claimed. All it contained of a nature to put the plaintiff upon inquiry was the reference to the articles of incorporation and by-laws which we have quoted. The articles were silent as to the matter, and no copies of the by-laws had ever been posted as required by statute. That provides that "a copy of the by-laws of the corporation, with the names of all its officers appended thereto, must be posted in the principal places of business, and be subject to public inspection." Code, § 1076. This provision is for the benefit of the public, and it was the duty of the defendant bank to comply with it for the protection of persons who might be affected by the by-laws. Had a copy of them been posted as required, constructive notice of their contents would have been given; but had the plaintiff visited the places designated by statute to ascertain the restrictions, if any, imposed by the by-laws upon the transfer of the stock, it would have found nothing. The notice of the by-laws required by statute not having been given, there was no constructive notice of them; and, as we have seen, the plaintiff had no actual knowledge of the restriction in question. At most, the by-laws created a secret lien in favor of the Warren County Bank, and such liens are not favored by law. Having neglected to give notice of its right to a lien in the manner pointed out by statute, the appellant should not be permitted to enforce it against a good-faith purchaser for value. We have no occasion to determine whether certificates of stock are personal property within the meaning of our recording act. The failure of the appellant to post a copy of its by-laws, as required by law, is sufficient to defeat the enforcement of the lien which they gave, as against the appellee.

A note of the land and cattle company for $2,000 was given after the original loan of December, 1891, was made by the appellee; but that was before the renewal note upon which this action is founded was given. Therefore we are not required to decide what right the appellant might have acquired by accepting Cheshire as surety after the transfer of stock to the plaintiff was made, and before notice of it was given.

Appellant has cited numerous authorities which are claimed to support a conclusion contrary to that reached by us. We have examined them, and find that most, if not all, of them, were based upon facts materially different from those involved in this case. Some were controlled by legislative enactments, and in others the form of the certificate or the indorsement thereon was of a character to give actual notice to the person

to whom it was transferred of the lien of the corporation.

What we have said disposes of the questions material to a determination of this appeal. The decree of the district court is affirmed.

GOODWIN v PROVIDENT SAV. LIFE ASSUR. SOC. OF NEW YORK.

(Supreme Court of Iowa. Feb. 5, 1896.)

LIFE INSURANCE—CONSTRUCTION OF POLICY—CONFLICT BETWEEN POLICY AND APPLICATION — HARMLESS ERROR — EVIDENCE — STATUTES OF OTHER STATES — PRESUMPTION—REINSTATEMENT OF POLICY—NOTICE—DECLARATIONS OF ASSURED —ACTION ON POLICY—BURDEN OF PROOF—"RENEWABLE TERM" POLICIES.

1. Where the terms of a life insurance policy will bear two interpretations, that one will be adopted which sustains the claim for indemnity.

2. In case of conflict between the provisions of a policy and the statements in the application for insurance, the former will control.

3. An application for life insurance stated that the death of assured by his own hand was a risk not assumed by the company, and the policy declared that a claim thereunder by death occurring two or more years after its date would be "incontestable, except for fraud" in procuring it. *Held*, that the company was liable in case of death by suicide occurring after two years from the date of the policy.

4. Error in sustaining a demurrer to one division of an answer is not ground for complaint, where defendant amends the pleading after the ruling, and no attack, by demurrer or otherwise, is made on the division as amended.

5. Books entitled "The Revised Statutes, Codes and General Laws of the State of New York," purporting to contain the text carefully compared with the original of all the general statutory law of that state, but which do not appear to have been published under legislative authority, and not proved to be commonly admitted as evidence of the existing laws of New York in the courts of that state, as required by Code, § 3718, are not admissible in an action in Iowa.

6. McClain's Code, § 1733 (declaring that if an insurance company neglects to attach to the policy on "issue or renewal" thereof, a "true copy" of any application or representation of the assured which may in any manner affect the validity of the policy, it shall be precluded from pleading or proving the falsity of any statement in the application), applies where the copy of an application for reinstatement attached to the policy omits the examiner's report contained in the original, and also a part of the statements made by the assured in regard to his previous physical condition, and incorrectly states the place to which notice of premiums shall be addressed.

7. The laws of the state where a contract was made will, in the absence of proof to the contrary, be presumed to be the same as those of the state where suit is brought thereon.

8. Where a policy of insurance issued in New York on the "renewable term" plan is forfeited by failure to pay premiums, a reinstatement of the policy, on the same terms, is not the making of a new contract, but merely a cancellation of the forfeiture, leaving the original policy in force as a New York contract.

9. Notice of a change in the address of the assured, given to a bank authorized to collect premiums and deliver receipts for a foreign insurance company, is notice to the company.

10. Declarations of the assured as to the amount due on a life policy are not admissible against the beneficiary.

11. There is no presumption that a person to whom a letter was mailed received the same, unless it appears that he then resided in the town to which the letter was addressed.

12. The burden is on a life insurance company, which claims a forfeiture for nonpayment of a premium, to show what the correct amount of such premium is, where the amount is variable, and knowledge thereof rests solely with the company.

13. A policy of life insurance which is renewable from quarter to quarter, on payment of premiums for the actual age attained "less the return premiums awarded," and which provides that, subject to the stipulation as to payment of premiums, it shall be incontestable after two years, except for fraud in obtaining it, is a continuing policy, governed by the principles applicable to ordinary contracts of life insurance with regard to forfeiture for nonpayment of premiums.

Appeal from superior court of Cedar Rapids; T. M. Giberson, Judge.

Action at law upon a policy of insurance issued by the defendant company upon the life of Matthew Goodwin. Trial to a jury. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

Mills & Keeler and Hubbard & Dawley, for appellant. Charles A. Clark, for appellee.

DEEMER, J. On the 16th day of November, 1887, the defendant, a corporation doing a life insurance business, organized and having its principal place in the state of New York, issued a policy of insurance to the plaintiff upon the life of her husband, Matthew Goodwin, agreeing to pay her, in the event of the death of the assured on or before noon of the 16th day of February, 1888, the sum of $5,000. The policy was issued on what is known as the "renewable term plan," a method of insurance originated by the president of the defendant company, and first used in the year 1887. By the terms of the contract, the defendant agreed to renew and extend the insurance, during each successive quarter year from the date thereof, upon the payment, on or before the 16th of February, May, August, and November in each successive year during the life of the assured, of the premiums for the actual age attained, in accordance with a schedule of rates printed on the back of the policy, less the return premiums awarded thereon. Goodwin, the assured, died by his own hand on the 11th day of November, 1891, at the city of Chicago, in the state of Illinois. His widow, the beneficiary in the policy, brought this suit, having first given notice, and made the proofs of death required by the terms of the policy. Defendant demurred to plaintiff's petition because there was no allegation therein that the policy had been renewed from time to time by the payment of premiums, and because the action was prematurely brought. The demurrer was sustained on the last ground, and overruled on the other; and thereupon plaintiff filed an amended and supplemental petition, avoiding the defect reached by the demurrer, and pleading some other matters not necessary to be here recited. The defendant, in answer,

admitted the execution of the policy, and its renewal from time to time down to May 16, 1891; admitted the death of Goodwin, but denied that the policy was in force at the time of his death. Defendant further pleaded, as a second division of its answer, that the assured made a written application for insurance, in which he agreed that the representations therein contained should be construed as warranties, and made the basis for the issuance of the policy, and that any false answers or statements should avoid the policy. It further pleaded that Goodwin represented in this application that he was in sound health, and was not then, and had not been, intemperate in the use of stimulants, and that he stated that he drank occasionally, but never to excess; that these representations were false and untrue; that Goodwin used intoxicating liquors habitually, and to excess; and that he made the representations he did with intent to deceive the defendant, and procure the policy in suit. In the third division of the answer the defendant pleaded other false and untrue statements made by Goodwin, respecting the place of his birth and the condition of his health, which need not be more particularly set out. In the fourth division the defendant pleaded that plaintiff and the assured wholly failed and neglected to pay the premiums necessary to be paid on May 16, 1891, in order to renew and extend the insurance from and after that date, and that the policy expired at that date by the express terms thereof; that thereafter, and on May 21, 1891, Goodwin applied for reinstatement in the defendant company, and, as a basis thereof, presented a health certificate, in which, among other things, he stated that he was then in good health and had been since May 16, 1891; that, in truth and in fact, Goodwin was not in good health and free from disease, and was not temperate in his habits, when he made the certificate of health. The fifth division pleaded failure of Goodwin or plaintiff to pay the quarterly premium due August 16, 1891, in order to extend the policy, and alleges that written notice of the amount of such premium, and of the place where and person to whom payment might be made, was mailed the assured on July 15, 1891,—the letter being addressed to him at Fifteenth and Harney streets, Omaha, Neb.; that being his last known post-office address, and the one fixed by him, in the application for insurance, to which notice should be sent. The sixth division of the answer merely pleads the failure of Goodwin or plaintiff to pay the premium due August 16, 1891, and further alleges that the statutes of the state of New York, which, it is claimed, should govern and control the contract in suit, requiring notice, etc., did not apply to policies like the one in suit. In the seventh division the defendant averred that the application of Goodwin contained this statement: "It is agreed that death by my own hand or act (except when mentally unaccountable), or death in violation of, or attempt to violate, law, are risks not at any time assumed by the society under the policy applied for." And defendant further averred that Goodwin took his own life while mentally accountable, and therefore there was no liability on the part of the company. The plaintiff demurred to the fourth division of the answer because the representations there pleaded were not made in the application for insurance, and for the further reason that, by the terms of the policy, it was incontestable, except for fraud in obtaining the policy in the first instance; to the fifth division, because of several alleged defects in the notice sent out by the defendant company; to the sixth, because no computation had been made by the company as to the amount of the quarterly premium Goodwin should pay, no deductions or allowances having been made on account of any surplus portion of preceding payments not needed for death or quarterly fund; to the seventh for the reason that the policy sued on became and was incontestable, except for fraud in obtaining it. This demurrer was sustained, as to the fourth and seventh divisions of defendant's answer, and overruled as to the fifth and sixth, each party excepting. Thereupon defendant amended the fourth division by pleading discovery of the falsity of the representations therein referred to on July 1, 1892, and offered to confess judgment for the amount of the premium paid May 21, 1891. Thereafter other pleadings were filed by each of the parties; the defendant, among other things, alleging that the contract of reinstatement in May, 1891, was a Nebraska contract, and that there was no law of that state requiring that a copy of the certificate of death be attached to, or made a part of, the policy. The defendant further pleaded that the original application for insurance was made in Nebraska, and the policy delivered in Omaha, in that state, and that there was no law in either the state of Nebraska or the state of New York requiring a copy or copies of the application to be attached to or incorporated in said policy. Such were the issues on which the cause was tried. The court, however, in its instructions to the jury, eliminated all questions made by the pleadings, save the issue as to the nonpayment of the quarterly premium claimed to have been due August 16, 1891. The jury found for the plaintiff on the questions of fact presented, and with their findings we are not called upon to interfere. The questions presented by this appeal arise upon the sustaining of plaintiff's demurrer to certain divisions of the answer, the rulings of the court during the trial, and the giving and refusing of instructions to the jury.

1. The first question presented in argument relates to the sufficiency of the seventh di-

vision of the defendant's answer. The application which Goodwin made for his insurance contained a statement which, if standing alone, would avoid the plaintiff's cause of action, for it is conceded that Goodwin committed suicide. But the policy contained this provision: "Subject to the stipulations regarding payment of premiums, and extrahazardous occupations, claim under this policy by death occurring two or more years after its date will be incontestable, except for fraud in obtaining this policy." If there were nothing more to the case than this provision of the policy, there would be no doubt that plaintiff's claim could not be defeated because her husband took his own life; for a claim under the policy by death occurring two or more years after its date was incontestable, except for fraud. We have a case, then, for construction of these seemingly ambiguous and conflicting provisions. The tenets established for the guidance of courts in such matters are well understood, and no one is better established than that in all cases the policy must be liberally construed in favor of the assured, so as not to defeat, without a plain necessity, his claim for indemnity. And when the words used may, without violence, be given two interpretations, that which will sustain the claim and cover the loss should be adopted. Thompson v. Insurance Co., 136 U. S. 297, 10 Sup. Ct. 1019; National Bank v. Insurance Co., 95 U. S. 673; Moulor v. Insurance Co., 111 U. S. 342, 4 Sup. Ct. 466; Wadsworth v. Tradesmen's Co., 132 N. Y. 543, 29 N. E. 1104; Fitch v. Insurance Co., 59 N. Y. 572; Garretson v. Association (Iowa) 38 N. W. 127; Meyer v. Casualty Co. (Iowa) 65 N. W. 328; Collins v. Insurance Co. (Iowa) 64 N. W. 602. Now, by the terms of the policy, it was incontestable, after two years from its date, except for fraud in procuring it,—subject, however, to the stipulations regarding payment of premiums, and extrahazardous occupations. That is to say, claims under the policy by reason of the death of the assured were not to be controverted or disputed, except for some of the reasons stated, and death by suicide is not one of them. It will be observed that the clause on which the defendant relies is not found in the policy in suit, but in the application, which preceded it in point of time, and there is significance in the fact that the words used in the application were not carried forward into the policy. Another rule of interpretation may well be used here, which is that when there is a conflict between the provisions of the policy and the statements contained in the application the former controls. Defendant's counsel contend with much plausibility that death by suicide was a risk not contemplated by the parties, nor covered by the policy. But we think such a holding would import into the terms of the policy something not found therein, and not contemplated by the parties —at least, not by the assured—at the time the policy was issued. And as said in the Wadsworth Case, supra, "we should adopt that construction which we think the insurer had reason to suppose was understood by the insured." The proper construction of this policy, taken in connection with the application, we think, is that the policy does not cover death by suicide occurring within two years from the date of its delivery, but that after two years it is incontestable, except upon the grounds stated therein. This construction will give effect to all the provisions of the policy, and as such a result is always sought after by courts, in interpreting all classes of contracts, we are quite content with it. We are the better satisfied with this conclusion because it seems that, in life insurance, certain companies limit the operation of the conditions as to suicide to a fixed period, and make their policies incontestable on that ground thereafter. 13 Enc. Brit. p. 179. For the reasons suggested, as well as for others which might be offered, we think the demurrer to the seventh division of the answer was properly sustained. The case of Mareck v. Association, 64 N. W. 68, from the supreme court of Minnesota, is directly in point; and, while we do not concur in all the reasoning of that opinion, we are satisfied that the result reached is correct.

2. Defendant complains of the ruling on the demurrer as to the fourth division of the answer. It is sufficient to say at this time, with reference to this count, that the defendant amended it after the ruling on the demurrer, and no attack was made upon the division as amended, by demurrer or otherwise. True, the court withdrew the defense pleaded by this division from the jury, but this had no relation to the ruling on the demurrer. There is nothing here to complain of, even if it be conceded that the demurrer was improperly sustained.

3. The lower court withdrew from the jury all defenses based upon the application, or the certificate for reinstatement, for the reason that no full or correct copy of the application, and no copy of the certificate, were annexed to the policy. These holdings of the court are complained of. It is insisted that a substantially correct copy of the application was attached to the policy, and that, if it be conceded that the copy was insufficient, yet, as the contract was made either in the state of New York or of Nebraska, and as there is no law in either of said states requiring a copy of the application to be attached, it may rely upon any false statements or warranties contained in the application. The original application and policy of insurance have been certified up for our inspection, to aid us in determining whether a true copy of the application was attached to the policy, and an examination of them leads us to the conclusion that the statute hereinafter referred to has not been complied with. Among other things, the place

to which notices of premiums shall be addressed is incorrectly stated in the copy. Again, some of the statements made by the assured with reference to his past afflictions were not carried out in the copy attached to the policy, and no part of the examiner's report is included in the copy attached. The relevancy of this omission is made apparent by McClain's Code, § 1733, which provides that: "All insurance companies or associations shall upon the issue or renewal of any policy, attach to such policy or endorse thereon a true copy of any application or representations of the assured which by the terms of the policy, are made a part thereof, or of the contract of insurance or referred to therein, or which may in any manner affect the validity of such policy. The omission to do so shall not render the policy invalid, but if any company or association neglects to comply with the requirements of this section it shall be precluded from pleading, alleging or proving such application or representations, or any part thereof or any falsity thereof or any parts thereof in any action upon such policy. * * *" As we have said, it is argued that the policy in suit is a New York or Nebraska contract, and that there is no such law as that above set forth in either of these states. The policy was signed by the president and secretary of the company, in the city of New York. The premiums are made payable there, and the amount of the policy was to be paid, in the event of the death of the assured, at the city of New York. It was also expressly agreed that the policy should be construed to have been made in the state of New York. It was therefore a New York contract, and is to be governed by the laws of that state. Richards, Ins. § 44. Now, in the absence of all proof to the contrary, the laws of the state of New York are presumed to be the same as in this state. Selverts v. Association (Iowa) 64 N. W. 671. The defendant, upon the trial, attempted to prove that there was and is no such statute in the state of New York as the one before quoted, and for this purpose offered in evidence four volumes of books, entitled "The Revised Statutes, Codes and General Laws of the State of New York," which purport to contain the text, carefully compared with the original, of all the general statutory law of the state in force January 1, 1890, published by one Clarence F. Birdseye, of the New York bar. What purports to be a printed certificate of the secretary of state is also in one of these volumes, to the effect that so much of the matter contained in the text of this edition of the Revised Statutes as purports to be a copy thereof is a correct transcript of the text of the Revised Statutes as originally published under the authority of the state, except such typographical errors in the original as have been corrected in the copy, and except such parts as have been altered by the acts of the legislature, and that, with respect to such parts, it conforms to the acts by which such alterations have been made. None of these volumes purport to have been published under the authority of the legislature of New York, nor were they proved to be commonly admitted as evidence of the existing laws of that state in the courts thereof, as required by section 3718 of the Code of Iowa. They were therefore inadmissible, and the court below properly rejected them. We return, then, to the presumption that the law of New York was the same, with reference to attaching copies of the application, as it is here, and the conclusion is inevitable that defendant cannot rely upon any alleged false representations or warranties in the application for insurance. It is argued, however, that the reinstatement or renewal which was made in May, 1891, when the assured furnished the health certificate, was a Nebraska contract, and that there is no law of that state requiring copies of the application or certificate of health to be annexed to the policy, and that, if this be not true, the statute of this state does not apply to renewals or reinstatements. Adverting to this last claim first, it is sufficient to say that the statute we have quoted is about as broad as language can make it, and we think it covers a renewal or reinstatement of the policy. Moreover, the reinstatement was not the making of a new contract, for no new or different terms were agreed upon. It was simply the cancellation of a forfeiture, whereupon the contract was restored, and recognized as binding by the company. Lindsey v. Aid Soc., 84 Iowa, 734, 50 N. W. 29; French v. Association, 111 N. C. 391, 16 S. E. 427. The contract remained a New York contract after the reinstatement, the same as it was before, and must be governed by the laws of that state. It is further to be noted that the application for reinstatement was accepted at the home office, in New York, and it is affirmatively shown that no officer or agent of the defendant in Nebraska had authority to make reinstatements or renewals. The defendant offered in evidence a copy of the Compiled Statutes of the State of Nebraska, which were rejected by the court below. We are inclined to think these statutes were sufficiently identified, but, for the reasons above suggested, they were properly rejected. But, aside from all this, we do not think the company established a ground for forfeiture because of nonpayment of the May, 1891, premium. The notice which was sent the assured of the maturity of the premium was improperly addressed, and did not reach the assured, but was returned to the company. And there is no showing as to the amount due in May, for the nonpayment of which the forfeiture is asked. The defendant relies upon statements made by the assured as to the amount due, and as to the alleged forfeiture. It seems to be well settled, however, that his declarations are not binding

upon the beneficiary. 2 May, Ins. § 579a; Insurance Co. v. Cheever, 36 Ohio St. 208; Bliss, Ins. § 383; Insurance Co. v. Haney, 10 Kan. 525; Seiverts v. Association, supra. The court below was right in refusing to submit the question of misrepresentations in the certificate of health.

4. We turn now to the alleged forfeiture for failure to pay the August, 1891, premium. It was conceded by both parties that the law of the state of New York required that the defendant, before it could forfeit a policy for nonpayment of premium, should, at least 30, and not more than 60, days prior to the day when the premium is payable, address and mail, postpaid, to the assured, at his or her last known post-office address, a written or printed notice, stating the amount of such premium, the place where and the person to whom payable, and that unless the same should be paid to the company, or to a duly-appointed agent or other person authorized to collect such premium, within 30 days after the mailing of such notice, the said policy, and all payments thereon, will become forfeited and void. It appears from the evidence that the defendant on the 15th day of July, 1891, addressed a notice to Matt Goodwin of the maturity of the August 16, 1891, premium. This notice was addressed to the assured, at Fifteenth and Harney streets, Omaha, Neb. Now, it is claimed by the company that this notice was addressed to the last named post-office address of Goodwin, while the plaintiff insists that both she and the assured gave notice to the defendant's agents of a change of address. This notice is claimed to have been given one Hall, a general agent of the defendant company, upon the streets of the city of Omaha, and to the Commercial National Bank of Omaha, which, for a time, at least, was charged with the duty of collecting premiums. The lower court submitted to the jury the question as to whether there was notice of a change of address given to either of these agents, and instructed that, if there was, then there was no forfeiture. We think there was ample evidence to sustain these instructions. The notice to Hall is not denied, but it is claimed that it was given to him upon the street, in a casual conversation, and therefore was not binding upon the company. There was evidence tending to show that Hall was a general agent, and uncontradicted evidence that he received the notice. And we think it was given to him in such a manner as to bind his principal. The place where the notice was given is entirely immaterial, if it was conveyed to him as agent of the company, and for the purpose of having it act thereon. According to the evidence, Hall was directed to change the address from Fifteenth and Harney to the general delivery. On the 13th day of July, 1891, Mrs. Goodwin wrote a letter to the Commercial National Bank, which bank was then collecting premiums for defendant, to forward all notices of assessments under her husband's policy to 57 Twenty-Third street, Chicago, Ill. This letter was received by the bank July 15th, and on the 16th it notified the defendant to send notice as requested. This notice was received by the company July 20, 1891. The only question with reference to this notice of July 13, 1891, is whether it was binding upon the defendant. Appellant contends that notice to the bank was not notice to it, for the reason that it had no authority whatever, except to collect and receive premiums, and deliver receipts to the assured. It seems that this question has heretofore been decided by this court, adversely to appellant, in the cases of Mayer v. Insurance Co., 38 Iowa, 304; Loughridge v. Association, 84 Iowa, 141, 50 N. W. 568, and authorities cited. The authorities cited by appellant's counsel are not in point.

5. It is also insisted that there was evidence to show that the assured received the notice, although it may have been incorrectly addressed; that it in fact went to the general delivery, where the assured directed it should go, and, as it was never returned to the defendant company, the presumption obtains that it was delivered. It is sufficient to say, in answer to this contention, that no such issue was made in the pleadings. The claim was that a notice was sent, as required by the New York statutes, to the last known post-office address of the assured, and, as payment was not made within the time allowed thereby, that the policy was forfeited. The defendant did not, in any of its pleadings, aver that the assured had actual notice of the maturity of the premium. But, aside from all this, the notice was not addressed to the city or town where the assured, at the time, resided. He was then living in Chicago, and it seems to be a well-established rule that under such circumstances no presumption arises that the addressee received the notice. See Henderson v. Coke Co., 140 U. S. 37, 11 Sup. Ct. 691; 2 Whart. Ev. § 1328; Carter v. Insurance Co., 110 N. Y. 23, 17 N. E. 396; Garretson v. Association, 74 Iowa, 421, 38 N. W. 127; Garbutt v. Association, 84 Iowa, 294, 51 N. W. 148; Phelan v. Insurance Co., 113 N. Y. 151, 20 N. E. 827. The court did not err in refusing to submit the question as to the actual receipt of the notice by the assured, or in refusing to give the instructions asked by defendant upon this subject.

6. Complaint is made of the fifth paragraph of the court's charge, which required the defendant to show that the sum claimed as premium, i. e. $18.65, was the correct amount which was due in August, 1891, after awarding and deducting return premiums for that quarter, etc. No valid objection can be lodged against this instruction, in view of the terms of the policy, which provide that the premium which could be required was "less the return premiums awarded," and that "maximum quarterly premiums were to be re-

duced in each case by surplus portion of preceding payments not needed for the death fund and quarterly fund." It appears that in every instance these return premiums had been deducted from premiums previously paid, and that they varied in amount. Knowledge as to the amount of the return premiums was solely in the possession of defendant, and, under well-known rules, the burden was upon it to prove the amount thereof. Plaintiff could not do it, as she had no data upon which to act. This is merely stating a general rule,—that where the amount of the premium to be paid is variable, and knowledge as to the amount rests peculiarly with the company, that it must show that the amount demanded was the correct sum. Tobin v. Aid Soc., 72 Iowa, 261, 33 N. W. 663; Underwood v. Legion of Honor, 66 Iowa, 134, 23 N. W. 300; 2 May, Ins. § 345a. The instructions given by the court with reference to this subject were correct, and those asked by defendant, in so far as they embodied correct rules of law, were given by the court.

7. Certain errors are assigned on the admission and rejection of testimony. We need not set them out. It is sufficient to say that we discover no error. The questions presented are unimportant, and this opinion has already grown too long.

8. Some claim is made that the policy in suit, being a renewable one, from quarter to quarter, is not governed by the ordinary principles applicable to life insurance contracts. Suffice it to say, in answer to this claim, that we see no merit in it. The policy in suit is a continuing one. It gave the assured and his beneficiary the right to make it incontestable, as to certain matters, and this they did, by the payment of premiums for more than two years. It also gave them the right to deductions for return premiums, as before stated, and promised them an additional credit at the end of ten years. Construed with such of the provisions of the New York statutes as we have, it clearly appears that it should have no other effect than an ordinary life policy, which could be forfeited for nonpayment of premiums, the same as other insurance policies. The contract was one of insurance, pure and simple; and the ingenuity of the author should not be allowed to work a fraud or injustice upon those who confided in the belief that upon payment of premiums after notice, as required by the statutes of New York, they, after the expiration of two years, had an incontestable policy. We have patiently considered the whole case, and examined a long line of authorities cited by counsel on either side, and have also made an independent search for cases which would aid us in disposing of the questions presented; and, while we have not discussed every proposition presented, we have considered those matters which we believe to be controlling, and are of the opinion that the judgment should be affirmed.

MOFFITT et al. v. ALBERT et al.

(Supreme Court of Iowa. Feb. 5, 1896.)

ATTACHMENT—ASSIGNMENT OF ERROR—GENERAL AND SPECIAL VERDICT—CONFLICT—MOTION IN ARREST—NEW TRIAL—PRESUMPTION—RIGHT OF INTERVENER.

1. Assignments that the court erred in overruling a motion in arrest of judgment, and in overruling a motion to set aside the verdict, are not sufficiently specific.

2. Inconsistency between a special finding and the general verdict cannot be taken advantage of by motion in arrest.

3. A conflict between a special finding and a general verdict is not ground for a new trial.

4. Where it was stipulated, on appeal in attachment, that some of the evidence tended to show that the property attached belonged to defendant and to interveners, and the jury's special finding found that the property belonged to both parties, but the general verdict found against the claim of the interveners, it will be presumed, in the absence of evidence, and in support of the general verdict, that plaintiff acquired a right to attach the property before the interest of interveners was acquired.

5. Where, in attachment, interveners claimed the property, and the entire case was submitted to the jury at one time, and the jury specially found that the property was owned by defendant and interveners, there was no error in failing to make such an order, under Code, § 3016, as would protect the interest of interveners; the summary proceedings for which that section provides not having been adopted, and no request for such order having been made after said finding was returned.

Appeal from district court, Cedar county; William G. Thompson, Judge.

Action at law, aided by a landlord's attachment, to recover an amount due as rent under a lease of real estate. A petition of intervention was filed, there was a trial by jury, and a verdict and judgment for plaintiffs. The interveners appeal. Affirmed.

Wright & Wright and Charles W. Kepler, for appellants. Preston, Wheeler & Moffit, for appellees.

ROBINSON, J. In August, 1889, the plaintiffs leased to the defendant Henry Albert, Sr., certain real estate, for the term of five years from the 1st day of March, 1890, at an annual rent of $1,278. This action was brought to recover rent due under the lease. The jury found that the defendant was indebted to the plaintiff in the sum of $430.79, and judgment was rendered in favor of the plaintiff for that amount, and for the sale of the attached property. The defendant did not except to the judgment, and does not appear to be interested in this appeal. The interveners are Henry Albert, Jr., and August Albert, sons of the defendant. They claim to be the absolute and unqualified owners of certain horses, cattle, hogs, sheep, and other personal property, upon which the writ of attachment was levied; that the defendant never owned the property so claimed, nor any part of it, and that it was not subject to the attachment for the payment of the amount due from the defendant. The evidence is not before us, but a stipulation of the par-

ties shows that some of the evidence offered tended to show that the property in question belonged to the defendant, some of the evidence tended to show that the property belonged to the interveners, and some tended to show that it belonged to the defendant and the interveners. The verdict of the jury on the claim of the interveners was as follows: "We, the jury, find against the interveners, Henry Albert and August Albert, that they are not the owners of the attached property." A special interrogatory was submitted to the jury, and answered, as follows: "Who were the owners of the property described in the sheriff's return, and which was levied upon by the sheriff in this action at the time of said levy? Answer. Henry Albert, Sen., and sons." The interveners filed motions in arrest of judgment, and to set aside the verdict, which were overruled.

1. The motion in arrest of judgment is based upon two grounds, which present different questions, and the motion to set aside the verdict is on more than two grounds, and involves several questions. The first assignment of errors alleges that the court erred in overruling the motion in arrest of judgment. The second assignment refers, in substantially the same terms, to the ruling on the motion to set aside the verdict. Neither of these assignments is sufficiently specific to present any question for our determination. Blocker v. Schoff, 83 Iowa, 266, 48 N. W. 1079; State v. Harbach, 78 Iowa, 476, 43 N. W. 272; Duncombe v. Powers, 75 Iowa, 187, 39 N. W. 261; Armstrong v. Killen, 70 Iowa, 52, 30 N. W. 14.

2. It is said that the special finding is inconsistent with the general verdict. If that be conceded, it does not follow that the motion in arrest of judgment should have been sustained. Such a motion lies, after trial, when the facts stated in the petition do not entitle the plaintiff to any relief whatever. Code, § 2650. But it is not claimed that the petition of the plaintiffs is defective, and defects in the petition of the intervener would not entitle them to relief. A conflict between a special finding and the general verdict is not a ground for a new trial. If they are inconsistent, the special finding controls, and judgment may be given accordingly. Code, § 2809. But the interveners did not ask for judgment on the special finding, and the judgment rendered cannot be disturbed, unless it appears that the general verdict is so inconsistent with the special finding that both cannot stand. Phoenix v. Lamb, 29 Iowa, 355. The stipulation of the parties shows that there was evidence to sustain the general verdict. The special finding shows that the defendant and the interveners were the owners of the property upon which the attachment was levied, and, although the date of such ownership is not fixed, it may be presumed to have existed at the time of the levy. But it may have been that the plaintiff had acquired a right to seize the property, by attachment, for the rent due, before the interest of the sons was acquired, and that their rights were subject to those of the plaintiff. We must presume, in the absence of the evidence, that this was the case; and if it was, there is no inconsistency between the special finding and the general verdict.

3. It is said that the court erred in not making such an order, by virtue of section 3016 of the Code, as would protect the interests of the interveners which the jury found to exist. The summary proceedings for which that section provides were not adopted in this case. The appellants intervened in the action, which was so tried that the entire case, as to the defendant and interveners, was submitted to the jury at one time. But it is immaterial whether the case falls within the section specified or the general provisions of the law permitting interventions, for the reason that the record does not show that the interveners were entitled to any relief. As we have seen, the general verdict and the special findings are not necessarily inconsistent, and we cannot presume that they are, nor that the interest of the interveners was of a character to require an order for its protection. A further answer to this claim of the appellants is that they are not shown to have asked for such an order, after the special finding was returned. In view of the pleadings and the general verdict, we think this should have been done, if the interveners were entitled to that relief.

4. The appellants discuss various questions, few of which are raised by the assignment of errors. Some of them relate to the omission of the district court to grant relief, which was not asked, and others are governed by the views we have already expressed. None of them are of sufficient importance to require special mention. It is sufficient to say that we have not found any ground for disturbing the judgment of the district court, and it is affirmed.

In re YOUNG'S ESTATE.

(Supreme Court of Iowa. Feb. 5, 1896.)

ADMINISTRATOR—FAILURE TO INVEST FUNDS—LIABILITY FOR INTEREST—COMPENSATION.

1. An administrator having funds of the estate, which he used in his private business without attempting to invest them for the benefit of the estate, though he could have realized a profit thereon greater than 6 per cent., was properly charged with interest at 6 per cent. on the average amount while it was in his hands, though the will, in providing that no distribution should be made until the youngest legatee attained majority, did not direct that the funds should be invested, and, though the administrator's report showed that the moneys were not invested, it did not show that he was using them for his own profit.

2. Though said administrator, as such, rendered his services for over 20 years, it was proper not to allow extra compensation under Code, § 2495, for extraordinary services, inasmuch as interest was not charged to him with annual rests, as might have been done under the circumstances of the case.

Appeal from district court, Polk county; W. F. Conrad, Judge.

Madison Young died in 1873, testate, and P. M. Casady became the administrator of his estate with the will annexed. One of the legatees was four years of age when Madison Young died, and, by the terms of the will, final distribution could not be made until each legatee attained his majority. The final report was filed September 23, 1893, to which exceptions were taken by the legatees, and the district court, after specifying the real estate in the hands of the administrator, made a finding as follows: "And the court further finds that said administrator had in his hands at the close of the years 1875 to 1888, inclusive, large balances, which averaged $18,552.95 for each of said years, and that he used said moneys in his private business, and that he has not charged himself with any interest upon any of such balances, nor accounted for any profits thereon; that, as a matter of law, he should be charged with six per cent. simple interest upon such yearly balances for the period of fourteen years, being from January 1, 1875, to December 31, 1888, which amounts to the sum of $15,402.45; and that he should be charged interest upon said last-named sum at the rate of six per cent. per annum from December 31, 1888, to December 31, 1893, giving him credit for such payments as have been made by him during such last-named period, and charging him with such sums as have been received by him during such period; and that there was in the hands of said administrator on December 31, 1893, belonging to said estate, the sum of nineteen thousand three hundred and seventy-one dollars and eighty-one cents ($19,371.81)." From the judgment entered in pursuance of this, and other findings, the administrator appealed. Affirmed.

Berryhill & Henry, for appellant. C. C. & C. L. Nourse, for appellee.

GRANGER, J. 1. Appellant presents two questions for consideration, as follows: "First, as to whether the administrator should be charged with interest upon the money in his hands; and, second, should he receive any compensation other than the percentage upon the estate allowed by law, being 5 per cent. for the first $1,000, 2½ per cent. for the overplus between $1,000 and $5,000, and 1 per cent. for the amount over $5,000?" The facts above found by the district court are not questioned, and hence we have a case in which the administrator had in his hands for about 20 years a large amount of money. By the terms of the will, except as to a few bequests, the money must be retained for distribution until 1890. This money was in no way invested for the benefit of the estate, but it was, as found by the district court, used by the administrator in his private business. The district court held, under this state of facts, that interest at the rate of 6 per cent. should be paid, and we will notice the reasons urged why the holding should be disturbed.

2. It is said that the will itself did not direct that the funds should be invested. Nor did it direct otherwise. The testator might well suppose a plain requirement of the law would be observed. It did require that the estate should be converted into money as soon as practicable, which was done. It then provided, in effect, that most of the money should be held by the administrator until 1890, before distribution. The law determines that such funds shall be invested, if it can be prudently done in the interest of the estate. The rule seems to be well stated in Perkins' Estate v. Hollister, 59 Vt. 348, 7 Atl. 605, as follows: "It is a fundamental principle that it is the duty of a trustee, whether an executor or administrator or guardian, or as in the case of an ordinary nature of trusteeship, to keep the trust funds separate from all other funds, and also, when they are not to be primarily paid over, to keep them securely invested, and as profitably as he can, in the exercise of that degree of prudence which a prudent man would exercise in regard to his own funds; and that he shall derive to himself no gain or advantage by use of the trust funds; and that he shall neither make nor lose by his management of the funds, and for his lawful management thereof he shall receive a reasonable compensation." It is not an unreasonable rule that requires an administrator to do with such a fund what a reasonably prudent man would do with his own money under the same circumstances. No prudent man would have held that money for all those years without investment if the way was open to do so with profit. The testimony shows that, during most of the time while the administrator had this money, it was worth 10 per cent. per annum, and at no time less than 8 per cent.

It is said that the general monetary situation excused the administrator from depositing the money in banks. There was nothing to require such a deposit. If the record showed a reasonable effort to invest it, and a failure because it could not be safely done, the situation would be different. No such effort was made, and it appears from the record that during all the time the money could have been loaned safely and with a profit greater than 6 per cent. to the estate. It is plainly apparent that the administrator desired it for his own use, and the money was so employed. Schieffelin v. Stewart, 1 Johns. Ch. 620, supports a rule as follows: "An executor, administrator, or trustee is not allowed to make any gain, profit, or advantage from the use of the trust funds. If he negligently suffer the trust money to lie idle, he is chargeable with interest. If he converts the trust moneys to his own use, or employs them in his business or trade, he is chargeable with compound interest." See,

also, Bond v. Lockwood, 33 Ill. 212; Merrifield v. Longmire, 66 Cal. 180, 4 Pac. 1176; Hook v. Payne, 14 Wall. 252; Elliott v. Sparrell, 114 Mass. 404; Lommen v. Tobiason, 52 Iowa, 665, 3 N. W. 715. It is said that the reports filed from time to time showed that he was not investing the money. Without saying that such facts would excuse a failure to exercise proper diligence to invest the money, it is sufficient to say that the reports do not show that he was using the money, for which reason, under all the authorities, he would be chargeable with interest. The same considerations apply to a claim that the parties knew that the funds were not being invested. If they even knew he was using them, it would reasonably be expected that he would pay for the use.

It is said that the child might have died before reaching its majority, in which case a distribution would have been required, for which reason the administrator is excused for not investing the funds. The will fixed the time for distribution when he attained his majority. It was the duty of the administrator to be guided by that provision, in which case the law would excuse him for not being prepared to meet an emergency not contemplated by the testator. While, of course, such a death might occur, there was no such expectancy of it as that it should in any way influence his course in the administration of the estate. The case is a remarkably clear one authorizing the allowance of interest.

3. It is thought that the administrator is entitled to compensation other than that allowed by law, for his services, and especially so if he is to be charged with interest on the funds not invested. He received on account of the personal estate $400, that being the percentage prescribed, and also commissions on the sale of real estate; so that, in all, his compensation allowed is over $700. Had the estate been settled in the usual time for collecting and paying it over, he would have been entitled to the same compensation. The statute provides for extra compensation for actual, necessary, and extraordinary expenses or services. Code, § 2495. Services may be out of the ordinary class either as to the kind or amount. The services in this case covered an unusual period of time because of the provisions of the will. The record shows receipts and expenditures extending over the whole period of the time. Such a service, because of the length of time it was continued, may be said to be extraordinary.

The authorities are quite uniform to the effect that, where such an officer uses funds for his own benefit, he may be charged with interest with annual rests. The authorities cited supra are to that effect. Notwithstanding this rule, the district court declined to allow interest with such rests, but allowed simple interest, and we assume that it took into consideration the facts of such service.

The legatees appeal also, and present the question of their right to interest with annual rests. In view of the situation, we are not disposed to disturb the judgment below, regarding it as approximating, as near as may be, substantial justice between the parties. The judgment is on both appeals affirmed.

HOUSE v. BOWMAN.

(Supreme Court of Iowa. Feb. 5, 1896.)

ACTION BY HEIR—DISTRIBUTIVE SHARE—PAYMENT TO ANOTHER HEIR.

Of four minor heirs, defendant was guardian of two. Certain land was sold by referees in partition, and the portions of two heirs were paid to said guardian. The portions of the other two were paid into court, and the clerk executed to said referees receipts therefor, reciting that said money was the distributive shares of defendant's wards. The clerk paid the money to defendant, as guardian, who settled with his wards, giving them twice the amount to which they were entitled. *Held*, in an action by an heir who did not receive his portion, that the issue as to whether defendant had notice that the money did not belong to his wards should have been submitted to the jury, after plaintiff introduced evidence in support of the affirmative thereof.

Appeal from district court, Linn county; J. H. Preston, Judge.

Action to recover for money alleged to be due to the plaintiff as an heir of George House, deceased. There was a trial by jury, and, at the close of the introduction of the evidence in behalf of the plaintiff, the court, on motion of the defendant, instructed the jury to return a verdict for the defendant. From a judgment on the verdict, the plaintiff appealed. Reversed.

Rickel & Crocker, for appellant. Wm. Smyth and J. W. Jamison, for appellee.

ROTHROCK, J. The plaintiff is a grandchild of George House, deceased. It appears that a partition of certain real estate of the deceased was had in the Linn district court, and the land was sold by referees appointed by the court. The plaintiff had two brothers and a sister, their names being Frank House, Arthur House, and Hester House. All these grandchildren were minors when the proceedings in partition were had, and when the land was sold each was entitled to $226 of the money received therefor. The defendant was duly appointed guardian of Arthur House and Hester House, and, as such guardian, he received from one of the referees the money to which his wards were entitled, and executed receipts therefor. The plaintiff and Frank House had no guardian, and their share of the money was paid, by one of the referees, to the clerk of the district court. The clerk of the court gave the referees a receipt for the money, which was in these words. "$452.42. Marion, Iowa, Nov. 16, 1888. Received of J. B. Leigh and John F. Gritman,

referees, four hundred fifty-two and 42/100 dollars, as the distributive shares Arthur and Hester House, in case of Hester Stantz vs. Allen House et al., district court. J. W. Bowdish, Clerk. By H. A. Stearns, Deputy." It will be observed that his receipt purports to be for the distributive shares of the two minors of whom the defendant was guardian. It was in fact the distributive shares of William House and Frank House, who had no guardian. Before this deposit was made with the clerk, the defendant had received from the referees the full amoun to which his wards were entitled, and re ceipts were given therefor. The defendant received from the clerk the money paid in by the referees, and settled with his wards by paying them each $434, or thereabouts, being twice the sum to which they were entitled. After making these payments, he made his report to the court, showing said payments, and his report was examined and approved by the court, and he was discharged as guardian. The above facts are practically undisputed, and it is conceded that the plaintiff has received nothing from the estate of his grandfather. As the clerk receipted for the money as belonging to the defendant's wards, it is to be supposed that the records showed that it was their money, and it was paid out to the defendant as their guardian. And there is no question that the defendant's wards have no right to the money. The defendant did not profit by acting as guardian for his wards. He paid his counsel only four dollars for services in the matter of guardianship, and he received 5 per cent. for his own services. There was evidence introduced by the plaintiff which tended to show that the defendant had notice, before he received the money from the clerk, that it belonged to the two heirs who had no guardian. The defendant, in his answer, claimed that he had no knowledge whatever that the money belonged to the plaintiff and Frank House, but that he received it from the clerk and paid it out in good faith, and in the full and honest belief that it belonged to his wards. And, so far as the case was tried, that appears to be the question to which the evidence was directed. We think, as that was the issue, and as there was evidence tending to show that the defendant knew that his wards were not entitled to the money in dispute, the case ought to have been submitted to the jury,—or, in other words, the defendant should have introduced his evidence on that issue. If money was received after notice that it did not belong to the wards, the approval of the report of the guardian, and his discharge by the court, cannot be held as an adjudication against the plaintiff, because he was not a party to that proceeding. The case involves one of the hardships which often occur in business affairs, whichever way it may be finally determined. The judgment of the district court is reversed.

HAMILTON et al. v. THOEN et al.

(Supreme Court of Iowa. Feb. 6, 1896.)

WRONGFUL ATTACHMENT — INSTRUCTIONS — HARMLESS ERROR.

1. Error by which a party is not prejudiced is not ground for reversal.

2. Instructions as to wrongful attachment need not state that, if plaintiff knew, when suing out the attachment, that the grounds alleged therefor were false, he would be chargeable with malice in suing out the writ; there being no evidence that he had such knowledge.

Appeal from superior court of city of Cedar Rapids; Thomas M. Giberson, Judge.

Action on promissory notes. Trial to a jury, and verdict and judgment for plaintiffs. Defendants appeal. Affirmed.

U. C. Blake, John M. Redmond, and Cliggitt & Rule, for appellants. Jamison & Burr, for appellees.

KINNE, J. 1. Plaintiffs, in their petition, seek to recover on nine promissory notes executed by the defendants, aggregating the sum of $1,850.50, exclusive of interest. None of said notes were due when this action was commenced. The petition stated that nothing but time was wanting to fix an absolute indebtedness, and, as a cause for an attachment, averred that "defendants were about to dispose of their property, with intent to defraud their creditors," asked for the issuance of a writ of attachment, and for judgment on said notes. The first note was afterwards paid. The defendants, in a counterclaim and supplemental counterclaim upon the attachment bond, pleaded that the attachment was wrongfully and maliciously sued out by plaintiffs, that a large amount of their property was seized and sold thereunder, that they were kept out of the use and occupation of their premises, setting out in detail the claimed damages, amounting in the aggregate to $2,786.57 and interest, also claiming the sum of $1,000 as exemplary damages. To this counterclaim and the supplement thereto, plaintiffs replied, admitting the filing of the bond, the levy on the property under the writ, and denying all other allegations therein contained. In response to special interrogatories submitted to them, the jury found as follows: That plaintiffs, at the time the writ was sued out, acted in good faith, and with reasonable care, and had reasonable grounds to believe the cause stated as a ground for the attachment to be true; that the writ was not willfully sued out; that the plaintiffs, before suing out the writ, submitted their case to an attorney, and were advised that they had a right to sue out the attachment; that, at the time the writ was sued out, the defendants were not disposing of their property, in whole or in part, with intent to defraud their creditors. The jury returned a general verdict for plaintiffs. Defendants appeal.

2. Many exceptions were taken to rulings

of the court upon the admission and rejection of evidence, which are now assigned as error. An examination of these alleged errors discloses the fact that most of them relate to matters which are unimportant, and the rulings, even if erroneous, are clearly without prejudice. We may briefly consider a few of the questions thus presented. One of the defendants had, on direct examination, testified that the rental value of the building in which the attached goods were kept by the sheriff up to the time of the sale, was $15 per month. On cross-examination he was asked, "You thought it was worth $15 a month to store this $1,900 in goods that the sheriff had attached?" An objection to the question was overruled. The witness answered, "Don't know what it is worth for storing these goods." It is clear that, even if the question was improper, no prejudice resulted to defendants. Again, on reexamination, the defendant was asked by his counsel, "From January to August 1st, aside from what you and your brother had to live on, was there anything that he and you appropriated to your own use out of the business?" This was objected to, as a repetition. It appears that this witness had already given a very detailed account of the disposition of all moneys which the firm had received during the period inquired about. We may here remark that the examination of the principal witnesses, on both sides, was spun out at great and unnecessary length. Witness Crissman was asked, "You knew a chattel mortgage placed on their stock would injure their credit?" An objection to this question, as being immaterial, was sustained. The inquiry was foreign to any issue in the case. What Lawyer Crissman may have known as to the effect of a chattel mortgage upon the credit of the defendants could in no way tend to enlighten the jury as to the matter they were required to determine. Exception is taken to the admission of the evidence of witness Cooper as to a conversation had by him with the defendants after the writ had been sued out. We do not decide as to the correctness of the ruling of the court in this instance, as it does not appear from the testimony that any prejudice could have resulted. Complaint is made because counsel for plaintiff was permitted to read to the jury from the return of the appraisers. It is said it was not in evidence. The record shows that the special execution and return were admitted in evidence, without objection. By the very terms of the return, this appraisement was made a part of it. It would seem, therefore, that the appraisement was in evidence as a part of the sheriff's return on the execution.

3. It is said that the court erred in the seventh paragraph of its charge to the jury. A portion of the paragraph is as follows: "It is not necessary that the information upon which the creditor acts in suing out the writ of attachment be true, if he acts in good faith, and with reasonable care, and on probable cause to believe the same, *nor is it necessary that he should act only upon such information as would be competent evidence in court*," etc. Defendants contend that so much of the instruction as appears in italics is improper. If it be so, a point we do not decide, the defendant was not prejudiced thereby.

4. The eighth paragraph of the court's charge is objected to, because it failed to embody the thought that, if plaintiffs knew, when they sued out the attachment, that the ground alleged therefor was false, then they would be chargeable with malice in suing out the writ. Such a charge would be proper, if there was any evidence to support such a claim. We do not think the evidence tended to show that when the writ was sued out plaintiffs knew that the ground alleged therefor was untrue. Under such circumstances, it was not error to fail to embody that matter in the instruction, or to refuse the instruction asked relating to the same subject. The case in that respect is unlike Hurlbut, Hess & Co. v. Hardenbrook, 85 Iowa, 610, 52 N. W. 510.

5. Sixteen instructions were asked by the defendants, and all were refused by the court. It may be said that the instructions of the court, while correctly embodying the law applicable to the case, were of a quite general character. Nearly all of the instructions asked might have been given without committing any error. Still, most of them were fairly covered by those given. The sixteenth instruction asked, touching the advice of counsel, might well have been given; but, in view of the special findings, heretofore set out, it is clear that no prejudice resulted to the defendants from a failure to give the instruction. We cannot consider more fully these instructions which were asked and refused. Some of them singled out, or made prominent, certain portions of the evidence. While, under some circumstances, such instructions may be proper, yet we discover no reason in this case for holding that they were improperly refused.

6. It is insisted that some of the special findings were not supported by the evidence. We have examined this claim with care, and find that the special findings were fully warranted. We do not mean to be understood as saying that there is no evidence which might tend to a contrary conclusion from that reached by the jury in their answers to these special interrogatories. The evidence was conflicting, but is such as to warrant the findings as made. On the whole record, we find no reversible error. Affirmed.

AMERICAN EXCH. NAT. BANK OF CITY OF NEW YORK v. CROOKS.

SAME v. DUGAN.

(Supreme Court of Iowa. Feb. 6, 1896.)

TAX SALE—TRANSFER OF CERTIFICATE—NOTICE OF EXPIRATION OF REDEMPTION.

1. Possession of a certificate of purchase at tax sale (which Code, § 888, declares shall be assignable by indorsement), indorsed with the name of the one to whom it was issued, is prima facie evidence of ownership.

2. Notice of expiration of time to redeem from sale of land for taxes, which the statute provides shall be served on the person in whose name the land is taxed if he is a resident of the county, and may be served on a nonresident of the county by publication, is properly addressed, in the case of a nonresident, to the "Am. Ex. Bank," that being the name as it appeared on the lists to whom the land was taxed.

3. The statement in a treasurer's tax deed of the fact of assignment of the certificate of purchase at a tax sale is, by express provision of Code, § 888, presumptive evidence of such assignment.

Appeal from district court, Boone county; D. R. Hindman, Judge.

Action to quiet title. Judgments for defendants, and the plaintiff in each case appealed. Affirmed.

Guernsey & Bailey, E. L. Penfield, and J. L. Stevens, for appellant. Crooks & Snell and Jordan & Brockett, for appellees.

GRANGER, J. 1. The two cases are submitted on the same abstract and arguments, and our considerations will be directed to the first-entitled case. The land involved in this suit is the S. E. ¼ of the N. E. ¼ of section 25, township 83, range 27, in Boone county, Iowa; and the plaintiff bank was the owner thereof prior to the tax sale which took place December 5, 1887, for the taxes of 1886. The land was sold to Charles S. Hazlet, and the certificate of sale issued to him. It came into the possession of the defendant Crooks, and the name "Chas. S. Hazlet" is indorsed thereon. On the return of the certificate so indorsed, the tax deed issued to Crooks. The point is now made that there is no evidence that Hazlet ever parted with his title or interest in the certificate. We think the facts of possession by Crooks and the indorsement are prima facie evidence of ownership by Crooks. It is provided by Code, § 888, that the "certificate of purchase shall be assignable by indorsement." It is conceded on the authority of Swan v. Whaley, 75 Iowa, 623, 35 N. W. 440, that such an indorsement conveys the title upon proof that the parties so intended, but it is thought that the indorsement and delivery are not sufficient evidence of the fact of such intent. The fact of possession alone is some evidence of ownership, and the known purpose of an indorsement generally, and its legal effect in particular cases, strengthen the evidence, so that it is at least a prima facie showing of ownership. The indorsement and delivery were for some purpose, and a transfer of the certificate is the presumable one where no other purpose appears.

2. The tax deed to Crooks bears date December 20, 1890. The plaintiff bank was then the owner, and the notice of expiration of redemption was addressed to "Am. Ex. Bank and John Staley." The "Am. Ex. Bank" was the name as it appeared on the lists to whom the land was taxed. John Staley was the person in possession of the land. It is contended that Crooks had the necessary knowledge or information to enable him to give the true name of the owner, and that it was his duty to do so. This is thought to be so because, in his affidavit of completed service, he states that the "Am. Ex. Bank" is a nonresident, and hence he must have known the true name of the owner. That conclusion does not follow necessarily. The most that can be said is that he knew there was no such bank in Boone county as that appearing on the lists as owner. It is true, as claimed, that the name is abbreviated on the lists, but the abbreviation does not correctly or reasonably suggest the name of the plaintiff bank, which appears in the record as the "American Exchange National Bank of the City of New York." If the name given in the notice of the expiration of redemption is not such an abbreviation of the name of the plaintiff bank as that the publication, under that name, would be one of the bank as owner, then it as conclusively follows that the land was not taxed in the name of the bank. The law is that the notice shall be served on the person in whose name the land is taxed; not necessarily on the owner. In Van Gorder v. Hillyer, 65 Iowa, 227, 21 N. W. 578, it is held that where, by mistake, land is taxed in the wrong name, a notice addressed to the real owner is not sufficient to support a deed. It must be addressed to the person in whose name it is taxed, even though it is a mistake. It seems to us that the notice is in compliance with the law.

3. In the second case, against Dugan, the deed to defendant was made by John L. Cunningham, who took the tax deed. The certificate in that case issued to L. & H. Goeppinger and W. H. Crooks. It is urged that there is nothing to show that Cunningham owned the certificate. The same considerations apply as in the other case, where Crooks held the certificate indorsed by Hazlet. It may further be said, as to this case, that in the tax deed to Cunningham it is recited that the certificate was assigned to W. H. Crooks, and by him to Cunningham. In Code, § 888, it is provided that "the statement in the treasurer's deed of the fact of the assignment shall be presumptive evidence of such assignment." The judgment in each case is affirmed.

JONES v. PHOENIX INS. CO. OF HARTFORD, CONN.

(Supreme Court of Iowa. Feb. 10, 1896.)

FIRE INSURANCE—CONDITIONS OF POLICY—CHANGE OF POSSESSION.

Where a policy of insurance is issued to a firm on its stock of goods, a dissolution of the firm, under an agreement whereby one partner remains in possession of the entire stock and gives his notes for the interest of the retiring partner therein, the latter retaining the right to see that the stock is kept up to its present value till the debt is paid, is a breach of a condition against change of possession of the property insured.

Appeal from district court, Calhoun county; George W. Paine, Judge.

Action on a policy of fire insurance. Judgment for plaintiff, and defendant appealed. Reversed.

R. W. Barger and Stevenson & Lavender, for appellant. Botsford, Healy & Healy, for appellee.

GRANGER, J. On the 31st day of March, 1892, the defendant company issued its policy of insurance to Jones & Kerstetter, of Manson, Iowa, for the sum of $1,900 on a stock of merchandise, and for $100 on their store fixtures and furniture. On the 31st day of March, 1893, the stock of goods was totally destroyed by fire, and this action is to recover on the policy. A defense pleaded to the action is that, before the loss, the property insured was sold, or the title or possession of the property, or a part of it, was transferred or changed. The defense is based on the following clause of the policy: "This policy shall be void in the following instances, unless consent is indorsed by the company hereon, namely, * * * if the said property shall be sold, or this policy assigned, or if the title or possession of the property, or any part thereof, is transferred or changed (other than by succession, by reason of the death of the assured), whether by legal process, judicial decree, voluntary transfer, conveyance, or otherwise." The contention, in this respect, is one of fact, it not being contended but that a violation of the provision will avoid the policy. Such a rule of law has been too many times announced to be open to question. It is, however, contended that, under the particular facts of this case, there was no breach of the conditions of the policy, and this leads us, briefly, to notice the facts. They appear, without dispute, as follows: That Jones and Kerstetter were a firm, engaged in the mercantile business, when the policy was given, and it was made to the firm, which, as such, owned and had possession of the stock insured. In November after, because the business did not amount to enough to warrant both to continue in it, it was agreed that Kerstetter should retire. To this end they estimated the value of the stock on hand, and their debt and credit accounts. The estimate disclosed that the debt and credit accounts were about equal, so that one offset the other, which left for division the stock of goods, which was valued at $1,900. As Jones was not able to buy Kerstetter's interest for cash, he made his notes to him for $950. The notes were not made till some days after the agreement. The agreement was made on the 18th day of November, and on that day Kerstetter retired from participation in the business, management, or control of the store, and took a clerkship in a store across the street. A clerk was hired by plaintiff, and the business was, in all particulars, done in his name. The only claimed right of Kerstetter in the business is this: that, from the testimony, it appears that, when the agreement was made, it was understood, and hence a part of the agreement, that half of the purchase price should be paid on the 1st of March, and the other half on the 1st of June, following. If there was a failure to pay at that time, Kerstetter's interest was to continue until the debt was paid. The only right that Kerstetter had, as to the stock, was to see that it was kept up to the present value,—that is, the value when the change took place. Mr. Kerstetter says, "The goods were kept up, according to my observation." It is manifest that the only interest or act of Kerstetter with reference to the goods, after November 18th, was to observe whether or not the stock was being kept up and together. That is the most that can be said. Whatever might be said as to the title, there is no room for dispute that the possession was changed. Kerstetter had no more the possession of the goods that he would have had under an absolute sale with a lien thereon, under a stipulation that the stock should be kept up to its value. He would then have the right to observe its condition, and insist upon a compliance with the stipulation. In such a case, there would be an entire change of possession, and there was in this case. The details of the evidence show it, as clearly as any facts could be shown. The insurance was given with Kerstetter as one in possession of the goods, and the parties contracted that the insurance should only continue while such possession was continued. The partnership was, unmistakably, dissolved, and a notice thereof published, signed by the parties. In Oldham v. Insurance Co. (Iowa) 57 N. W. 861, we held that a sale by one partner, of his interest, to another partner was a breach of the condition of the policy against sale, and it must follow, logically, that such a change of possession constitutes such a breach. In fact, we do not understand this to be questioned. See, also, Hathaway v. Insurance Co., 64 Iowa, 229, 20 N. W. 164. We need not dwell upon the facts. There was such a change of possession, if not of title, as to avoid the policy. At the close of the evidence, the defendant moved the court to direct a verdict for it,

on the ground that no legal liability had been shown, and it should have been sustained. This point seems so conclusive of the case that we need not consider other errors assigned. The judgment is reversed.

WOLF v. WOLF et al.

(Supreme Court of Iowa. Feb. 10, 1896.)

LIMITATIONS OF ACTIONS—RUNNING OF STATUTE—NEGOTIABLE INSTRUMENTS—CONSIDERATION—BURDEN OF PROOF.

1. Limitations begin to run against an action to recover a balance alleged to be due from property turned over to defendant to secure him from liability as accommodation indorser for plaintiff, from the time plaintiff is aware that defendant claims to have accounted in full therefor, and it is barred in five years, under Code, § 2529, subd. 4.

2. In an action on a note, the burden of overcoming the presumption of consideration arising from the execution of the note is on the maker.

Appeal from district court, Johnson county; S. H. Fairall, Judge.

Action in equity for an accounting, to recover any balance found to be due, and for general equitable relief. There was a hearing on the merits, and a decree for the defendants. The plaintiff appeals. Affirmed.

John W. Slater, Milton Remley, Remley & Ney, and Slater & Conklin, for appellant. George A. Ewing and S. H. Fairall, for appellees.

ROBINSON, J. The defendants are Wolf & Oakes, a copartnership, and Louis R. Wolf and John Oakes, the partners who compose it. The petition alleges that in the year 1881 the plaintiff was indebted in various sums, which aggregated not less than $8,100; that the defendants became sureties for the plaintiff on a promissory note to the Johnson County Savings Bank for the sum of $4,000, a note to the Iowa County Bank (or Holbrook Bank) for $1,317, a second note to the Johnson County Savings Bank amounting to $700, and a note to John Hall for $2,700; that to secure the defendants for the liabilities they thus incurred, and for payments they should make on account of the plaintiff, he caused to be turned over to the defendants money and other property, and furnished pasturage for stock, to the amount of $11,311.01; that the defendants have paid, on account of the plaintiff, sums of money to about the amount of $8,100, and owe him a balance of $3,211.01. The petition further alleges that in September, 1882, the plaintiff suffered a stroke of paralysis, which rendered him unfit to attend to or transact business; that, he had great confidence in the defendants, Louis R. Wolf being his brother; that he did not discover that the defendants had received the sum last stated in excess of the amount they had paid for him, and that he had been defrauded, until the 20th day of January, 1891. He asks that the defendants be compelled to answer the petition fully, and to account for the property received by them. The defendants admit that they received money and other property from and on account of the plaintiff, but claim to have accounted for all of it, and to have paid, for and in his behalf, $1,000 in addition to the amount they have received; and for that they ask judgment. They further allege that they had a full and complete settlement with the plaintiff in October, 1885, and that the action on his part is barred by the statute of limitations. The district court dismissed the petition, at the cost of the plaintiff.

There are many errors in the printed record which appear to be clerical, but are nevertheless confusing. They relate mainly to dates, amounts, and designations of parties. We have endeavored to separate them from matters in regard to which there is actual controversy, and think we have succeeded, as to everything that is material.

The items with which the plaintiff charges the defendants, and which the latter admit, in substance, are as follows: September 3, 1881, cash, $850; December 26, 1881, cattle, $4,180.11; March 8, 1882, stock, $2,026.99; November, 1882, proceeds of hogs, $300; March 7, 1883, cattle, $1,110.84; February 20, 1885, proceeds of cattle, $917.87; November, 1885, notes from cattle sale, $926. In addition the defendants admit $350 of a charge of $475 for pasturing stock in the year 1882, $175 of a charge of $350 for sale notes, and $170 of a charge of $175 for hogs. They also claim credits to the amount of $45 on some of the charges which are admitted. In other words, the defendants are charged by the plaintiff with items to the amount of $11,311.81, of which they admit $10,961.81 to be correct. The items charged by the defendants against the plaintiff are as follows: June 21, 1881, cash loaned, $4,000; July 9, 1881, cash paid Marengo Savings Bank, $1,317.35; December 10, 1891, cash loaned, $700; January 1, 1883, cash paid N. B. Holbrook, or bank at Marengo, $464.26; January 3, 1882, cash paid John Hall on mortgage, $2,788.18; cash paid Mrs. Wolf, $60; and cash paid on a note of son of plaintiff, $110. In regard to all of these items, excepting the first one and last two, it is enough to say that they are admitted, or clearly proven. We think the item of $60 is shown to be correct, but that there is some doubt about the one for $110. The sums proven, exclusive of the item "Cash loaned, $4,000," aggregate $5,329.79. In addition, the defendants claim $718.26 as commissions for shipping and selling stock for the plaintiff, and a considerable amount for interest. If the claims of the defendants be correct, the plaintiff owed them in November, 1885, after the notes from the cattle sale to the amount of $926 were received, something more than $200.

The chief contention between the parties is in regard to the cash item of $4,000 claimed by the defendants. It appears that on the 21st day of June, 1881, the plaintiff gave to

the defendants his note for $4,000, payable on the 1st day of the next January. The defendants claim that this was for a loan of money to the amount of the note, made at that time, and paid directly to the plaintiff; while he insists that it was for payments on his account to be made thereafter to his creditors by the defendants, and that the payment of $2,788.18 to Hall, and $1,317.35 to the Marengo Savings Bank, were made on account of that loan. It is admitted that the Hall claim was paid by means of a draft sent to Hall by Thomas C. Carson, president of the Johnson County Savings Bank, at the request of the defendants. Carson's letter of transmittal is dated June 3, 1881, and it is formally conceded in the record that it was of that date. The draft itself is dated "Jan. 3, 1881." But no one claims that it was sent on that date, nor on the 3d day of June. It is marked, "Paid Jan. 10, 1882," and we are well satisfied that the other dates are due to clerical or typographical errors; that the draft and letter transmitting it were dated "Jan. 3, 1881," by mistake; that they were in fact written and sent on the 3d day of January, 1882. We understand, from the testimony of the plaintiff, that the Hall note was not due for six months after his note for $4,000 was given to the defendants; and it appears to have been paid from the proceeds of cattle which are charged to the defendants under the date of December 26, 1881. At the time the plaintiff made his note for $4,000, he gave a mortgage on certain live stock and crops, to secure its payment. That mortgage was subject to another given to secure the Hall claim. The defendants contend that, when the mortgage to them was executed, they believed that the Hall mortgage was the only paramount lien on the mortgaged property, but that they afterwards ascertained that the Marengo Savings Bank held a mortgage to secure its claim, which was also senior to their mortgage, and that they were forced to pay the savings bank in order to protect their mortgage. The transactions of the parties to this action were substantially closed in the year 1885. In the latter part of October of that year there was a public sale of cattle owned by the plaintiff, at which sale notes were taken. The defendants claimed an interest in the property sold, and were present. The notes were delivered to John A. Dougherty, a justice of the peace of the neighborhood, who had transacted some business for the plaintiff, with the understanding that the balance due the defendants should be ascertained by them, and sale notes sufficient to pay it should be delivered to them. They claimed to have ascertained that the balance due them was about $900, and notes for the amount claimed were delivered on their order early in November, 1885. When this was reported to the plaintiff, he stated to Dougherty that he had overpaid the defendants to the amount of $900, and sent Dougherty to them to investigate the accounts. He visited Louis R. Wolf, and, on comparing accounts, found that the plaintiff's statements did not contain any reference to the Marengo Savings Bank payment. Dougherty thereupon said that would more than balance the amount claimed by the plaintiff, and nothing further was done in the way of settlement, but the matter was reported to the plaintiff. He seemed to be surprised by the savings bank item, but did not deny it, and concluded that it was correct. We do not think Dougherty was authorized to make a final settlement at that time, but the fact that the plaintiff only claimed an overpayment of $900 before the savings bank credit in favor of the defendants was called to his attention is most important, as corroborating the testimony of the defendants in regard to the loan of June, 1881, and the payments they have made for the plaintiff.

It is said that the plaintiff was mentally incapable of attending to his business after the latter part of the year 1882, when he became partially paralyzed, and that the documents relating to his business were kept from him. It appears that he was confined to his bed during the first year or two that he became affected by paralysis, and that he was quite feeble, and had the assistance of others in attending to his business. But his mind does not appear to have been seriously affected, and in the year 1885 he gave personal attention to his business. The record does not show any ground for claiming that he was not fully capable of transacting his own business in the year 1885, and since. He knew in November of that year that the defendants claimed to have paid him in full. It may be conceded that they were trustees of the property which came into their hands from the plaintiff, and for his benefit, but no fraud on their part is shown; and if there was in fact any property in their hands after November, 1885, for which they should have accounted to the plaintiff, he knew at that time that they, in effect, denied having such property, and that they denied being responsible to him for either money or other property. The statute of limitations then commenced to run. But it is said that a right of action in favor of the plaintiff would not be barred for 10 years after the denial by the defendants of further liability. This claim is founded on a provision in the mortgage given by the plaintiff to the defendants, in words as follows: "The money remaining after paying said sums, if any, to be paid on demand to the said party of the first part." This refers to money which should be received by the mortgagees on a foreclosure of the mortgage, but it does not appear that the mortgage was foreclosed, nor that they obtained anything by virtue of it for which there has not been an accounting. We are of the opinion that the plaintiff's alleged right of action is governed by subdivision 4 of section 2529 of the Code, and that it was barred at the end of five years from Novem-

ber, 1885, or before this action was commenced. We are better satisfied to reach this conclusion because the plaintiff has failed to convince us that his theory in regard to the transaction of June 21, 1881, is well founded. He has argued the case as though the duty were on the defendants to show what he did with the money for which the $4,000 note was given, if it was paid to him as claimed, but that duty did not rest upon them. The law authorizes the presumption that they parted with a sufficient consideration for the note when it was given to them, and the burden of showing that this was not true was upon the plaintiff. His claims in argument in regard to his transactions with the defendants are in conflict with the admissions of his petition, and are not sustained by a preponderance of the evidence. If there was anything due him after November, 1885, the amount was not large; and, although the conference between Dougherty and Louis R. Wolf did not amount to a formal settlement, it was treated as having that effect by all parties in interest until about the time this action was commenced. The conclusions we reach, in effect, make it final, and the plaintiff has no just ground for complaining of it. The decree of the district court appears to be right, and it is affirmed.

SHELLEY et al. v. SMITH et al.

(Supreme Court of Iowa. Feb. 7, 1896.)

TAXATION—SALE—FRAUD—NOTICE OF EXPIRATION OF REDEMPTION — ACTION TO RECOVER LAND SOLD FOR TAXES—TITLE TO MAINTAIN APPEAL—OBJECTIONS NOT RAISED BELOW.

1. That the purchaser at a tax sale, after receiving a deed to the land, conveyed to the person who was county treasurer at the time of the tax sale, and who was deputy treasurer at the time of the conveyance to him, does not show fraud in the issuance of the tax deed.

2. When land is sold for taxes, the failure to serve upon the occupant notice of the expiration of the time for redemption, as required by Code, § 894, renders the tax deed invalid as to him.

3. Code, § 902, providing that no action for the recovery of land for the nonpayment of taxes shall lie, unless brought within five years after treasurer's deed is executed and recorded, does not apply, where the deed was issued without notice to the occupant of the expiration of the time for redemption, as required by section 894.

4. That the owner of a quarter section of land, only a portion of which was tillable, erected a house thereon, built fences, raised crops, and used a portion for pasture, shows that he was in "possession" (Code, § 894) of a portion thereof, which was sold for taxes, on which some of the breaking and fencing were, which was also pastured, and from which firewood and fence posts were cut.

5. Title to land sold for taxes so as to enable the occupant to maintain an action for its recovery may be based on adverse possession against a grantee of the state, who has complied with all the conditions entitling him to a patent, though the patent was not issued until just prior to the tax sale.

6. In an action to recover land sold for taxes, that the petition does not allege that plaintiff has paid all the taxes due on the land, as required by Code, § 897, cannot be raised for the first time on appeal.

Appeal from district court, Boone county; B. P. Birdsall, Judge.

Action in equity to have canceled a tax deed of real estate. There was a hearing on the merits, and a decree for the plaintiffs. The defendants appeal. Affirmed.

Crooks & Snell, for appellants. Whitaker & Dale, for appellees.

ROBINSON, J. The material facts shown by the pleadings and evidence are substantially as follows: In the year 1867, a Mrs. McMillian occupied the N. E. ¼ of section 7, in township 83 N., of range 26 W., in Boone county, under a claim of right, the nature of which is not fully shown; but it appears to have been made under the pre-emption laws of the United States. Michael Shelley purchased Mrs. McMillian's claim, and moved onto the land in April, 1868, and resided thereon with his family until his death, which occurred in the year 1878. The plaintiffs are his widow and children, and are entitled to all the property of his estate. They have made their home on the land continuously since his death. At a sale of the land for delinquent taxes, held in October, 1883, the N. E. ¼ of the N. E. ¼ of the section specified, known as lot 1, and containing nearly 40 acres, was sold for the delinquent taxes of the year 1882, to S. T. Stanfield. He assigned the certificate of sale to John Y. Smith, to whom a tax deed was issued July 21, 1887. In March, 1890, Smith executed a deed for the lot to W. H. Wright and Miles Beckett; in May, 1890, Beckett executed to W. H. Wright a quitclaim deed for the lot; and in March, 1893, the latter executed a warranty deed for it to his minor son, F. H. Wright. Beckett was treasurer of the county, and W. H. Wright was in his office as an employé and a delinquent tax collector of the county, when the tax deed was executed. Smith, Beckett, and the two Wrights are made parties defendant. The plaintiffs allege that, when Michael Shelley died, he was the absolute owner of the land; that the tax deed which was executed for it is void and of no effect, that it was obtained by fraud, and without any knowledge of it on the part of the plaintiffs, with the intent to deprive them of the ownership of the lot; that Beckett and W. H. Wright knew, when the tax deed was executed, that it was void. The plaintiffs ask that the tax deed, and the other deeds executed by the defendants to which we have referred, be decreed to be void, and for general equitable relief. The district court found that the plaintiffs are the owners of the lot, and that the tax deed was void, and rendered a decree according to the findings. The decree also provided for the redemption of the lot from tax sale, by the plaintiffs, and contained other provisions, which are not important to a determination of this appeal. The plaintiffs do not prove title to the lot from the general government to Mrs. McMillian, nor any title in

themselves, excepting as they show the claims of Mrs. McMillian, the purchase from her, and the occupation and improvement of the land by Michael Shelley and by themselves. It is shown, on the part of the defendants, that the state of Iowa patented the lot, with other lands, to the Des Moines Valley Railroad Company, on the 22d day of November, 1881, and that on the 28th day of January, 1882, the railroad company executed a deed for the lot to Charles E. Whitehead, trustee.

1. The petition does not state the facts which constitute the alleged fraud in the issuing of the tax deed. It is claimed in argument that Smith, in connection with what he did with the tax title, acted for Beckett and W. H. Wright. The only indications of fraud are the fact that Beckett was treasurer when the tax deed was made to Smith, and that Wright was employed in his office; that Beckett was deputy treasurer, and Wright was an employé of the office when the deed from Smith to them was made; and that, after the transfer by Beckett to Wright, the latter conveyed to his minor son. We do not think these facts establish fraud, and no further consideration need be paid to that branch of the case.

2. The lot was taxed for the years 1882 and 1883 in the name of C. E. Whitehead, and his name is set out in the record of the tax sale as its owner. It is not shown to whom it was taxed in the years 1886 and 1887. The notice of the expiration of the time in which to redeem from the tax sale was addressed to Charles Whiteside and Charles E. Whitehead, and was served only by publication in a newspaper. It was stated in the proof of service that no person was in possession of the lot, and no notice of the taking out of a tax deed was ever served upon the plaintiffs, nor upon any of them. We understand that the plaintiffs intend, by the averments of the petition, to charge that notice of the expiration of the time for redemption was not served upon them. They claim to have been in the actual possession of the lot when the notice was served, and at all times since the tax sale was made, and that they were entitled to notice, and that the tax deed was void for want of it. Section 894 of the Code relates to the notice required in such cases, and provides that, "after the expiration of two years and nine months after the date of sale of the land for taxes, the lawful holder of the certificate of purchase may cause to be served upon the person in possession of such land or town lot, and also upon the person in whose name the same is taxed, if such person resides in the county where the land is situated, * * * a notice signed by him, his agent, or attorney, stating the date of the sale, the description of the land or town lot sold, the name of the purchaser, and that the right of redemption will expire and a deed for said land will be made unless redemption from such sale be made within ninety days from the completed service thereof." This requirement is absolute, and a failure to observe it will afford ground for setting aside the tax deed. Bradley v. Brown, 75 Iowa, 180, 39 N. W. 258; Callanan v. Raymond, 75 Iowa, 307, 39 N. W. 511; Rice v. Bates, 68 Iowa, 394, 27 N. W. 286; Ellsworth v. Low, 62 Iowa, 179, 17 N. W. 450; Wilkin v. Wilkin (Iowa) 60 N. W. 194; Cornoy v. Wetmore (Iowa) Id. 246; Snell v. Railway Co., 88 Iowa, 444, 55 N. W. 310. When the required notice has not been given, section 902 of the Code, which provides that "no action for the recovery of real property for the non-payment of taxes shall lie unless the same be brought within five years after the treasurer's deed is executed and recorded," does not bar an action by the owner of the land to redeem. Slyfield v. Barnum, 71 Iowa, 245, 32 N. W. 270; Wilson v. Russell, 73 Iowa, 395, 35 N. W. 492; Hillyer v. Farneman, 65 Iowa, 227, 21 N. W. 578. The evidence satisfies us that Michael Shelley took actual possession of the land in controversy in April, 1868, that he held it continuously until his death occurred, and that his possession was continued by the plaintiffs until after the tax deed was executed. It is true that the dwelling house and appurtenant buildings were not on the lot in question, but they were on the quarter section of land of which the lot formed a part, and which was claimed by Michael Shelley. The quarter section was rough, and but a portion of it was tillable, but Shelley erected a house and built a fence upon it, planted an orchard, raised crops, and used a part of the land for pasture. After his death, the plaintiffs continued his possession, and constructed a new house and additional fences. Some of the breaking and some of the fencing were upon the lot in question, and it was pastured, and firewood and fence posts were cut therefrom. We are satisfied that the plaintiffs were in possession of it, within the meaning of section 894 of the Code, and should have been served with a notice of the tax deed. Callanan v. Raymond, 75 Iowa, 307, 39 N. W. 511; Ellsworth v. Low, 62 Iowa, 178, 17 N. W. 450; Brown v. Pool, 81 Iowa, 456, 46 N. W. 1069; Cahalan v. Van Sant, 87 Iowa, 594, 54 N. W. 433.

3. Section 897 of the Code provides that "no persons shall be permitted to question the title acquired by a treasurer's deed without first showing that he or the person under whom he claims title, had title to the property at the time of the sale, or that the title was obtained from the United States or from this state after the sale, and that all taxes due upon the property have been paid by such person, or the person under whom he claims title as aforesaid." It is claimed by the appellee that the land in question was a part of the grant made by act of congress for the improvement of the Des Moines river, and afterwards conferred

upon the Des Moines Valley Railroad Company, and that the title of the state in the land was divested January 1, 1871, under the rule of Whitehead v. Plummer, 76 Iowa, 181, 40 N. W. 709. It is not denied that the land was taxable for the year 1882. Michael Shelley and the plaintiffs had been in actual possession of the lot in question, under a claim of right which was sufficient to constitute color of title, for more than 16 years before the lot was sold for delinquent taxes. See Hamilton v. Wright, 30 Iowa, 484; Tremaine v. Weatherby, 58 Iowa, 620, 12 N. W. 609. It was held in Railway Co. v. Allfree, 64 Iowa, 501, 20 N. W. 779, that adverse possession may be based upon such a right or color of title, as against the grantee of the general government, even though the land had not been formally conveyed by it. That rule applies in this case. It is not definitely shown when the title to the land actually passed from the state, but it was prior to the time when the taxes for which the sale was made were levied, and may have been many years before. The possession and claim of the plaintiffs and Michael Shelley had continued, unquestioned by any one, so far as the record shows, for more than 19 years, when notice of the tax deed was given, and it does not appear to have been questioned, excepting by the claimants under the tax deed, at the time of the commencement of this action, nearly 26 years after the claim of title was made, and possession taken under it. We are of the opinion that these facts are sufficient to authorize the presumption that the plaintiffs had title to the lot when it was sold for the delinquent taxes of 1882. Paxton v. Ross, 89 Iowa, 664, 57 N. W. 428. That presumption has not been overcome by the defendants, and it must be regarded as conclusive in this case.

4. The petition does not allege that the plaintiffs or others have paid all taxes due upon the lot, and appellants insist that this is a fatal defect. The answer to this and similar claims in regard to the petition is that these alleged defects were not in any manner called to the attention of the district court, and they must therefore be deemed to have been waived. Lynn v. Morse, 76 Iowa, 671, 39 N. W. 203; Seymour v. Shea, 62 Iowa, 711, 16 N. W. 196; Mann v. Taylor, 78 Iowa, 361, 43 N. W. 220; Pitts v. Lewis, 81 Iowa, 54, 46 N. W. 739; Linden v. Green, 81 Iowa, 366, 46 N. W. 1108; Dunn v. Wolf, 81 Iowa, 690, 47 N. W. 887. We conclude that the plaintiffs are entitled to redeem from the tax sale in question, and the decree of the district court is therefore affirmed.

SWITZER v. DAVIS et al.

(Supreme Court of Iowa. Feb. 7, 1896.)

PARTY WALL—CONSTRUCTION OF STATUTE—APPEAL.

1. Code, § 2019, providing that the owner of a lot in a city or town, and being "about to build" thereon contiguous to his neighbor's lot, may, if there is no wall between them, rest one-half the wall for his building, if of brick or stone, on the neighbor's lot, does not authorize the building and maintenance of a stone wall, half on the lot of a neighbor, by one who simply "intends" to build a brick superstructure thereon.

2. Where there is but one issue of fact made by the pleadings, and appellant assigns as error that the evidence is insufficient to sustain the decision of the trial court, it will be assumed on appeal that such issue was determined against the appellant.

Appeal from district court, Clinton county; B. P. Wolfe, Judge.

The plaintiff is the owner of lot 5, and the defendant Margaret Davis is the owner of lot 6, in block 14, in the city of Clinton, Iowa. These lots are contiguous, and the defendants have erected a stone wall on the line between the lots, 18 inches in thickness, so that one-half thereof rests on the land of the plaintiff. This wall, to the height of the surface of the ground, was built in April, 1892, and it so remains to this time. On the plaintiff's lot is her house, occupied as a homestead; and this action is brought to enjoin the defendants, who are husband and wife, from maintaining the wall where it is, and for damage for the wrongful act of placing it where it is. The defendants justify the act of placing the wall where it is under the law providing for walls in common, and stating that the wall was placed there when the defendant Margaret Davis was about to erect on her lot a one-story brick building, and that at the time of erecting said stone wall she intended, and that she still intends, to erect on said wall a party wall of brick at least one story in height, under the provisions of the law as to such walls. The plaintiff, by way of reply, denies the averments of good faith and intention to build such wall, and avers the acts of the defendants to be intentionally wrong and malicious, and denies the validity of the law under which it is claimed that the wall is placed there. The cause was tried without a jury, and judgment given for the plaintiff. The defendants appealed. Affirmed.

Walsh Bros., for appellants. Chase & Seaman and E. S. James, for appellee.

GRANGER, J. Two propositions are presented on the appeal: First, whether or not the facts bring the defendants within the provisions of the law as to walls in common, so as to justify the act of placing the wall on the line; and, second, the validity of the act granting such a right.

It seems that the court below thought the act unconstitutional, but the record does not disclose its finding as to the other proposition, which is largely one of fact. If we should differ with the court below, and hold the law valid, we could not for that reason reverse the judgment, if it had support in the second proposition; that is, if the facts did not bring the defendants within the pro-

visions of the law. Hence, for appellants to succeed in this court, both propositions must be determined in their favor. The law must be held valid, and the facts must bring them within its provisions. If, however, they are not within its provisions, the question of the validity of the law is of no importance in this case; and if this is true it is better to leave the question of the validity of the law for consideration in a case in which it is really involved.

The law under which defendants justify their acts is as follows (Code, § 2019): "In cities and towns and other places surveyed into building lots, the plats whereof are recorded, he who is about to build contiguous to the land of his neighbor, may if there be no wall on the line between them, build a brick or stone wall at least as high as the first story, if the whole thickness of said wall above the cellar wall does not exceed eighteen inches, exclusive of the plastering, and rest one-half of the same on his neighbor's land; but the latter shall not be compelled to contribute to the expense of said wall." It will be seen that the right to build a wall in common is limited to one "who is about to build contiguous to the land of his neighbor." The contention is as to the word "about." It is not enough that one "intends" to build, to have such a right. He must be "about" to build. "About," as defined, means "nearly, approximately, almost." It seems to us that appellants' pleadings, to a great extent, settle this proposition against them. In an amendment to their answer filed as late as June 18, 1894,—more than two years after the commencement of the wall,—it is stated only that Margaret Davis "intends" to erect on said wall "a party wall of brick." The right to take the land of another does not depend on such a purpose. It rests on the fact that a building is "about" to be erected, the wall of which may be placed on the line. There is some testimony that the defendants have again commenced the work, and intend to continue it until the wall is completed. We must assume that the court found the facts against them, necessary to bring them within the statute. The parties are in contention as to this fact, because the court specified its finding as to the validity of the law, and said nothing on the question of fact, and gave judgment for plaintiff. As we have said, in no way can appellants have a reversal, except both propositions are determined in their favor. It is a law action, as tried, and defendants pleaded the law in justification, and they have the burden of showing themselves within its provisions. If the district court disregarded that issue, then it has not been tried; and in a law action, on appeal, it cannot be tried anew in this court. No assignment of error brings such an action of the court in question, and we can only consider errors upon assignment. It is more consistent to assume that the court found upon the issues submitted, where the contrary does not appear, so as to bring the case within the errors assigned. An assignment of error presents the question of the sufficiency of the evidence to sustain the findings of the court. That could only refer to the issue as to a compliance with the law, for that is the only issue of fact in the case.

The appellants also argue the assignments as to the evidence in a reply, all of which indicates that the proposition is properly before us for consideration. Assuming that the court found the facts against the defendants, the finding has support in the evidence. There is a strong showing of a want of good faith, if not of malice. The judgment is affirmed.

O'LEARY et al. v. MERCHANTS' & BANKERS' MUT. INS. CO.

(Supreme Court of Iowa. Feb. 7, 1896.)

FIRE INSURANCE—CONDITIONS OF POLICY—OTHER INSURANCE.

Where a fire insurance policy provides that it shall be void if the assured contracts other insurance on the property without consent in writing indorsed on the policy by the company, and the assured procures additional insurance without such indorsement, the policy is void.

Appeal from district court, Iowa county; S. H. Fairall, Judge.

Action to recover the sum of $500 upon a fire insurance policy. Trial by jury. Verdict and judgments for the plaintiffs. Defendant appeals. Reversed.

James A. Howe and Read & Read, for appellant. Thomas Stapleton and T. S. Kitchen, for appellees.

ROTHROCK, J. The policy of insurance upon which the action was brought was issued by the defendant to O'Leary & Plank on the 24th day of May, 1888. Afterwards Plank assigned his interest in the policy to O'Leary & Bro. This assignment was assented to by the defendant, by the proper indorsement in writing as required by the policy. The property insured consisted of a stock of farm implements, wagons, buggies, and other merchandise. The property was destroyed by fire in December, 1891. After the fire, O'Leary & Bro. assigned their claim against the defendant to the Staver & Abbott Manufacturing Company, one of the creditors of the insured. These transfers have no particular significance, more than that the action appears to be maintained for the benefit of the last-named company. The policy provided that the contract of insurance should become void if the assured contracted other insurance on the property without consent in writing indorsed on the policy by the company. And it further provides that no agent of the company has any authority to waive, modify, or erase any of the printed conditions of the contract. It appears that O'Leary & Bro. afterwards insured the

property in other companies, to the extent of $1,500, without complying with the foregoing provision of the contract. The policy was not sent to the general office of the company for its indorsement consenting to the additional insurance, and no reason is shown in this whole record why the consent of the company was not obtained in the manner provided for in the contract. It is not claimed that the clause in the contract in reference to additional insurance was in any manner concealed, or that the plaintiffs did not know that they contracted that they would not procure additional insurance without obtaining the required indorsement. On the contrary, it would seem, from the fact that the plaintiffs sent in the policy, and procured the consent to the change of ownership by an indorsement in writing, that they were fully advised of the terms of the contract.

The plaintiffs claim that they procured the consent by writing a letter to the company, and that they received a letter in reply, from the secretary, consenting to the additional insurance. Neither of these alleged letters, and no copies thereof, were produced on the trial. O'Leary and his brother both testified, as witnesses, to the contents of the alleged letters. The secretary of the company testified that he neither received nor answered such a letter. It is contended in behalf of appellant that, although there may be a conflict in the evidence as to whether a letter was written and answered, the evidence did not show a compliance with the contract on the part of the plaintiffs. This is the main question in the case, and we think the court should have sustained objections to the evidence, and should have instructed the jury that, under the undisputed facts in the case, the plaintiffs were not entitled to a verdict, because they did not comply with their contract. There is no principle of law which sanctions any such a failure to abide by a contract of insurance. It will be observed that this question does not involve a waiver of proofs of loss, or of holding the company liable for the acts of its agents in effecting insurance. And there ought to be no question that an insurance company has the right to so contract as that its liability consequent upon a change in the contract shall be in writing. These views are supported by the following cases: Zimmerman v. Insurance Co., 77 Iowa, 685, 42 N. W. 462; Kirkman v. Insurance Co. (Iowa) 57 N. W. 952; Hankins v. Insurance Co. (Wis.) 35 N. W. 34; Cleaver v. Insurance Co. (Mich.) 32 N. W. 660; Insurance Co. v. Watson, 23 Mich. 486; Smith v. Insurance Co. (Vt.) 15 Atl. 353; Gladding v. Insurance Co. (Cal.) 4 Pac. 764. It is true that the secretary of an insurance company is an agent clothed with greater authority than adjusting or soliciting agents, but it is not an unreasonable requirement that the policy holder should comply with his contract, in a matter of such importance as procuring additional insurance; and the reason of such a rule is exemplified in this case by the fact that when the fire occurred the insurance on the property was about equal to its value. As this disposition of the case leads to a reversal, other alleged errors need not be considered. Reversed.

SANGER v. SKIDMORE.

(Supreme Court of Iowa. Feb. 10, 1896.)

APPEAL—DISMISSAL.

A case presented, on bill of exceptions and argument, for review of a refusal of mandamus, will be dismissed, the record not showing that an appeal was taken from the judgment of the lower court.

Appeal from district court, Decatur county; W. H. Tedford, Judge.

This appears to be an action of mandamus to compel the defendant, who is president of the board of directors of a school district, to approve a contract for teaching a school. The court refused the mandamus, and the case is presented to this court for review.

Curry & McGinnis, for plaintiff.

ROTHROCK, J. The case is presented here upon what purports to be a bill of exceptions and an argument in behalf of plaintiff. It does not appear from the record that an appeal was taken from the judgment of the district court, and the case is dismissed.

FARWELL v. DES MOINES BRICK MANUF'G CO. et al.

(Supreme Court of Iowa. Feb. 11, 1896.)

MUNICIPAL CORPORATIONS—ASSESSMENTS—EXEMPTIONS—LANDS USED FOR AGRICULTURAL PURPOSES—TAXES FOR CITY PURPOSES—WHAT CONSTITUTE — PERSONAL JUDGMENT AGAINST OWNER — DEED—DELIVERY.

1. In an action to set aside certain paving assessments on 100 acres of land within the city limits of Des Moines, it appeared that 95 acres were on one side of the street, and 5 acres were on the other side; that, before the street was laid out and paved, the land had all been fenced in one field; that since, it has been occupied and used, in fact, for agricultural purposes; that plaintiff paid about $600 per acre for it; that its location was favorable for the purpose of being platted as city lots; that in its immediate neighborhood the whole territory was divided into city lots, blocks, streets, and alleys; and that on such street and other streets in the vicinity, are water mains and public lights. *Held*, that such land has not been "in good faith" occupied and used by plaintiff for agricultural purposes, within Acts 23d Gen. Assem. c. 1, § 3, providing that no lands within the extended limits of such city which shall not have been laid off into lots of 10 acres or less, and which shall also in good faith be used for agricultural purposes, shall be taxed for any city purposes, etc.

2. Special curbing and paving assessments are not taxes "for any city purposes," within the meaning of Acts 23d Gen. Assem. c. 1, § 3, providing that no lands included within the ex-

tended limits of a city, not laid off into lots, and which shall in good faith be used for agricultural purposes, shall be taxable for any city purposes, etc.

3. A deed of land within the city limits of Des Moines was dated May 19, and filed for record June 17, 1893. *Held*, that the facts that the grantee resided in Chicago and the grantor in Rock Island were not sufficient to overcome the presumption that the deed was delivered when it was made.

4. Code, § 478, providing that charges for public improvements in a city, "when assessed shall be payable by the owners at the time of the assessment personally, and shall also be a lien upon the respective lots or parcels of land from the time of the assessment," was not repealed by implication by Acts 21st Gen. Assem. c. 168, § 13, providing that such assessments shall be a lien on the property abutting on the street or streets on which any such improvement is made, from the commencement of the work, and shall so remain until fully paid.

5. In an action by a nonresident to cancel certain paving assessments, plaintiff stated in his petition "that he is willing and hereby offers to pay any and all legal assessments of taxes, for city or other purposes, upon said land, or for which said land may be legally assessed." *Held*, that such tender justified a personal judgment against plaintiff for the amount found to be legally due, regardless of any statute providing for a personal liability.

Appeal from district court, Polk county; S. F. Balliet, Judge.

Action in equity to set aside certain curbing and paving assessments, and the certificates issued thereon. Decree for defendants, and plaintiff appeals. Affirmed.

Barcroft & McCaughan, and Gatch, Connor & Weaver, for appellant. Guernsey & Bailey, Cummins & Wright, and J. K. Macomber, for appellees.

KINNE, J. 1. Prior to 1885, John A. Elliot owned the north fractional half of section 1, in township 78, range 24, west fifth P. M. Thereafter, the state fair grounds were located east of the city of Des Moines, and, for the purpose of affording ready access to the same, the board of supervisors of Polk county, in 1885, established Grand avenue as a consent road 160 feet wide through said land. Several parcels of this land were platted by Elliot and others as additions to the city, and the balance was, in the fall of 1885, conveyed to J. W. McCabe, who, about three years later, conveyed it to L. S. McCabe, and he, in turn, by deed dated May 19, 1893, and which was filed for record on June 17, 1893, conveyed this land, consisting of abut 95 acres, to the plaintiff, Farwell. In this deed was the following provision: "It is expressly understood that the grantor herein excepts, from the covenant of warranty and against incumbrances, judgment and mortgage liens, accrued interest thereon, the tax for 1892, and the curbing tax,—in all, not exceeding $5,300; also excepting taxes for 1893, and claim or lien for paving." In 1888, two parcels of the land, situated near the center of the tract bought by McCabe, were conveyed to Crosswaits. By the provisions of chapter 1 of the Acts of the 23d General Assembly, which took effect by publication on March 14, 1890, the corporate limits of the city of Des Moines were extended, and its territory increased to 54 square miles. It had formerly embraced only 8 square miles. This act is commonly known as the "Annexation Act." At the time this act took effect, McCabe owned this 95 acres of land. In 1891, the city council ordered Grand avenue improved by paving and curbing, and the work was done, and the cost assessed against the adjacent land. The work had been completed prior to the time plaintiff purchased the land, but the cost of it had not then been assessed. The amount of these assessments as fixed in the decree of the district court, and, including interest and collection fees, is $16,822.75, of which sum $2,088.50 was for curbing and $14,734.25 was for paving. The street, thus improved runs east and west through the plaintiff's land. Plaintiff claims that, under the law, this land was not liable for the cost of making these improvements, and brings this action to cancel said assessments, and the certificates issued in pursuance thereof; and, at the same time, he tendered and offered to pay "any and all legal assessments of taxes, for city or other purposes, upon said land, or for which said land may be legally liable." In this action the contractors for the improvements were made defendants. These contractors filed counterclaims, based upon the assessment certificates, upon which judgments were entered in their favor. A personal judgment was also, in effect, ordered against the plaintiff for the amount of the special assessment for paving, and plaintiff's bill was dismissed, and he appeals.

2. The annexation act, heretofore spoken of, and by virtue of which the land now owned by the plaintiff was incorporated into the city of Des Moines, contained the following provision: "Sec. 3. No lands included within said extended limits of such city, which shall not have been laid off into lots of ten acres or less, or which shall not subsequently be divided into parcels of ten acres or less, by the extension of streets and alleys or otherwise, and which shall also in good faith be occupied and used for agricultural or horticultural purposes, shall be taxable for any city purpose, except that they may be subjected to a road tax to the same extent as though they were outside the said extended limits, and which road tax shall be paid into the city treasury." Acts 23d Gen. Assem. c. 1. The first question for consideration is, has the land in controversy been, in good faith, occupied and used for agricultural or horticultural purposes, within the meaning of the statute? That it has been, in fact, used for agricultural purposes, and so occupied, is so fully established as to need no further consideration. The contention is that the occupancy and use have not been, in good faith, for agricultural purposes. Now, what is meant by a good-faith use and

occupancy for the purposes mentioned? Manifestly, it means something more than mere actual occupancy and use for the purpose mentioned; else there would have been no occasion for the use of the words "in good faith." The occupancy and use must be in good faith. So, if the plaintiff acquired title to this land for purposes of speculation, with the intention of laying it out into lots, and selling the same, an occupancy or use of the land, temporarily, for farming purposes, would not be in good faith for such purposes, within the contemplation of the statute. If, however, his main purpose in making the purchase of this land was to use it for ordinary agricultural purposes, and so far it has been thus used and occupied, then we should say such use and occupancy had been, and was, in good faith. It becomes, then, a question of the intent of the owner, which must be gathered from what he has done and said, if anything; from the circumstances surrounding the purchase; the amount paid, in view of what might reasonably be expected to be realized from its use for agricultural purposes; and other facts and circumstances which may go to show the situation, surroundings, and peculiar adaptability of the property for certain purposes or uses, and tending to show the purpose for which it was purchased and is held. Hence, a mere temporary occupation and use for agricultural purposes, until such time as the real object of the purchase can be attained, would not be a good-faith occupancy and use, within the contemplation of the statute. In the light of the above suggestions, we turn to the record, to discover, if possible, the intent with which this land was purchased and is held by the plaintiff. When Grand avenue was laid out through this land, there was left about 5½ acres of the land south of the highway, and about 95 acres north of it. Before the highway was established, the entire tract had been fenced in one field. The tract north of Grand avenue is about 1,750 feet north and south, and about 1,887 feet in length. The other tract varies in depth from 155 to 157 feet, and extends along the street for a distance of 1,506 feet. When the highway was laid out, in 1886, it was done at the instance of the then owners of this land. The only buildings then on the land consisted of a house and barn. McCabe, who bought this land in 1885, clearly shows, by his testimony, that he did not purchase it with a view to its use or value for purposes of agriculture. He says: "I bought it because I believed it was valuable for some other purpose than to be used agriculturally. I thought it could be used for platting purposes, or cropping purposes, or some other purpose, because it was adjacent to the city. I did not buy it because it was good agricultural land, and could be used for that purpose. I bought it because it was close to Des Moines." He claims, however, that in his absence, and without his authority, his agent caused this land to be platted. He says: "I did not record it, because we did not consider it good policy to do it. We were not ready to sell the lots, and I did not record it." He kept the land about three years, and then sold it to his brother, for $300 per acre, the same price he had paid for it. Now, if this man still held this land, it would hardly be claimed that he occupied and used it in good faith for agricultural purposes. It is true that the intention with which he purchased and held it is not determinative of the character of the purchase and holding of the plaintiff, but it is proper to be considered, as showing the history of the land, how it had been treated and held by owners prior to the plaintiff. Now, what was plaintiff's intention as to this land? He paid about $600 per acre for it. True, he traded a stock farm for it, but it is conceded that the actual consideration was from $50,000 to $60,000. We do not think that Farwell should be bound by Harding's testimony as to his (Farwell's) intent, for it appears that Harding was the agent for the seller in the negotiations which led up to the trade. Now, it is clear that Farwell would not make such a purchase without expecting to realize a profit out of the transaction. We think, also, it should be presumed that Farwell knew all of the facts touching this land which were matters of public notoriety, as well as those matters which appeared of record. He knew, then, that the land, for agricultural purposes, would pay practically nothing upon the amount he had invested therein. He knew of its favorable location for the purpose of being platted and sold as city lots. He must be presumed to have known, what the records showed, that this tract was bounded on all sides, except on the south, by laid-out streets, and on the south by an alley; that numerous streets abutted upon it; that, lying near it, on the north, were the platted additions of Fairview and Hyde Park; that, east and southeast of it, were platted additions, also the fair grounds; that south, southwest, west, and northwest of it the ground was nearly all laid out into lots and blocks, and platted. In other words, for half a mile north and east, and for miles south and west, of this land, substantially the whole territory is subdivided into city lots, blocks, streets, and alleys. On Walnut street, only a block and a half south of this land, is a line of electric railway, extending from the fair grounds to the center of the city, and on the same street, and other streets in the vicinity, are water mains and public lights. Near by are public schools. The territory in the vicinity of this land—especially south, southwest, and southeast of it—is much occupied by dwellings, stores, and factories. As appears by his deed, he had actual knowledge, when he made his purchase, that Grand avenue had been curbed and paved through this land. He knew

that such improvements were not ordinarily made through purely agricultural land, and as well knew that such improvements would only enhance the value of the land when utilized for city purposes. We think the facts are such as to warrant the conclusion that plaintiff did not purchase this land with the intention of thereafter devoting it to agricultural uses, but such use was a mere temporary incident of the purchase, and to be continued until the land could be made available for the real use for which he acquired it, viz. selling it, in small tracts, for urban purposes. It is said in Fulton v. City of Davenport, 17 Iowa, 404, "Difficult as the task will be, it is apparent that every such case will have to be determined upon its own peculiar circumstances, without regard to any definite or fixed rule, and herein, doubtless, the decision in some instances will appear quite arbitrary, and, perhaps, unsatisfactory." In Brooks v. Polk Co., 52 Iowa, 461, 3 N. W. 494, it is said, "Indeed, adjudicated cases aid but little in the determination of questions of this character, when no two cases can be found precisely similar in their facts." It may be profitable, however, to notice briefly some of our decisions relating to the liability of farm property to municipal taxation. In 1876, the legislature passed an act authorizing cities to extend their limits. It contains a section, in substance identical in language with section 3 of the annexation act. Acts 16th Gen. Assem. c. 47. Several cases have arisen and been determined since that act was passed. Not all of them, however, arose under the act. In Brooks v. Polk Co., supra, the question as to the taxation of land for municipal purposes arose as to land originally included within the city limits. That case, as to the actual use of the land and its surroundings, is much like the one at bar. The rule laid down in Fulton's Case, that "when the proprietors of undivided town property, being locally within the corporate limits, hold such close proximity to the settled and improved parts of the town that the corporate authorities cannot open and improve its streets and alleys, and extend to the inhabitants thereof its usual police regulations and advantages, without incidentally benefiting such proprietors in their personal privileges and accommodations, or in the enhancement of their property, then the power to tax the same arises," was approved, and it was held that the property was taxable. In Winzer v. City of Burlington, 68 Iowa, 281, 27 N. W. 241, a case which arose under the act of the 16th general assembly, it appeared that the land had been used and occupied for agricultural purposes, and that it was not held for speculative purposes, and it did not appear that it was adapted to be subdivided into lots. It was held that its use, under such circumstances, was in good faith under the statute. In Tubbesing v. City of Burlington, 68 Iowa, 691, 24 N. W. 514, 28 N. W. 19, a case not arising under the act of the 16th general assembly, the Brooks Case was followed. In Leicht v. City of Burlington, 73 Iowa, 31, 34 N. W. 494, in which was involved the constitutionality of the act of the 16th general assembly, it was said that "the design of the legislature evidently was to exempt property which is used essentially for agricultural purposes." Perkins v. City of Burlington, 77 Iowa, 554, 42 N. W. 441, followed the Brooks Case. In no case, however, has the meaning of the words "in good faith," as used in the statute, been fully considered. Counsel for appellant contend that the legislature, by the provisions of the annexation act, intended to extend the exemption which the courts had recognized prior to the passage of the act of the 16th general assembly. We do not think that is correct. The fact is that the act of the 16th general assembly, as well as the section of the annexation act under consideration, narrows the former rule as to exemptions, by creating additional tests by which the right to the exemption is to be determined. It will serve no useful purpose to discuss all of the cases decided by this court wherein the right of a municipal corporation to tax what was claimed as farm land has been considered. So far as they can be said to be applicable to the question before us, they sustain the conclusions which we have reached. Morford v. Unger, 8 Iowa, 82; Butler v. Muscatine, 11 Iowa, 433; Langworthy v. Dubuque, 13 Iowa, 86, 16 Iowa, 271; Davis v. Dubuque, 20 Iowa, 458; Buell v. Ball, Id. 282; Hershey v. Muscatine, 22 Iowa, 184; Deeds v. Sanborn, Id. 214, 26 Iowa, 419; O'Hare v. Dubuque, 22 Iowa, 144; Delman v. Ft. Madison, 30 Iowa, 542; Durant v. Kauffman, 34 Iowa, 194.

3. Is a special assessment for paving or curbing a street taxation for "any city purpose," within the meaning of section 3 of the annexation act? Appellant contends that this court has so recognized it. It is true that in Sears v. Railway Co., 39 Iowa, 417, a sewer is, by way of argument, included in the list of objects for which a municipal tax may be levied. No doubt, the writer had in mind section 465 of the Code of 1873, which authorized cities to construct sewers and pay for the same out of the general fund. It is said that in Warren v. Henly, 31 Iowa, 31, the doctrine is recognized that special assessments for the improvement of streets are to be deemed taxes for city purposes. We do not think that case is properly open to the contention that it holds such special assessments are in the nature of general corporate taxes. In Tuttle v. Polk, 84 Iowa, 12, 50 N. W. 38, in considering an act of the legislature wherein a special assessment is also spoken of as a tax, it is said, "It is well to remember that a special assessment for street improvements is now regarded everywhere as a tax, and subject to the same rules, in many respects, as ordinary taxation for revenue." And an assessment denomi-

nated by statute as a "special tax" is covered by an agreement in a lease "to pay all taxes." Cassady v. Hammer, 62 Iowa, 361, 17 N. W. 588. In the same case, however, the court says: "We are aware that it has been held that a statute providing for the exemption of a certain class of property from taxation does not exempt from assessment for local improvements. An exemption from taxation being an exception, it is strictly construed." Whether the sum to be raised to pay for curbing and paving a street, and which is assessed against the property of the adjacent owner, be called a special assessment or a tax, is not very material for the purposes of this inquiry. The question is, is it to be treated, under this statute, as a tax "for any city purpose"? That it is a tax, in the sense that the right to impose such a burden is based upon the power of taxation, there is no doubt. But that it should be so treated in a statute which exempts certain property from taxation "for any city purpose" is quite another question. No doubt, some confusion has arisen from the use of the words "tax," a "special tax," and a "special assessment," in various cases, to indicate the same thing. Section 495 of the Code of 1873 requires the city council to certify to the auditor the percentage of "tax levied for all city purposes," which "tax for municipal purposes" the county treasurer is to collect and pay over to the city. Section 496 limits the amount thus certified, assessed, and collected for all general and incidental purposes to 10 mills on the dollar. Now, if special assessments for curbing and paving are to be deemed "taxes for all city purposes," it would follow that the entire amount of general taxes and special assessments to which property could be subjected would be 10 mills on the dollar, and that it must all be collected by the county treasurer, nor could such special assessments be transferred by the city to others. That the "tax for all city purposes" does not include special assessments is clear, because, by section 460, the city is given the power to pave and curb streets, and to levy a special tax therefor upon the abutting property, and this assessment it may assign to the contractor. Code, § 478. And it may collect it by proceedings in court. Code, §§ 478, 479. Or it may certify it to the auditor for collection by the county treasurer. Code, § 481. It being, then, clear that the words used in the Code, "tax levied for all city purposes," do not include special assessments, why should we say that the words "taxable for any city purpose," in the annexation act, should be held to include special assessments? The language of the Code is as broad as that of the act referred to. Taxation is the rule, and exemption the exception; therefore, strict construction of the statute under which the exemption is claimed is also the rule. Sioux City v. Independent School Dist. of Sioux City, 55 Iowa, 152, 7 N. W. 488; Cassady v. Hammer, *supra*; Dunlieth & D. Bridge Co. v. Dubuque, 32 Iowa, 427. It was held in the case first above cited that a provision that the property of a school district is "not to be taxed" will not exempt such property from a special assessment, unless, from the entire statute, it is clear that such was the legislative intent. A brief reference to cases from other states may be profitable. It is the almost universal rule that a general exemption from taxation will not extend to and embrace special assessments. Cooley, Tax'n, p. 207; 2 Desty, Tax'n, 1248, 1249; Welty, Assessm. §§ 169, 170; 25 Am. & Eng. Enc. Law, 160, 495; 2 Dill. Mun. Corp. §§ 777, 778; 2 Beach, Pub. Corp. §§ 1172, 1173; Burroughs, Tax'n, p. 461; Elliott, Roads & S. 370. In the following cases the language quoted was held not to include assessments for local improvements: "Taxed by any law of the state," In re Mayor, etc., of New York, 11 Johns. 77; "All public taxes, rates and assessments," Buffalo City Cemetery v. Buffalo, 46 N. Y. 506; "All and every county, road, city and school tax," Northern Liberties v. St. John's Church, 13 Pa. St. 107; "Exempt from taxation of every description," Canal Trustees v. City of Chicago, 12 Ill. 403; "Exempt from all taxation by state or local laws for any purpose whatever," Zabel v. Louisville Baptist Orphans' Home (Ky. App.) 17 S. W. 212; "Taxes, charges and impositions," President, etc., of Paterson v. Society for Establishing Useful Manufactures, 24 N. J. Law, 385; "Charges and impositions," State v. Mayor, etc., of Newark, 27 N. J. Law, 185; "Any tax or public imposition whatever," Mayor, etc., of Baltimore v. Proprietors of Green Mountain Cemetery Co., 7 Md. 517; "A tax on franchises in lieu of all other taxes," Bridgeport v. New York & N. H. R. Co., 36 Conn. 255; "All taxes either by state, parish or city," City of Lafayette v. Male Orphan Asylum, 4 La. Ann. 1; "Taxation of every kind," Sheehan v. Hospital, 50 Mo. 155; "Exempt from taxation," Boston Seaman's Friend Soc. v. Boston, 116 Mass. 181, Roosevelt Hospital v. Mayor, etc., of New York, 84 N. Y. 108; "Taxes of every kind," Illinois Cent. R. Co. v. City of Decatur, 126 Ill. 92, 18 N. E. 315; "All taxation," Winona & St. P. R. Co. v. City of Watertown (S. D.) 44 N. W. 1072. See, also, Worcester Agricultural Soc. v. Worcester, 116 Mass. 189; Hassan v. City of Rochester, 67 N. Y. 528. In view of the above and many more authorities which might be cited, we think there can be no doubt that the clause in the act under consideration does not exempt plaintiff's property from these special assessments for curbing and paving. While all such assessments are in a sense taxes, they are in no proper sense taxes or special assessments "for any city purpose." While it is true that all citizens of the city may use these improvements, and hence may be said to be to such extent benefited by them, and while the benefits derived from them do not all attach to the adjacent property, still, they are not treated by our law as taxes for strictly city purposes. The taxes

referred to in the act are what we speak of as general corporation taxes,—that is, burdens imposed upon all property and property owners for general corporation purposes. These burdens, which plaintiff seeks to escape, are not such as are imposed for general corporation purposes. They are special and local in character. They may exist in one part of the city, and never be imposed in another part.

4. Is plaintiff personally liable for the amount of the paving assessment? Many reasons are urged to show that he should not be held so liable. It is said that there is nothing to show that plaintiff was the owner of the property when the assessment was made. Farwell filed his deed for record June 17, 1893. It was executed May 19, 1893. It is hardly necessary to cite authorities to the effect that the presumption is, in the absence of evidence to the contrary, that this deed was delivered when it was made. It is not enough, to overcome such presumption, to show that Farwell resided in Chicago and the grantor in Rock Island. It is not to be presumed that, in a deal involving property worth from sixty to ninety thousand dollars, the purchaser was not represented at Rock Island, either in person, or by some one authorized to act for him. In law, then, we must assume that the deed was delivered on the 19th day of May, 1893. The act of the council in making the assessment occurred on June 12, 1893. All other acts which led up to this assessment were preliminary. It is said that there was no ordinance of the city making the landowner personally liable for such assessments. The personal liability is created by the statute. It provides, "Such charge, when assessed shall be payable by the owners at the time of the assessment personally, and shall also be a lien upon the respective lots or parcels of land from the time of the assessment." Code, § 478. It is claimed that this statute has been repealed. Reliance is placed upon section 13 of chapter 168 of the Acts of the 21st General Assembly. It provides: "Said assessments with interest accruing thereon shall be a lien upon the property abutting upon the street or streets on which any such improvement is made from the commencement of the work, and shall remain a lien until fully paid * * *: Provided that such lien shall be limited to the lots bounding or abutting on such street or streets, and not exceeding in depth therefrom one hundred and fifty feet." A similar provision is found in the Acts of the 23d General Assembly (chapter 14, § 12). Section 17 of the same act provides that "any owner of any lot or lots * * * assessed for payment of costs of any such improvement, who will not promise or agree in writing, as provided in section 16 hereof, shall be required to pay his assessment in full when made, and the same shall be collectible by or through any of the methods provided by law for the collection of assessments for local improvements, including the provisions of this act." Similar provisions are found in section 18 of chapter 168, Acts of the 21st General Assembly. The claim is made that, as in these acts subsequent to the Code no express provision is made for personal liability, therefore the provision of the Code is repealed, by implication. We fail to find in these subsequent acts anything repugnant to the provision of the Code which makes the landowner personally liable for such assessments. It seems to us these subsequent provisions are perfectly consistent with the intent to preserve a personal liability against the owner.

5. The decree in this case provides that, after a sale of that part of this land subject to the assessment, a general execution may issue against the plaintiff for the balance remaining unpaid. It is contended that, if the statute authorizes such a decree, it is in conflict with the second clause of section 1 of article 14 of the constitution of the United States. We do not find it necessary to determine that question. Plaintiff, in his petition filed in this action, made the following tender: "Plaintiff says that he is willing, and hereby offers, to pay any and all legal assessments of taxes, for city or other purposes, upon said land, or for which said land may be legally assessed." Now, we find that the assessment was legal,—that the land was liable for these local improvements. If plaintiff's offer means anything, it is a proposition to pay these assessments. It is, in effect, a tender and offer to pay whatever may be adjudged legally assessable against the land. Such an offer justified a personal judgment for the amount found to be due, regardless of the statute providing for a personal liability. Corbin v. Woodbine, 33 Iowa, 301.

6. Several other objections are made to these assessments. We have examined all of them, and discover no such irregularity in the proceedings as justifies us in disturbing the decree rendered by the district court. It is claimed that to impose the burden of these assessments upon plaintiff and his land will work a great injustice. The imposition of burdens for local improvements not infrequently results in a practical confiscation of the property sought to be benefited. Nevertheless, such improvements are necessary. In this case, however, plaintiff, by the very terms of his deed, took this land charged with actual knowledge of these assessments, and was bound to know that they were a charge upon this property. He was not deceived. Whatever injustice there is in the practical effect of laws which permit such improvements to be made and the cost thereof to be liens upon the abutting property, plaintiff is in no situation to complain, as he assumed voluntarily the very burdens which in this proceeding he is seeking to avoid. After a careful consideration of all of the questions raised, we conclude that the decree below should be affirmed.

DEAN v. TOWN OF SOLON.

SAME v. MAHER, County Treasurer.

(Supreme Court of Iowa. Feb. 11, 1896.)

TAXATION—MANUFACTURER—COUNTY ENTITLED TO TAX.

1. Under Code, § 816, providing that the average value of personal property held to increase the value thereof by manufacturing shall be listed for taxation, and that the value shall be estimated upon those materials only which enter into the manufactured product, the lessee of a creamery and its appliances is required to list for taxation the average value of the material used in making butter.

2. Under Code, § 806, providing that, when a person is doing business in more than one county, the property existing in one of the counties shall be taxed in that county, the capital invested by a manufacturer residing in one county, but doing business in another, is taxable in the latter county, though the business was temporarily suspended during a part of the year, and the property used in carrying on the business, but not the property assessed, was removed to the county where the residence was located.

Appeals from district court, Johnson county; M. J. Wade, Judge.

The first-entitled case, involving less than $100, comes to us on the certificate of the trial judge, and the following are facts presented therein: "The plaintiff is, and for many years last past has been, a resident of the town of Tipton, Cedar county, Iowa. Since the year 1887 he has been operating a creamery in the town of Solon, Johnson county, Iowa. He did not own the creamery, nor the tools and fixtures used in operating the same, but has rented the same, all together, under written leases, for a term of one year, with a privilege of three years; and since 1887, and during the years 1892 and 1893, he has been operating the same in about the same manner each year, and contemplates a continuance thereof, commencing operations about April, and closing operations about November. During the period from April to November, he was engaged in buying and collecting cream, and in manufacturing butter at said creamery, and had more or less capital invested in the business. He closed in November because there was not cream enough to pay to run the business, but did not give up his lease. When he closed in November, he shipped out and sold the balance of the output for that year, and removed his cans, teams, wagons, and personal property to the town of Tipton, Cedar county, Iowa; and during the balance of the year, until spring, he had no property of value in the town of Solon, and no property subject to taxation, unless, under the foregoing statements, he can be taxed upon capital invested in manufacture." It appears that he was regularly assessed with $800 as capital invested in manufacturing; and, from a refusal of the board of equalization to change or cancel the assessment, an appeal was taken to the district court, which affirmed the action of the board, and the plaintiff appealed to this court. Affirmed.

Wheeler & Moffit and Joe A. Edwards, for appellant. Baker & Ball, for appellee.

GRANGER, J. 1. The district judge presents the legal proposition to be considered, as follows: "Whether, upon said facts, the plaintiff had, within the meaning of the law, capital invested in manufacture, so as to render him liable to be assessed thereon in the town of Solon for the year 1893." It will be seen that our inquiry is specifically limited to whether, under the facts, plaintiff had, at Solon, capital invested in manufacturing, liable to assessment at that place. It will be well to first settle what is meant by "capital invested in manufacturing," within the meaning of the revenue laws. The law governing the assessment of such capital is found in Code, § 816, as follows: "Any person who purchases, receives or holds personal property of any description for the purpose of adding to the value thereof by any process of manufacturing, packing of meats, refining, purifying or by the combination of different materials, with a view of making gain or profit by so doing, and by selling the same, shall be held to be a manufacturer for the purposes of this title, and he shall list for taxation the average value of such property in his hands, estimated as directed in the preceding section; but the value shall be estimated upon those materials only which enter into the combination or manufacture." The facts recited refer to teams, wagons, cans, and other property; and it should be understood that such property is not included within the term "personal property," as used in the section. Nor do we understand the question certified to refer to such property as teams, wagons, etc., but only to property assessable under the provisions of the section quoted. The property specified in the section is such only as is held for the purpose of adding to the value thereof by the process of manufacture, and with a view to a gain or profit by such manufacture and the sale thereof. The section specifically provides that, in estimating the value of such property, only the material that enters into the combination of manufacture shall be considered. It excludes such things as do not become a part of the commodity when ready for sale. The plaintiff was a manufacturer of butter, and the section in question was designed to reach, for purposes of taxation, the capital represented by the cream, salt, and other materials used to produce the butter ready for sale. It is a class of property liable to vary in amount and value from time to time; and hence the average for the year, or a part thereof, is taken, instead of the value at a particular time. The section refers to the preceding one, where the manner of ascertaining the average is prescribed.

By "capital invested in the business," we understand the court to mean the value of the materials entering into the manufacture

of the butter; and of such capital it appears that there was "more or less," and we have nothing to do with the question of amount. It follows that there was such property for assessment, and the remaining inquiry is, was it assessable in the town of Solon? Although the plaintiff resided in Cedar county, he was doing business in Johnson county. It does not appear, from the facts certified, whether he was doing business in Cedar county, except such as might be assumed as incident to a residence there, as the care of his property, and the like. It is provided by Code, § 806, "When a person is doing business in more than one county, the property and credits existing in one of the counties shall be listed and taxed in that county, and the credits not existing or pertaining especially to the business of any county, shall be listed and taxed in that where the principal place of business may be." The section is of somewhat doubtful application where the person is doing business in more than one county, unless the business in the different counties is of the same kind; but, if the section is to be applied only where the business is the same in the different counties, the application must arise from inference, and not from express terms. We may aid this inquiry by a reference to section 815 of the Code, which is the one as to assessment of stocks of merchandise, to which section 806 also applies. If A. resides in one county, and is conducting a mercantile business in another, in which county would the stock of merchandise be assessed? Manifestly, we think, in the county where the business was done. Any other rule would be so impracticable as to make it impolitic. If this conclusion is right, it must have its support in section 806, for we find no other section of the law applicable to such a question. It may be true that, in the absence of any other rule, personal property is assessable where the owner resides, as claimed by appellant. We base our holding on section 806. That section, with unimportant changes, was in the Code of 1851; and in Lemp v. Hastings, 4 G. Greene, 448, it was considered argumentatively, and it is there said: "If a party has most of his capital invested in an established store in Muscatine county, whence he derives his profits and incomes, and resides in Scott county, it could hardly be regarded as a fair construction of the above sections to say that his property and credit existing in Muscatine county should yield their revenue to Scott. That county in which his business is established, and which furnishes the protection, security, and profit to his property, should derive its appropriate revenue therefrom. Such should be the policy of revenue laws, and such we believe to be the spirit and intention of the Code." The law which relates to such assessment was then as it is now, and it will be observed that the application is made in a supposed case where the party merely resides in one county and does business in another. The same rule is certainly applicable to manufacturing industries, for the law says "doing business" in more than one county, which term includes both manufacturing and mercantile pursuits.

Some importance is attached to the fact that the business at Solon was only carried on during a part of the year, and that in November of each year the teams and other personal property used in carrying on the business were removed to Cedar county, where the plaintiff resided. The property assessed, however, was not removed. It was closed out by sale each year, and the business resumed the following spring. The interruption in the business was only during a part of the year, when the cream, for making butter, could not be obtained in sufficient quantities. It was not an ending or quitting of the business. The lease of the premises, and the purpose to continue the business, existed. It was simply a suspension during the winter season, as a business expedient. We think the conclusion of the district court correct.

2. The case of Dean v. Maher, County Treasurer, grows out of the seizure by the treasurer of certain property for the taxes in question, and it is controlled by the conclusion in the case we have considered. In both cases the judgment is affirmed.

GRIMES v. NORTHWESTERN LEGION OF HONOR.

(Supreme Court of Iowa. Feb. 11, 1896.)

On petition for rehearing. Denied.

For original opinion, see 64 N. W. 806.

DEEMER, J. A petition for rehearing has been filed in this case which, among other things, challenges the statement that the defendant is something more than a secret fraternal society, as that term is used in section 21, c. 65, of the Acts of the 21st General Assembly. In view of this, and to correct any wrong inferences that may be drawn from some of the language used, it is thought advisable to file this supplement. What is said in the opinion with reference to this subject had relation to the facts as stated, and alluded solely to the question of the necessity of attaching copies of the application to the certificate of membership on policy of insurance. We held that the defendant was organized and is acting in a dual capacity; that it had entered into a contract of insurance; and that there is nothing in chapter 65, Acts 21st Gen. Assem., absolving it from the terms of the general law (McClain's Code, § 1733) requiring it to attach copies of the application to the policy. We also held that, if it be conceded that it was acting under the said acts, it was still required to attach these copies, in order to rely upon any misrepresentations made by the assured, following

the McConnell Case (Iowa) 43 N. W. 188; and that, if it was not so acting, it followed that it was acting under the general law, and, if so acting, it was clearly subject to the provisions of section 1733 of McClain's Code. It was unnecessary to determine what the intent of the legislature was in enacting section 21 of the act in question, for, in any event, defendant had entered into a contract of insurance, and was an insurance company, within the meaning of section 1733. The effect to be given section 21 was not a controlling question, and what is said in the opinion regarding it should be limited by, and construed in the light of, what is here said regarding the case. We are content with the conclusions reached, and with the modifications here suggested the opinion is adhered to.

WALLERICH v. SMITH et al.

(Supreme Court of Iowa. Feb. 11, 1896.)

TRIAL—WAIVER OF PROOF—PARTNERSHIP—HOLDING OUT AS PARTNER—INTENT.

1. Where counsel for a defendant make no objection when it is stated by a trial judge that, as he understands, there is no controversy as to the correctness of an account, and plaintiff therefore does not prove the account, such omission cannot be taken advantage of by defendant afterwards for any purpose.

2. The intention with which words are spoken holding the speaker out as a member of a partnership is immaterial. Such statements are obligatory, in favor of one who acts upon their reasonable import.

Appeal from district court, Polk county; W. F. Conrad, Judge.

Action at law to recover of the defendants upon an account for services rendered. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant Annie C. Smith appeals. Affirmed.

Bishop, Bowen & Fleming and St. John & Stevenson, for appellant. S. S. Cole and Thomas Burke, for appellee.

ROTHROCK, J. 1. The action was brought against E. W. Smith & Co., as a partnership, and against C. L. Smith and Annie C. Smith, the alleged members of the firm. Annie C. Smith denied that she was a member of the partnership. A trial was had to a jury. The account for services was proved up, and the jury returned a verdict against the defendants. A motion for a new trial as to Annie C. Smith was sustained, upon the ground that the evidence did not authorize a finding that she was a member of the firm. Afterwards the plaintiff amended his petition by pleading that Annie C. Smith was a partner, as to him, because she held herself out and represented herself to be a partner in such a way as to be liable to him, the same as though she were in fact a partner. There was no evidence introduced upon the second trial in the way of proving up the account of the plaintiff as a valid claim for his services, and the court instructed the jury upon the theory that, as the amount had been determined on the first trial, the jury should accept that as the sum for which appellant was liable, if liable at all. The appellant excepted to the instructions in a general way, and one ground of a motion for a new trial was that there was no evidence that the plaintiff's account was valid; and it is urged that the judgment should be reversed for that reason. It is probably somewhat of a question whether, under the facts of the case, it was necessary to make such proof on the second trial. We are not to be understood as holding that it was essential. We are well satisfied, however, that appellant is in no position to raise that question. The case was tried all through upon the theory that the account was established upon the first trial. The record shows that plaintiff's counsel, at the commencement of the trial, stated to the court, in the presence and hearing of defendants' attorney, that plaintiff understood that there was no further controversy in regard to the amount of the plaintiff's claim; and, at the close of the introduction of plaintiff's evidence, plaintiff's counsel stated that was all of plaintiff's evidence, unless there was some dispute as to the amount plaintiff was entitled to recover. The court then said, in the presence and hearing of the defendants' attorney, that he (the court) understood there was no question but that, if plaintiff was entitled to recover, the amount of the judgment in the former trial was the measure of recovery. We quote the following language from the bill of exceptions: "The defendants' attorney heard said statement, but made no admission or reply whatever." And when the court, in giving the form of a verdict to the jury, inserted the amount of recovery in one of the forms, and said to defendants' attorney that if the amount of interest was not correct it could be corrected afterwards, the attorney made no objection or reply. Under this state of the record, it should be held that the defendant waived the introduction of evidence as to the amount, and ought not now to be allowed to question it.

2. Other objections to the judgment are founded upon exceptions to the instructions given to the jury, and for refusing instructions asked by defendant. We discover no error in the manner in which the case was submitted to the jury, and we do not think it proper to especially consider the questions presented.

3. We do not understand that the defendant claims, as a distinct proposition, that there was no evidence upon which the verdict was authorized. But it is claimed that, under the instructions, the evidence was insufficient. The defendant was sought to be held liable upon the well settled and established rule of the law that everyone who authorizes another to believe him to be a partner is, as to the person so authorized,

liable as a partner. Much is said in argument to the effect that the plaintiff, in order to recover should have proved that the defendant intended by her declarations and admissions to lead the plaintiff to believe she was a partner. The actual intention of the alleged partner is not the test of liability. In Sessions v Rice, 70 Iowa, 306, 30 N. W. 735, it was said that "every person will be conclusively presumed to intend to be understood according to the reasonable import of his words, and when a person's words are thus reasonably understood and justly acted upon by another, such person cannot be heard to aver the contrary, as against the other." See, also, Morgan v. Railroad Co., 96 U. S. 716; Continental Nat. Bank v. National Bank of Commonwealth, 50 N. Y. 583. Applying this rule in the case, the verdict was well supported by the evidence.

4. Other questions are presented, which we do not think require special mention. We find no error, and the judgment is affirmed.

RISTINE et al. v. KURTZ et al.

(Supreme Court of Iowa. Feb. 12, 1896.)

ESTATE OF DECEDENT — SALE BY LEGATEE OF HIS INTEREST — PROCEEDS ARE NOT ASSETS OF ESTATE.

Where a legatee under a will sells his interest in the estate, in advance of its settlement, the proceeds received by him do not become assets of the estate, nor subject to the payment of its debts or expenses. The thing sold being merely a right to participate in the effects of the estate, its transfer in no manner prejudices the rights of creditors, and the money received therefor is impressed with no trust in their favor.

Appeal from district court, Linn county; James D. Giffin, Judge.

Action in equity. The plaintiffs are physicians, and, as such, rendered professional services for and to Eliza A. Beam, about June, 1890, of the value of about $76. Mrs. Beam died testate in August, 1890; and the defendant Kurtz was appointed administrator of her estate, with the will annexed, and duly qualified. The defendant Charles E. Beam is a son of Mrs. Beam, and a legatee in the will. The only estate of Mrs. Beam was a share in the estate of one Miller, who died in California, the share amounting to from $10,000 to $15,000. Charles E. Beam, for a consideration of $2,600, assigned his interest in his mother's estate to one Bowdle, "by quitclaim deed." The will of Mrs. Beam was admitted to probate in Linn county October 14, 1890, and the claim of the plaintiffs for services was duly presented and allowed; also, a claim for a further sum of $17.50, which had been assigned to the plaintiffs,—and no payments have been made. Nor has any property of any kind ever come into the administrator's hands, in Linn county; and his expenses, inincluding compensation for his services, amount to $75, which are unpaid. Administration was also granted on the estate of Mrs. Beam in Tulare county, Cal., and on the 22d day of June, 1892, the administrator there "took decree of final distribution, and settlement of final account"; but the estate was not closed, because of property on hand for distribution to minor heirs. Because of no means, the administrator in Iowa never attempted to get possession of, nor realize from, the property in California, or any part of it. The petition seeks to recover—First, from the administrator Kurtz, if he has received any property of the estate from which payment can be made; and, second, if there is no such property, they ask that judgment be entered requiring plaintiffs' claim to be paid from the amount received by Charles E. Beam from Bowdle. The administrator Kurtz answered, denying that he had received any property belonging to the estate, and asking judgment against his codefendants, who, as legatees, had received any part of the estate, for the sum of his expenses. The district court gave judgment against plaintiffs and defendant Kurtz for the costs, and they appealed. Affirmed.

L. M. Kratz, for appellant Kurtz. Frank G. Clark and Clark & Clark, for other appellants. Whipple & Zollinger, for appellee Charles E. Beam.

GRANGER, J. We experience little difficulty in reaching a satisfactory conclusion in this case. Counsel for appellants, by their brief, evidence a commendable effort to trace and present the doctrine of trusts, and the extent to which a trust, when once impressed upon a fund, will follow it, even into the hands of innocent third parties. On this appeal there is no claim of a liability, except as to defendant Charles E. Beam; and such claim is because of his sale to Bowdle, and the receipt of the $2,600. The thought is that the trust created by the law, as to the property of the estate for the payment of claims, constructively attaches to this money in the hands of Beam as a legatee under the will. Now, let it be conceded that if Beam had received any part of the estate of his mother, to the prejudice of any claimant, that a constructive trust would be created, and the funds in his hands be liable to the full extent for their payment, and we are in a position to inquire if that is Beam's relation to the case. Beam's interest in the estate of his mother was not a definite amount, in dollars and cents, but a proportionate amount of any balance after the satisfaction of all claims preferred by operation of law. He sold to Bowdle his interest in the estate, which gave to Bowdle, at the time of distribution to legatees, the right to take what, but for the sale, would be Beam's right. The transaction in no way disturbed the estate, or affected a claimant. It was a substitution of one person for another, to receive a proportionate share of a balance after claims were paid. As indicating the mis-

apprehension of the rule to govern in this case, we may say that we are cited to the law as to trustees using trust property to their personal advantage, as stated in Perry, Trusts, § 209. It seems to be thought that Beam occupies a trust relation to the claimants of the estate, and herein lies the difficulty with appellants' position, and the inapplicability of the law cited. Beam, as a son of the testatrix, and a legatee under the will, owed, because of such facts, no duties to the claimants of the estate. In common with them, he had an interest in the settlement of the estate, that he might realize what would be due him therefrom; and the thought, in argument, that because of these facts he owed an active duty to aid in the administration by supplying funds to the administrator to obtain the property in California, is without the support of any rule of law known to us. In no legal sense has he received any part of the estate. After the sale to Bowdle, and Beam had his pay, the situation of the estate was the same as before, and hence he had no part of the estate or fund on which the law had impressed the trust. He was never in a position to be responsible for a faulty or delinquent administration. The law fixes the remedy for such defaults. We need not further elaborate the case. Beam simply sold what he had a right to sell, and left the estate to be settled as the law provides, and he is in no way responsible for the failure of appellants to obtain what is their due. The judgment is affirmed.

IOWA CITY STATE BANK v. NOVAK et al.

(Supreme Court of Iowa. Feb. 10, 1896.)

COLLATERAL SECURITY—CONVERSION—EVIDENCE—PRESUMPTION.

1. One having no knowledge, outside a memorandum on a stock book, that stock was left as security, cannot testify to that fact, the memorandum being the best evidence.

2. An original entry of credit to a person, made in his presence and with his knowledge, and without any objection, is admissible to show what credit was given him.

3. It cannot be presumed, for the purpose of showing error in admitting statements of a person that at a certain date there was an overbalance in the account of a bank, and on another date a shortage, that witness was testifying from the books; in which case the books would be the best evidence.

4. It being contended by plaintiff bank that certain stock was sold to it by defendant, and by defendant that the stock was merely deposited as collateral security, and was afterwards converted by plaintiff to its use, it is proper for plaintiff to show that, at a time when, according to defendant's theory, plaintiff held it as security or had converted it, plaintiff's claims against defendant were figured up, new notes given by him, further collaterals put up by him, the collaterals which he then had up called for, and a list of the entire lot made and signed by him, and that the stock did not appear, and nothing was said about it.

Appeal from district court, Johnson county: S. H. Fairall, Judge.

Action on a promissory note. Trial to the court. Judgment for plaintiff. Defendants appeal. Affirmed.

Baker & Ball and Milton Remley, for appellants. Ranck & Wade, for appellee.

KINNE, J. 1. The action is brought upon a promissory note for $2,000, dated August 8, 1891, and due 60 days after date, and signed by both of the defendants. The answer admits the execution of the note, and that it is unpaid. It alleges that the defendant Frank Novak is only a surety on the note, which fact was known to plaintiff when it took the note, and that he is entitled to the benefit of the counterclaim. Defendants, in a counterclaim, allege that the defendant J. J. Novak was the owner of 25 shares of stock in the plaintiff bank, worth $2,500, which had been deposited with said bank as collateral security; that plaintiff has converted the same to its own use. For said sum, and for the dividends on said stock, defendants pray judgment against plaintiff, after deducting the amount due upon said note, for $800 and costs. Plaintiff replied to the counterclaim, admitting that said Novak owned the 25 shares of stock; that the same was, for a short time, deposited with plaintiff as collateral security; that defendants were indebted to plaintiff, and to the Iowa City National Bank, and plaintiff took said stock, and paid the defendant the money therefor, to assist him in canceling said indebtedness; that the stock was legally transferred to plaintiff, was fully paid for, and that it did not convert it to its own use. The case was tried to the court, and a judgment rendered for plaintiff, for the full amount due upon the note.

2. It is said the court erred in its ruling excluding the testimony of one Switzer, to the effect that the stock was left as collateral security. Switzer testified that the memorandum on the stock book was that the stock had been left as collateral security, and that was all he knew. The court held that the memorandum was the best evidence. There was no error in this ruling. The testimony showed that Switzer knew nothing as to how, or for what purpose, the stock was left with the bank, except as the memorandum showed. Having no knowledge of the transaction outside of the memorandum, it is clear that the memorandum itself was the best evidence of what it contained.

3. Coldren testified that, at the time the stock was transferred to the bank, he started to give credit for the dividend, but in fact indorsed it on a deposit ticket or slip. Appellants claim that this ticket is not binding upon them; that they did not make out or sign it, and had no knowledge of its contents. We think the evidence justified the trial court in finding that this ticket was made out in the presence of F. H. Novak, who was transacting the business for his

brother; that he saw it, and knew its contents. Such being the fact, it was competent evidence to explain the transaction between the parties. The evidence further shows that this deposit ticket was the original entry of credit to Novak, and, if made in his presence, and with his knowledge, as we find it was, and without any objection on his part, it is proper evidence to show what credit was given him.

4. Error is assigned on the ruling of the court admitting in evidence the receipt of F. H. Novak for the dividend on the stock which had stood in J. J. Novak's name. It is said it is immaterial and incompetent, because it is not the receipt of the defendant. Now, it appears from the evidence that F. H. Novak was, all through this transaction, at various times acting for J. J. Novak. He so acted for him in the sale of the stock, and in the transfer of the certificates to the bank. He received this dividend, which had been reserved in the sale of the stock. It is no part of the dividends now claimed by the defendants. There was, therefore, no error in the admission of this evidence.

5. Coldren was permitted to testify, over defendants' objection, that at a certain date there was an overbalance of 88 cents in the accounts of the bank; that on another date the accounts balanced, and on a subsequent date there was less than $4 shortage. It is insisted that the books were the only competent evidence of the facts testified to. If the witness knew the facts testified to, independent of the books and their contents, then the evidence was proper. It is said he was testifying from the books. If that be so, then, of course, the books were the best evidence, not the statements of the witness as to their contents. But the record does not show that the witness was testifying from the bank's books. For all that appears, he was stating facts from his own knowledge, entirely independent of the books. We cannot presume what the record does not show, in order to establish the fact that the court erred in the admission of evidence. So far as appears from the record, there was no error in this ruling.

6. Three assignments of error are directed to the action of the court in permitting Mr. Wade and Mr. Morrison to testify to a conversation with defendant J. J. Novak, on August 8, 1891, and to the introduction of a bond and list of collaterals. The complaint is that the testimony was incompetent, immaterial, and irrelevant. We think this evidence was material. The claim of the defendant J. J. Novak is that in 1890 he owned $2,500 of the stock of plaintiff bank; that he had deposited it with the bank as collateral security for money he was owing the bank; that the bank thereafter, though the precise time is not made to appear, converted this stock to its own use. Now, if that be true, then on this 8th day of August, 1891, when J. J. Novak, Frank Novak, Morrison, and Wade were all in the bank, and its claims against Novak were being figured, and his notes to the bank being renewed, and further collateral put up, the bank held this $2,500 in stock, as collateral for his obligations to it, or it had, before that time, converted the stock, according to Novak's claim. The fact that all this was done, and not a word said, or a claim made, by J. J. Novak, that he then owned the stock, or that the bank had converted it and owed him for it, is, we think, a very strong indication that there was no merit in Novak's claim that the stock had been converted by the bank. It is possible, but not probable, that a man pressed for money, as the evidence shows he was, would have overlooked the fact that he had a claim of over $2,500 against his creditor, for stock which it had converted to its use. He was wanting an extension of time on his indebtedness to the bank. The collateral which Novak then had in the bank was called for, and brought out. It did not include this stock. Novak said it was all the collateral he had. The evidence shows he did not have money enough to pay the interest then due on his indebtedness to the bank. New notes were made out; Novak went out, and brought in other collaterals; and a list of the entire lot was made, and J. J. Novak signed it, assigning all these collaterals to the bank. J. J. Novak himself does not claim that at this time he said a word about the bank's holding his stock as collateral, or that they had converted it. The evidence sought to be eliminated from the record was both competent and material, as strongly tending to show that, at the time of this general settlement of J. J. Novak's indebtedness to the bank, he had no claim against it in any way growing out of, or connected with, the stock which he now claims the bank had converted to its use.

7. Error is assigned on the ruling of the court refusing to permit the witness Morrison to testify to whom the Novak stock was sold. If error, it was without prejudice, as the witness had already testified that he did not know who the stock was sold to.

8. Other errors are assigned touching the admission of evidence. We have examined them, and discover no cause for complaint.

9. Lastly, it is urged that the judgment is contrary to, and not supported by, the evidence. We shall not undertake to review the evidence. We have already discussed some of it, which tends to show that the judgment below was correct. It is conflicting. The judgment of the court below stands as the verdict of a jury, and we should not disturb it, unless it is so contrary to the evidence as to indicate passion or prejudice. Viewing all of the testimony, we think it fairly justified the finding of the district court. We cannot, therefore, disturb the judgment below. Affirmed.

HATHAWAY v. CITY OF DES MOINES.

(Supreme Court of Iowa. Feb. 12, 1896.)

INJURY TO LABORER ON STREET — LIABILITY OF CITY—NEGLIGENCE OF VICE PRINCIPAL —PLEADING.

1. The petition in an action for injuries to one shoveling for a city, caused by the negligence of D., who was in charge of the work, states that D. was vice principal, by alleging that for doing the work he was, by the board of public works, authorized, in the name of the city, to employ and discharge men and manage the work so done, and that he was given the entire charge of all persons employed to do the work, and of the manner in which it should be done, and that, being so authorized, he, for and on behalf of the city, assumed the control of the work, and employed plaintiff to work for the city, under his control in the performance of the work.

2. Acts 22d Gen. Assem. c. 1, §§ 9, 13, declaring that the board of public works shall take charge of the construction, repairing, and superintendence of streets and public places, and shall have power to appoint agents and employés absolutely necessary for the doing of the work of said board, "but such agents or employés shall be actually engaged in the construction of the public works of such city, and shall not include any assistants, superintendents, bookkeepers or secretaries, but said last named offices shall be filled and duties performed by said board," do not prohibit the board's appointing one with power to hire and discharge men, and to direct in the prosecution of the work.

Appeal from district court, Polk county; C. P. Holmes, Judge.

Action to recover for a personal injury. There was a demurrer to the petition, which was sustained, and plaintiff appeals. Reversed.

Henry S. Wilcox, for appellant. J. K. Macomber, for appellee.

ROTHROCK, J. 1. It is not practicable to set out the petition in an opinion. It is drawn out at great length. We will quote such parts of it as appear to be necessary to determine the questions discussed by counsel. It appears from the petition that the plaintiff was employed by the city as a shoveler at a bank about 10 feet high, and that the top of the bank was frozen, and the earth at the bottom was removed, so that the bank was undermined to some extent, and that while engaged in shoveling into a wagon the bank caved, and the earth fell on the plaintiff and injured him. It is charged in the petition that the injury was sustained by reason of the negligence of one Dunkle, who was in charge of the work. It is claimed by counsel for appellee that, under the averments of the petition, there can be no recovery, because Dunkle was a fellow servant of the plaintiff. The petition avers, in effect, that he was not a fellow servant. It is stated therein that Dunkle was appointed by the board of public works to take charge of the work on the streets, and said appointment was approved by the city council. The petition contains the following averments: "That for the doing of said work the said Dunkle was, by said board, authorized and permitted, in the name and on behalf of said city, to employ and discharge men, and control, direct, and manage the work so done; and the said Dunkle was given the entire charge, direction, and control of all persons employed to do said work, and of the manner in which said work should be done. That, being so authorized, the said Dunkle, for and on behalf of said defendant city, did assume the charge, management, and control of said work, and did employ the plaintiff and divers other men and teams to work for the said city, under his control, in the performance of said work." Substantially the same averments are repeated in the petition. So far, then, as the averments of the petition are concerned, it cannot be said that Dunkle was a fellow servant. He was what is sometimes called a "vice principal," and the principal is answerable for his negligence.

2. But it is insisted that the city is not liable, because it had no authority to approve the act of the board of public works in the appointment of Dunkle. Reliance is had upon sections 9 and 13 of chapter 1 of the Acts of the 22d General Assembly. Section 9 is in these words: "Said board shall take special charge of the construction, repairing and superintendence of all streets, alleys, highways, sidewalks, public grounds, cleaning streets, alleys, highways, lamps and light for lighting the streets, alleys, highways, parks, public places and public buildings." Section 13 is as follows: "It [the board of public works] shall have power to appoint agents and employés, subject to the approval of the city council, absolutely necessary for the doing of the work of said board, but such agents or employés shall be actually engaged in the construction of the public works of such city, and shall not include any assistants, superintendents, bookkeepers or secretaries, but said last named offices shall be filled and duties performed by said board of public works without extra compensation." We think that the appointment of Dunkle, with the power to hire and discharge men, and to direct in the prosecution of the work, was not prohibited by these provisions of the statute; and the claim that he must be regarded as a mere common laborer cannot be sustained, under the averments of this petition, as matter of law. It must be remembered that we are not determining the case upon its merits. The averments of the petition must be accepted as true. Surely, the statute does not contemplate that a foreman may not be appointed, with the authority set forth in the petition. It appears to us that most of the cases cited by appellee relate to mere servants, such as the driver of a luggage cart, teamsters, and laborers, and a driver of an ambulance belonging to the city. The requirement of the statute that the agent employed by the city shall be actually engaged in the work does not necessarily mean that he shall be a shoveler or common laborer. His employment to direct

the work, and to employ and discharge laborers, was actual employment in the work. We do not determine the question whether the city can be allowed to question the authority of Dunkle, if he had the authority set out in the petition. In City Council v. Harris (Ala.) 14 South. 357, it was held that a city which has placed a superintendent in charge of a gang of laborers cannot be heard to deny the legality of his appointment, in an action by one of the laborers for injuries caused by the superintendent's negligence.

3. It is said that the petition showed on its face that the plaintiff was chargeable with contributory negligence. This claim is not well founded. The petition not only expressly avers that plaintiff was without negligence, but it contains facts which, if true, show that he was in the exercise of due care when he was injured. The ruling sustaining the demurrer is reversed.

MATTHEWS et al. v. METCALF.

(Supreme Court of Iowa. Feb. 12, 1896.)

WATERS AND WATER COURSES—INJUNCTION—SUFFICIENCY OF EVIDENCE.

In an action by a mill owner against the owner of another mill, situated lower down on the same stream, to enjoin defendant from maintaining his dam at such a height as to damage plaintiff's property by backwater, where plaintiff does not show by a preponderance of the evidence that defendant's dam, as constructed at the time of the trial, interfered with plaintiff's legal rights, he is not entitled to an injunction.

Appeal from district court, Jones county; J. D. Giffen, Judge.

This is a suit in equity, by which the plaintiffs seek to enjoin the defendant from maintaining a milldam at such a height as to damage the property of the plaintiffs by backwater. There was also a claim to recover for damages alleged to have been sustained. The defendant answered, denying that the water in his dam was at a greater height than he had a right to maintain it. The case was fully heard on its merits, and a decree was entered dismissing the petition, and the plaintiffs appeal. Affirmed.

Remley & Ercanbrack, for appellants. Sheean & McCarn, for appellee.

ROTHROCK, J. There is no disputed question of law in the case. The whole controversy turns upon the ultimate question of fact, whether in the year 1891 the defendant raised, and has since maintained, a dam, at a greater height than he had a right to do. Or, in other words, was the dam of a greater height, and did it back water further up the stream than had been done many years before that time? The plaintiffs are the owners of a flouring mill situated on Buffalo creek, and propelled by the water in that stream. The mill is located about three-quarters of a mile from the place where the creek empties into the Wapsie river. The defendant is the owner of a mill located on said river about a half mile below the confluence of the two streams. Both of the mills are situated at the city of Anamosa, and dams were erected at both points many years ago. The plaintiffs' improvement was made a number of years before that of the defendant. A dam was built very near where the defendant's dam is now located as early as the year 1847, and it has been maintained ever since. Of course, there have been changes of structure by washouts, and decay, and the water in the dam has not at all times been maintained at a uniform height. There is no waterfall or rapids in the stream at that point, and the power is measured by the height of the water in the dam, without regard to other conditions. It is conceded by the plaintiffs that the defendant has the right to maintain a dam to the height it usually was kept up, and the right to keep it full of water. And the defendant concedes that he has no right to maintain a dam which backs water up Buffalo creek further than the old dam or dams backed it, if by so doing the backwater interferes with the operation of the plaintiffs' mill. We are now treating of facts which are either undisputed in the evidence, or conceded by the parties in argument. When the defendant completed the new dam, in 1891, complaint was made by plaintiffs that it was higher than he had a right to build it, and when it was full of water the defendant went up the Buffalo, and examined the effect upon that stream; and he immediately put men at work in lowering his dam, and did lower it, so that he now claims that it does not raise the water in the stream to a greater height than had usually before that been maintained. And this is the question of fact which the district court was required to determine by a preponderance of the evidence; and, as the case is in equity, we are to determine it by the same rule. As we have said, these mills are located at Anamosa, and the condition of this dam, and of the streams between the two mills, has for many years been under the observation of many persons. A large number of witnesses were examined on each side of the controversy. They were former owners of the two mills, men who were engaged in working in the mills, and experts who made measurements of the water and of the dam, persons who resided on the banks of the river and creek, and fishermen who angled in the waters and rowed boats up and down the creek and river, and people of other occupations. We will not review the testimony of the witnesses. It is not our practice to do so. The testimony is well presented in this court. There is no dispute in the abstracts as to what the witnesses testified to on the trial. After a most careful examination and study of the evidence, considered in connection with the undisputed facts, we concur with the district court in holding that the plaintiffs have

not shown by a preponderance of the evidence that the dam of the defendant, as constructed at the time of the trial, interfered with the plaintiffs' lawful rights. We must content ourselves with this general finding, and we may say, in conclusion, that, as the plaintiffs were not entitled to recover damages, the court rightfully dismissed the petition without determining to what point in Buffalo creek the defendant had a right to back the water. The decree of the district court is affirmed.

KLOTZ v. JAMES, Sheriff.

(Supreme Court of Iowa. Feb. 12, 1896.)

Supplemental opinion. For prior report, see 64 N. W. 648.

GRANGER, J. A petition for rehearing was filed in this case, which we examined; but, before our conclusion was announced, the parties stipulated for judgment, and dismissed the petition for a rehearing. To avoid any misapprehension as to some language in the opinion as to the rights of a fraudulent grantee of property, we present the following as supplemental to the opinion:

The language of the opinion is based on the condition of the record. The second division of the answer is an attempt to plead an affirmative defense to the action for possession, and for that purpose it simply sets up the fact of the fraud in the sale of the property. Issue is taken thereon, without any question as to its sufficiency. This court has held that facts so pleaded, and unquestioned, are to be taken as a defense. Benjamin v. Vieth, 80 Iowa, 149, 45 N. W. 731. The district court followed the issues and presented the case to the jury on the theory of the fact of fraud being a complete defense. The instructions, in this particular, are not questioned, and they stand as the law of the case. The former consideration of the case was upon this condition of the record, which is controlling; and any language of the opinion which might, apparently, be of broader scope, is to be considered with reference to the facts of the case. Under the issues, and the law governing the case, the finding of fraud became conclusive of the right of possession. The case of Chapman v. James (Iowa) 64 N. W. 795, is not determined on a like record.

HART v. MT. PLEASANT PARK STOCK CO. et al.

(Supreme Court of Iowa. Feb. 13, 1896.)

ESTOPPEL — UNAUTHORIZED ACT OF CORPORATE OFFICER—APPOINTMENT OF RECEIVER.

1. A noncapitalized religious association authorized its officers to contract with an auxiliary stock company; authorizing it, as an auxiliary, to take title to and improve certain land for an association park, and that its stock should be secured by a lien on the land. These officers exceeded their power by authorizing the stock company, in a certain event, to sell the park, and reimburse the stockholders out of the proceeds. Plaintiff, who drew up the contract, while it was in force, purchased stock. Subsequently, at a meeting of the association and company at which plaintiff presided, the contract was modified by striking out the unauthorized provisions; and later, by agreement of both, the company gave the association a trust deed of the park, subject to all liabilities of the company and claims of stockholders,—the association giving its notes for stock liability, payable in five years, with interest, secured by lien on the park. Plaintiff had been an officer of both the company and association at various times, and a supporter of the association, and was present at a meeting when the trust deed was approved, and donated 10 shares of the stock to the association, in furtherance of the plan. *Held*, that plaintiff was estopped from denying the validity of the trust deed.

2. An officer of a corporation, who, as one of its agents authorized to make a specified contract, inserts therein unauthorized provisions, cannot base a right of recovery against the corporation on such provisions, where the corporation, as soon as it discovered the unauthorized provisions, repudiated them.

3. The contract of a noncapitalized religious association with an auxiliary stock company provided that the company should take title to certain land, and its stock be a lien on the land, and that the association might at any time reimburse the company "for all money expended by them," and require it to convey back the land. *Held* that, the land having increased from $2,800 to $15,000 in value, a reconveyance of the land to the association, subject to the lien for stock and liabilities incurred by the company, did not, as being prejudicial to a stockholder, authorize the appointment of a receiver.

Appeal from district court, Clinton county; W. F. Branneu, Judge.

We shall only set out such of the facts as may be necessary to a proper understanding of the questions presented and determined. November 21, 1882, the Mississippi Valley Spiritualist Association was incorporated as the Iowa Conference of Spiritualists, the name being afterwards changed to the Mississippi Valley Spiritual Association. This body will hereafter be referred to as the "Association." The object of this corporation was stated to be the promotion of general intelligence, good morals, liberal sentiments, and the teaching of spiritualism, through its phenomena and philosophy. The usual officers were provided for. The corporation was authorized "to make contracts, acquire and transfer property, * * * and make by-laws and rules and regulations * * * for the management of its affairs according to law." There was no provision for issuing shares of stock, and none were issued. This corporation had contracted for the purchase of certain land for the sum of $2,800, to be used as a camping ground. It entered into the possession of said premises and dedicated the same as the Mt. Pleasant Park, and began holding camp meetings thereon in 1883. In 1884 it was determined that, to accomplish the objects of the association, a stock company must be formed. Thereupon, in the spring of 1884, the Mt. Pleasant Park Stock Company was organized and incorporated.

This corporation will hereafter be referred to as the "Stock Company." The object of the stock company was, as an auxiliary of the association, to raise funds with which to purchase said park, and to improve the same, for the use of the association, and for other purposes which might afford a revenue to the company. The capital stock was limited to $50,000, in shares of $10 each. Provision was made for the usual officers and an executive board. Each stockholder was authorized to cast one vote for each share of stock, and it required two-thirds of the directors to constitute a quorum. It should be said that most of the time the offices in both corporations were filled by the same persons. The association passed a resolution authorizing its president and secretary to enter into a contract with the stock company authorizing it to take title to the land, and requiring it, "as an auxiliary association," to meet all the obligations of the association; to improve and furnish the grounds for the association, as it might determine, for its camp meetings. The resolution also provided that "the stock company, after paying all expenses each year of said camp meeting, may make a dividend of the balance of the funds raised, * * * unless the amount shall exceed eight per cent. on * * * money expended on said grounds, in which case the balance exceeding eight per cent. shall be subject to the direction of the association"; also, that the association might at any time thereafter reimburse the stock company "for all money expended by them," and require the stock company to convey the park to said association. In pursuance of this resolution, which was passed early in 1884, as it afterwards appeared, the president and secretary of the association entered into a contract with the stock company which in some respects exceeded the authority given them, viz. in authorizing the stock company, in a certain event, to sell the park, and in reimbursing stockholders by paying the amount of their stock, with interest thereon. It appears that this contract was never reported to the association for its approval, but in 1888 it discovered what had been done, and at a meeting of both the stock company and association the contract so made was modified by eliminating the two provisions above referred to. Prior to this change in the contract, and in 1885, this stock company made an extraordinary effort to sell its stock; and it is claimed that in reliance upon said contract, as originally made, the plaintiff and others subscribed and paid for additional stock to pay for the park grounds, and a deed was taken in the name of the stock company. It appears, however, that the balance due for the park was paid, not by the stock company, but by the directors giving their notes, which obligations were finally paid in 1892, by the association, as a debt of the stock company. In 1891 committees were appointed by the two corporations to arrange for a transfer of the property to the association. They agreed upon a report, which was approved by the majority of the stockholders of the stock company, and by both corporations. That agreement was, in substance, that the association should assume all debts and liabilities of the two corporations, pay the debts, and for the stock liability the association should execute its notes to the stock company, or to the holder of any stock who desired to surrender his stock to the association, for the face value of the stock, and the association to receive a conveyance of the park. In pursuance of this arrangement the officers of the stock company executed to the association a trust deed conveying the property to it, and subjecting said property to the same liability for all indebtedness of the stock company, and also to all claims of the stockholders, the notes for stock liability to be paid in five years, without interest. It was also provided that the notes should be liens on the park, until paid; that the title and interest on the stock company should not cease until all such liabilities were paid. This deed was unanimously approved and confirmed by the stock company. Plaintiff refused to take the notes of the association, and instituted this suit, in which he makes the two corporations, only, defendants. In his bill he seeks to recover the amount he has paid for stock, with interest thereon; asks for the appointment of a receiver and for a sale of the land, and payment of his claim out of the proceeds. Against this claim the defendants urge (1) the invalidity of the original contract under which plaintiff claims; (2) acquiescence in and ratification of the acts done, and which are now complained of; (3) that plaintiff has no right to sue in his own name. The court below dismissed plaintiff's petition, and rendered a judgment against him for the costs, and he appeals. Affirmed.

L. A. & F. W. Ellis, for appellant. R. W. Stewart, for appellees.

KINNE, J. 1. We shall not attempt to discuss, much less determine, the many questions argued by counsel. To our minds, a consideration of two of the questions will be decisive of this case. Defendants insist that plaintiff has acquiesced in and ratified the acts of which he now complains. We cannot undertake to recite all of the very many facts which we think fully show that this claim is well founded. We may refer to a few of them. Plaintiff was one of the prime movers in the organization of both corporations, and he continued his interest therein until it became apparent to him that he, and those acting with him, could no longer control the affairs of the two corporations. Until that time arrived, he had, as a member of the association, as a stockholder in the stock company, and as an officer, been present at most, if not all, of the meetings of the corporations, and had acquiesced in all that had been done. He drew the original contract, upon which he now bases his right

to recover; he was present and presided at the meeting of the association when the part of that contract was eliminated of which he now complains; and, though there is a conflict in the evidence, we incline to the opinion that the action of the body, in eliminating the parts of the contract upon which plaintiff now relies, was unanimous. Certain it is, he made no objection thereto. And being present, and not objecting, he ought not now to be heard to complain of what was done. True, he says he did object, but the weight of the evidence is against him. He was more or less of the time an officer in both of these corporations; was for five years prior to 1890 president of the stock company: and was, as he testifies, a supporter of the association, in various ways, up to the very time of the trial of this case in the court below. He was present at a meeting of the stock company when a committee was appointed to confer with a like committee of the association touching the transfer of the park to the latter; also, at a meeting when the officers reported their action in executing the trust deed. After the terms and conditions of the deal had been arranged, whereby the title to the park was to be transferred to the association, and to be charged with all debts, and it was to give its notes for outstanding stock, to be secured by the land, and it was sought to get stockholders to donate the stock to the association, plaintiff donated 10 shares. Indeed, he was the first man to make a donation, and thus attempt to further the carrying out of an arrangement which he now claims deprived him of substantial rights which he formerly possessed. He claims that a condition was attached to this donation, but the weight of the evidence is to the contrary. He donated money, only the summer before this case was tried, to pay a debt of the association. He was present when, by a unanimous vote, the trust deed was approved. From these and many other facts, it seems clear that plaintiff acquiesced in what was done, and of which he now complains, and, as to some matters now complained of, he lent his active approval. His action has been such that he has no just cause for complaint.

2. If we should be in error as to our view of the testimony, and consequently as to the conclusion reached above, there is still another reason why plaintiff is not entitled to the relief asked: According to his claim, he was to have the amount paid for his stock, with interest thereon, and a lien or claim upon the land to secure said sums. Now, we find that the association never authorized or ratified the making of a contract empowering the stock company to, in any event, sell the land, and pay the amount paid for stock, with interest thereon. He was one of the men authorized to draw that contract. He knew the measure of his authority. He exceeded it, and, unless it was ratified thereafter by the association, he is in no position to claim the benefit of provisions therein which he was not authorized to make. Now, the association, just as soon as the fact was brought to its notice that the contract provided for the sale of the property and the repayment to stockholders of the amount they had paid for the stock, with interest thereon, repudiated those provisions. Having, as the agent of the association, wrongfully inserted such provisions in the contract, he cannot be heard to insist upon a right of recovery based thereon. Now, how were his rights impaired by the subsequent action of the stock company in deeding the land to the association? He theretofore had his stock, and the amount paid for it was a charge upon the land. By the new arrangement he had his stock, and it still remained a charge upon the land. He might, it is true, take the notes of the association, for which the land stood as security, for the amount he had paid for his stock, or he might surrender his stock to the stock company, and by it settle with the association; but, in any event, for the amount he had paid for his stock he was at all times secured by the land, and in either case his security was preserved to him unimpaired. Besides, when he bought his stock the land which stood as security for his investment was worth only $2,800, while now, according to his own evidence, it is worth $15,000. Irrespective of his right to bring this suit,—a question we have not considered,—it is impossible to discover how any substantial right he possessed in the first place has been impaired by the subsequent acts of the corporations, of which he now complains. The terms and conditions upon which the land was deeded to the association amply protect every interest he has, and there is no occasion for taking this property out of the hands of the owners, in the absence of any showing that they are doing anything to injuriously affect plaintiff's rights or to impair his security. The decree below is affirmed.

STATE v. McNAMARA.

(Supreme Court of Iowa. Feb. 14, 1896.)

CRIMINAL LAW—NOTICE OF APPEAL.

Where the record does not show any notice of appeal served, the case will be dismissed.

Appeal from district court, Webster county; D. R. Hindman, Judge.

Milton Remley, Atty. Gen., for the State.

PER CURIAM. The defendant was indicted for a liquor nuisance, pleaded guilty, and appeals. The cause is submitted upon a partial transcript of the record, from which it does not appear that any notice of appeal was ever served. The cause must therefore be dismissed.

STATE v. AHERIN.

(Supreme Court of Iowa. Feb. 14, 1896.)

Appeal from district court, Webster county; D. R. Hindman, Judge.

Milton Remley, Atty. Gen., for the State.

PER CURIAM. The defendant was indicted for the crime of nuisance, pleaded guilty, and was sentenced to pay a fine of $300 and costs. The case is submitted on a partial transcript of the record. It nowhere appears that any appeal was taken. The cause must therefore be dismissed

STATE v. BUTLER.

(Supreme Court of Iowa. Feb. 14, 1896.)

Appeal from district court, Iowa county; M. J. Wade, Judge

Milton Remley, Atty. Gen., for the State.

PER CURIAM. The appellant was charged by indictment with the crime of nuisance, committed by maintaining and keeping a place in which to keep and sell intoxicating liquors in violation of law, and by keeping and selling therein such liquors in violation of law. He pleaded guilty to the charge, and from the judgment rendered on his plea he appeals. The case is submitted to us on a transcript of the record, without argument by either party. We have examined the transcript with care, but do not find any error of which the appellant can justly complain. The judgment of the district court is affirmed.

STATE v. LODER.

(Supreme Court of Iowa. Feb. 14, 1896.)

Appeal from district court, Benton county; G. W. Burnham, Judge.

Milton Remley, Atty. Gen., for the State.

PER CURIAM. The appellant was charged by indictment with the crime of nuisance, committed by maintaining and keeping a place in which to keep and sell intoxicating liquors in violation of law, and by keeping and selling therein such liquors in violation of law. He pleaded guilty to the charge, and from the judgment rendered on that plea he appeals. The cause is submitted for our determination on a transcript of the record, without argument by either party. We have read the transcript carefully, but do not find any error in the proceedings in the district court. The judgment of that court is therefore affirmed.

STATE v. LANER.

(Supreme Court of Iowa. Feb. 14, 1896.)

Appeal from district court, Washington county.

Defendant was convicted of the crime of selling intoxicating liquors, and appeals to this court. Affirmed.

Milton Remley, Atty. Gen., for the State.

PER CURIAM. The case is submitted by the attorney general upon a transcript of the record containing a copy of the information, plea of the defendant, and judgment of the court. We have examined the record, and discovered no error, and the judgment is affirmed.

STATE v. McGUIRE.

(Supreme Court of Iowa. Feb. 14, 1896.)

Appeal from district court, Fayette county; L. E. Fellows, Judge.

Milton Remley, Atty. Gen., for the State.

PER CURIAM. This cause is submitted to us upon a partial transcript of the record, embracing the indictment, record entry of judgment, and notice of appeal. We have examined all of the record before us, and, discovering no error, the judgment below is affirmed.

STATE v. BUSSIMUS.

(Supreme Court of Iowa. Feb. 14, 1896.)

Appeal from district court, O'Brien county; G. W. Wakefield, Judge.

Information for nuisance in keeping for sale intoxicating liquors in violation of law. Verdict of guilty, and a judgment thereon, from which the defendant appealed. Affirmed.

The case was submitted by the attorney general on a partial transcript of the record. No appearance for the appellant.

PER CURIAM. The evidence is not in the record. The proceedings appear to have been regular, and the record discloses no error. The judgment is affirmed.

STATE v. WILTSIE.

(Supreme Court of Iowa. Feb. 14, 1896.)

Appeal from district court, Kossuth county; Lot Thomas, Judge.

Defendant was indicted, tried, and convicted of the crime of adultery, and appeals to this court. Affirmed.

D. C. Chase, for appellant. Milton Remley, Atty. Gen., for the State.

PER CURIAM. The case is submitted upon a transcript containing a copy of the indictment, plea of the defendant, instructions of the court, verdict of the jury, motion for new trial, judgment of the court, and notice of appeal; there being no appearance for appellant. We have examined the record, and find no error, and the judgment is affirmed.

STATE v. DANIELSON et al.

(Supreme Court of Iowa. Feb. 14, 1896.)

Appeal from district court, Mills county; N. W. Macy, Judge.

Indictment for nuisance. Verdict of guilty, and a judgment from which the defendant appealed. Affirmed.

The cause was submitted on a partial transcript of the record, there being no appearance for defendants.

PER CURIAM. There is nothing in the record to indicate but that the proceedings leading to the judgment were regular and legal, and the judgment is affirmed.

STATE v. FISHER.

(Supreme Court of Iowa. Feb. 14, 1896.)

Appeal from district court, Webster county; S. M. Weaver, Judge.

Milton Remley, Atty. Gen., for the State.

PER CURIAM. This cause is submitted to us on a transcript of the indictment, judgment, and appeal bond, without argument for either party. It appears that the defendant was convicted of the crime of nuisance, committed by maintaining and keeping a place in which to keep for sale and sell intoxicating liquors, in violation of law, and by keeping and selling therein such liquors, in violation of law. The record submitted to us does not show that an appeal has been taken, and the cause is therefore dismissed.

ROACH v. CAMERON.

(Supreme Court of Iowa. Feb. 12, 1896.)

LEASE—ALTERATION BY PAROL—SUFFICIENCY OF EVIDENCE—CROSS-EXAMINATION—HARMLESS ERROR.

1. Evidence that after defendant had leased to plaintiff part of a building to be erected, reserving a portion for his own use, and before the completion of the building, expensive changes were made therein; and that defendant thereafter used more of the building than was reserved to him in the lease; and that plaintiff kept an account of the space occupied by defendant, but made no charge therein for such extra space, and paid rent without deducting its value, and made no claim therefor until after the end of the term,—will support a finding that defendant occupied the additional space under oral agreement made at the time of the alterations, and in consideration thereof.

2. Error in allowing a witness to be cross-examined on matters not gone into on direct examination was harmless where the testimony elicited related to an undisputed fact.

Appeal from superior court of Keokuk; Henry Bank, Jr., Judge.

Action at law on an account, and to recover rent for the use of portions of a barn. There was a trial by the court without a jury, and a judgment for the plaintiff for the amount of his account. From that judgment, he appeals. Affirmed.

Parsons & Dolan, for appellant. James C. Davis, for appellee.

ROBINSON, J. This appeal involves questions growing out of the claims of the plaintiff for rent. In February, 1891, the parties to this action entered into a written agreement, by which the defendant leased to the plaintiff a part of a building which was to be thereafter erected in the city of Keokuk, for the term of one year from the completion of the building, with the option of extending the term to include three years. The lease gave to the plaintiff the right to use all of the building except an office 12 by 14 feet in size, and one-half of the basement. He was to pay a rent of $30 a month, and all gas and water charges. The building was completed, and occupied by the plaintiff for the term of 29 months. During that time the defendant occupied one-half of the upper floor, for which a reasonable rent would have been $174. He also used, during a part of the time, a portion of the first floor above the basement, in which he stored three sprinklers, a buggy, a sleigh, and two excursion cars. The reasonable value of the space so used was about $95. The plaintiff seeks to recover for the use of the upper and second floors, the latter being the first above the basement, but was not allowed anything on account of such use.

1. The defendant admits the making of the lease to which we have referred, but claims that after the building was commenced, and before it was completed, the lease was modified by a verbal agreement, under which expensive changes in the building as originally planned were made, in consideration of which the defendant was to have the right to occupy the second and third floors of the building in common with the plaintiff, and that the building was used under the second agreement, and that the defendant is not liable for the rent in question. The superior court found that the claim of the defendant was substantially correct. It does not appear that formal plans and specifications were prepared, but there was a rough drawing, and a plan of the building in all material respects was well settled and understood by the parties when the original agreement was made. The first plan provided that the stalls for horses should be on the first floor, and that the basement should not be inclosed. Under the plan as changed, the basement was inclosed, and stalls made in it for the horses. A runway from it to the floor above was made for taking horses to and from it to the basement, and the storage space in the second floor was much increased. Changes were also made in the upper floor for storage of hay and grain for the horses, and other improvements not contemplated by the original plan were made. There is much conflict in the evidence in regard to the effect of these changes upon the liability of the parties under the original lease. The plaintiff contends, in effect, that his rights were not affected by them, and that he retained the right to use all the building not reserved by the original agreement; while the defendant insists that, in consideration of the changes, he was given the right to use the building as he did without charge, and without deductions from the rent for which the original lease provided. Each party is corroborated to some extent by the testimony of disinterested witnesses, the plaintiff claiming, at least, one or more witnesses for his theory than those who testified for the defendant. The plaintiff kept a record of the use the defendant made of the building, but did not enter in his book any charge for that use. Nor did he make any claims upon the defendant on account of it until after his lease was terminated, although he paid the rent regularly as it became due. This fact tends strongly to corroborate the claims of the defendant. The superior court was authorized by the evidence to find that the changes involved considerable expense, and that the agreement to modify the original lease, upon which the defendant relies, was based upon a sufficient consideration. It is clear that

there is not such a lack of evidence in favor of the defendant upon any material issue in the case as to authorize us to interfere with the judgment of the superior court. On the contrary, we are well satisfied that substantial justice has been done.

2. The appellant complains of rulings made by the court which compelled him to answer certain questions asked on cross-examination. They did not refer to anything concerning which the plaintiff had testified in his direct examination, and were not proper; but they related to matters in the original plan of the building, about which there is no dispute, and no prejudice could have resulted from the rulings which required answers. The judgment of the superior court is affirmed.

LONG v. VALLEAU (LONG, Intervener).

(Supreme Court of Iowa. Feb. 12, 1896.)

EXECUTION—SALE—REDEMPTION—RIGHT OF PURCHASER TO DEED.

Code, § 3089, provides that, where the purchaser at sheriff's sale "fails to pay the money when demanded, plaintiff may elect to proceed against him for the amount; otherwise, the sheriff shall treat the sale as a nullity, and may sell the property on the same day, or after a postponement," as authorized elsewhere. *Held* that where an execution for $500 was given to the sheriff without notice that it was issued on an appeal judgment, from a sale to satisfy which no redemption could be had (Code, § 3102), and levy was made in the belief that redemption could be had, on land worth from $6,000 to $11,000, and sale was made to one who failed to pay the price for 30 days, when the sheriff accepted the amount of the execution, with costs, and returned it as satisfied, the purchaser was not entitled to a deed on a subsequent tender of the amount of the bid (no election having been made by the plaintiff to sue the purchaser), since the sale was virtually nullified, and the money was not received by the sheriff for a redemption, but to satisfy an outstanding execution in his hands.

Appeal from district court, O'Brien county; S. M. Ladd, Judge.

H. E. Long, for appellant. Allen & Brown, for appellees.

KINNE, J. 1. Mary A. Long, on November 21, 1893, filed her motion in the office of the clerk of the district court of O'Brien county, Iowa, against O. N. Norgard, sheriff of Winneshiek county, Iowa, asking the issuance of a mandatory order upon said sheriff directing him to accept the amount of her bid made as hereinafter set forth, and requiring said sheriff to execute a deed to certain real estate sold to Mary A. Long. Angie Valleau, the judgment debtor, whose land had been sold, intervened upon the hearing. The matter was heard upon affidavits and documentary evidence, and the court overruled the motion of Mary A. Long, and taxed her with the costs of the proceeding. She appeals.

2. The facts, stated briefly, are that on December 12, 1891, J. J. Long, as administrator, received a judgment for $225 against Angie Valleau. The costs therein amounted to $218. An appeal was taken in said case, and the judgment below was affirmed by this court in May, 1893. 55 N. W. 31. August 21, 1893, plaintiff caused an execution to be issued upon said judgment, directed to the sheriff of Winneshiek county, Iowa; and, under the direction of her attorney, said sheriff levied upon the undivided two-thirds interest of Angie Valleau in certain real estate worth from six to eleven thousand dollars, and advertised and sold the same to Mary A. Long for $520.90, the amount of said judgment, costs, and accruing costs. The sheriff, in his answer showing cause why he should not be compelled to execute a deed to Mary A. Long, says his understanding was that the land was to be sold subject to redemption, and so he levied on much more property than he otherwise would have done; that he never knew until after the sale that the execution was issued upon a judgment from which an appeal had been taken to the supreme court; that the land was sold subject to redemption; that the land levied upon was worth $7,000; that the sale occurred on September 29, 1893; that the purchaser paid nothing on the bid, and never offered to pay anything until October 24, 1893, when the attorney for Mary A. Long tendered the money, and demanded a deed which the sheriff refused; that on October 23, 1893, Angie Valleau paid to the sheriff the amount due on the execution, costs, and accrued costs, and said sheriff returned the execution satisfied; that Mary A. Long, having failed to offer or pay the amount bid the sheriff, declared the sale off, and ignored her said bid, accepted and received said money from said defendant. Angie Valleau intervened, claiming to be the owner of the land levied upon; that it was worth $11,000; that the levy was wrongful, unjust, and excessive, and setting out the fact that she on October 23, 1893, paid said sheriff the full amount due on said execution, including costs and accruing costs. Many other facts are recited in the petition of intervention not necessary to be here set forth. Issue was taken by Mary A. Long on the facts stated in the petition of intervention, and the hearing proceeded.

This matter may be briefly disposed of without entering into a discussion of the many questions argued by counsel. This record shows that Mary A. Long is the wife of H. E. Long, the attorney for her in this case. J. J. Long, the plaintiff, is a brother of H. E. Long. Counsel claims that under the provisions of Code, §§ 3101, 3102, his wife had a right to a deed to this property. It appears in this case that the sheriff making the sale was not advised by counsel, or otherwise, that the sale was to be made without redemption, nor was he advised that the judgment had been appealed from. He therefore told parties representing the defendant in execution that the property would

be sold subject to redemption, and it was in fact so sold. We need not determine what the effect of such a proceeding would be upon Angie Valleau's right to redeem. Under the showing made in this record, it cannot be doubted that, had the sheriff known that the case was one where the property should be sold without redemption, he would not have levied upon from seven to eleven thousand dollars worth of real estate to satisfy a claim and costs aggregating only $520.90. Our law provides that, "where the purchaser [at sheriff's sale] fails to pay the money when demanded, the plaintiff or his attorney may elect to proceed against him for the amount; otherwise the sheriff shall treat the sale as a nullity, and may sell the property on the same day, or after a postponement as above authorized." Code, § 3089. The only postponement which the sheriff could make in the absence of agreement between the parties must be made on the day of sale for not more than three days, and but two such postponements may be made. Code, § 3083. The facts are that Mary A. Long was not present at the sale, nor was any one there to act for her. Just before the sale, her husband, the attorney for plaintiff, wrote the sheriff, instructing him to bid the property in, in her name, if there were no other bidders. This was done. The next day the sheriff wrote the attorney what had been done, and demanding his costs and the amount of the bid. No money came, and, after waiting for almost 30 days, the sheriff accepted the amount due on the execution from Angie Valleau, and returned the execution as fully satisfied. The next day Mary A. Long tendered to the sheriff the amount of her bid, and demanded a deed, and the tender was rejected, and the sheriff refused to execute the deed. No such election to proceed against the purchasers, as the statute contemplates, was made by the plaintiff. The bid had not been paid. The officer was not required to wait the pleasure of the bidder as to the time she would pay. The bidder having failed to pay the amount of her bid, she is in no situation to complain or to insist upon a deed to the property. The plaintiff having failed to elect, as required by the statute, to proceed against the bidder, and the full amount of the claim and costs having been paid, he ought to be satisfied.

We discover no reason for assisting Mary A. Long to obtain title to land worth from seven to eleven thousand dollars for $520.90. It is said that the sheriff could not receive the money from Angie Valleau as a redemption, as she had no right to redeem. Her right to redeem is not in controversy, as the money was not received in redemption from the sale. The sale was virtually set aside, and the money paid, in satisfaction of the amount due upon the execution in the sheriff's hands. There are other and sufficient reasons why such a sale should not be permitted to stand, which we need not now consider. The action of the district court meets with our approval, and its order and judgment is affirmed.

BRAUN v. WISCONSIN RENDERING CO.

(Supreme Court of Wisconsin. Jan. 28, 1896.)

CONTRACT—CONSTRUCTION—REFORMATION—PAROL EVIDENCE—RES JUDICATA.

1. A contract reciting that the first party, in consideration of $500 to him to be paid, leases unto the second party, for three months, certain articles; the second party, in case he should return them before the expiration of that time, to pay for the use thereof at the rate of $200 per month till the return thereof; the second party also having the right, at any time before returning them, to buy them at a price not exceeding $900,—is a lease with a privilege of purchase during the term thereof, rent not to apply on purchase price.

2. Reformation of an instrument leasing property with privilege to purchase during the term at a certain price, and open only to the construction that rent should not apply on purchase price, cannot be reformed to allow such application: the parties knowing that the words which would permit it were omitted, and consent of the lessee to their omission having been given on the parol assurance of the lessor that it should make no difference.

3. A contract leasing property at a certain amount per month, with privilege to purchase during the term at a price "not exceeding $900," which merely gives the right to purchase at $900, with a suggestion that the lessor might consent to take less, does not admit of parol evidence to show a contemporaneous agreement that in case of purchase the rent should be applied on the purchase price, within the rule that, where only part of a contract is reduced to writing, the remainder may be proved by parol.

4. In an action to reform a contract to give it a certain meaning, plaintiff claiming that, through fraud or mistake, a material part was not inserted in the writing, judgment was rendered for defendant, the court remarking at the time that the meaning of the contract would not be changed by granting the prayer. *Held* that such remark, not being part of the judgment, would not be res judicata in an action on the contract as written.

Appeal from superior court, Milwaukee county; J. C. Ludwig, Judge.

Action by Jacob M. Braun against the Wisconsin Rendering Company. Judgment for plaintiff. Defendant appeals. Affirmed.

On the 24th day of June, 1892, plaintiff and defendant entered into a written contract, whereby the parties agreed as follows: "The said first party [plaintiff], in consideration of the sum of $500 to him to be paid, does hereby lease unto said second party, for a term of three months, from June 24, 1892, ten cars and 2,500 feet of track. Should said second party, however, return said cars and track before the expiration of the said three months, they are to pay for the use thereof at the rate of $200 per month from the commencement thereof to the time of the return of said cars and track; said cars not to be returned before sixty days. Said second party also has the right, at any time before returning said cars and track, to buy the entire outfit, at a price not to exceed the sum of $900." The property referred to was

delivered to the defendant under this contract, and, after using the same for some length of time, it took the benefit of the option to purchase, by notifying plaintiff to that effect. Thereupon defendant claimed that all payments that had been made for rent, of which there were several, should be applied as part of the purchase money. Defendant claimed that such was the contract, and that it was through fraud or mistake that it was not so stated in the writing, and on this theory an action was brought in the circuit court for Milwaukee county to reform the contract. The result of such action was that judgment was rendered in favor of the defendant in that action (plaintiff here). The trial judge remarked at the time that the meaning of the contract would not be changed by granting the application to reform it according to the prayer of the complaint. This action was brought to recover for the use of the property for 24 days, and a recovery on the contract for purchase money, on the theory that defendant is not entitled to have the rent applied thereon. Defendant, by answer, set up the facts as claimed by it in respect to the making of the contract, claimed that the contract should be construed as allowing the rent to be applied on the purchase money, or that it should be reformed in order to so provide, also set up, by way of counterclaim, the result of the action brought to reform the contract. Judgment was rendered in favor of the plaintiff, from which this appeal was taken.

Fiebing & Killilea and C. H. Van Alstine, for appellant. Turner, Bloodgood & Kemper, for respondent.

MARSHALL, J. (after stating the facts). There are several questions presented on this appeal, which will be considered in their order.

1. The first error assigned is that the court erred in the construction of the contract, in that it was not found that defendant was entitled to have the payments for rent applied on the purchase money. In construing a contract, it must be observed that while the office of judicial construction is to give effect to the intention of the parties, and that words and sentences should be so construed as to subserve such intention (Johnson v. Insurance Co., 39 Wis. 87; Weiseger v. Wheeler, 14 Wis. 101; Jacobs v. Spalding, 71 Wis. 177, 36 N. W. 608), this does not mean that violence may be done to the words the parties see fit to employ, but only that it is the duty of courts to look at the whole and every part of the contract, and to give that construction to it which will make it effectual to carry out the real intention of the parties so far as the words they see fit to employ will permit, without doing violence to the rules of language or the rules of law. Applying this to the contract before us, the conclusion is easily reached that the construction given to it by the trial court is correct. It is as clearly a lease of the property for a rental of $200 per month, with the privilege of purchasing the same at any time during the period named at $900, as English words can make it; and any other construction would do violence to the language the parties saw fit to use.

2. It is further claimed that, if the construction contended for by defendant is not correct, then the contract should be reformed. This court has repeatedly held that written contracts cannot be reformed except upon most positive and satisfactory evidence, showing fraud or mistake in committing the agreement to writing; that is, mistake of one party, and fraud of the other, or mutual mistake. Newton v. Holley, 6 Wis. 592; Lake v. Meacham, 13 Wis. 355; Harrison v. Bank, 17 Wis. 340; Fery v. Pfeiffer, 18 Wis. 510; Manufacturing Co. v. Langworthy, Id. 444; Ledyard v. Insurance Co., 24 Wis. 496. The proof must be plain, convincing, and beyond reasonable controversy that, by fraud or mistake, the true contract was not expressed in the writing (Blake Opera-House Co. v. Home Ins. Co., 73 Wis. 667, 41 N. W. 968); that is, as applied to this case, a mistake in omitting something which the parties intended to have inserted, or something which was in fact a part of the agreement, and which it was supposed was contained in the writing when it was signed and delivered,—not a mistake of judgment, in that one party relied upon the contemporary parol agreement of the other, instead of insisting upon its being reduced to writing. The latter appears to be the mistake in this case, if there was any mistake. Both parties knew that the words were omitted. Giving the most favorable effect to defendant's evidence, consent was given to the omission upon the promise made that such omission should make no difference. For this kind of mistake the law affords no remedy. It was a mere simultaneous parol agreement, which cannot be resorted to to vary or control the written contract. It follows that the court rightly refused to grant that part of the relief prayed for asking a reformation of the contract.

3. It is further claimed that the court erred in not finding that the written contract was modified by a subsequent oral contract. It must be conceded, as claimed by appellant, that a written contract may be modified by a subsequent parol agreement without any new consideration to support it (Lynch v. Henry, 75 Wis. 631, 44 N. W. 837); but the trouble in this case is that the evidence wholly fails to show any such subsequent agreement. The very theory upon which the action was brought in the superior court to reform the contract, and that the claim for reformation was made in this case, is consistent only with the theory that the agreement which appellant seeks to show was contemporaneous with the written contract, not subsequent to

it, and that is strictly in accordance with the evidence. Polabeck, one of the officers of the defendant, testified that the conversation about applying the rent paid as purchase money in case the option was accepted was before the contract was delivered. Fred C. Gross, also an officer of the defendant, testified that the conversation was at the time the contract was written and signed. Charles Freidrich, the secretary, and the one who wrote the contract, testified that the matter was talked over at the time of the making of the contract; that the remark about having the payments of rent apply on the purchase money was after the writing was signed, and before it was delivered. The evidence was all one way on the subject. Hence the written contract must be held to extinguish the parol agreement, if one was made, and to express the final intention of the parties, unless the facts bring the case within some of the exceptions to the general rule that parol evidence cannot be admitted to vary a written contract. Whiting v. Gould, 2 Wis. 552; Williams v. Slaughter, 3 Wis. 347.

4. It is further claimed that the case comes within the rule that, where only a part of the contract was reduced to writing, it is competent to prove by parol that part that rests in parol, under the rule referred to, but not applied, in Hubbard v. Marshall, 50 Wis. 322, 6 N. W. 497. Appellant asks, on this branch of the case, to have force given to the fact that the purchase price of the property was not fixed by the writing, but left to be thereafter determined. But we think the use of the words "not exceeding $900" means no more than that the "purchase price," strictly so called, should not be more than the price named. It suggests only that, while circumstances might arise whereby the vendor would consent to take less, the vendee might at any time within the period named have the property at the price mentioned. The rule that appellant invokes applies to a case where an entire verbal contract in part performance only has been reduced to writing (Whart. Ev. § 1015; Hope v. Balen, 58 N. Y. 382; Chapin v. Dobson, 78 N. Y. 75); or where there was a distinct contemporaneous parol agreement, and one of the parties seeks to make use of the written agreement for purposes inconsistent with the parol agreement, under such circumstances as would render such use fraudulent (Juillard v. Chaffee, 92 N. Y. 529; Martin v. Pycroft, 2 De Gex, M. & G. 785; Jervis v. Berridge, 8 Ch. App. 351). But the rule is not so broad as to allow parol proof of mere contemporaneous stipulations or conditions; the writing being the agreement, and not a mere part performance or incident of it. Under such circumstances, the proof of such contemporaneously agreed upon conditions or stipulations would operate merely to vary the terms of the writing, and must be barred; otherwise, the salutary rule that parol evidence cannot be admitted to alter or vary a written instrument, nor annex thereto any conditions not appearing in the contract, that has been so long established as not to be open to discussion, would be wholly swallowed up in the exception. What is here claimed is that defendant should have been allowed to establish as a fact that an important condition of the agreement was omitted; that is, that, in case of the purchase, the rent paid, upon the acceptance of the option to purchase, should be thereby converted into purchase money, and applied on the price of $900. This is not allowable under any authority with which we are familiar, except in cases which entitle the party to a reformation of the contract itself; and such a case is not here presented, as heretofore stated.

5. The remark made by the presiding judge expressing a reason for dismissing the complaint in the action to reform the contract is not, under the circumstances, res adjudicata in plaintiff's favor on the question of the proper construction of the writing. That question was not within the issues made by the pleadings. Appellant then claimed that, through fraud or mistake, a material part of the agreement was not inserted in the writing. On this he failed, and judgment was rendered against him. A judgment is conclusive only as to that which was in issue. Murphy v. Farwell, 9 Wis. 102; Hagan v. Casey, 30 Wis. 553; Pfennig v. Griffith, 29 Wis. 618. Reasons given in the course of a trial for an order or judgment, not contained or referred to in such judgment or order, are not res adjudicata. Robinson v. Railway Co., 64 Hun, 41, 18 N. Y. Supp. 728; Harmon v. Auditor of Public Accounts, 123 Ill. 122, 13 N. E. 161; Girardin v. Dean, 49 Tex. 248; Greathead v. Bromley, 7 Term R. 456; Barrett v. Failing, 8 Or. 152. Neither can evidence of such reasons be given to vary the effect of such judgment as it appears upon its face, if inconsistent with the record. Robinson v. Railway Co., supra; Agan v. Hey, 30 Hun, 594; Steam Packet Co. v. Sickles, 5 Wall. 593.

The judgment of the superior court is affirmed.

YANISH v. PIONEER FUEL CO.

(Supreme Court of Minnesota. Feb. 7, 1896.)

INSOLVENT CORPORATION — ASSIGNMENT — SEAL — PREFERENCES — ACTION TO SET ASIDE — JURY TRIAL — DESCRIPTION OF CREDITORS.

1. The case of Tripp v. Bank, 43 N. W. 60, 41 Minn. 400, followed, to the effect that the insolvent law of 1881 is applicable to private corporations.

2. The deed of assignment under the insolvency law was signed by the president and secretary of the corporation, under its corporate seal. *Held*, that the presence of the seal gave rise to a prima facie presumption that it was affixed by the proper authority.

3. The primary object of the insolvency law of 1881 is a fair and honest division of the insolvent's unexempt property among his creditors, and passive as well as active fraudulent preferences are forbidden. Yanish v. Fuel Co. (Minn.) 62 N. W. 387, followed.

4. Where the assignee in insolvency brings an action to set aside an execution sale, and to cancel the record of the sheriff's certificate thereof, upon the grounds that the judgment and sale thereunder constituted a preference permitted by the insolvent in favor of one of its creditors, *held*, that in such case the defendant was not entitled to a jury trial; that the gist of the action was to remove a cloud resting upon the title, and thus make the property available as assets for the payment of the insolvent's creditors.

5. A deed of assignment in insolvency, which in terms assigns all of the unexempt property of the insolvent for the equal benefit of all his creditors who shall file releases of their demands against the debtor, is sufficient, although the phrase "bona fide" is not contained therein.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; William Louis Kelly, Judge.

Action by Edward Yanish, assignee of the St. Paul Electric & Construction Company, against the Pioneer Fuel Company, to set aside a preference. From a judgment for plaintiff, defendant appeals. Affirmed.

Jones & McMurran, for appellant. O. E. Holman, for respondent.

BUCK, J. The plaintiff is the assignee of the St. Paul Electric Manufacturing & Construction Company. The proceedings were had under chapter 148, Laws 1881, and its amendments. The defendant on the 18th day of October, 1893, obtained a judgment by default against the insolvent for the sum of $1,374.48, and this action is brought to set it aside, as a preference given to one of the insolvent's creditors. The insolvent company was a corporation organized under the laws of this state, and was engaged in the business of manufacturing electric light and power, and furnishing the same to its patrons. The suit was commenced against the company September 25, 1893, by service of summons and complaint; but the complaint was not filed until the 17th day of October, 1893,—one day prior to the entry of judgment. On the 27th day of October, 1893, the electric company made an assignment for the benefit of its creditors, and the deed of assignment was filed the next day in the office of the clerk of the district court of Ramsey county. On the 27th day of October, 1893, the defendant caused an execution to be issued upon its judgment; and the sheriff of Ramsey county levied upon the real estate of the insolvent, and on the 28th day of December, 1893, sold the same to this defendant, and executed and delivered to it a certificate of sale, which was duly recorded. Before the second trial of this action the parties, by permission of the court, entered into an arrangement whereby the plaintiff deposited in a St. Paul bank a sum of money sufficient to cover the defendant's claim, and the defendant duly quitclaimed all its lien and claim upon the real estate of the insolvent, and the parties further agreed that the deposit in bank should abide the result of this action.

We are asked by the defendant's counsel to review and overrule the case of Tripp v. Bank, 41 Minn. 400, 43 N. W. 60, holding that the insolvent law of 1881 (chapter 148) is applicable to private corporations. No authority is cited, and no good reason suggested, for our doing so. We will state, however, that as a private corporation, at common law, could assign its property in trust for the payment of its debts, and could exercise that right to the same extent and in the same manner as a natural person, unless restricted by its charter or some statutory provision, and make preferences, if it saw fit to do so, we think it a wise policy which brings those corporations within the limitations, restrictions, and privileges of the insolvent law of 1881. The language of that law is broad enough to include private corporations, and, as their right to make such an assignment under it has been repeatedly recognized by this court, it should no longer be deemed an open question.

It is also contended by the appellant that the deed was unauthorized by the stockholders or directors of the insolvent corporation. The complaint alleges that the deed of assignment was duly made by the corporation for the benefit of its creditors, and this deed was admitted in evidence, and shows that it was signed by the president and secretary of the corporation under its corporate seal, and that it was duly acknowledged before a notary public. The presence of the corporate seal gave rise to a prima facie presumption that it was affixed by the proper authority. 4 Am. & Eng. Enc. Law, 243, 244, and cases there cited.

The trial court found the following facts in the case, and they are amply sustained by the evidence: "That said St. Paul Electric Manufacturing & Construction Company, and all its officers, and particularly said Henry Martin, who was then secretary of said corporation, and had sole charge of the books and accounts of said corporation, well knew at the time the summons and complaint was served in the action wherein said defendant herein, the Pioneer Fuel Company, was plaintiff, and said St. Paul Electric Manufacturing & Construction Company was defendant, that said St. Paul Electric Manufacturing & Construction Company was then insolvent, and that said debt sued on was due, and that it had no bona fide defense to said action, and that judgment would be taken against said St. Paul Electric Manufacturing & Construction Company in favor of said Pioneer Fuel Company, as in said summons stated, and that nevertheless said St. Paul Electric Manufacturing & Construction Company, and its officers and directors, willfully failed and neglected to take any steps towards and to make an assignment of its property for the benefit of all its creditors until after the judgment was entered in said action above described, and that said Pioneer Fuel Company obtained whatever preference which the entry of

said judgment gave it over the other creditors of the said St. Paul Electric Manufacturing & Construction Company, above named, solely by reason of the willful failure and neglect of said St. Paul Electric Manufacturing & Construction Company to so assign its property as it might have done; that said St. Paul Electric Manufacturing & Construction Company, and all its officers, intended, by reason of the facts hereinbefore found, that said Pioneer Fuel Company should obtain and have, by the entry of the judgment aforesaid in its favor, an undue and unlawful preference over all the other creditors of said St. Paul Electric Manufacturing Company; and said Pioneer Fuel Company, by reason of its action in the premises, well knowing at the time said action was begun, and also when said judgment was entered, that said St. Paul Electric Manufacturing & Construction Company was insolvent, intended thereby to obtain such preference over said other creditors." Applying to these facts the test adopted in the action between the same parties (62 N. W. 387), the insolvent company must be deemed to have suffered judgment to be entered against it for the purpose of giving a preference to the defendant over its other creditors. This it is not permitted to do, either by an active participation in proceedings which give a preference, or by remaining passive, and permitting other creditors to succeed in obtaining a preference. The insolvency law has for its primary object the fair and honest division among creditors of the insolvent of his unexempt assets, and forbids passive as well as active fraudulent preferences. This question is so fully discussed in the opinion rendered in the former appeal that we need not enlarge upon it.

The next question arises upon the right of the defendant to a jury trial. This action was not brought for the recovery of money only, or of specific real or personal property. Title to the real estate in question passed to the respondent by virtue of the deed of assignment, and the defendant's judgment, and its sale of the property under the execution issued on the judgment, constituted a cloud upon the respondent's title to the property; and he had a right to invoke the equitable power of the court to remove the cloud of an apparent lien of the judgment, set aside the sheriff's sale, and cancel the sheriff's certificate. Such an action is not triable by a jury. Although the practical result would be the recovery of the property, yet the gist of the action is to get rid of a cloud resting upon the title, and thus make the property available as assets for the payment of the insolvent's creditors.

Appellant also contends that the trial court erred in excluding the evidence of the secretary of the insolvent company as to whether he intended to give the defendant a preference by not putting in an answer to the complaint of the defendant in its suit against the insolvent. Conceding that this was error, it was cured by the subsequent evidence of the same witness, given without objection, to the effect that he had no intent either way upon the subject. This evidence was not contradicted by any oral testimony. Thus, the appellant had all the benefit of the witness' testimony upon the subject which it was possible for it to have secured, even if it had been previously admitted. But, if he had no active intent one way or the other, such passiveness upon his part could not, of itself, overcome the intentional preference which might be properly inferred from his acts, and which, unexplained, constituted a preference. It is the results which flow from an insolvent's acts by which he is to be judged as to his intended preference, as well as by his silence when he ought to speak, or by his open assertion of intent. His acts may belie his asserted intention, and be more potent, although testimony as to his intent is admissible. See Penney v. Haugan (Minn.) 63 N. W. 728.

Another point raised by the appellant is that the deed of assignment does not, in terms, make an assignment of all of his unexempt property for the equal benefit of all his bona fide creditors who shall file releases of their demands against the debtor, as provided by the amendment to the insolvent law. Gen. Laws 1895, c. 66. The deed of assignment is for the benefit of all creditors, to be paid in full, if there are sufficient funds. This would include bona fide creditors, and fraudulent creditors should not be allowed their claims, in any event. The phrase "bona fide," in the amendment of 1895, does not add anything to the law as it existed before the passage of that amendment. Other questions are raised by the assignment of errors, which we have carefully examined, but consider them without merit, and the judgment of the trial court is affirmed.

CLOUGH et al. v. MISSISSIPPI & R. R. BOOM CO.[1]

(Supreme Court of Minnesota. Feb. 6, 1896.)

BOOM FEES—LIEN—LOSS.

The plaintiffs contracted to sell to C. & Co., and deliver at the limits of defendant's boom a quantity of logs. Plaintiffs delivered the logs at the limits of defendant's boom, but retained the ownership of the marks of record in their own name, as security for the purchase money, which still remains unpaid. The defendant, under its charter, took possession of the logs and drove them to Minneapolis, where it turned out and delivered part of them to the vendees, C. & Co., and extended to them the time of payment of its boom charges, by taking their time notes for the amount, which also remain unpaid. The defendant now claims a lien, paramount to plaintiffs' rights, upon the logs having the same marks remaining in its boom, for its boom charges for the logs delivered to C. & Co. *Held*, that the lien was, as to plaintiffs, released by defendant's granting an extension of time to C. & Co., that C. & Co. and plaintiffs' interests in the logs oc-

[1] Rehearing denied.

cupied the relation of principal and surety for defendant's boom fees; C. & Co. being the principal debtors, and the logs the surety. Also, that defendant was chargeable with notice, by the records, of plaintiffs' interest in the logs.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Henry C. Belden, Judge.

Action by D. M. Clough and others against the Mississippi & Rum River Boom Company. From a judgment for defendant, plaintiffs appeal. Reversed with directions.

John F. Byers, for appellants. J. B. Atwater, for respondent.

MITCHELL, J. The question presented by the agreed facts is whether the defendant has a lien, paramount to the claims of the plaintiffs, upon certain logs in its boom, for boom fees for logs having the same marks which were turned out and delivered to N. P. Clarke & Co. in the year 1894. In February, 1893, plaintiffs contracted with N. P. Clarke & Co. to sell, and deliver in the limits of defendant's boom, 11,000,000 feet of logs, bearing certain marks, owned by and recorded in the name of the plaintiffs, for which N. P. Clarke & Co. agreed to pay a specified price per 1,000 feet, part to be paid when the logs were banked, part when the rear of the drive was in the Mississippi river, part when the rear was in the limits of defendant's boom, and the balance in three equal payments, in 60, 90, and 120 days from the third payment. These log marks remained recorded in the office of the surveyor general of logs and lumber as the property of the plaintiffs, no bill of sale or other written instrument affecting the ownership of these marks or the logs bearing them ever having been filed or recorded. During the driving season of 1893 plaintiffs cut and drove the quantity of logs mentioned in the contract to the boom limits of the defendant, at which place the defendant, acting under its charter, took possession of the logs, and drove them to the city of Minneapolis, at which place the defendant, pursuant to the order of N. P. Clarke & Co., and with the knowledge and assent of the plaintiffs, turned out and delivered to N. P. Clarke & Co. a part of the logs in 1893, and still another part in 1894, the balance still remaining in defendant's boom. The fees and charges of the defendant for the logs turned out and delivered in 1893 were all paid by N. P. Clarke & Co. The aggregate amount of logs turned out and delivered by defendant to N. P. Clarke & Co. in 1894 was over 60,000,000 feet, of which less than 8,000,000 bore the marks owned by plaintiffs. This aggregate was composed of logs bearing many different marks, and purchased of many different persons by N. P. Clarke & Co. The charge of the defendant was an equal and uniform rate per 1,000 feet on the entire amount. The manner of doing business between the defendant and N. P. Clarke & Co. during 1894 was as follows: At the end of each month the defendant would render N. P. Clarke & Co. a statement of account of all the logs turned out and delivered to them during the preceding month, the number of feet of logs of each mark separately, and the total amount of defendant's boom fees, which were all charged to N. P. Clarke & Co. Thereupon N. P. Clarke & Co. would give to defendant their promissory note, payable in three months, for the total amount of such boom charges for the month, and defendant would give to them a receipt, acknowledging the receipt of the note in settlement of the bill. Some of these notes were paid by N. P. Clarke & Co. when they fell due. Others were not paid, but were renewed from time to time, by N. P. Clarke & Co. giving the defendant other similar notes for the amount of the original notes. These renewal notes to the amount of several thousand dollars have never been paid, and are still held by the defendant. It is for the amount of the boom fees represented by these notes for logs turned out in 1894 that defendant now claims a lien on the logs bearing the same marks still remaining in its boom. N. P. Clarke & Co. never made any payments to plaintiffs on the logs, but, from time to time, as payments became due, executed to plaintiffs their promissory notes therefor, which remain unpaid. N. P. Clarke & Co. being thus in default, plaintiffs, intending to terminate the contract with them, on April 10, 1895, notified the defendant not to turn out any more logs to them. On May 4, 1895, N. P. Clarke & Co., being insolvent, made an assignment of all their property for the benefit of their creditors. On the 15th of May, 1895, the defendant seized a part of the logs which still remained in its boom, claiming a lien thereon for its boom charges for logs, bearing the same mark, turned out to N. P. Clarke & Co. in 1894. Until this seizure plaintiffs had no knowledge that these boom charges had not been paid by N. P. Clarke & Co.

The provision of its charter under which the defendant more particularly bases its right to a lien is as follows: "Said corporation shall have a lien and property in all such logs or other timber, so far as to enable it to take, scale, and retain a sufficient number or quantity of said logs or other timber to pay boomage or charges due on the same, and also all charges due on logs or timber of the same mark that may have been previously delivered." Sp. Laws 1867, c. 134, § 12. Much of the briefs of counsel is devoted to the discussion of the construction of the provisions of defendant's charter, and of the nature and extent of the right of lien given thereby. We do not find it necessary to consider any of these questions, for the reason that, under the view we take of the case, the logs in question were released from defendant's lien (assuming it would otherwise have had one) by its granting to N. P. Clarke & Co. an extension of time for the payment of its fees and charges. The log marks remained the property of plaintiffs, no bill of sale or other written

instrument affecting the ownership of the marks or the logs having been recorded in the office of the surveyor general of logs and lumber of that district. The plaintiffs held the title to the logs as security for the payment of the purchase money. The defendant was chargeable with notice of plaintiffs' rights, because the public records showed that they continued owners of the marks. N. P. Clarke & Co. were the principal debtors, and plaintiffs' property in the logs was, at most, merely security for the debt. The relation of principal and surety may exist between a person and property, as well as between two persons. The case is one where the principle applies that giving time to the principal discharges the surety. By giving time to N. P. Clarke & Co. (the principal debtor), the defendant released plaintiffs' property in the logs (the surety). We do not mean to be understood as holding that defendant would have released its lien merely by failing to insist on payment of its charges before delivering the logs, or even by deferring to present its bills for payment for such time as would be reasonably necessary, or customary, according to the usual mode of conducting such a business; as, for example, once a week, or once a month. That is not this case. Here the defendant, when it presented its bill at the end of each month, accepted N. P. Clarke & Co.'s note for the amount, payable in three months, and thereafter renewed these notes from time to time. The cases cited by defendant's counsel, holding that, by delivering part of a consignment of goods to the consignee, a common carrier does not, as against the unpaid vendor or consignor, release his lien on the remainder of the consignment for his entire charges, are not in point. If the carrier should grant an extension of time to the consignee by taking his time note for the charges, that case might be somewhat analogous to the present one. If the defendant had not given N. P. Clarke & Co. any extension of time, but had merely delivered part of the logs without demanding prepayment of its charges, the cases cited would be in point. Judgment reversed, and cause remanded, with directions to enter judgment for the plaintiffs.

AKELEY v. MISSISSIPPI & R. R. BOOM CO.[1]

(Supreme Court of Minnesota. Feb. 6, 1896.)

Appeal from district court, Hennepin county; Henry C. Belden, Judge.

Action by H. C. Akeley against the Mississippi & Rum River Boom Company. From a judgment for defendant, plaintiff appeals. Reversed, with directions.

Taylor, Calhoun & Rhodes, for appellant. J. B. Atwater, for respondent.

MITCHELL, J. This case is controlled by that of Clough v. Same Defendant (just decided) 66 N. W. 200, the only difference in the facts being that in this case the logs in question had been sold by Clough Bros. to the plaintiff, Akeley. Judgment reversed, and cause remanded, with directions to enter judgment for the plaintiff.

[1] For opinion on reargument, see 67 N. W. 208.

HALL v. LELAND et al.

(Supreme Court of Minnesota. Feb. 6, 1896.)

REFORMATION OF DEED — EVIDENCE — CONSTITUTIONAL LAW—AMENDMENT OF STATUTE —TITLE OF ACT.

1. Evidence *held* to justify the findings of fact.

2. Gen. Laws 1885, c. 53, entitled "An act to amend section 36 of chapter 73 of the General Statutes of 1878 relating to the testimony of witnesses," is not repugnant to section 27, art. 4, of the constitution.

3. Where an act purports to amend any part of the compilation called "General Statutes of 1878," its title will be sufficient, if it would be so if such compilation was an original enactment.

(Syllabus by the Court.)

Appeal from district court, Anoka county; C. B. Elliott, Judge.

Action by Ruel L. Hall against Charles F. Leland and Cora G. Leland. Judgment for defendants. Plaintiff appeals. Affirmed.

Savage & Purdy, for appellant. Alford & Hunt, for respondents.

MITCHELL, J. This was an action to reform a deed by striking out a provision purporting to be an assumption and an agreement, on part of the grantee, to pay a mortgage on the granted premises, which, he alleges, was not in accordance with the actual agreement of the parties, but was fraudulently inserted by the grantor, and, through the mistake or inadvertence of the grantee, was unknown to him when the deed was delivered. The court found that this provision was inserted in the deed "in accordance with the agreement between the parties, and that the grantor was not guilty of any fraudulent conduct or actions in causing the deed to be drawn in the manner in which it was drawn and recorded, or inducing the grantee to accept it." This, on its face, is a full finding on the merits against the plaintiff, and is abundantly supported by the evidence. The circumstantial evidence as to the business relations of the parties, and their relations to the property, are strongly corroborative of defendants' contention, because tending to show the reasonableness and probability, under the circumstances, that plaintiff would and did assume the payment of the mortgage as one of the conditions of the transfer of the property to him. In view of the rule requiring clear and satisfactory evidence to entitle a party to a reformation of a deed, it is at least doubtful whether the evidence would have justified any other finding than the one made. Plaintiff, however, contends that it is apparent, especially from the memorandum of the judge, that he did not predicate his finding upon the evidence as to the actual agreement between the par-

ties, but upon the mistaken idea of the law that, because the plaintiff was negligent in not examining the deed when it was delivered, he is conclusively presumed to have accepted it in the terms in which it was drawn, although not in accordance with the prior agreement of the parties. We do not wish to be understood as holding that resort can be had to the judge's memorandum for the purpose of impeaching his findings of fact. But, assuming that this may be done, the memorandum will not bear the construction placed upon it by counsel. The judge commences by saying that "the evidence shows that Hall assumed and agreed to pay the debt represented by the $5,000 note. This finding alone disposes of the case." This cannot be reasonably construed otherwise than that the evidence showed that the actual agreement between the parties was that Hall assumed and agreed to pay the mortgage. What follows, although possibly indicating a somewhat inaccurate view of the law, was evidently intended merely as an additional reason why the plaintiff was not entitled to a reformation of the deed.

2. The answer of the defendant, after denying, specifically, all the allegations of fraud or mistake contained in the complaint, alleges "that, by said agreement, plaintiff assumed and agreed to pay one-half of said indebtedness." It is urged that this is an admission that the deed was not in accordance with the agreement, in so far as it assumed to provide that plaintiff should assume and pay more than one-half of the mortgage. The evidence discloses the fact that defendant had conveyed to plaintiff the other undivided half of the property by a prior deed, which was made subject to this mortgage; also, that when plaintiff and defendant dissolved partnership, and defendant transferred his interest in the partnership business to the plaintiff, the latter had assumed and agreed (at least conditionally) to pay half of this mortgage indebtedness, which was, in fact, a partnership debt, although contracted by the defendant in his individual name. The allegation of the answer referred to was, presumably, made in view of this fact, and is not at all inconsistent with the fact that the deed was drawn in accordance with the actual agreement of the parties; and the trial seems to have been conducted throughout on that theory.

3. The only remaining question is as to the admission of a deposition of a witness within the state, taken pursuant to Gen. St. 1894, § 5688. The original act (Gen. Laws, 1873, c. 61) was entitled "An act to provide a more efficient method for the taking of depositions without the state." Section 1 of this act was incorporated into Gen. St. 1878 as section 36 of chapter 73. This section was amended by Gen. Laws 1885, c. 53, entitled "An act to amend section 36 of chapter 73 of the General Statutes of 1878 relating to the testimony of witnesses," so as to read, "Any person within or without this state." This last act is claimed to be repugnant to section 27 of article 4 of the constitution, because the subject is not expressed in the title. It was held, in Carner v. Railway Co., 43 Minn. 375, 45 N. W. 713, that the act was not subject to this objection. The question was disposed of rather summarily, but we think it was rightly decided. If the reference in the amendatory act of 1885 had been directly to the original act of 1873 there would have been much more force to plaintiff's contention. But, while the General Statutes of 1878 are a mere compilation, yet by the mass of people, as well as the legislature, they have been generally looked upon and treated as original enactments. Our Session Laws are full of amendatory statutes whose titles refer to them, and never once allude to the original acts. Public policy and necessity, if nothing else, requires us to hold that the title to an act purporting to amend any part of such a compilation is sufficient, or it would be so if, instead of being a compilation, it was original legislation. Any other rule would result in most disastrous consequences. As a matter of fact a reference to the General Statutes better subserves the purposes of the constitutional provision than would a reference to the original Session Laws. Judgment affirmed.

BRIGHAM v. PAUL et al.

(Supreme Court of Minnesota. Feb. 6, 1896.)

APPEAL—RECORD—REVIEW.

Held, that the findings of fact justified the conclusions of law.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; S. H. Moer, Judge.

Action by John H. Brigham against Charles Paul and others. From a judgment for plaintiff, defendants appeal. Affirmed.

H. F. Greene, for appellants. Wm. A. Cant, for respondent.

MITCHELL, J. The record is insufficient to raise the questions argued by counsel for the defendants. There is neither case nor bill of exceptions, the record containing nothing but the judgment roll, consisting of the pleadings, findings, and judgment. Hence, the only question presented is whether the findings of fact justified the conclusions of law. The court finds that the plaintiff is the owner in fee of the premises described in the complaint, and that the allegations of the answer constituting defendants' counterclaim of title are untrue. No other conclusion of law could be drawn from these findings than that the plaintiff was entitled to judgment. It is true that the court does find the execution of a deed by the surviving members of the town council of Fond du Lac, purporting to convey the

premises to the estate of Alexander Paul, defendants' ancestor; also the existence and record of the deeds referred to in the eighth paragraph of defendants' counterclaim, and that "they constitute a part of the chain of title upon which plaintiff relies." But these special findings may all be true, and yet the general findings, above referred to, be also true. In the absence of any case or bill of exceptions, we must presume that the plaintiff introduced sufficient other evidence to establish his title. It should be noted that the last special finding is inaccurately printed in the paper book, the words "a part of" being omitted. Judgment affirmed.

DOBBERSTEIN v. MURPHY.

(Supreme Court of Minnesota. Feb. 6, 1896.)

DOWER—ASSIGNMENT BEFORE ADMEASUREMENT—TRUSTS—QUITCLAIM DEED—CONSTRUCTION—JUDGMENT LIEN.

1. A consummate right of dower, although still unmeasured, is assignable; and, under the Code, the assignee may maintain an action in his own name for its admeasurement.

2. The rights of the assignee are not affected by the fact that the probate court subsequently assigns the dower to the widow.

3. In such case she becomes the trustee of the bare legal title for the benefit of her assignees.

4. A quitclaim deed of land by a widow construed as operating as an assignment of her dower therein.

5. Also, that the rights of the assignees, the deed being of record, are paramount to the lien of a subsequent judgment against the widow.

(Syllabus by the Court.)

Appeal from district court, Waseca county; Thomas S. Buckham, Judge.

Action by Carl Dobberstein against Elizabeth Murphy. Verdict for defendant. From an order refusing a new trial, plaintiff appeals. Affirmed.

J. A. Sawyer, for appellant. P. McGovern, for respondent.

MITCHELL, J. In 1870 John Murphy died intestate, seised in fee of a quarter section of land, and leaving, surviving him, his widow, Catherine, and his children, John H., James, Elizabeth, Mary, and Margaret, his only heirs. In 1872, no probate proceedings having been had to administer the estate, and the widow's dower being still unassigned and unmeasured, she executed to her daughters, Elizabeth, Mary, and Margaret, three of the heirs, a quitclaim deed in terms conveying to them all her interest in the land. This deed was recorded. In 1885 proceedings were had in the probate court by which dower was assigned to the widow, to wit, a life estate in the north 13⅓ acres of the south 40 acres of the quarter section and in an undivided one-third of the remainder of the land. The court also assigned to John H. said south 40 acres subject to said dower, and to the other four heirs, in common, the remaining 120 acres, subject also to said dower. Thereafter James, Mary, and Margaret executed deeds to the defendant, Elizabeth, conveying their interests in the land; Mary and Margaret, however, reserving the reversion in the dower lands. Subsequently to the decrees of the probate court, John H. conveyed all his interest in the land (the south 40) to the plaintiff. Thereafter all the interest of the widow, if any she had after the execution of the quitclaim deed, was levied on and sold to plaintiff's grantors, on execution on a judgment against her, rendered after the execution and record of the quitclaim deed. Upon this agreed state of facts the parties to this action stipulated as follows: "If said quitclaim deed from the widow, Catherine, to the defendant and her two sisters, conveyed to them all her dower interest, then the defendant shall have judgment herein; but, if said deed did not so convey her dower interest in the share of the land taken by the son John, who was a stranger to said deed, and if said widow, Catherine, retained her dower interest in the land distributed to said John, or if said deed operated as a release of her dower interest to each of said children, then the plaintiff is entitled to judgment declaring him the owner of said north 13⅓ acres of said south 40 acres of said quarter section, free from all claim by or through the defendant."

The controversy is over an estate for the life of the widow, Catherine, in the north 13⅓ acres of the south 40 acres of the quarter section. The plaintiff, claiming that he is the owner of this estate, brought this action to recover damages from the defendant for the alleged wrongful withholding the possession of the land from him. His counsel makes the point that this is purely an action at law, that no matter of equitable cognizance is set up in the pleadings, and, hence, that the only matter involved is the legal title of the land and the right of possession thereunder. If there would otherwise have been any force in this contention, it is entirely removed by the stipulation of the parties, by which they have submitted to the decision of the court all their rights, of every sort, in the premises. In a former action between these parties we held that the quitclaim deed from the widow to her daughters operated either as a conveyance or a release of her dower; that it was immaterial, in that action, in which way it took effect, for in either case it left in the widow no claim upon the land. Dobberstein v. Murphy, 44 Minn. 526, 47 N. W. 171. If that is so, it would seem to be decisive of this case; for if, after the execution of the quitclaim, the widow had no interest in the land, it is difficult to see how plaintiff's grantors acquired anything by their execution sale. But, passing that question, the deed was, in form, a conveyance, and not a release, and conceding that, under some circumstances, it might be held to operate as a mere release, a court would always hold it to operate as an as-

signment, whenever necessary to protect the rights of the grantees, which would certainly be the case if the effect of holding it to operate as a mere release would be to vest in the plaintiff an estate in the land for the life of the widow. Whatever may have formerly been the rule, there is now ample authority for the doctrine that a consummate right of dower, although still unmeasured, is assignable, and that, under the Code, the assignee can maintain an action in his own name for its admeasurement. And so far as this doctrine is concerned, it is immaterial whether unmeasured dower be deemed an estate in the land, or a chose in action, entitling the owner to an estate in the land. It is a vested right of property in an interest in the land, both assignable and enforceable. Of this vested right of property the daughters became the owners upon the execution of the quitclaim deed, and their rights were not affected by the subsequent decree of the probate court assigning the dower to their mother. Farnham v. Thompson, 34 Minn. 330, 26 N. W. 9; Dobberstein v. Murphy, supra. The mother thereby became a mere trustee of the bare legal title for her assignees, who could have maintained an action against her to compel her to convey that title to them. Their deed being of record, their rights were paramount to the lien of the subsequent judgment in favor of plaintiff's grantors. When the judgment was rendered, the widow had no beneficial interest in the land, and, hence, the purchasers at the execution sale acquired none.

Plaintiff's counsel, assuming that unmeasured dower is a mere chose in action, and not an estate in the land, and, hence, that the deed conveyed no estate in the land to the daughters, argues that it follows that plaintiff is entitled to judgment declaring him to be the owner of the land, relying somewhat, we presume, upon the use of the words "convey" and "conveyed" in the stipulation. If the premise be conceded to be correct, the conclusion does not follow. By whatever name unmeasured dower be designated, it is a vested property interest, which entitles the owner to an estate in the land as fully as an executory contract for the sale of land entitles the vendee, who has performed, to a conveyance. We will not give to the word "convey," as used in the stipulation, a technical meaning that would give to the stipulation the effect of defeating the clear rights of the parties, but must assume that it was used in the general and popular sense of "assign" or "transfer." Order affirmed.

STATE ex rel. COCORAN v. CHAPEL, Sheriff.

(Supreme Court of Minnesota. Feb. 6, 1896.)

CONSTITUTIONAL LAW — VALIDITY OF GAME LAW —DUE PROCESS OF LAW.

The provision of Gen. Laws 1893, c. 124, § 9, as amended by Gen. Laws 1895, c. 115, § 5, that "it shall be unlawful for any person to consign by common carrier to any commission merchant or sale market, at any time, any elk, moose, caribou or deer, or any part thereof except the head or skin," is valid, and not in violation of either the state or federal constitution.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; J. J. Egan, Judge.

Application by the state of Minnesota, on the relation of William Cocoran, against Charles E. Chapel, sheriff, for a writ of habeas corpus. From an order denying a petition, relator appeals. Affirmed.

Akers & Williams, for appellant. W. E. Bramhall and Pierce Butler, for respondent.

MITCHELL, J. Appeal from an order of the district court denying the petition of the relator, on a writ of habeas corpus, for his discharge from the custody of the respondent, as sheriff of Ramsey county.

The relator is held under a commitment issued upon a conviction of a violation of Gen. Laws 1893, c. 124, § 9, as amended by Gen. Laws 1895, c. 115, § 5, which provides "that it shall be unlawful for any person to consign by common carrier to any commission merchant or sale market, at any time, any elk, moose, caribou or deer, or any part thereof except the skin or head." He claims that this provision is unconstitutional, as class legislation, and is in violation of both the federal and state constitutions, because it deprives the citizen of his privileges and property without due process of law. An analysis of the provision shows that there is no discrimination between persons in the matter of killing game, or in the use or transportation of it after it is killed. Any one may kill or buy it during the open season, and every one is allowed equal privileges for shipping it after it is thus acquired; also, when a common carrier is not used as the means of transportation, every one is allowed to ship it to any one for any purpose; also that, when it is not consigned to a commission merchant or sale market, any means of transportation, either a common or a private carrier, may be used. The only restriction is that, when consigned to a commission merchant or sale market,—that is, to one handling game for sale,—it cannot be consigned by a common carrier. In its practical working, the only effect of the law is to limit the means of transportation of game killed for the market, and consigned to commission men for sale, either for themselves or on account of the consignors. The result would be to prevent, in a great measure, such game from becoming an article of general commerce, and thereby materially decrease the amount killed. The object of the statute, as its title indicates, is to protect and preserve the game of the state from extinction or undue depletion. The most usual method adopted to effect such an object is to limit in some way the amount of game killed. One way of accomplishing

this is to limit the open season. But this is not always effectual; for, even if the open season is reduced to the shortest reasonable period, the number of hunters, especially those who hunt for the market, may be so great as to unduly deplete the game even during that period. Another method resorted to is to limit the amount that any one person may kill, and to restrict the modes of killing. Experience proves that such provisions are difficult to enforce, because of the difficulty of procuring the evidence of their violation, especially in the case of large game, which is usually killed in the secrecy of the forest.

It is a matter of common knowledge that the rapid depletion of game, especially large game, such as deer, is caused by its indiscriminate slaughter by "pot hunters," who kill it for the general market. The practical question which confronted the legislature was how to prevent the undue depletion of such game from this cause. This could only be done by adopting some means that would, as far as possible, prevent the game from becoming a subject of commerce in the general market, and thereby reduce the amount that would reach such market. It is also a matter of common knowledge that the facilities for regular, rapid, and cheap transportation furnished by common carriers, especially railways, are practically essential to the business of these pot hunters, and furnish its chief stimulant and aid, and that, without this method of transportation, hunting for the general market would be quite limited, and the amount of game killed very much reduced. Hence, the enactment of the provision under consideration. The legislature has a very large discretion in such cases as to the means to be adopted to effect the desired object, and, if these means do not violate any constitutional provision, the courts will never set up their judgment against that of the legislature as to whether they are the best or most equitable means that might have been adopted. Neither will the courts declare a law invalid, unless it is in plain violation of some express provision of the constitution. All reasonable doubts must be solved in favor of the legislative action.

The provision under consideration certainly has a natural and reasonable tendency to preserve the game of the state from extinction or undue depletion, and we cannot say that the restriction upon the method of transporting game consigned to commission men or sale markets is arbitrary, or not founded upon an apparent natural reason, suggested by the necessities of the case. If the law is otherwise unobjectionable, the mere fact that, in its operation, it may incidently deprive common carriers of some business which they would otherwise get, or may render it more difficult for those to procure game in the market who live at a distance from those parts of the state where it is killed, will not render the law invalid. If this restriction was sought to be applied to some article in which the citizen had an absolute and unlimited right of private property, it could not be sustained. But wild game, before it is reduced to possession, belongs to the state in its sovereign capacity, in trust for the whole public. Hence, in the exercise of its police power, the state may impose such limitations and restrictions upon the right of property in it, after it is taken or killed, as will tend to prevent its extermination or undue depletion. State v. Rodman, 58 Minn. 393, 59 N. W. 1098. One who kills a deer does not acquire an absolute and unlimited right of property in it. His right of property, from its very inception, is subject to all the limitations imposed upon it by the police laws of the state, one of which is the restriction upon the mode of transportation under consideration. Hence, no question of taking private property without due process of law is involved. Order affirmed.

NELSON, County Treasurer, v. ST. PAUL TITLE INSURANCE & TRUST CO.

(Supreme Court of Minnesota. Feb. 6, 1896.)

TAXATION—TITLE INSURANCE COMPANIES.

If a title insurance company, organized under Gen. Laws 1887, c. 135 (Gen. St. 1894, §§ 3338–3343), avails itself of the provisions of Gen. Laws 1889, c. 227, and engages in the annuity, safe-deposit, and trust business authorized by Gen. Laws 1883, c. 107 (Gen. St. 1894, §§ 2841–2854), all its property is subject to assessment and taxation under the general tax law, in the same manner as the property of annuity, safe-deposit, and trust companies organized under the act of 1883.

(Syllabus by the Court.)

Case certified from district court, Ramsey county; Hascal R. Brill, Judge.

Action by A. N. Nelson, county treasurer of Ramsey county, against the St. Paul Title Insurance & Trust Company. Case certified. Affirmed.

Pierce Butler, for plaintiff. Stevens, O'Brien, Cole & Albrecht, for defendant.

MITCHELL, J. The defendant was originally a corporation existing and doing business under Gen. Laws 1887, c. 135, as amended, entitled "An act regulating and confirming the formation of real estate title insurance companies." Gen. St. 1894, §§ 3338–3343. The authorized business of such corporations was "examining titles to real estate and of guaranteeing or insuring owners of real estate and others interested therein or having liens or incumbrances thereon against loss by reason of defective titles, encumbrances or otherwise." The act provided that such corporations "shall be taxed in like manner as domestic insurance companies are." The statute relating to domestic insurance companies provided that "they

shall annually pay to the state two per cent. on their premium receipts in this state and shall also pay taxes and assessments upon real estate owned by them within the state in like manner and in like amount as real estate owned by individuals is taxed and assessed, and no additional taxes shall be collected of such companies." Gen. St. 1894, § 3192. Gen. Laws 1883, c. 107, and amendatory acts (Gen. St. 1894, §§ 2841–2854), authorized the formation of corporations "for the purpose of transacting business as annuity, safe deposit and trust companies." The powers of such companies as enumerated in section 9 of the act (section 2849, Gen. St. 1894) are quite varied and extensive, and the kinds of business which they are authorized to transact are very different from that to be transacted by title insurance companies organized under Gen. Laws 1887, c. 135 (Gen. St. 1894, §§ 3338–3343). The act of 1883 made no provision for any special mode of taxing annuity, safe-deposit, and trust companies, but left their property to be assessed and taxed in the usual and ordinary method in which the property of corporations is assessed and taxed under the general tax law. In 1889 the legislature passed an act (Gen. Laws 1889, c. 227; Gen. St. 1894, § 3339) providing that any corporation organized under or confirmed by Gen. Laws 1887, c. 135 (Gen. St. 1894, §§ 3338–3343), upon complying with the provisions of Gen. Laws 1883, c. 107 (Gen. St. 1894, §§ 2841–2854), as amended, or as the same might be thereafter amended, should be subject to the provisions of the last-named act, as amended, or as the same might thereafter be amended, and entitled to all the rights, privileges, and franchises thereby conferred. After the passage of the act of 1889, the defendant complied with the provisions of the act of 1883, and amended its articles of association so as to authorize it to transact both a title insurance business and an annuity, safe-deposit, and trust business, and any other kind of business authorized by the act of 1883, and since that time it has been engaged in transacting both kinds of business. Its capital is invested partly in securities as a "guaranty fund," as required by Gen. Laws 1887, c. 135,—the title insurance company act (Gen. St. 1894, §§ 3338–3343),—partly in securities deposited with the state auditor, as required by Gen. Laws 1883, c. 107,—the annuity, safe-deposit, and trust company act (Gen. St. 1894, §§ 2841–2854),—partly in a "title insurance plant," partly in real estate, partly in bank stock, and the balance in personal property chiefly mortgage securities.

The questions certified to this court are: First, is the property of the defendant, other than its real estate and bank stock, subject to taxation in any other manner than as provided by Gen. Laws 1887, c. 135 (Gen. St. 1894, §§ 3338–3343), to wit, by payment of 2 per cent. on its premium receipts from title insurance? If so, then, second, what portion of its property is subject to such other mode of taxation? Our answer to these questions is that all the property of the defendant is subject to assessment and taxation in the usual and ordinary manner in which the property of corporations is assessed and taxed under the general tax law. Both parties concede the validity of the commuted system of taxing insurance companies provided by statute. Hence, we shall assume, without deciding, that this commuted system is not in conflict with any provision of the constitution. It is a familiar rule that exemptions from taxation are to be construed strictly in favor of the state. We think the same rule should be applied in the construction of statutes providing for a special or commuted plan of taxation which exempts or excepts property from the general system of taxation. The exclusive business of domestic insurance companies is insurance. Their entire capital is used in, or invested for the purposes of, that business, and the chief source of their income is premium receipts on insurance policies issued by them. When the legislature provided for the same system of commuted taxation of title insurance companies, the exclusive business of such companies, as the law then was, was insuring against defective titles, and such business as was reasonably incident thereto. Their entire capital was used in, or invested for the purposes of, that business. The legislature must be presumed to have determined that, under such circumstances, 2 per cent. on premium receipts from insurance would be a fair equivalent for the amount of tax which the property of such companies would contribute if assessed in the usual manner. But when the legislature subsequently authorized such companies also to transact other and entirely different kinds of business, in which they might use and invest the greater part of their capital, and from which the larger part of their profits might be derived, it is not to be presumed that they intended to accept 2 per cent. of the premium receipts from the insurance part of the business in lieu of all other taxes on the entire property of such companies. Any such scheme would be wholly repugnant to the provisions of the constitution requiring uniformity and equality of taxation. Suppose, for example, there was another corporation organized under the act of 1883, with a capital equal to that of the defendant, but which is doing an exclusively title insurance business, while the defendant, having, under the act of 1889, availed itself of the provisions of the act of 1887, is doing both a title insurance and an annuity, safe-deposit, and trust business, but 90 per cent. of its business is of the latter kind, and 90 per cent. of its capital is used in that business. In such a case, the entire property of the other company would

be assessed and taxed in the usual manner, under the general tax law, while, according to defendant's contention, all the tax it would have to pay (except on such of its capital as happens to be invested in real estate or bank stock) would be 2 per cent. on its receipts from the small fraction of its business which consisted of title insurance. The result might be that, while both companies had an equal amount of capital, the defendant would pay only a few hundred dollars taxes, while the other company would have to pay as many thousands. Any such construction of the statute is not to be entertained for a moment. The legislature provided that if a title insurance company, organized under the law of 1887, availed itself of the provisions of the act of 1889 so as to enable it to do "an annuity, safe-deposit, and trust" business under the act of 1883, it should be subject to all the provisions of the last-named act. The defendant, having availed itself of the benefits, must accept the burdens imposed by the act. One of these burdens is that its property shall be assessed and taxed in the usual method, the same as that of any other annuity, safe-deposit, and trust company. Whether it would be feasible to apply a dual system of taxation to companies which, like defendant, are doing both kinds of business, and segregate the "title insurance" business from the "annuity, safe-deposit, and trust" business, we are not sufficiently advised, and it is not a question for us to consider. That is a question for the legislature. This will not result in double taxation. If the defendant, under an erroneous construction of the law, has paid to the state 2 per cent. of its premium receipts, it will be entitled to have it refunded, and it is to be presumed that the state will do its duty in that regard. The decision of the trial court was correct, and the proceedings are remanded, for further action in accordance therewith.

LEQVE v. STOPPEL et al.

(Supreme Court of Minnesota. Feb. 6, 1896.)

FRAUDULENT CONVEYANCES — CONSIDERATION — NOTICE—SUFFICIENCY OF EVIDENCE—RIGHTS OF GRANTEES.

1. Action by a receiver, under an assignment for the benefit of creditors, to set aside, as having been executed with intent to defraud creditors, a conveyance by S., one of the insolvent assignors, of certain land to his son F.; also, a conveyance of other real estate by S. to K., and then by K. to O., wife of S.'s son G. The partnership of which S. was a member was in fact insolvent when he executed these conveyances, but did not cease business or make the assignment until about a year and a half afterwards. *Held*, that the evidence justified a finding that the conveyance to F. was executed in performance of an oral agreement between him and his father—made seven years previously—that if he would remain at home for six years after he came of age, and work and assume the charge and management of his father's farm, the father would convey to him the land in question, and that F. received the conveyance in good faith, and without notice of any fraudulent intent on part of his father.

2. Where a conveyance is partly voluntary, courts will, in favor of creditors, often set it aside, so far as it is without consideration, but let it stand as security for the consideration actually paid. But although, in this case, the contract between the father and son was more favorable to the latter than the former would have made with a stranger, the facts do not make a case for the application of this rule of partial interference, especially as there was no gross disparity between the value of the land conveyed and the value of the services rendered.

3. The property conveyed by S. to K., and by the latter to O., was subject to a mortgage executed by S. before the conveyances. After the property was conveyed to O., she paid off this mortgage with her own money. *Held* that, while the evidence of a fraudulent intent on the part of K. and O. was not at all clear or strong, yet the suspicious circumstances connected with the transactions were sufficient to justify the finding of the court that the conveyances were made and received with knowledge of the insolvency of S., and to secure the property for the benefit of S. and his family free from the claims of creditors.

4. But *held*, also, that under the circumstances the conveyances should have been allowed to stand as security to O. for the amount she had expended in paying off the mortgage.

5. While the general rule is that, if a transfer is tainted with actual fraud, it will not be allowed to stand for any purpose, either of reimbursement or indemnity, this rule is not inflexible. Courts of equity will look at the facts, giving to each its due weight, and deal with the transaction before it according to its ideas of right and justice. If it appears that the grantor and grantee have combined to commit a meditated, positive fraud, and the evidence is clear, the court will not allow the conveyance to stand for any purpose of reimbursement or indemnity. But where the circumstances are so suspicious that the court does not feel warranted in allowing the conveyance to stand, but the evidence of fraud is by no means clear or conclusive, they will, under some circumstances, allow the conveyance to stand as security for the reimbursement of the grantee, at least for money expended by him for the benefit of the property, as by paying off incumbrances.

6. Distinction noted between such a case and one where the money has been paid by the grantee to the fraudulent grantor.

(Syllabus by the Court.)

Appeal from district court, Olmstead county; Thomas S. Buckham, Judge.

Action by Jacob Leqve, receiver, against George Stoppel, Sr., and others. From orders denying new trials, all parties appeal. Affirmed as to plaintiff, and modified as to defendants.

Charles C. Willson, for appellant. Brown & Abbott, George W. Granger, and George J. Allen, for respondents.

MITCHELL, J. This action was brought by the plaintiff, as receiver of George Stoppel, Sr., to set aside, as having been made with intent to hinder and defraud creditors—First, a conveyance of 160 acres of land by said George to his son the defendant Frederick Stoppel; second, a sale by the same to the same of certain personal property, consisting of farm machinery and stock; third, a conveyance by the same to his daugh-

ter-in-law the defendant Otelia Stoppel of 13 acres of timber land; fourth, conveyances by the same to defendant Gustav Krueger, and by the latter to the said Otelia, of certain Rochester city property. The court below held all the conveyances and transfers valid, except those of the Rochester city property, both of which it set aside as being fraudulent and void as to the creditors of George Stoppel, Sr. Both parties appealed from orders denying new trials. As plaintiff did not move for a new trial as to the transfer of the personal property, and as, upon the argument, he abandoned his appeal, as we understood his counsel, as to the 13 acres, these two transfers need not be considered, except so far as they may throw light upon the intention of the parties in making the other transfers, to wit, of the 160 acres to Frederick Stoppel, and of the Rochester property to Krueger, and by him to Otelia, wife of George Stoppel, Jr.

1. We shall first consider the conveyance of the 160 acres to Frederick Stoppel. The defendant George Stoppel, Sr., was a well to do farmer, who had resided for many years three or four miles from the city of Rochester, on his farm, which consisted of 240 acres, or three 80's; all the buildings being on the middle 80, which was his homestead. His family consisted of his wife and two sons, the defendant George, Jr., and Frederick; the latter being the younger of the two. In 1877 the father, being then over 70 years of age, and desiring to retire from the active management of the farm, and apparently, at the same time, to make a partial division of his property between his sons, conveyed the farm to his son George, taking back a mortgage for an amount which he presumably considered sufficient to support himself and wife in their old age, and also to provide a proper allowance for his younger son, Frederick. George, Jr., seems, however, to have soon become tired of farming, and desired to move into the city of Rochester and engage in some other business. Thereupon, in 1879, he reconveyed the farm to his father, and moved to the city. At this time Frederick was absent, at school, but his father, having the farm again on his hands, brought him home, and set him at work on the farm, at which he continued until he arrived at the age of 21 years. Upon his coming of age, which was in 1885, the question naturally arose as to his future course of life. Thereupon, as the court finds, "the defendant George Stoppel, Sr., orally promised and agreed to and with his son Frederick that if he would remain at home for six years after he so came of age, and work on the farm, and assume the charge and responsibility of carrying on the same, he, the said George, Sr., would at the expiration of said period convey to him, the said Frederick, the one hundred and sixty acres of said farm, other than the homestead; that, in consideration of and reliance upon such agreement, the said Frederick continued, for about seven years after he became of age, to reside at home and work on his father's farm, and mainly carry on and manage the same; that on April 25, 1892, in pursuance of said oral agreement, and in consideration of the services so rendered, the defendant George Stoppel, Sr., executed to said Frederick a deed of the 160 acres of the farm, other than the homestead." Counsel for plaintiff urges that this finding is not supported by the evidence, his contention being that this alleged oral agreement between the father and son is a mere afterthought; that, at most, there was nothing more than a loose family talk or understanding how the father would divide his property among his family after he was through with it; that this understanding had none of the features of a contract of sale, and did not include the displacement of the father's creditors; and that this general, loose understanding is now attempted to be used so as to do service in supporting a conveyance made after the father had become insolvent. These family arrangements should, of course, always be scanned with the severest scrutiny, when the rights of creditors are involved, but we certainly cannot say that the evidence did not justify the finding of the court. The alleged agreement between the father and the son was, under the circumstances, a natural and reasonable one; and the fact of its existence, and that the son remained at home and managed the farm until he was 28 years old, in pursuance of and reliance upon this agreement, finds considerable support in the evidence other than the direct testimony of Frederick and other members of the family. As this agreement, in performance of which the conveyance in question was executed, was made while the father was still perfectly solvent, and years before he contracted any of the debts represented by the receiver, this finding of the court would seem to be almost conclusive of plaintiff's appeal.

The court also finds that Frederick received the conveyance "in good faith, and for the consideration hereinbefore named, and without any intent or purpose to hinder, delay, or defraud any of the creditors of George Stoppel, Sr., and that he had neither notice nor knowledge of his father's insolvency or inability to pay all his debts." This finding is also assailed as not being justified by the evidence. It appears, in 1889 George Stoppel, Sr., and several others, formed a partnership for the purpose of establishing and operating a creamery in the city of Rochester, together with a number of outlying "skimming" stations. The capital was to be $2,000, "represented by forty shares of stock, of fifty dollars each," of which Stoppel subscribed for six. The business seems to have been started mainly with borrowed capital, and was conducted by a superintendent or manager. The

partners, becoming dissatisfied with their manager, secured his retirement in November, 1890, at which time they had a meeting to determine whether the business should be continued. From the statement presented to them, they found themselves with a plant which had cost about $19,000, and with an indebtedness of about $26,000. The evidence shows that Frederick was present at this meeting, with his father, but it does not appear that he took any part in the proceedings. The general opinion expressed was to the effect that the loss had been caused by bad management, but that the business would pay under proper management, and the conclusion arrived at was that it should be continued. It was continued, but apparently at a constant loss, until November, 1893, when the partners made a general assignment under the insolvent law of 1881, at which time the business was badly and hopelessly insolvent. This, it will be observed, was over a year and a half after the conveyance of the land to Frederick. There is no doubt under the evidence that the business was also insolvent in April, 1892, when Frederick got his deed. But aside from his presence at the meeting in November, 1890, —a year and a half before,—there is no evidence that Frederick knew anything about the affairs of the partnership, or had any dealings with it, except delivering milk to it, first for his father, and afterwards for himself. From some things that appear in the evidence, he probably knew that the creamery owed some debts to the defendant bank, but there is no evidence that required a finding that he supposed the business was being run at a loss, or that a failure was likely to occur. He testified that he did not suppose that the debts of the creamery had anything to do with his father's individual property; and, as suggested by the trial court, there is nothing improbable in this, in the case of a man unacquainted with business, especially as the partners themselves always designated their interests in the concern as "shares of stock." In view of subsequent conveyances by the father to other parties, the evidence is quite persuasive that he had in mind a probable failure of the creamery business, in disposing of his property; but Frederick's knowledge of such intent must be judged of by what had occurred when he got his deed, and at that time his father had not disposed of any of his property. There is nothing unusual or suspicious in Frederick's leasing the homestead 80, and buying his father's farm machinery and stock, soon after he obtained his deed. He had neither stock nor implements nor buildings on his own land. His father would not, at his age, be inclined to resume the management of the homestead 80. It is conclusively established by the evidence that he paid his father full value, in cash, raised by executing a mortgage on the 160 acres. There was no secrecy about the transactions. The deed was promptly placed on record, and the milk account at the creamery changed from the name of the father to that of the son. The officers of the defendant bank—much the largest creditor of the partnership—soon acquired actual knowledge of these transfers; and yet this does not seem to have excited their suspicions that anything was wrong, for they continued to extend and renew credits to the partnership for over a year afterwards.

It is also argued that the conveyance of the 160 acres must have been intended in part as a gift from the father to the son, and not a contract of sale, pure and simple; that the father would never have made any such bargain with a stranger. It must be admitted that there is some force in this argument, and it has suggested to our minds the only question about which we have had the least doubt in reference to the conveyance to Frederick, viz. whether the conveyance should not be set aside as being in part a voluntary one, but allowed to stand as security for the value of Frederick's services for the seven years; a thing which courts frequently do where the conveyance is partly voluntary,—at least, where it is only constructively fraudulent on that ground. But, if the agreement was that Frederick should have the land for his services, we do not think that the case is one for the application of any such rule. It cannot be said that the conveyance was in part voluntary, even if the land was worth more than the services, and the father gave his son a better bargain than he would have given to a stranger. Moreover, it is by no means clear that any such disposition of the case would in fact do justice to the son. When, at the age of 21, he was about to decide upon his future course, it is not at all certain that he would have been willing to stay at home, and work his father's farm, merely for ordinary wages. It also appears that there was no gross disparity between the value of the land and the value of the services. The court finds that the land was worth $3,500 at the time the conveyance was executed, but the evidence tends to show that it was worth considerably less seven years before, when the oral agreement was made. The court did not find the value of the services, but the uncontradicted testimony of the witnesses placed it at from $300 to $500 a year. Allowing interest on each year's services, estimated at the average of the figures given by the witnesses, the total amount would equal the value of the land at the date of the conveyance.

2. It remains to consider the conveyances of the Rochester city property. This property had formerly belonged to George Stoppel, Jr., who had sold it to his father,—part in 1880, and part in 1883. The court finds (and the evidence supports the finding) that his father was still indebted to him for the whole of the purchase money of this property, and for other moneys, but does not find

the amount of such indebtedness. The conveyances of the Rochester property from the son to the father state the purchase price at $4,500. On May 14, 1892 (very soon after the conveyance and transfer by George, Sr., to Frederick), George Stoppel, Sr., conveyed the 13 acres of timber, for $130, to Otelia, wife of George, Jr.; the purchase money being applied on the indebtedness of George, Sr., to George, Jr. On the 25th of the same month, George, Sr., sold and conveyed to defendant Gustav Krueger the Rochester property for $2,000 cash, subject to a mortgage thereon executed by George, Sr., for $4,000, which, by the terms of the deed, Krueger assumed and personally agreed to pay. This deed was recorded on the day of its execution. According to the evidence introduced in behalf of the defendants, George, Sr., immediately paid over the $2,000 received from Krueger to his son George, Jr., to apply on his indebtedness to him. This disposed of all George, Sr.'s, nonexempt property, except his interest in the creamery, which, as we have seen, was a debt, rather than an asset. George, Jr., according to his own testimony and that of his wife, immediately paid over to her the $2,000, to apply on an indebtedness which he owed her for money which she had received from her father, and which her husband had used in his business. It should have been also stated that the evidence for the defendants is that the $1,160 received by George, Sr., from Frederick for the farm machinery and stock was also paid over by the former to George, Jr., to be applied on his indebtedness to the latter. According to the testimony on behalf of the defendants, Krueger, shortly after (within two or three weeks) his purchase of the Rochester property, becoming dissatisfied with his bargain, because George Stoppel, Sr., had made misrepresentations to him as to how the premises were rented, and as to the duty of one of the tenants to make certain repairs, concluded to request George, Sr., to take back the property; that having mentioned this to George, Jr., the latter suggested that perhaps his wife would buy the property; that George, Jr., having communicated the fact to his wife, the latter went to Krueger, and bought the property from him for the same price he had paid George, Sr., and paid him $2,000; but, not having the money with which to pay the $4,000 mortgage which Krueger had assumed, no conveyance was made until the following December, when, having raised the $4,000, she paid off the mortgage and obtained her deed, but, not then having the money to pay the taxes, she did not record it until the following spring. The court finds that the conveyances from George Stoppel, Sr., to Krueger, and from the latter to Otelia Stoppel, were both executed with knowledge and notice to all the parties thereto of the insolvency of George, Sr., and that both conveyances were made and received for the purpose of transferring the title through Krueger to Otelia, and in view of the insolvency of George, Sr., and to secure the property for the benefit of himself and family, free from the claims of his creditors, and, as a conclusion of law, held that they were fraudulent and void, and ordered judgment that they be wholly set aside.

Judging merely from the evidence as it appears in the record, we are inclined to think that we would have hesitated to find that Krueger was not a bona fide purchaser without notice of any fraudulent intent on the part of his grantor; and, if he was such a purchaser, he would convey good title to his grantee, Otelia, whatever notice or motive she might have had when making the purchase. But in view of all the circumstances disclosed by the evidence, and suggested by the judge in his memorandum, and recognizing the weight to be given in such cases to suspicious circumstances or earmarks of fraud, of the force of which the trial judge, who saw the witnesses, is in better position to judge than an appellate court, we do not feel justified in setting aside his finding as not justified by the evidence. Our conclusion is that the evidence would have justified either one of three conclusions, to wit: (1) That Krueger was an actual, bona fide purchaser for value; or (2) that the purpose of George, Sr. (known to all the other parties), was to give a preference to his son George, as his individual creditor, over his partnership creditors; or, (3) substantially as found by the court, that his object was to secure to his son George his share of the property free from the claims of creditors. It would be only under the last hypothesis that plaintiff would be entitled to any relief; for, as the property conveyed was the grantor's individual property, his individual creditors were entitled to a preference, in the application of it to the payment of debts. The only question is whether the conveyances should have been wholly set aside, or whether, under the circumstances, they should be allowed to stand as security for the amount of the $4,000 mortgage, which the last grantee, Otelia, has paid. The finding of the court, and the undisputed evidence, is that the defendant George Stoppel, Jr., either with his own money or that of his wife, has paid this mortgage. The trial judge seems to have been of the opinion that this question could not be determined in this action, for the reason that the defendants asked for no such relief in their answer, but stood on the entire validity of these conveyances. In this view of the law we cannot concur. The whole includes all its parts, and the plaintiff having asked that the conveyances be wholly set aside, and all the facts and parties being before the court, it was competent for it to determine, in accordance with the equities of the case, whether the whole or only a part of the relief asked for should be granted.

It is well settled that when a conveyance is not tainted with actual fraud, but is only

constructively fraudulent,—as, for instance, where it is in part voluntary,—it will be allowed to stand as security for the money advanced by the grantee, or to pay off incumbrances, or to pay the grantor's debts. But it is generally laid down in the textbooks that, where a transfer is tainted with actual fraud, it is absolutely void, although founded upon a valuable consideration, and that it will not be allowed to stand for any purpose,—either for reimbursement or indemnity. An examination of the authorities satisfies us that this is too broad a statement of the law. We admit that where the grantor and grantee have conspired together to commit a meditated, positive fraud, and the evidence of that fact is clear, no court ever has or should allow the conveyance to stand for any purpose of reimbursement or indemnity to the grantee, who was particeps criminis. Any other rule would be to offer protection to positive fraud. But it is a matter of common knowledge with courts and lawyers that there are frequently cases where conveyances are set aside on the ground of what, in the legal sense, constitutes an actual fraud, which nevertheless involves no moral turpitude, and where the parties did not actually intend to commit, or suppose that they were committing, a fraud. There are also frequently cases where the circumstances are so suspicious that the court does not feel warranted in allowing the conveyance to stand, but the evidence of fraud is by no means clear or conclusive. To meet the requirements of justice in all these classes of cases, a more elastic rule should obtain than the mere presence or absence of actual fraud, in its broadest legal sense. And an examination of the adjudged cases shows that the courts have never been inclined to tie themselves down to any such hard and fast rule. The English courts seem to feel themselves at liberty, after looking at all the facts, and giving to each its due weight, to deal with each case according to their own ideas of right and justice. Numerous English cases can be found where the court, while setting aside the conveyance, has decreed it to stand as security for money actually paid by the grantee, even where he appeared to have been a partaker of the fraud, but the proof was not entirely clear. See Herne v. Meeres, 1 Vern. 465; Addison v. Dawson, 2 Vern. 678; Clarkson v. Hanway, 2 P. Wms. 203; How v. Weldon, 2 Ves. Sr. 516. The best American authorities have frequently announced a similar flexible rule, which left them at liberty to do equity in each particular case according as the facts appeared. In the leading case of Boyd v. Dunlap, 1 Johns. Ch. 478, Chancellor Kent states the law thus: "A court of law can hold no middle course. The entire claim of each party must rest and be determined, at law, on the single point of the validity of the deed; but it is an ordinary case in this court that a deed, though not absolutely void, yet, if obtained under inequitable circumstances, should stand only as security for the sum actually due. A deed fraudulent in fact is absolutely void, and is not permitted to stand for any purpose of reimbursement or indemnity; but it is otherwise with a deed obtained under suspicious or inequitable circumstances, or which is only constructively fraudulent." He then quotes with approval what was said in Herne v. Meeres and How v. Weldon, supra (which were both cases involving actual fraud), and adds, "Nothing can be more equitable than this mode of dealing with these conveyances of such indecisive and dubious aspect that they cannot be entirely suppressed or entirely supported with satisfaction and safety. In Clements v. Moore, 6 Wall. 290-312, the court, speaking through Justice Swayne states the law thus (after stating the rule in courts of law): "When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to, while it scans the transaction with the severest scrutiny, looks at the facts, and, giving to each its due weight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in an action at law. In others it allows a security to stand for the amount advanced upon it. In others it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value, and the property may have passed beyond the reach of the court, it regards him as trustee, and charges him accordingly. When he has honestly applied the property to the liabilities of the seller, it may hold him excused from further liability. The cardinal principle in all such cases is that the property of the debtor shall not be diverted from the payment of his debts, to the injury of the creditors, by means of the fraud."

In the present case the court finds that the value of the property was $5,500. Hence the value of the equity ($1,500) was all there was in it for creditors, if these conveyances had never been made. Consequently, that sum is the utmost amount out of which they could have been defrauded. Had the defendants never paid the mortgage, $1,500 was all the creditors could have gotten out of the property. They could not have enforced Krueger's covenant with George Stoppel, Sr., to pay the mortgage. That was a matter that concerned only the grantor and the mortgagee. It is not the debtor's money which has gone to pay the mortgage. Why, then, unless some considerations of public policy are involved, should the creditors have the benefit of the payment of the mortgage, and be allowed to realize $5,500 out of the property, when $1,500 is all the actual interest they had in it originally.

Four thousand dollars seems a severe penalty to impose upon parties for an act which the Penal Code does not recognize even as a misdemeanor. Another fact should be kept in mind: This is not a case where reimbursement is sought for money paid to the grantor, and which he may have used up, or placed beyond the reach of his creditors. That would present a very different case. Here the money went to the benefit of the property, and, if the mortgage had not been paid, the creditors, or those who purchased at a creditors' sale, would have to pay it, in order to save the property. While the transaction might have involved actual fraud, in a legal sense, yet the proof of fraud was by no means clear or conclusive. It was, in the language of Chancellor Kent, "one of those conveyances of such indecisive and dubious aspect that they cannot be entirely suppressed or entirely supported with satisfaction and safety." Under the circumstances, the case is one for "limited interference"; and while the conveyances should, under the finding of the court, be set aside, they should be allowed to stand as security for the reimbursement of the defendant Otelia for the $4,000 which she has paid to discharge the mortgage, and when the property is sold she should be reimbursed, for that amount, out of the proceeds. As she has had the rents and profits, she would not be entitled to interest. But she ought not to be allowed to make any profits out of the transaction. Hence, if the net rents and profits have exceeded the interest on the $4,000, the receiver may, at his election, allow her interest, and compel her to account for the rents and profits. On the appeal of the plaintiff, the order appealed from is affirmed. On the appeal of the defendants, the cause is remanded, with instructions to the court below to modify its conclusions of law, and to take such further proceedings as may be necessary to conform to the opinion of this court.

PEOPLE v. POPE.

(Supreme Court of Michigan. Feb. 18, 1896.)

HOMICIDE — EVIDENCE — PRACTICE — REMARKS OF COUNSEL — INSTRUCTIONS — WITNESSES.

1. The assertion, in the opening argument of the prosecuting attorney, on the trial of one for murder of her husband, the motive for which was claimed to be the obtainment of insurance on his life, that she had all the policies assigned to herself, is harmless, even if, instead of their being assigned to her, she was the beneficiary therein.

2. The expression of opinion by the prosecuting attorney as to the guilt of defendant cannot be complained of, the court having told the jury to disregard it.

3. Whether parol evidence as to the contents of a paper was properly admitted is immaterial, the paper having afterwards been produced and admitted.

4. On trial of one for murdering her husband to obtain insurance on his life, an insurance agent, who had testified that he demanded policies back from defendant, was asked why he demanded them. *Held* that, as a preliminary question, it was proper, and that, if the answer contained incompetent or immaterial matter, the proper practice was a motion to strike it out.

5. On the prosecution resting in a homicide case, the defense called attention to the fact that witnesses whose names were indorsed on the information had not been called, and demanded that they be called and examined, so the defense could cross-examine them. *Held* that, they not having been eyewitnesses of the transaction, it was enough that they were produced and tendered to the defense for cross-examination.

6. Before completion of the cross-examination of a witness for the prosecution, she was taken sick, and carried away. Thereafter the defense wished to further cross-examine her, but she was too ill to appear. *Held*, that the defense could not complain, but should have moved to strike out her testimony.

7. The court may refuse to give instructions based on the testimony of certain witnesses, such testimony not forming the sole basis on which conviction can be had.

8. On a trial for murder, the motive for which was claimed to be the obtaining of insurance on the life of deceased, it is not error to refuse an instruction calling attention to evidence that, four years before, when deceased was sick, and carrying a large amount of insurance, defendant properly administered medicine to him, though an overdose would have resulted in his death.

Error to recorder's court of Detroit; William W. Chapin, Judge.

Nellie W. Pope appeals from a conviction of murder. Affirmed.

Henry M. Cheever, John Atkinson, and George X. M. Collier, for appellant. Allan H. Frazer, Pros. Atty., and Henry A. Mandell, Asst. Pros. Atty., for the People.

GRANT, J. The respondent was convicted of murder in the first degree. The victim was her husband. One Brusseau, who was at the time a servant and nurse in the house, killed Mr. Pope with a hatchet. The theory of the prosecution was that the murder was committed under an arrangement agreed to between the respondent and Brusseau. Brusseau confessed the crime, told how it was done, and testified to the arrangement between respondent and himself. The motive was claimed to be to obtain a large insurance on Mr. Pope's life in favor of respondent.

1. Complaint is made that the assistant prosecuting attorney, in his opening statement to the jury, said that Mrs. Pope had all the policies of insurance, with the exception of $3,000, assigned to herself, and that, on a certain occasion, when the officers went to her house, "she pretended she was sick, and couldn't understand the officers' questions"; also, that the prosecuting attorney was permitted to express his opinion as to the guilt of the prisoner; and, also, argued to the jury that "the relations between the prisoner and Brusseau were filthy and improper." The opening statement to the jury was made in good faith. It was shown that certain policies were assigned to Mrs. Pope, and the deed of assignment introduced in evidence. Even if it were true that she was the beneficiary in all the policies, the statement that they were assigned to her could not have preju-

diced the jury. The argument of the prosecuting attorney is not given in the record. The court, at the request of the respondent's attorneys, instructed the jury that "the prosecuting attorney has no right to express his personal opinion as to the guilt of a prisoner. The jury should disregard his opinion, except so far as it is supported by the testimony." After giving this request, the court further explicitly charged them that they must disregard the opinions of the attorneys, and be guided solely by the evidence, and also instructed them that there was no testimony to show improper relations between Brusseau and Mrs. Pope, and that the argument of the assistant prosecutor upon this point must be rejected. Under this charge, it is unnecessary to determine whether there was any testimony to justify the comments. It is doubtful if the court was correct in so stating. We find nothing upon this branch of the case to justify further comment or a reversal.

2. One Crawford, an attorney, was introduced on the part of the defense, and produced an affidavit, made by Brusseau, which contradicted his confession, and his testimony in court. The prosecutor subjected this witness to a rigid cross-examination, which is now claimed to have exceeded proper bounds. No objection was made to the admission of the testimony, and it is now too late to object. We think, also, that the examination was proper.

3. One Werzel testified that he was called by Brusseau, at the request of Mrs. Pope, to go to Mr. Pope's house on the Saturday night prior to the murder; that Mrs. Pope wanted him, as a notary public, to acknowledge some papers made out by her attorney; that he saw and read the paper, and left it in the hands of Mrs. Pope. Some discussion arose between counsel, in the court, about the paper, in which counsel for the respondent said he did not insist upon a written notice to produce the paper, whereupon the court stated they might produce it the next morning. On the following morning, one of the attorneys for the respondent stated that he was unable to find any such paper, whereupon the court allowed parol evidence of its contents. We think it was admissible; but the point becomes immaterial, because the paper was afterwards produced and admitted in evidence.

4. Mr. Frank P. Guise testified that he was an attorney, and acted for an insurance company which had a $10,000 policy on Mr. Pope's life; that a note for $253 was given for the first payment, signed by Mrs. Pope; that in 1891 he went to her, and demanded this policy of Mrs. Pope, and also one for another company. He was then asked, "What reason did you give why you demanded the policies back?" Respondent's counsel objected to the question, but stated no grounds therefor. An assignment of error based upon such an objection will not be considered by this court. People v. Moore, 86 Mich. 134, 48 N. W. 693. As a preliminary question it was proper. If the answer contained incompetent or immaterial matter, the proper practice would have been a motion to strike it out, which was not done.

5. When prosecution rested, respondent's counsel called the attention of the court and of the prosecutor to the fact that certain witnesses, whose names were indorsed upon the information, had not been called, and demanded that they be called and examined in behalf of the people, so that the defense could cross-examine them. The prosecuting attorney stated that the evidence of these witnesses was cumulative. They were, however, produced, and tendered to the defense for cross-examination. None of these were eyewitnesses to the transaction. The prosecution had done all that the law required. People v. Henshaw, 52 Mich. 564, 18 N. W. 360; Wellar v. People, 30 Mich. 23.

6. One Mrs. Montgomery, a witness for the prosecution, became ill before the close of the cross-examination, fainted, and was carried from the court room. The defense reserved the right to further cross-examine her if they desired. Shortly after the prosecution rested, one of the respondent's counsel stated that he desired to ask Mrs. Montgomery three or four questions. She was then too ill to appear in court. The prosecutor then offered to go with prisoner's counsel to her home, and take her deposition, which, however, was declined. No motion was made to strike out the testimony of the witness, nor was any reason shown why a further cross-examination was desired. People v. Kindra, 102 Mich. 147, 60 N. W. 458. The proper course for the respondent would have been a motion to strike out the testimony. Having failed to do so, she cannot now be heard to object because a further cross-examination was desired.

7. Several errors are assigned upon the oral charge of the court, and upon the refusal to give certain requests. Forty requests were preferred on behalf of the respondent, 29 of which were given, and covered fully the entire theory of her case. No possible room, under the instructions of the court, was left for the jury to determine the case upon any other theory than that she and Brusseau had entered into a conspiracy for the murder of her husband, and that it was successfully carried out. Some of the requests refused called the attention of the court to the testimony of certain witnesses, and asked specific instructions based upon it. This is not the duty of the court, unless the testimony forms the sole basis upon which conviction can be had. If the result depends upon the testimony of one witness, it would be entirely proper for the court to instruct the jury that, if they disbelieve his testimony, or if it does not convince them beyond a reasonable doubt, they should acquit. Testimony was offered on the part of the people to show threats and propositions made by

Mrs. Pope in 1891 to kill her husband. Testimony on the part of the respondent showed that Mr. Pope met with an accident in 1891, in consequence of which he was confined to his bed for some time; that his physician prescribed morphine, which, if administered in larger doses than prescribed, might have produced death; that Mrs. Pope then had the care of her husband, and administered the morphine; that she did not administer any larger doses than were prescribed; and that he then held insurance upon his life to the amount of $40,000. Two requests were preferred upon this testimony, to the effect that the jury should take this into consideration as bearing upon the question of any intent on her part to take the life of her husband. This took place four years before the murder. The request, if given, would substantially have said to the jury that the fact that one had an opportunity to murder, and the motive for it, four years before, but did not improve it, would be evidence of no intent to murder at the time the deed was committed. We think the requests were properly refused. The question for the jury was her intent in 1895, and not in 1891. The testimony as to her statements and conduct in 1891, and the testimony in explanation thereof, were competent; and it was the province and duty of counsel to argue the facts, and their effect, to the jury; and it was also proper for the jury to consider them. It was neither essential nor proper for the court to select this piece of testimony from all the rest in the case, and specifically charge the jury upon it.

All the other assignments of error involve principles which are familiar to the profession. They relate chiefly to the presumption of innocence, the credibility to be given to witnesses, including an accomplice, the duty of each juror to be convinced beyond a reasonable doubt, and the rule that, in order to convict, the facts proved must be all consistent with the theory of guilt, and inconsistent with the theory of innocence. We do not deem it important to discuss the alleged errors. The instructions were correct and explicit, and fully guarded all the rights of the respondent. The conviction is affirmed. The other justices concurred.

PEOPLE, to Use of HIRTH et al., v. POWERS et al.

(Supreme Court of Michigan. Feb. 18, 1896.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—CONTRACTOR'S BOND—RELEASE OF SURETIES.

1. That curbstone was furnished a contractor having a contract for the improvement of a street for a "lump sum," does not render the person furnishing the material a subcontractor instead of material man, and thereby prevent his recovery on the contractor's bond, conditioned for payment of claims of material men.

2. Sureties on the bond of a contractor for a public improvement requiring payment for all labor and material furnished for the work are not released, by payment of an antecedent debt by the contractor to a material man from the contract price, to the extent of such payment, from liability to such material man for materials furnished.

Error to circuit court, Kent county; Allen C. Adsit, Judge.

Action by the people, for the use of Anton Hirth and others, against John Powers and others. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Taylor & Eddy (Kingsley & Kleinhans, of counsel), for appellants. Smiley, Smith & Stevens, for appellee.

HOOKER, J. The defendant Powers was a paving contractor, and the other defendants are his sureties upon a bond given in compliance with the statute (2 How. Ann. St. §§ 8411b, 8411c, and 3 How. Ann. St. § 8411a) to secure payment for all labor performed by contractors and subcontractors upon a contract let to him by the city of Grand Rapids for the improvement of Valley avenue. Hirth & Son were dealers in stone, and furnished the curbstone, and perhaps some stone for crossings, for this job, upon an agreement made by them with Powers soon after the contract was let by the city. Previous to the time such agreement was made Powers was indebted to Hirth in the sum of $300, for which Hirth had signed a note with Powers at bank, thereby receiving pay from the proceeds of the note. This note had been renewed from time to time, and a renewal note was then outstanding. It was paid by Powers giving Hirth an order for $300 upon his second estimate of work done under the Valley avenue contract, which Hirth presented to the city treasurer, whereby he obtained the money, and paid the note at bank. Three questions are presented by counsel for the defendants, who have appealed from an adverse judgment: (1) That Hirth & Son were subcontractors, and therefore not within the protection of the bond; (2) that, if found to be within the provisions of the statute, the sureties were released from liability upon the Hirth claim by the application of $300 to an existing debt by the procurement of Hirth & Son; (3) that, if not released, the $300 should be applied in reduction of their claim. The jury determined that Hirth & Son were material men, and not subcontractors, and the first question arises on the rulings of the court relating to the introduction of testimony upon the subject.

The defendants' counsel claim that they should have been permitted to show that the bargain for the stone was for a given quantity, and for a "lump sum"; and the case of Avery v. Supervisors, 71 Mich. 538, 39 N. W. 742, is relied upon in support of the proposition that Hirth & Son were subcontractors, and not within the statute. Staffon v. Lyon (Mich.) 62 N. W. 354, is also cited in support of plaintiff's claim. In the first of these cases Avery made a written

contract with the contractor of the Ionia county courthouse, whereby he agreed to deliver for a given price, fixed at $8,425, all the stone necessary for the building, to be cut and fitted in accordance with plans and specifications of the architect of the building, as fast as needed, and not to hinder or delay the workmen. He was to be paid on monthly estimates of stone furnished to the extent of 90 per cent. of the contract price, and 10 per cent. on completion of the building. The plans and specifications were to be followed in cutting the stone, and they were made a part of the contract between the county and the original contractor, and were also made a part of the contract with Avery. The court held that Avery was a subcontractor, and not a material man merely, because he took his contract under the original contract, to be performed in accordance with the original contract, and presumably with knowledge of its terms and conditions, by which he was bound. Nothing was said in this case about the fact that he was to be paid a "lump sum," and its prominence in this case cannot be justified by it. Plaintiff's contention must rest, therefore, upon the other case, where it was held that the plaintiff was a material man, and not a subcontractor. In the opinion Mr. Justice Long points out the difference between the contracts in the two cases, among which he mentions the fact that the brick were furnished, "not for a lump sum, as under a contract, but by the thousand." The price was agreed upon in advance, and the plaintiff was to furnish all brick needed for the building; so that, if the plaintiff is right in his contention, it would seem that an agreement to furnish materials for a given sum would make the vendor a subcontractor, while, if he agreed to furnish them for an agreed price per thousand, if they were brick, by load, if sand, or by barrel, if some other commodity, he would be a material man. We are unable to reach this conclusion. We think, in this case, as in Staffon v. Lyon, the vendor merely sold marketable material, used in the work of paving, and was in no sense a subcontractor. It therefore becomes unnecessary to discuss questions pertaining to evidence bearing upon the question of whether the stone was furnished for a lump sum.

The defendants' counsel cite a number of cases in support of the contention that the receipt by Hirth of $300 upon an antecedent debt was inequitable, and contend that the sum so received should be applied in reduction of the liability of the sureties, if it be not held to release them altogether as to the Hirth claim. These cases, for the most part, involve bonds given to the landowner as a protection against liens, and the sureties are held to be discharged by reason of payments advanced before they became due according to the terms of the respective contracts upon the ground that such payments tended to remove inducements to perform the contract, which the withholding of such payments was calculated to offer. Counsel insist that there is an analogy between such cases and the present, because this bond is given for the benefit of the laborers and material men, as in those cases the bonds were given for the benefit of the land owners, and in this case the acceptance of the sum of $300, on an earlier debt lessened the inducement to perform the condition of the bond as in those cases the receipt and use of the money was likely to do. There seems to be, however, one difference. In the cases cited there was privity of contract between the sureties and the obligee, and the bond upon its face undertook that the contract should be performed. By accepting it, the obligee was in duty bound not to vary the contract in such way as to increase the liability of the sureties, whether by making new contracts, extending time of performance, or otherwise. In this case there is no actual privity of contract between the Hirths and the sureties, unless the statute can be said to create one by requiring a bond, which is evidently intended for their benefit. They have undertaken nothing, and, unless we are to say that they could not extend the time of payment without releasing the security, we shall find difficulty in applying the rule of the cases cited. Again, to do so is to say that one who furnishes labor and material cannot receive payment for former labor or material furnished elsewhere, although the contract by which that sought to be recovered for expressly provided for such payment. It assumes that the sureties have a right that the earnings of the contractor under his contract shall be applied upon the labor and material going into the building, when no such agreement is stated in the bond or provided by statute. If it were the law, it would seem to follow that a contract to build a house, or to render services as a subcontractor in consideration of an existing indebtedness, could not be enforced against sureties who had signed a bond that the contractor or subcontractor should fulfill his contract. This bond did not, in terms, provide that the contractor should apply his earnings to pay the laborers or material men, and the statute does not provide for such a bond. It undertook that the contractor should perform his personal obligations in his own way. It contemplated that he would receive and disburse his money as should suit his convenience. This contention depends upon an alleged equity, that the money earned shall be applied only upon the account for materials furnished for the particular job. It is not supported by the letter of the bond or statute, and we think it is not supported by authority. The judgment is affirmed. The other justices concurred.

VOIGT BREWING CO. v. HOSMER, Circuit Judge.

(Supreme Court of Michigan. Feb. 18, 1896.)

APPEAL FROM INFERIOR COURT — COSTS — DISCRETION OF COURT.

The discretion of the circuit court, on appeal from justices of the peace and court commissioners, under How. Ann. St. §§ 7026, 8307, 9004, to allow costs, including term fees, cannot be overcome by a rule of court not to allow them in certain cases.

Application of the Voigt Brewing Company for mandamus to George S. Hosmer, Wayne circuit judge. Writ granted.

James A. Randall, for relator. Edwin Henderson, for respondent.

LONG, C. J. On August 4, 1894, William McCarthy instituted proceedings before a circuit court commissioner of Wayne county to obtain possession of certain premises. The commissioner rendered judgment in favor of the relator, from which McCarthy took a statutory appeal to the circuit court. On the trial in the circuit the court directed verdict in favor of the relator, who thereafter caused its costs to be taxed at the sum of $41.20 by the clerk of that court; but it appears that at that time no final judgment had been entered in the cause. Final judgment was thereafter entered in favor of the relator for full costs. Counsel for McCarthy thereupon moved to set aside the taxation of costs, and that order was granted, with $10 costs against the relator. The costs were afterwards taxed by the clerk at $30.95. Those costs were again set aside by the court, and the parties then agreed that the taxation of costs should be submitted to the court, and the court thereupon allowed the relator full costs, less $10, which had been theretofore awarded McCarthy as costs of said motion. Application is made to this court for a mandamus to compel the respondent, as circuit judge, to set aside the order of taxation of costs, and to grant to the relator the $10 term fees, as the case had been regularly noticed and placed upon the docket for two terms of court prior to the term at which the cause was tried. The petition for the writ sets up that at the time the court taxed the costs he stated orally as follows: "I will say in this case that when the original judgment was rendered I had no intention of violating the rule of the court which my brethren and myself had agreed upon; that is, in all appeal cases to disallow the term fees. If, in the case at bar, there had been no such rule in existence, I should concede you would be entitled to full costs, and the discretion in this case should have been exercised to give you full costs; but I had no intention of departing from the rule which had been established, and therefore I conceive that the judgment was entered wholly without any consideration of the question before the court, and, having been so entered, it must be amended, and you may recover all the costs which have been taxed, except the term fees." The circuit judge, in his return to the order to show cause, states that: "Costs are awarded in the same manner in cases of this nature as in cases of appeals to the circuit court from judgments rendered before justices of the peace. How. Ann. St. § 8307. By section 7026, How. Ann. St., it is provided that 'in all cases heard and determined on appeal [from justices of the peace] the costs, or such part thereof as to the court shall seem just, may be awarded to either party,' etc. Inasmuch as the question of awarding costs in all appeal cases is left to the discretion of the trial judge, the judges of this court have adopted a rule that in all cases similar to this case, viz. appeals from justice courts, term fees would not be allowed the prevailing party, because of the inability of concluding the docket at any term, and that, complying with this rule, in the exercise of discretion vested in me as circuit judge, I ordered a final judgment to be entered in the cause allowing the relator costs in the sum of $24.95. The only item of costs disallowed in the exercise of my discretion aforesaid was the sum of $10 claimed by the relator for term fees for the April and June terms of this court of 1895." The circuit judge nowhere denies in his return that he delivered the oral opinion herein stated, or that he was not of the opinion that, but for the rule adopted by the judges there, he would have allowed the term fees in the present case. It appears, then, that the circuit judge was of the opinion that the relator was entitled to its costs, including these term fees, and that costs would have been allowed but for the above rule. Section 7026, How. Ann. St., provides that: "In all cases heard and determined on appeal the costs, or such part thereof as to the court shall seem just, may be awarded to either party as the court may deem just and right between the parties, in view of the particular circumstances of the case." Section 8307, in reference to appeals from circuit court commissioners, provides that appeals may be "taken within the same time and in the same manner and return may be compelled and the same proceedings shall be thereon had, as near as may be and with like effect as in cases of appeal from judgments rendered before justices of the peace, and costs shall be awarded and collected in the circuit court in the same manner." Under section 7026 the court is given discretion to award costs as it may deem just and right between the parties. This section has reference to appeals from justices of the peace, and it is evident from section 8307 that the court shall, on appeals from circuit court commissioners, have the same discretion as to awarding costs. The respondent in the present case, in the exercise of discretion, thought that costs, including term fees, should be awarded relator, but felt bound by the general rule made by

all the judges of that circuit, which provided that in appeal cases no term fees should be allowed. Section 9004, How. Ann. St., provides that: "For every circuit or term at which a cause is regularly on the calendar and not reached or is postponed, excluding that which is tried or heard, $5.00: provided, in all cases heard and determined on appeal, the costs or such part thereof as to the court shall seem just, in view of the particular circumstances of each case, may be awarded to either party;" so that by the various provisions of the statute the term fees, as well as other costs in appeal cases from justices of the peace and circuit court commissioners, are in the discretion of the trial court. No general rule which the judges of the Wayne circuit may adopt in relation to costs in appeal cases can set aside or override these statutes, nor can such general rule deprive the trial court of the right, in view of the particular circumstances of each case, to award costs to either party. The trial court should be left untrammeled by any set rule to do justice in each particular case as the circumstances may appear to him at the time of the trial, and at liberty to exercise that discretion in awarding costs which these provisions of the statute contemplate. It appearing that the trial judge would have awarded these term fees to the relator but for the above rule, the writ will issue directing the respondent to include the term fees in the taxable costs of the relator.

Some suggestion is made that these statutes have reference only to money judgments which are obtained before justices of the peace, and appeals therefrom, and have no reference to other judgments, or to judgments rendered by circuit court commissioners. We think these statutes cannot be so construed. The writ will issue as prayed. The other justices concurred.

HOWELL et al. v. SMITH et al.

(Supreme Court of Michigan. Feb. 18, 1896.)

ATTORNEY AND CLIENT — ACTION BY ATTORNEYS FOR SERVICES — WITNESS — EVIDENCE — COMPETENCY — EXECUTION OF RECEIPT — QUESTION FOR JURY.

1. In an action by attorneys for professional services, defendant, if not an attorney, is not a competent witness to testify as to the value of plaintiff's services, though he has employed and settled with other attorneys, and knew what their charges were in other cases.

2. In an action for services as attorney, defendant testified to a receipt for services written by him, and signed for the attorney; and, on cross-examination, testified that he had often drawn receipts for his attorneys. *Held*, that such receipts from other attorneys than plaintiff were inadmissible.

3. In an action by attorneys for services, defendants claimed that they had paid plaintiffs in full, and had taken a receipt therefor, which they produced, and which purported to be signed by plaintiffs. One of defendants testified that he wrote it, and that B., one of plaintiffs, signed it. B. testified that "I never executed that paper on the date it purports to bear date, or upon any other date. * * * I would not be able to state positively whether it is my signature or not. The paper bears evidence of having had writing upon it before this, and that writing having been erased by a rubber." He also testified that "it is my impression that I wrote that date and the signature. It being in pencil, it would be difficult for me to say. If it had been done in pen and ink, I could tell a great deal better." *Held*, that such witness did not admit the signature, and that whether it was executed by defendants or not was a question for the jury.

Error to circuit court, St. Joseph county; George L. Yaple, Judge.

Action by Marshall L. Howell and others, copartners, doing business under the firm name and style of Howell, Carr & Barnard, against Frank B. Smith and Henry B. Smith, late copartners, doing business under the firm name and style of Smith Bros., to recover for services alleged to have been rendered defendants by plaintiffs as attorneys at law. There was a judgment for plaintiffs, and defendants bring error. Affirmed.

R. R. Pealer and George E. Miller, for appellants. David Knox, B. E. Andrews, and H. P. Stewart, for appellees.

LONG, C. J. This action was brought to recover for professional services rendered by the plaintiffs as attorneys at law for the defendants. Plaintiffs had verdict and judgment. Defendants bring error.

The principal contention arises upon the ruling of the court in refusing to permit the defendant Frank B. Smith, while upon the stand as a witness in his own behalf, to testify to the value of plaintiffs' services. Mr. Smith testified that he had had some experience in employing counsel, and had employed as good attorneys as the plaintiffs, and those who were in as good standing in the profession, and had had occasion to settle with them. He was then asked: "From your experience and knowledge of the going or customary price of attorneys' fees, or what they charge for their services, and from your knowledge of what was done and the time that was expended in the Thurston case, what do you say the services rendered that day were worth?" This was objected to, and the objection sustained. It is contended by counsel for defendants that the witness was competent to testify to the value of these services, for the reason that he knew what services had been rendered and what other attorneys charged for like services. Counsel cites no case which sustains this contention. The general rule is stated by Lawson in his work on Expert and Opinion Evidence, holding that an ordinary witness cannot testify as to the value of services performed by an attorney; that an attorney, on the other hand, is an expert on these questions, and therefore, when one lawyer brings an action on a bill for legal services, it is the proper and usual mode to call another lawyer as a witness to ask him, considering the amount in controversy, the

legal questions involved, and the importance of the case, what, in his opinion, is the value of the plaintiff's services. The reason for this rule is stated by the same author to be "that the question is one on which, from the nature of the case, it is not practicable to furnish more definite evidence than the opinion of witnesses who show themselves qualified to form well-grounded estimates of such value by their familiarity with the departments of business in which such services have been rendered. * * * There is no fixed standard by which their value can be determined. Their value and reasonable price vary with the magnitude and importance of the particular case, the degree of responsibility attached to its management, the difficulty of the questions involved, the ability and reputation of counsel engaged, the labor bestowed, and other matters which will readily occur to the profession." Lawson, Exp. Ev. Rule 21. In Allis v. Day, 14 Minn. 516 (Gil. 388), the court stated, as the reason why expert testimony in this class of cases was proper, that the experience and knowledge of the ordinary juryman do not qualify him to form an opinion as to the value of services of this kind. In Hart v. Vidal, 6 Cal. 56, it was held that a witness who is not an attorney is incompetent to prove the value of an attorney's services. It was said that the witness was not a lawyer, and therefore not such an expert as the rules of evidence admit.

It is contended by counsel for defendants, however, that inasmuch as the witness had settled with other attorneys, and knew what their charges were in other cases, his testimony was competent, as his knowledge was based upon knowledge thus obtained. In Babbitt v. Bumpus, 73 Mich. 331, 41 N. W. 417, it appeared that an offer was made by the defendant to show that less was charged by the attorneys for the other side in the same case than was charged by the plaintiff, and that the services of the former were quite as important and of as much or even greater value than those rendered by the plaintiff. The testimony was rejected, and it was held by this court that the court below was not in error in refusing to receive the testimony.

It is further claimed that the court was in error in refusing to permit the defendants to put in evidence receipts taken from other attorneys upon settlements with them. Upon the trial, the defendants contended that they had paid the plaintiffs in full, and taken a receipt therefor. Plaintiffs denied the execution of the receipt. While defendant Frank Smith was upon the witness stand, he was asked by counsel upon cross-examination if he ever wrote a receipt for a lawyer in his life, and asked him to sign it; and the witness answered that he had. He was then asked to give an instance where he did, except in this one case. On redirect examination by his own counsel on the following morning, he was asked if he could produce other receipts so signed. He produced several, was permitted to testify what attorneys signed them, and his counsel then offered them in evidence. The court refused to receive them. We think the court was not in error in this ruling. The receipts were not offered for the purpose of showing payments upon any claim made by the plaintiffs.

Counsel for defendants requested the court to charge the jury in the first request: "The burden rests upon the plaintiffs to establish their right to recover by a fair preponderance of evidence, and they cannot recover unless they have produced a preponderance showing their right to your verdict." The court charged the jury: "The plaintiffs are required to prove their case by a preponderance of the evidence before they are entitled to recover, notwithstanding the plea of set-off; and, unless you find a greater weight of evidence in favor of the plaintiffs' claim, you will find for the defendants." It is difficult to discover why counsel make the claim that their first request was not given substantially, when we read this portion of the charge.

In the second request, counsel ask the court to charge: "The signature of the receipt produced by defendants being admitted to be that of the plaintiffs, the burden rests upon them [the plaintiffs] to establish a change since its execution, unless you find evidence of a change from the paper itself." The court charged the jury upon that question as follows: "A paper has been introduced in evidence which defendants claim is a receipt in full of all demands against them by the plaintiffs upon a final settlement of their claims. The plaintiffs deny the execution of the receipt in question. The burden of proof is upon the defendants to show by a fair preponderance of the evidence the execution of the receipt in question by the plaintiffs. Whether or not the plaintiffs did execute it is for you to determine from the evidence in the case. If you find the plaintiffs did not execute the alleged receipt, then you are to reject it. If you find that the plaintiffs did execute the receipt in question, then I instruct you that the receipt is prima facie evidence of payment, but not conclusive evidence of payment. It may be contradicted by parol testimony; and if you are satisfied from a fair preponderance of evidence that plaintiffs rendered any services or incurred any expense or expended any money for defendants, as claimed by the plaintiffs, for which they have not been fully paid, and that the receipt in question is not intended to cover the same, and that the same were overlooked, and by mistake of parties not included in this settlement when the receipt was given, then plaintiffs are not bound by the alleged settlement, nor by the receipt as a receipt in full." On the trial, defendants contended that they had paid the plaintiffs' claim in full, and produced a re-

ceipt which they claim was taken upon the settlement, as follows: "Received of Smith Bros. & Co., F. B. Smith & H. B. Smith, and M. M. Smith, in full for all demands to date. February 7th, 1887." This was purported to be signed by Howell, Carr & Barnard. Defendant Smith testified that he wrote the receipt, and Barnard signed it in his presence. He says that, after writing the receipt, Barnard said that it was not dated, and that he (Barnard) sat down, and dated it, and signed it; but the witness thinks that the receipt was given in July, instead of February. Upon this question, Mr. Barnard, upon his cross-examination, was asked: "You may state whether that paper was executed by you." He answered: "No, sir; I never executed that paper." And further on he states: "I never executed that paper upon the date it purports to bear date, or upon any other date." He also said: "I would not be able to state positively whether it is my signature or not. The paper bears evidence of having had writing upon it before this, and that writing having been erased by a rubber. The paper has dark lines across it, such as would be made by erasing what had been written with a pencil; and the glossing seems to have been disturbed and rubbed off, and the paper seems to have been trimmed down with a pair of shears." He was further asked: "I understand you to testify that the signature attached to that paper to be your signature or resembles your signature?" A. "Yes, sir; I couldn't say positively that it was not mine." Further on he stated: "It is my impression that I wrote that date and the signature, but the absence of those marks makes me think I did not. It being in pencil, it would be difficult for me to say. If it had been done in pen and ink, I could tell a great deal better." It is from this testimony that defendants contend that Mr. Barnard admitted signing the paper. We think this cannot be construed as such admission. The question was fairly submitted to the jury.

The third request, we think, was substantially given.

We find no error in the record, and the judgment must be affirmed. The other justices concurred.

SHELDEN v. SHATTUCK et al.

(Supreme Court of Michigan. Feb. 18, 1896.)

HUSBAND AND WIFE—RIGHT OF HUSBAND'S CREDITORS TO HIS EARNINGS.

An insolvent debtor may, as against his creditors, employ his time in aiding his wife to carry on a business owned by her, so that the accumulations will belong to her.

Appeal from circuit court, Shiawassee county, in chancery; Luke S. Montague, Judge.

Action by Allen Shelden against Charles E. Shattuck and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

James M. Goodell and G. R. Lyon (Hugh McCurdy, of counsel), for appellant. Kilpatrick & Pond, for appellees.

HOOKER, J. The complainant has been a judgment creditor of Charles E. Shattuck since 1873, the original judgment for $1,094.81 having been sued with sufficient frequency to perpetuate the claim. At the time this suit was commenced, it amounted to upward of $3,150. An execution was issued December 10, 1892, and returned unsatisfied, whereupon this bill was filed to reach property alleged to be equitably subject to complainant's claim. The testimony shows that, in 1876, Charles E. Shattuck was the owner of a house and lot, constituting his homestead, and very little else. He was selling sewing machines for a salary of $40 or $45 per month. He testified that at this time his wife had some money, and purchased a number of machines, and the business was continued in her name. Mr. Shattuck managed the business, and she assisted, and Shattuck testified that he was to conduct the business for her, and was to have his living from it. After a time the name was changed, and the parties professed to form a corporation, some sort of articles being filed, or, at least, stock issued, and annual reports were filed. Mrs. Shattuck claimed to own most of the stock, a few shares being placed with a sufficient number of friends to make the requisite number of stockholders. Subsequently Mrs. Shattuck transferred her interest to her son, Jesse Shattuck, who thereupon gave up his business of teaching at Port Huron, and returned home, and engaged in the business, in accordance with an agreement made with his mother when she transferred her interest to him. In 1890 Mrs. Shattuck died. A large amount of property has been accumulated in the business, which the complainant seeks to reach. We are satisfied from the evidence that the defendant Charles E. Shattuck had no means except his homestead at the time the business was started, and that what he has had since has been drawn from that business; that his wife, on the contrary, has had considerable property from her father, who was in easy circumstances. We may justly conclude from this record that Charles E. Shattuck has put no money or property into this business, but that its growth and the accumulation of property are due largely to his efforts and business sagacity. If the complainant is entitled to have this property applied upon his claim, it must be by reason of a right to have the products of Shattuck's labor thus applied.

Our attention is not called to any authority that holds that, where a debtor refuses to labor for the benefit of his creditor, the latter has a remedy, or that, if the debtor chooses to labor for another, any more than his wages can be reached. On the contrary, it has been held by this court that an insolvent may devote his time to carrying on a business owned by his wife, as a means of sup-

porting his family. Where this is done, the accumulations may belong to the wife, especially when, as in this case, the wife puts her private fortune and her own labor into the business; and, when she chooses to turn her interest over to her child or children, it is her right to do so. We understand that this is not disputed, but that it is claimed that in this case this was in furtherance of the original design to conceal the husband's property, and keep it from his creditors. It is contended that the husband has, at least, an interest in the homestead, which is subject to the complainant's claim. The evidence shows that the husband owned this up to 1890, when he gave a warranty deed of it to his son, warranting against all incumbrances except a mortgage of $1,500, and two other mortgages which the grantor agreed to settle. The amount of these is not shown definitely, but there is reason to believe that they aggregated some $600 or upward, and that they were paid from the business. The $1,500 mortgage was given to Mrs. Shattuck's father in 1868, payable within four years, with interest payable annually. This mortgage was bequeathed to Mrs. Shattuck, by her father's will, which was probated in Saginaw county in 1870. It is claimed that upon Mrs. Shattuck's death, in 1890, this mortgage belonged to her estate, and that her husband and her two children should share it equally. There is nothing to show that her estate was ever administered upon. Complainant's brief asserts that it was not. Charles E. Shattuck testified that this mortgage was also turned over to Jesse C. Shattuck at the time the stock was transferred. There is no evidence to contradict this, and no question of Mrs. Shattuck's right to do so if she chose Hence we cannot say that the husband was entitled to a distributive share of this mortgage. We think the decree of the circuit court in chancery should be affirmed, with costs. Ordered accordingly. The other justices concurred.

SHIETART v. CITY OF DETROIT.

(Supreme Court of Michigan. Feb. 18, 1896.)

MUNICIPAL CORPORATIONS — CONSTRUCTION OF WALKS—INJURIES—LIABILITY.

A municipality is not responsible for personal injuries resulting solely from a property holder's failure to construct a walk in front of his premises as ordered. Montgomery, J., dissenting.

Error to circuit court, Wayne county; George S. Hosmer, Judge.

Action by August Shietart against the city of Detroit for damages for personal injuries. From a judgment in favor of plaintiff, defendant brings error. Reversed.

John J. Speed, for appellant. Fink & O'Connor, for appellee.

GRANT, J. The city gave notice to lot owners to construct this sidewalk. All but one complied with the order. The sole ground of negligence upon which it is sought to hold the city liable is the failure to construct this walk in front of this lot. The walk was in a sparsely settled part of the city. The ends of the walk opposite the open space were a few inches above the ground. We do not think the statute covers this case. In most cities and villages sidewalks are constructed with steps to the cross walks and streets. There was no more danger in walking over this sidewalk than over those constructed so that travelers are compelled to frequently step up and down. The plaintiff safely stepped off the walk. He had no right to assume that there was no walk beyond higher than the ground. The sidewalk was not out of repair. It had not been built. We see no reason why a municipality should be held liable solely for a failure to construct a walk or a part thereof. The judgment must be reversed, and no new trial ordered.

LONG, J., concurred with GRANT, J. McGRATH, C. J., took no part in the decision.

HOOKER, J. (concurring). I think that if the walk in this case was defective, and not in a condition reasonably safe for travel, its condition was apparent to the most casual observer. It was perfectly safe to all except the heedless, and the public should not be required to make walks so smooth that people cannot stub their toes upon them. Sidewalks in many places require steps, single or in flights, and cross walks are often upon a different level from the sidewalks which they join. Manholes for sewers must have covers which are above the level of the pavement. Wooden sidewalks become uneven by wear, and must be repaired by planks thicker than the half-worn planks which they adjoin, and flagstones are thrown out of level by the freezing of the ground. In all such cases, where the defect is obvious, the circumstances must be exceptional to authorize a recovery. I think they are not shown to be so in this case, and therefore concur in the result reached by my Brother GRANT.

MONTGOMERY, J. (dissenting). The common council of Detroit ordered sidewalks to be constructed, on the east side of Fisher avenue, from Jefferson avenue north, a distance of about 2,000 feet. The entire walk was constructed in the fall of 1892, with the exception of about 30 feet in front of one lot. Plaintiff, while traveling along the walk on the evening of the 12th of April, 1893, towards the north, stepped from the walk to the ground, and, after traveling the distance across the lot, caught his foot in the same, and fell, receiving the injuries for which he recovered in this action. No question is raised over the care exercised by plaintiff, nor is it open to question that the work hav-

ing been undertaken by the city, and the walk north and south of this section having been completed months before, the city had ample notice of the condition of the walk. Defendant's contention is that the statute does not make a city liable for failure to construct a sidewalk; that liability arises only upon and for a failure to keep its sidewalks, etc., in repair; and in this construction we think the learned counsel is right, so far as he asserts a general proposition. Williams v. City of Grand Rapids, 59 Mich. 51, 26 N. W. 279; Alexander v. City of Big Rapids, 76 Mich. 282, 42 N. W. 1071. But what is meant by a defect in a sidewalk already constructed? This sidewalk which caused the injury was constructed and existed. The city was responsible for its care. Its abrupt termination was the cause of the injury, and this was neither necessary nor contemplated as a part of the plan of construction. Shippy v. Village of Au Sable, 85 Mich. 280, 48 N. W. 584. Under these circumstances, it was a question for the jury whether this constructed walk was in a condition reasonably safe and fit for public travel. If it was not, the responsibility of the city was none the less, because to render it safe it became necessary to build 30 feet of walk, than it would have been if a single plank needed supplying, provided the city had ample notice and reasonable time to repair the defect. We think no error was committed in submitting the case to the jury. Judgment should be affirmed.

LOUDEN v. VINTON.

(Supreme Court of Michigan. Feb. 18, 1896.)

CHATTEL MORTGAGES—ACCEPTANCE—EVIDENCE—UNCERTAINTY—DESCRIPTION—FRAUD—DAMAGES—TRIAL—REMARKS OF COUNSEL.

1. That a mortgagee was, after the execution and filing of a chattel mortgage, informed thereof, and authorized her attorney to take possession of the property, is a sufficient acceptance of the mortgage, as against other creditors of the mortgagor subsequently attaching the property.

2. That the mortgagee, in answer to the question whether she was satisfied with what her agent had done in regard to the mortgage, said, "Well, I am satisfied if I get my pay, and not before," does not contradict her testimony that she gave her attorney authority to take possession of the property.

3. In an action by a mortgagee against other creditors of the mortgagor for wrongful seizure of the mortgaged property, it is not error to admit in evidence the mortgage, without the note which it was given to secure first being put in evidence.

4. A chattel mortgage, reciting that the party of the first part is indebted to the party of the second part in a certain sum, and whereas said party of the "first part" desires to secure to said party of the "first part" the payment of said sum, "now, therefore, in consideration of the above sum of money, to him paid by the party of the second part, does grant unto said party of the second part certain property," is not invalid for uncertainty.

5. A mortgage of "all the stock in trade, wares, and merchandise, furniture and fixtures, of every name and nature, situated in the building now occupied by said party of the first part in the village of T., and all goods and wares and merchandise that may be hereafter acquired by us and placed in said store building, excepting from the terms and condition of this mortgage such property as is by law exempt from levy and sale upon execution, hereby reserving the right to make selection of said exempt property," is not invalid, as against attaching creditors of the mortgagor, for failure to identify the property.

6. A mortgage covering after-acquired property is good as against creditors of the mortgagor.

7. Permission in the mortgage to the mortgagor to sell the mortgaged property in the usual course of trade does not invalidate the mortgage, as against attaching creditors of the mortgagor.

8. That a mortgage was given for a greater amount than was due the mortgagee does not conclusively show that it was in fraud of other creditors of the mortgagor.

9. A mortgagee in a mortgage given to secure her from liability as surety on a note may, as against other creditors of the mortgagor wrongfully seizing the property, recover the amount of her liability.

10. That plaintiff's counsel in his opening argument referred to the wealth of defendant, and stated that he was trying to crush his client, is not ground for reversal, the counsel not having persisted in such argument, and defendant having failed to request a charge in regard thereto.

Error to circuit court, Grand Traverse county; Roscoe L. Corbett, Judge.

Action by Clara Louden against Medad Vinton. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Dodge & Covell, for appellant. Foster & Crotser and Pratt & Davis, for appellee.

MONTGOMERY, J. Defendant is sheriff of Grand Traverse county, and as such levied two attachments upon a stock of hardware as the property of one Antony Pohoral, at the suits, respectively, of Buhl Sons & Co. and the Pritzlaff Hardware Company. These suits proceeded to a judgment, and executions were issued, and defendant, acting as sheriff, made a sale of the property to Buhl Sons & Co. The plaintiff claims under a chattel mortgage made and signed on the 1st day of November, and filed on November 17, 1894, both dates being earlier than the attachment. The mortgage was made without the intervention of plaintiff, and in pursuance to an agreement on the part of Pohoral to secure her from indebtedness owing to her, and indebtedness against her on account of certain obligations which she had incurred as surety. It does not very clearly appear as to just when the plaintiff learned that the mortgage had been executed, although it is clear from her testimony that it was before the attachment, and she also testified that she accepted it; and it would seem that possession was taken on her behalf before the levy. The mortgage was given for $3,500, and, as Pohoral testifies, was intended to cover his indebtedness to plaintiff, amounting to $1,140, and to secure her against liability on a note given by her for Pohoral's debt, to one James A. Venn, of $700 and interest, and to indemnify her against liability on a note of $1,106.30 given to Rathburn Sons & Co., also as security for Pohoral. The contention of defendant, before the trial court, was: First,

that the mortgage was fraudulent in fact; second, that the fact that the mortgage was given for a larger amount than was actually owing made it fraudulent in law; third, that the mortgage was invalid for want of sufficient description; fourth, that it was invalid as to creditors, because it covered after-acquired goods, and permitted sales from the stock. In addition to these main contentions, it is insisted that error was committed in the admission of testimony, and in the refusal to charge as requested. There are a large number of assignments of error, which we find it unnecessary to refer to in detail, but think it better to deal with the questions presented substantially in the order adopted in appellant's brief.

The first five assignments of error relate to rulings upon testimony offered to show the identity of the goods levied upon by the defendant with those seized under the writ of replevin in this case. We discover no error in these rulings. The proof is so clear as to leave no room for question about the facts.

The fifth assignment relates to the ruling of the circuit judge admitting the mortgage in evidence, the objection being that there had not been a delivery and acceptance by the plaintiff. There was testimony, however, that plaintiff was informed of the execution and filing of the mortgage after it was filed, and that, through her attorney, she authorized a Mr. Huellmantel to take possession of the stock of goods in her interest, and that he was actually in possession when the attachment was levied; and plaintiff further testified that she thought the mortgage and notes were brought to her before the levy was made. This constituted a sufficient acceptance. Stress is laid upon testimony of the plaintiff, given in one part of her examination, in answer to the question, "whether you are still satisfied with what your attorney did for you in taking that mortgage of $3,500 for you on that stock of goods," as follows, "Well, I am satisfied if I get my pay, and not before." This did not contradict her testimony that she, with knowledge of the mortgage, gave her attorneys authority to take possession of the stock. A further objection to the admissibility of the mortgage in evidence was that it referred to an accompanying note, and this note was not offered with it or proven before the offer of the mortgage was made. We think this objection to the introduction of the mortgage in evidence was not good, at the time. It, at best, only went to the order of proof; and, while the defendant had the right to demand the production of the note or have its absence accounted for, he seems not to have taken this course, but the plaintiff was subsequently interrogated by him about the note, and neither party offered it in evidence. See Hill v. Merriman (Wis.) 40 N. W. 399. It is further contended that the mortgage should not have been received, for the reason that no proof had been made connecting it with the subject-matter in the cause, and it is claimed that no such proof was afterwards made; but we think that there is abundant evidence making the connection, and do not deem it profitable to set it out at length in this opinion.

It is next asserted that the mortgage is too uncertain to be valid as against creditors. The mortgage, after reciting that it is made between Antony Pohorni, of the first part, and Clara Louden, of the second part, witnesseth that, whereas said party of the first part is indebted to said Clara Louden in the sum of $3,500, and whereas said party of the first part desires to secure to said first party the payment of said sum of money, now, therefore, in consideration of above sum of money to him paid by the party of the second part, etc., does grant, bargain, and sell unto said party of the second part, all and singular, etc. It is contended that the recital of the desire to secure the first party to the instrument is evidence of a trust in his own favor. It is conceded that the subsequent provision seems to express a different intent, but, it is seriously asked, "How shall the real intent be determined?" We answer by reading the mortgage. It is perfectly plain that, whatever error was committed in reciting the desire (and it was an error which corrected itself), the mortgage acknowledged a consideration received from the second party, and the grant was to the second party.

It is next urged that the description of the property in the mortgage is not sufficient to lead to its identity. The description is as follows: "All the stock in trade, wares, and merchandise, furniture, and fixtures, of every name and nature, situated in the building now occupied by said first party in the village of Traverse City, Michigan, and all goods and wares and merchandise and personal property that may hereafter be acquired by us, and placed in said store building, excepting from the terms and condition of this mortgage such property as is by law exempt from levy and sale upon execution, hereby reserving the right to make selection of said exempt property." The rule, as stated in Willey v. Snyder, 34 Mich. 60, is that the written description is to be interpreted in the light of facts known to and in the minds of the parties at the time, and that a subsequent purchaser or mortgagee is supposed to acquire a knowledge of all the facts, so far as they may be useful to his protection, and he purchases with a view to that knowledge; that descriptions alone do not identify,—they only furnish the means of identification. Applying this test the description is sufficient. See Wade v. Strachan, 71 Mich. 459, 39 N. W. 582.

It is also contended that the mortgage is void, for the reason that it covers after-acquired property, and for the reason that, as it permits the mortgagor to sell from the stock, and apply the proceeds to his own use, it creates a trust in his favor, contrary to section 6184, How. Ann. St. The permission

to sell in the usual course of trade does not invalidate the mortgage. People v. Bristol, 35 Mich. 28; King v. Hubbell, 42 Mich. 597, 4 N. W. 440. And a mortgage can be given conveying after-acquired property. Curtis v. Wilcox, 49 Mich. 425, 13 N. W. 803.

Defendant objected to the introduction in evidence of the notes upon which plaintiff was liable, as evidence of the indebtedness secured. Plaintiff's testimony, and that of Pohoral, tend to show that the mortgage was given to secure the indebtedness, and these notes are competent for the purpose of fixing the amount. The amount found due plaintiff was less than the amount of the mortgage. Pohoral testified that he supposed, at the time he made the mortgage, that the indebtedness to plaintiff amounted to the face of the mortgage, and plaintiff testified that she had not figured up the amount at the time she accepted the mortgage. The fact that the mortgage was given for more than was due was a badge of fraud, but not conclusive evidence of fraud. Jones, Chat. Mortg. §§ 92, 339; Bush v. Bush, 33 Kan. 556, 6 Pac. 794; Wood v. Scott, 55 Iowa, 114, 7 N. W. 465; Lyon v. Ballentine, 63 Mich. 102, 29 N. W. 837; Brace v. Berdan (Mich.) 62 N. W. 568.

The circuit judge charged the jury that "the giving and taking of a chattel mortgage for more than the actual amount owing to the mortgagee is, on its face, a badge of fraud; and if not explained as being the result of honest mistake or honest want of knowledge on the part of parties thereto, it becomes conclusively fraudulent as to other creditors who are hindered thereby; and in this case, in determining the question of intent, you must take into consideration the fact that parties had the means at hand of computing the exact amount due the mortgagee."

It is also urged that the plaintiff, although she was a mere surety on the notes, was permitted to recover the amount when it did not appear that she had paid them. But, as against a stranger or wrongdoer, she had the right to hold the property, or in lieu thereof, sufficient to indemnify her.

Complaint is made that the circuit judge instructed the jury that certain facts were undisputed, but we think the record justified this instruction as to the points covered, as we discover no dispute as to the facts upon the point involved. The charge of the court was full and fair, and we think covered every phase of the case. The exceptions to refusals of requests are numerous, but a careful examination of them, in connection with the charge as given, convinces us that the defendant has no just ground of complaint. Many of the objections urged in this case were technical in the extreme, and relate to questions which, in the ordinary trial of a lawsuit, would be considered facts. No one connected with the case, it is fair to assume, doubted the identity of the goods seized by defendants with those named in the writ of replevin, or the actual execution of the mortgage, or of the notes produced. Substantially the only question to be litigated was the bona fides of the plaintiff and Pohoral, and the chief badge of fraud was the naming of an excessive consideration in the mortgage. Counsel should understand that a case is not strengthened by multiplying objections.

Complaint is made of the language used in the argument of plaintiff's counsel. The reference to defendant's wealth, accompanied by a statement that defendant was trying to crush the plaintiff, was not warranted, and counsel should have been reprimanded. This statement was made in the opening argument, and it does not appear that the line of argument was persisted in, as was the case in Bedford v. Penny, 58 Mich. 424, 25 N. W. 381, cited by defendant's counsel; and no request to instruct the jury on the subject was preferred. We are not convinced that this indecorum was prejudicial. Judgment will be affirmed. The other justices concurred.

MURPHY v. MULVENA, Sheriff, et al.

(Supreme Court of Michigan. Feb. 18, 1896.)

TAXATION OF COSTS—NOTICE—VALIDITY—EXEMPTIONS—APPEAL—HARMLESS ERROR.

1. A notice of taxation of costs is not invalid because served before the judgment was entered on the verdict, the early service being a mere irregularity.

2. In order to be entitled to exemptions under How. Ann. St. § 7686, subd. 8, providing that certain property shall be exempt to enable any person to carry on the profession, trade, occupation, or business in which he is wholly or principally engaged, it must appear in what business the execution defendant is engaged.

3. In replevin of property taken on execution, and claimed by plaintiff to be exempt, it appeared that plaintiff was absent at the time of the levy, that the sheriff selected the exempt property, and that his return stated that the execution debtor refused to select. *Held*, any error in holding the return of the officer conclusive was harmless, under How. Ann. St. § 7690, which permits the officer to make the selection if the execution debtor is absent.

Error to circuit court, Alpena county; Robert J. Kelley, Judge.

Action of replevin by John J. Murphy against William Mulvena and Henry Denst, to recover certain cattle levied on by defendant Mulvena, as sheriff, under an execution in favor of defendant Denst and against plaintiff. There was a judgment for defendants, and plaintiff brings error. Affirmed.

John E. Mills, for appellant. George B. Greening (J. D. Turnbull, of counsel), for appellees.

HOOKER, J. The defendant Denst recovered a judgment against the plaintiff in an action of assumpsit in the circuit court. After verdict, and before judgment, notice of taxation of costs was served, and, a few days after the entry of judgment, the costs were taxed in accordance with the notice, in the absence of the judgment debtor. Execution

issued, and was duly returned, the return showing that the officer had collected the amount of damages, but no costs; whereupon an alias execution was issued and delivered to the defendant Mulvena, as sheriff, who levied upon a number of cattle upon a farm in the township of Wilson, owned by the plaintiff. The plaintiff was not present, and the defendant asked plaintiff's hired man, who was at work on the farm, to select plaintiff's exemptions, but he declined to do so; whereupon the officer set aside, and left as such exemptions, two cows and a bull, and drove the other cattle away, and afterwards advertised them; whereupon plaintiff replevied them. The return states that the execution debtor refused to select his exemptions. Upon the trial, the plaintiff claimed that he was given no opportunity to select his exemptions, and made an offer to show that, but the court held that the return could not be contradicted. It also appeared that the property was not appraised within the township of Wilson. The court directed a verdict for the defendants, and the plaintiff, having removed the cause to this court, assigns the following errors: (1) That the execution was void for the reason that the taxation of costs was irregular and unauthorized under the notice of taxation that was given; (2) that testimony should have been admitted to show that the plaintiff was never offered a chance to "make any exemptions"; (3) that the levy was invalid for the reason that the officer did not have the property appraised within the township of Wilson.

It is not claimed that the costs were taxed less than two days after judgment, and plaintiff's point seems to be that a notice served before the judgment was entered upon the verdict was invalid. We agree with the circuit court that there is no force in this contention. He should have appeared and contested the taxation if he desired to. No question is raised over the defendants' right to tax the amount, and the early notice was, at most, an irregularity.

The statute (How. Ann. St. § 7687), providing that the officer "may cause the property levied upon to be appraised," is, by the terms of the section, limited to "property of any class or species which is exempt by law from execution, to a specific amount or value." To bring this case within it, counsel appears to claim a right to exemption under subdivision 8 of section 7686,[1] but, as the record fails to show the business in which the owner was wholly or principally engaged, that subdivision is not applicable. The plaintiff's counsel did show that his client was a householder, and he was therefore entitled to two cows, as exemptions, under subdivison 6; and, under section 7690, he had a right to select these, if present when they were levied upon. The section permitted the officer to make the selection, if the execution debtor was absent or neglected to select his exemptions. Hence, it becomes immaterial whether or not the court erred in holding that the return was conclusive of the question of plaintiff's refusal to select his exemptions, inasmuch as there appears to be no question of his absence at the time of the levy. The judgment is affirmed. The other justices concurred.

[1] How. Ann. St. § 7686, subd. 8, provides that certain property shall be exempt, under any execution, "to enable any person to carry on the profession, trade, occupation or business in which he is wholly or principally engaged, not exceeding in value two hundred and fifty dollars."

DOWLING v. LIVINGSTONE et al.

(Supreme Court of Michigan. Feb. 18, 1896.)

LIBEL AND SLANDER — BOOK REVIEW — CORRECT STATEMENTS—CRITICISM—PLAGIARISM—CHARACTERIZATIONS.

1. Where there is no misstatement of facts or of the propositions set forth in a book under review by a newspaper critic, it is not libelous for him to attack with sarcasm and ridicule the theories of the author.

2. In an action for an alleged libelous review of plaintiff's book, it is error to charge that defendant had the right to ridicule the book if, in the candid judgment of any fair man, the book deserved ridicule, since the critic himself is the judge of the language of his criticism.

3. Where an author has quoted from another a paragraph inclosed in quotation marks, but not credited by name, a statement by a reviewer that the author has quoted another without giving him credit does not charge him with plagiarism.

4. For a critic to write, "Of course, like all quack remedies, it would intensify the trouble," does not characterize the author under review as a quack.

5. In a book review it is not libelous to write of one of the author's views that Horace Greeley advocated the same doctrine, though it should appear that such was not the case.

6. Where an author, in discussing Mr. George's proposition to take the land from the present owners without compensation, denounces it as "a gigantic piece of robbery," it is not libelous for a critic to write that the author "denounces the single-tax scheme as robbery."

Error to circuit court, Wayne county; William L. Carpenter, Judge.

Action by Morgan E. Dowling against William Livingstone, Jr., and others, for publishing an alleged libelous review of plaintiff's book. From a judgment in favor of plaintiff, defendants bring error. Reversed.

Plaintiff published a book entitled "The Wage Worker's Remedy," which was offered for sale to the public generally. The defendants are the publishers and owners of the Detroit Journal, a newspaper printed and published in the city of Detroit. Plaintiff took this book to the editorial room of the Journal, and requested that it be reviewed. The book was handed by the managing editor to an employé for that purpose. A review was written and published May 15, 1894, and is as follows: "Mr. Dowling's Book,—The Wage Worker's Remedy. Morgan E. Dowling's little book, The Wage-Worker's Remedy, is a well-meant, but rather

hysterical, attempt to solve the labor question. Although utterly lacking scientific value, it is interesting to most Journal readers, because the author is a Detroit man, and because it reveals how the average mind is groping and floundering in the midst of a forest of contradictions and in swamps of bad logic to the discovery of the truth. We do not claim to know beyond question the right path, but feel sure that Mr. Dowling has hopelessly lost his way. In the first place, Mr. Dowling's view is entirely confined to this country. His wage worker is the American wage worker. This is mainly why his effort has no value as a contribution to economic science. What would be thought of a writer who tried to explain the law of the correlation of forces wholly from the American or French standpoint? The truths of political economy are, of course, world-wide, like all truth. Rent and interest and wages must rise and fall in the United States in obedience to the same eternal laws that govern them elsewhere. To think otherwise is to doubt the harmony and simplicity of God's rule. Bearing this in mind, one of the author's nine remedies for low wages and lack of employment is seen to be inadequate. For instance, he would suspend immigration to this country; yet Italy, Germany, and Poland, all having emigration instead of immigration, and enjoying to a small degree some of his other remedies, are suffering from low wages. Ireland still seems to be too crowded, although, from famine and immigration, her population has been reduced one-half in less than a century. Surely, France's low wages have not been caused in any way by immigration, and war and starvation and a low birth rate have kept her population within reasonable limits, almost at a standstill. Another of Mr. Dowling's remedies for low wages is government ownership of railways, street railways, telegraph lines, and telephones. This is funny. He doesn't stop to think, but disposes of the whole subject almost with one flourish. If he had stopped for even a moment, it might have occurred to him that wages were low before the telegraph and locomotive were known. In his hasty opinion, governmental operation of street cars would realize Mayor Pingree's dream of a three-cent fare, and that would lead to more travel, and hence to the employment of more men. There you are. The whole question of labor is solved! But electricity has displaced horses (outside Detroit); travel on street cars has doubled; and yet wages have fallen. We, of course, are using the word 'wages' in its strict economical sense, whereas Mr. Dowling for the moment has in mind only the wages of one set of men. The reduction of street-car fares, he says, would be equivalent to raising the wages of those wage workers who used the cars. Has he never thought of the influence of street-car improvements on rent? May it not be possible that the landowner, not the wage earner, would absorb the benefits of such improvements? We are not arguing against the restriction of immigration and governmental ownership and management of these natural monopolies. They may be desirable in themselves, but as a solution of the labor problem they are ridiculous. Mr. Dowling disclaims being a paternalist; yet he advocates the most astounding piece of socialistic policy. He inveighs against class legislation, and then proposes some legislation of that kind. He would have the government forbid a higher rate of interest than 4 per cent. and a lower rate of wages than $2 a day. Such childish suggestions were bad enough in the Middle Ages, when the laws of political economy were unknown. An old king commanded the tide to recede, and an English parliament undertook to fix a maximum wage. Both were excusable, for they were ignorant. We know better to-day. Like the tide, wages follow certain unchangeable laws. The old king might have erected a stone wall against the tide, but the tide would have gone on working just the same, until it overflowed the obstruction or undermined it or pushed it over. So the law of wages does not cease to operate when artificial obstructions are placed in the way of its sweep. Something may fall and smash, but it will not be the fault of the economic law. The law itself is all right, being the will of the Creator, and any patchwork by the finite mind cannot but lead to bad results. Mr. Dowling simply does not understand what 'wages' are, in the meaning given to the word by political economy. He has constantly in mind the meaning of the word as applied to 'wage earners.' In political economy, however, the meaning of the word 'wages' is broader. It is the return for any service or for any productive labor. Thus, many are their own employers, and receive as wages what they themselves produce. How could the legislature compel an express-wagon driver or a small market gardener or a small shopkeeper to pay himself at least $2 a day? The merchant is both a capitalist and a wage earner, as political economy regards him. His profits are made up of interest on his capital, and of wages of superintendence. He may have, let us say, 50 clerks employed, at an average rate of $1.50 a day. The law suddenly compels him, according to Mr. Dowling's scheme, to pay them not less than $2 a day, increasing his expenses $25 a day. He is himself a laborer, a wage worker, as truly as are his clerks, and nine times out of ten a harder and more anxious worker, for upon him rests responsibility, and the shame should failure come. His own wages may already be cut down fearfully by high rent and competition; yet Mr. Dowling would arbitrarily make him pay higher wages to his clerks than the labor market required. Of course, like all quack remedies, it would intensify the trouble if it had any effect at all. Besides trickery and

lying, it would cause business failures and the employment relatively of less clerks. The tide might be dammed up for a moment, but its strength would be felt. About one-third of Mr. Dowling's book is devoted to praising Henry George, and to refuting his ideas. In the opening chapter he quotes from George without giving him credit, and outdoes him in raising alarm over present social conditions, even saying that revolution is at hand unless something is quickly done to appease the wrathful and wronged masses. In the last chapter he has apparently cooled off, forgotten his alarm, and believes that material progress tends to benefit all. One wonders what he made such a fuss for first, especially when it is found that he believes that some poverty is bound to exist anyway. He says Henry George's scheme is socialistic, and then he proposes an extension of governmental powers which would make Sam Goldwater happy. He denounces the single-tax scheme as robbery, and then advocates it, at least so far as it is applied in New Zealand. He would exempt improvements largely, and tax land values so high as to prevent speculation in land, which is all any single taxer dares to hope will be accomplished in a generation or two to come. After giving his programme of nine remedies, Mr. Dowling thinks of many more. He would prohibit the acquirement of more land by any man than is actually needed by him for business or homestead purposes. This is pretty strong for one who has just been defending the institution of private property in land as all right, and it hasn't the merit of originality, for Horace Greeley advocated the same thing 50 years ago. It is altogether an amusing book, as full of contradictions and absurdities as a schoolboy of tricks. Mr. Dowling gravely assures the reader that the remedy for poverty is 'steady work, shorter hours, and fair wages.' He might have added that food is an excellent remedy for hunger. 'The Wage Worker's Remedy' is on sale at Hunt & Eaton's, 189 Woodward Ave."

The defendants, with their plea, gave notice that they would insist in their defense that they had the right, and that it was their duty, to justly and fairly criticise said book, and that the criticism complained of is a just and fair one, and was published without malice or intention to injure said plaintiff. Two questions are presented: (1) Is the article libelous? (2) If so, what is the measure of damages?

Cutcheon, Stellwagen & Fleming, for appellants. Morgan E. Dowling, in pro. per.

GRANT, J. (after stating the facts). The propositions advocated by the plaintiff are thus stated in the second chapter of his book. "(1) The suspension of all immigration to this country. (2) The making of eight hours a legal day's work. (3) The prohibition of marriage under the age of 21 years. (4) The prohibition of the employment of children under 15 years of age in workshops, factories, and mines. (5) The fixing of the minimum rate of wages at $2 per day for all laborers, except domestic and farm laborers. (6) The reduction of the legal rate of interest to 4 per cent. per annum. (7) The purchase of all street railways, and the placing of them under the control and management of of the municipal authorities. (8) The purchase of all telegraph, telephone, and railroad lines in the United States, and the placing of them under the control and management of the national government. (9) The prohibition of the purchase of lands in this country by nonresident aliens, and the compelling of all nonresident aliens who now own lands to sell them within a specified time, or forfeit their titles." The book is mainly devoted to a discussion and elucidation of these propositions. No malice was shown on the part of the defendants, unless it is fairly deducible from the article itself. On the contrary, it appears to be conclusively established that the defendants did not entertain any malice towards him, and that the book was placed by them in the hands of their critic, who wrote the article, without any comment or instruction.

When an author places his book before the public, he invites criticism; and, however hostile that criticism may be, and however much damage it may cause him by preventing its sale, the critic is not liable in an action for libel, provided he makes no misstatement of any material facts contained in the writing, and does not attack the character of the author. The book and the criticism are both before the public. The language we used in Belknap v. Ball, 83 Mich. 589, 47 N. W. 674, applies to this case: "When language is truthfully stated, the criticism thereon, if unjust, will fall harmless, for the former furnishes a ready antidote for the intended poison. Readers can then determine whether the writer has, by the publication, libeled himself or the candidate. When the language is falsely and maliciously stated, privilege ceases to constitute a defense." We think that case and the authorities there cited establish the principle governing this. Townshend states the rule as follows: "As criticism is opinion, it can never be primarily material to inquire into its justness. The right to criticise implies the right to judge for one's self of the justness of the criticism. It would seem to be but a delusion to say one has the right to criticise, provided the criticism be just. The justness or unjustness can never be more than matter of opinion. The test always is, was the criticism bona fide? It is like the case of one writing concerning the sanity of another. The test of the justification is not, was the statement such as a man of sound sense would have made? but, was it the honest conviction of the publisher?" The case of Bacon v. Railroad Co., 66 Mich. 166, 33 N. W. 181, has no application

to this case. No question of criticism of an author's writing was there involved. The defendant had reported the plaintiff as having been discharged from its employ for stealing. The report was a direct attack upon his personal character. There is in both reason and authority a wide distinction between language uttered concerning a person and criticism of his writings. Townsh. Sland. & L. § 255. It was said in Campbell v. Spottiswoode, 3 Fost. & F. 428: "The article, no doubt, is pungent, bitter, and caustic. At the same time, public men, and, above all, public writers, must not complain if they are sometimes roughly treated. Public writers, who expose themselves to criticism, must not complain that such criticism is sometimes hostile. * * * It was perfectly lawful for a public writer to say that it was an idle scheme, and that it was a delusion to suppose that, by forcing these papers [meaning the plaintiff's newspapers] into circulation by a free distribution, the great cause of missions would be promoted, and, in short, to denounce the whole scheme as pernicious and delusive." In a note to the above case will be found cited several English cases sustaining the rule. See, also, Townsh. Sland. & L. § 254. It is not libelous to ridicule literary composition. Carr v. Hood, 1 Camp. 355, note. Lord Ellenborough in that case said: "One writer, in exposing the follies and errors of another, may make use of ridicule, however poignant. Ridicule is often the fittest weapon that can be employed for such a purpose. If the reputation or pecuniary interest of the person ridiculed suffer, it is damnum absque injuria. Where is the liberty of the press if an action can be sustained on such principles? * * * Every man who publishes a book commits himself to the judgment of the public, and any one may comment on his performance. If the commentator does not step aside from the work, or introduce fiction for the sake of condemnation, he exercises a fair and legitimate right."

It is unnecessary to cite or quote further from the authorities. The rule of law in such cases is clear. In applying it to the present case, we find that the personal character and reputation of the author are not attacked. His theories are. In no material matter is there any misstatement of fact or of the propositions set forth in the book. The critic was at liberty to attack or denounce them with sarcasm and ridicule.

The learned circuit judge instructed the jury that "the defendants had the right to ridicule this book if, in the candid judgment of any fair man, the book or any part of it deserved ridicule." This is not the law. As already shown, when the critic correctly states the author, he (the critic) is the sole judge of the language of his criticism. Many fair men might disagree with him, and very likely would in this case. This is for the public, and not for a jury, to determine. If the plaintiff's contention be the correct rule of law, then the protectionist might maintain an action for libel against the free trader who attacks his protection theories and arguments with sarcasm, ridicule, and contempt.

Plaintiff insists that the defendants charged him with plagiarism, because he did not give Henry George credit for a quotation from his works. The quotation was inclosed in quotation marks, but not credited to Mr. George, and the court very properly charged the jury that this did not charge him with plagiarism.

The court also correctly instructed the jury that it was not libelous to call his remedy a "quack remedy."

It was not libelous to say that "Horace Greeley advocated the prohibition of the acquirement of more land by a man than is actually needed by him for his business or homestead purposes," even though it should appear that Mr. Greeley had not advocated such a doctrine.

Complaint is also made of the statement that "he [plaintiff] denounces the single-tax scheme as robbery." In that part of the book to which this statement has reference, plaintiff is discussing the single-tax theory of Mr. George, and is denouncing his proposition to take the land from the present owners without compensation, which he denounces as "a gigantic piece of robbery." As stated in the book, this was a part of the single-tax theory of Mr. George. The article complained of, however, correctly states the position of the plaintiff upon this subject.

The declaration contains no innuendoes, and, although the criticism is undoubtedly severe and caustic, it does not exceed the bounds of legitimate criticism. The court should have directed a verdict for the defendant. Judgment reversed, and a new trial ordered. The other justices concurred.

REILLY v. OTTO et ux.

(Supreme Court of Michigan. Feb. 18, 1896.)

DEED—BUILDING RESTRICTIONS—WAIVER—INJUNCTION.

Violation of a provision in a deed that no store or saloon should be erected on the lot, but that it should be kept for dwelling-house purposes only, will be enjoined, though prior to the deed the grantor had leased a store opposite for a saloon, and thereafter conveyed adjoining lots without any restrictions, it appearing that such other deeds were pursuant to contracts made long before, and that the property conveyed with the restrictions had been purchased by such grantor to prevent the erection of a saloon there, and to protect his store on the next corner and his residence property in the next block from being depreciated by proximity of a saloon.

Appeal from circuit court, Wayne county, in chancery; William L. Carpenter, Judge.

Suit by Cornelius J. Reilly against George Otto and wife for injunction. Judgment for complainant. Defendants appeal. Affirmed.

James V. D. Willcox (Elbridge F. Bacon, of counsel), for appellants. John W. A. S. Cullen, for appellee.

MOORE, J. In 1891, complainant and his wife conveyed, by deed, a lot in Detroit, with the following restrictions: "This conveyance is made with the express restriction that there shall not be placed or erected, at any time, on said premises now conveyed, any store, but only dwelling houses. To have and to hold the said premises above bargained and described, with the express reservation that no store or saloons shall be erected or placed on said premises now here conveyed, and that said real estate shall be kept for dwelling house purposes only." In 1894 the complainant filed a bill in chancery, alleging that he has been for several years past, and now is, the owner of said property; that defendants came to him to buy said property, and that he told them that he had purchased the premises with a view of erecting dwelling houses thereon, and that he would not sell to them for any other purpose than to be used solely for dwelling-house purposes, and that no store, saloon, or business place should be erected on said vacant lots, and thereupon the complainant entered into a contract of sale to the defendants of said premises, with the reservation as stated in his deed to them; that the defendants have moved a large frame building, which was used where it formerly stood for saloon purposes, and is now fixing it up to use as a saloon and for the sale of intoxicating liquors; and asking that the defendants be enjoined from so putting the saloon on said premises. Defendants answered, and averred that in July, 1892, the complainant sold to Kaminsky the property adjoining the defendants' on the south, without any restrictions as to buildings or business; that in December, 1892, he sold to Fass & Fass the south 26 feet of lots 113, 114, and 115, without restriction as to buildings or business; that complainant is not interested in any property in the block south of Leland street; that he is the owner of a store directly opposite and north of the property owned by the defendants; that in May, 1889, he leased said store for five years to one Faber, authorizing him to carry on a store and saloon in said building; that all the property owned by complainant at present lies on the west side of Russell street, north of and adjoining said last-mentioned store and saloon; that there are other business properties, including saloons, in that immediate neighborhood; that the city of Detroit has a population of 235,000, and that there are a large number of saloons in said city, and a large number in the immediate neighborhood of the property in question; that said complainant lives upward of a mile and a half from the property owned by the defendants, and is not interested by the business carried on by the defendants, except as it may affect the property owned by him there; that it is not true that the building of a store or saloon on said premises would cause any great damage to complainant's business, or depreciate the value of his property; that the condition contained in said deed is not sufficient to authorize the granting of an injunction. The trial judge granted the relief prayed for in complainant's bill. His action is sought to be reversed here.

It is urged by the defendants that, if the condition in the deed was ever valid, it has been waived by the complainant, and that he cannot enforce it, because he has conveyed the balance of lots 113, 114, and 115 without restrictions, and has authorized the carrying on of a saloon on his own property, and cites a large number of cases, relying especially upon the cases of Duke of Bedford v. Trustees, 2 Mylne & K. 552; Barrie v. Smith, 47 Mich. 130, 10 N. W. 168; Smith v. Barrie, 56 Mich. 314, 22 N. W. 816; Jenks v. Pawlowski, 98 Mich. 110, 56 N. W. 1105. The record discloses that the lease from Reilly to Faber was made before Reilly's contract and deed with the Ottos, and that in 1891 Faber ceased to do a saloon business. While the deed to Fass & Fass was made in 1892, it was made in pursuance of a contract made in 1888. The contract with Kaminsky was also made in 1888, so that it cannot be said that, after the Ottos made their contract with Reilly, the latter made any new conveyances authorizing the erection of stores or saloons. The record does not disclose any waiver on the part of the complainant. On the contrary, it shows his purpose in buying the land sold to the defendants was to prevent the erection of a saloon there, and to protect his store on the next corner and his residence property in the next block from being depreciated in value by the proximity of a saloon. In Watrous v. Allen, 57 Mich. 368, 24 N. W. 104, it was held that "every owner of real property has the right so to deal with it as to restrain its use by his grantees within such limits as to prevent its appropriation to purposes which will impair the value or diminish the pleasure of the enjoyment of the land which he retains. The only restriction on this right is that it shall be exercised reasonably, with a due regard to public policy, and without creating any unlawful restraint of trade." To the same effect is Smith v. Barrie, 56 Mich. 314, 22 N. W. 816; Abraham v. Stewart, 83 Mich. 7, 46 N. W. 1030; Whitney v. Railroad Co., 11 Gray, 359. The same doctrine is held in the Michigan cases cited by counsel for appellant. The judgment of the court below is affirmed, with costs. The other justices concurred.

LOCKWOOD v. MICHIGAN MUT. LIFE INS. CO.

(Supreme Court of Michigan. Feb. 18, 1896.)

LIFE INSURANCE—SURRENDER—CONSENT OF BENEFICIARIES—PLEADINGS.

1. The complaint, in an action on a life policy for its cash value at the end of the third year after it was issued,—under the provision therein that

on its surrender, within three months after expiration of the third or any subsequent year for which premiums had been paid, the cash value specified therein would be paid,—will not be held fatally defective by reason of failure to aver surrender within the time limited, objection being first made on appeal.

2. Under a life policy payable to insured in 20 years, if he was then alive; but in case of his death before that time payable to his mother, if living; if not, to his brothers and sisters; and providing that, on surrender thereof at the end of three years "receipted by the insured and beneficiaries," the cash value specified therein would be paid,—it is necessary, on making such surrender, that the receipt be signed, not only by insured and his mother, but by the other beneficiaries.

Error to circuit court, Ingham county; Charles H. Wisner, Judge.

Action by Stanley L. Lockwood against the Michigan Mutual Life Insurance Company. Judgment for plaintiff. Defendant brings error. Reversed.

The plaintiff secured three policies of insurance, for $1,000 each, which were termed accumulative bonds. The annual premium on each was $49.95. They were payable to him in 20 years; but if he should die before that time, the company agreed "to pay the said sum of $1,000, and, in addition thereto, an amount equal to all annual premiums paid to the company on this bond prior to such death, the sum so to be paid being indicated and guarantied upon the margin hereof (all indebtedness on account of this bond being first deducted therefrom), to his mother, Hila A. Lockwood, if living; if not living, then to Amy L., Harriet L., Joseph B., Floyd A., Alta I., and Ruth Lockwood (the brothers and sisters of the assured), or the survivors of them equally." The guarantied cash value is printed upon the policy, as follows: "On the surrender of this bond, duly receipted by the insured and beneficiaries, within three months after the expiration of the third or any subsequent year, for which premium has been paid, the company will pay the cash value specified in the following table." The cash value of each policy at the end of the third year was $92.98. After paying the premiums for three years, plaintiff decided to surrender the bonds and take the cash-surrender value stipulated. He notified the company, and sent receipts, signed by himself and Hila A. Lockwood, but not signed by any of the other beneficiaries named. The defendant requested receipts signed by the other beneficiaries, and declined payment unless they were furnished. Thereupon plaintiff instituted this suit to recover the stipulated amounts. The defendant requested the court to direct a verdict for the defendant, which was refused, and a verdict directed for the plaintiff.

Cahill & Ostrander, for appellant. F. S. Porter, for appellee.

GRANT, J. (after stating the facts). 1. The declaration failed to aver the surrender of the bond within the time limited, duly receipted by the insured and beneficiaries. It is insisted that this was a fatal defect in the declaration. The defendant was not taken by surprise or prejudiced upon the trial by this technical defect in the declaration. Upon request, the court below would have permitted an amendment, and, under How. Ann. St. § 7636, this court may treat the amendment as made.

2. Was it necessary that the receipt should be signed by all the beneficiaries? The record does not show the reason given by the learned circuit judge for his direction. The brief of the plaintiff is based upon the theory that the interests of the beneficiaries were contingent, that the insured could deal with these policies as he chose, and that no receipt signed by any of the beneficiaries was necessary. Upon no other theory can the plaintiff's contention be sustained; for if the policy required the receipt of any beneficiary, it required the receipt of all. Such, however, is not the rule of law governing contracts for life insurance. The beneficiaries, upon the execution of the policy, acquire thereby an interest which the law recognizes, and which the insured cannot dispose of at his own will. This interest is recognized by the authorities, and it is of little consequence whether it be called vested or contingent. Bliss lays down the rule as follows: "We apprehend the general rule to be that a policy, and the money to become due under it, belongs, the moment it is issued, to the person or persons named in it as the beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or will, to transfer to any other person the interest of the person named. An irrevocable trust is created." Bliss, Ins. (2d Ed.) p. 517. In Hubbard v. Stapp, 32 Ill. App. 541, the policies were payable to the insured at the end of 15 and 20 years, respectively; but if he died before those dates, then to his wife and son, if they should survive him. It was held that the beneficiaries held a vested interest, which could not be affected by any subsequent act of the assured. In Insurance Co. v. Smith, 44 Ohio St. 156, 5 N. E. 417, the policy was issued on the life of the husband, payable to the wife. The husband retained the policy, and paid the premiums, and received the dividends. He and his wife separated, whereupon he notified the company that he no longer wished to continue the policy. It was held that he had no power to surrender the policy merely because he was the insured party and had paid premiums; and that after the company was informed of the separation it was its duty to notify her of the premiums due; and that the policy did not lapse in consequence of the failure to pay them. In Fowler v. Butterly, 78 N. Y. 68, the husband obtained the policy in terms very similar to the present ones, payable, in the event of his death before a certain time, to his wife, if living; otherwise to his daughter. She joined with her husband in

an assignment of the policy to secure a debt of the husband. The court found that the assignment was procured through undue influence and control, amounting to compulsion, which rendered it void. The court said: "It will be seen that the policy was not alone for the benefit of the husband, but contained two separate and independent provisions. One of these was for his benefit, and conferred upon him absolute authority to receive the amount insured, if he remained alive until the time named and the policy was then in force, and the other for the benefit of the wife, if she survived him, or, otherwise, of the daughter. In case of the death of the assured, the wife or daughter became thereby vested with the sole right to collect and receive the money mentioned in the policy. The payment of the premium was made, and the policy was obtained, having these objects in view. The husband alone could collect the policy, if alive at the time of its expiration; otherwise it inured to the benefit of the wife, in case she survived her husband, or of the daughter, as provided. The fact that the covenant in the policy was with Butterly, as the assured, and the legal title and interest was in him, if he lived until the time named, does not establish an intention to keep control of the policy otherwise than as specified, or deprive the wife of the right which she had by virtue of the same." To the same effect are Insurance Co. v. Woods (Ind. App.) 37 N. E. 180; Insurance Co. v. Palmer, 42 Conn. 60; Landrum v. Knowles, 22 N. J. Eq. 594; Brown's Appeal, 125 Pa. St. 303, 17 Atl. 419; 2 May, Ins. 390. The interests of all the beneficiaries in the present case depend upon contingencies. The contingency of the death of the insured within 20 years applies to both beneficiaries. The interest of the brothers and sisters depends upon one other contingency, viz. the death of the mother before the assured. The contract is specific and clear in requiring the receipt of all the beneficiaries before the obligation of payment is fastened upon the defendant. It might have provided for its surrender upon his receipt alone, or upon those of himself and mother, in which event the beneficiaries could not complain; but it did not. Both the plaintiff and the defendant agreed that the beneficiaries should be consulted about the termination of the contract, and that their receipt should be produced in order to terminate it. If plaintiff should refuse or neglect to pay the annual premiums, it would be doubtful if the policy would be forfeited, without notice to the beneficiaries and the opportunity afforded them to keep the policy alive by payment. It follows that plaintiff had not complied with the plain terms of his contract, and was therefore not in position to maintain this suit. Judgment reversed, with the costs of both courts, and no new trial ordered. The other justices concurred.

JENKS v. LANSING LUMBER CO.

(Supreme Court of Iowa. Feb. 13, 1896.)

APPEAL — HARMLESS ERROR — TRESPASS — DEFENSES—OBSTRUCTING HIGHWAY—PLEADING—LIMITATIONS—TRIAL—INJUNCTION.

1. In an action against a lumber company to enjoin it from keeping freight cars on a public way in front of premises for loading lumber, a refusal to join as defendant a railroad company which owns and operates the cars is not prejudicial where the restraining order is finally denied.

2. The fact that land is unfenced, and has been traveled by the general public with knowledge of the owner, is no defense to trespass by the owner for the unlawful occupation thereof.

3. Matter pleaded in justification of trespass cannot be urged in mitigation of damages.

4. The obstruction of a public highway by keeping and using cars and placing buildings thereon will not be excused on the plea that such use was made in the conduct and operation of a business on land abutting on the street.

5. Where one division of an answer in trespass denies damages generally, a denial, in another division, of special damages, may be disregarded.

6. That a railroad company is authorized to operate its road over a public highway is no defense in an action against a lumber company for obstructing the highway by keeping cars on such road in conducting its business located on property abutting on the highway.

7. Where a petition sets out the obstruction of a public street as a continuing nuisance, and claims damages from the time limitations began to run against the claim, a demurrer is properly sustained to a division of answer pleading limitations applicable to and running against such obstructions as a permanent nuisance.

8. Separate counts against the same defendant for the use of land, for trespass by such use, and for injury to the land by the obstruction of the highway in front of it, are properly joined in the same petition.

9. In an action for the use of land and for trespass by such use it is proper to allow plaintiff to ask witnesses testifying on cross-examination to the rental value of the land what the value of the land is.

10. In an action for the use of land and for trespass by such use, where the evidence designates the property with such certainty as to render a technical description unnecessary, a charge that plaintiff claimed to be the owner of certain lots "in said petition described," and subsequently therein referred to as "said premises or property," is not objectionable as referring the jury to the petition for a description of the property.

11. In an action for the use of land and for trespass by such use and for obstructing the highways in front of it, an instruction requiring plaintiff to prove all allegations denied, and on proof of any or all of the allegations to prove the amount she is entitled to recover by a preponderance of the evidence, is not objectionable as authorizing recovery on proof of any of such allegations, where other instructions plainly state the different causes of action, and the facts which would warrant a recovery thereon.

12. An order refusing an injunction against obstructing a street, being within the discretion of the court, will not be disturbed unless an abuse of discretion is shown.

Appeal from district court, Allamakee county; W. A. Hoyt, Judge.

Action to recover for the use and occupation of certain real estate, and for trespassing upon the same, and for obstructing streets and alleys adjacent to said property, to the damage of the plaintiff. There was a trial by jury, verdict and judgment for the plaintiff, and defendant appeals. Affirmed.

James H. Trewin, for appellant. Stilwell & Stewart, for appellee.

ROTHROCK, J. 1. The petition in the case is in three counts. In the first count it is averred that the plaintiff is the owner of certain lots and lands in the city of Lansing, and it is sought to recover of the defendant, as a lessee, for the use and occupation of the property since January 1, 1889. By the second count it is claimed that the defendant entered on the property with teams and wagons, and piled lumber and rubbish thereon, and destroyed sidewalks constructed by the plaintiff adjacent to said property. The third count is a showing that the defendant used the street and alleys on which said land abuts so as to obstruct the same by piling lumber thereon and erecting therein buildings and platforms for the loading of the lumber, and in keeping in front of said premises large numbers of freight cars for the purpose of loading lumber, in such a manner as to make the use of the property of plaintiff without value. Damages are demanded for the use of the property and for injury thereto, and it is prayed that defendant be enjoined from maintaining the alleged nuisance in the street and alleys. The defendant answered the petition in seven divisions. The plaintiff demurred to the answer, and the demurrer was sustained as to six divisions. The first division of the answer was not attacked by the demurrer. The action was tried upon the issues made in that division, and there was a verdict and judgment for the plaintiff for $150. It should further be stated in this connection that the court denied the application for an abatement of the alleged nuisance, and the plaintiff appeals from this order.

2. It is alleged in two divisions of the answer that the railroad cars kept and used in the street belonged to the Chicago, Milwaukee & St. Paul Railway Company, and a motion was made by defendant asking that the railroad company be made a party to the suit. The motion was denied, and complaint is made of that ruling. If it should be conceded that an order restraining and prohibiting the defendant company from placing cars in the street for the purposes of use in its business would affect the railroad company, and that it would have been a proper party (which question we do not determine), there was no prejudicial error in the ruling of the court, because a restraining order was denied even as against the defendant, and the final judgment in no way affects either party in that respect.

3. In the second count of the petition the plaintiff seeks a recovery for trespass in entering on the property and using and injuring the same. That count was answered in the second division of the answer as follows: "For answer to the second count of plaintiff's petition, defendant states that the property described in plaintiff's petition is, and since the 1st of January, 1889, has been, unfenced, unoccupied, and commons, except a small par of lot eight (8) in government lot four (4), an that the general public has traveled an passed over plaintiff's premises without hin drance or objection, and with plaintiff's know ledge, during all of said time." The demurre was sustained to this part of the answe The facts recited in what we have abov quoted, as it appears to us, furnish no leg excuse for defendant's entering on the pro erty, and occupying it in a way to injure i or in doing more than was being done by th general public. But it is claimed this part the answer is allowable in mitigation of dan ages. It is not good as pleaded, even if would be otherwise. The facts are pleade in justification, and not in mitigation, an they should have been so pleaded. Ronan Williams, 41 Iowa, 680.

4. The third count of the petition recite facts as to the obstruction of the street b buildings, platforms, lumber, and cars i such manner as to render the use of plain tiff's land of no value. The following is th third division of the answer, to which th demurrer was sustained: "For answer to th third count of plaintiff's petition, defendan states that it is, and for more than the las five years has been, engaged in the manu facture and sale of lumber, laths, shingle and moldings; and that its mills, lumbe yards, and factories have been by itself an its grantors located and used in the sam place, near the property alleged by the plain tiff to be owned by her, for a period of mor than ten years last past; and that the street and alleys about and near the same and sai property claimed by plaintiff have been use by the defendant and its grantors for th purpose of carrying on said lumber busines openly, notoriously, adversely, and continu ously for more than ten years last past, un der claim of right, and with the knowledg and acquiescence of the city of Lansing Iowa; and that the defendant has at n time made any use of the said streets an alleys, or of any streets and alleys in th vicinity of plaintiff's property, other tha was and is necessary, reasonable, and pro er for carrying on its business, and has an does in no way interfere with the free us and enjoyment of plaintiff's property, or a access thereto; and that the plaintiff ha suffered no injury or damage by reason o defendant's use of said streets and alley other, more than, or different from the pub lic generally, and has no right to maintai this action for the alleged obstruction o said streets and alleys." It is urged in be half of appellant that the owners of lot abutting on streets have the right to make proper use of the street. This propositio may be conceded, but we cannot assent t the doctrine that even an abutting owne may lawfully erect buildings in a street, an obstruct it with cars and lumber in suc manner as to destroy the use of the land o lots of others, and escape liability on th

ground that it is a reasonable or proper use. 2 Dill. Mun. Corp. § 734, cited by appellant's counsel, in no way sustains such a rule. The count of the petition to which this division of the answer applies describes the condition of the street as a nuisance, and its sufficiency in that respect cannot be questioned. The case of State v. Railway Co., 77 Iowa, 442, 42 N. W. 365, was an indictment for obstructing a highway, and in discussing the question as to the right to obstruct the highway for business purposes it is said that "an obstruction in a highway will not be excused on the plea of its being necessary for the carrying on of a party's business, though such obstruction be only occasional." It is said that the plaintiff's right of access to her property was a private right, and that she could not be allowed redress unless it was unreasonably obstructed. But she had other rights in the use of her property than mere access to it, and the petition does not limit the injury to the mere right of access. It is also urged that in the third division of the answer it is denied that plaintiff sustained any damage except such as was common to the public generally. It is true that the answer contains that averment, and a denial of damages was proper, but the first division of the answer denies all the averments of the petition not admitted, and the court, in submitting the case to the jury, treated the averments of damage as denied. Under that state of the case it was not error for the court to disregard the denial in the division of the answer under consideration. It appears to be the thought of counsel for appellant that, in order for plaintiff to recover, she must show that she has suffered damages distinct from the public generally, and that the part of the answer under consideration denies that she sustained such damages. But such damages are distinctly claimed in the petition, and it does not appear that there is any such damage to the public generally. It is further urged that the city of Lansing had the right to permit the railroad company to occupy the streets with its railroad tracks. Conceding a full right to the railroad company in that respect, it does not follow that a recovery may not be had from the defendant if it wrongfully procured cars to be put in the street, to the plaintiff's damage. The action is not for what the railroad company has done, but for what the defendant has done for using the street unlawfully. There is no complaint that the railroad tracks are wrongfully laid in the street.

5. It is not necessary to consider the demurrer so far as it applies to the fifth division of the answer. It merely states facts to show that the railroad company is a necessary party because of the injunction or restraining order asked in the petition, and, as such an order was denied, no prejudice resulted to the defendant, even if the company had been made a party.

6. The seventh division of the answer is as follows: "Further answering, defendant states that the cause of action set out in the third count of plaintiff's petition arose and accrued to her more than five years before the commencement of this suit, and is barred by the statute of limitations." Owing to the peculiarity of the question presented by the demurrer to this division, it appears to us that we should set out that part of the petition to which the above division of the answer refers. It is in these words: "That for five years last past plaintiff has been the owner of the property, * * * and entitled to the free and unobstructed use and enjoyment of the same. That the defendant * * * has during all of said time persisted in occupying the streets and alleys upon which said property abuts by piling thereon immense amounts of rubbish and lumber from the mill which the defendant operates in the immediate vicinity, and erecting and maintaining on said streets buildings and platforms for the loading of lumber, and in keeping in front of plaintiff's premises large numbers of freight cars for the purpose of loading the same, and generally so obstructs and incumbers the streets as to render plaintiff's use and enjoyment of her said property valueless, to her damage," etc. It will be observed that the count of the petition above set out does not contain any averments that the obstructions in the street were of a permanent character. It pleads a continuing nuisance, and the plaintiff seeks to recover damages therefor for five years back to the limit fixed by the statute of limitations, and to the time when it is alleged the defendant wrongfully obstructed the streets and alleys. This division of the answer to which the demurrer was sustained was intended to apply to a case where permanent structures are erected, and the damage is original, and the statute commences to run at once. The argument of the counsel for appellee proceeds on this theory, and relies upon the cases of Powers v. Council Bluffs, 45 Iowa, 652; and Baldwin v. Light Co., 57 Iowa, 51, 10 N. W. 317. If it was the purpose to present that question, the answer should have set out the facts upon which it relied as a bar to the action. The defense of the statute of limitations is an affirmative one, and the party pleading it must affirmatively show the facts constituting the bar. Harlin v. Stevenson, 30 Iowa, 371; Tredway v. McDonald, 51 Iowa, 663, 2 N. W. 567. In view of the averments of the petition, the answer does not set forth the facts upon which it is sought to invoke the bar of the statute. The answer is but the statement of a legal conclusion, and the demurrer thereto was rightfully sustained.

7. The defendant made a motion that the plaintiff should be required to elect upon which count of the petition she would go to trial. The motion was denied. This ruling is the subject of complaint. We think it

was correct. It is claimed that a party cannot maintain a claim to property by two or more inconsistent rights at the same time, and the cases of Bank v. Dows, 68 Iowa, 460, 27 N. W. 459, and Crawford v. Nolan, 70 Iowa, 97, 30 N. W. 32, are cited in support of the contention. We do not think that either of the cited cases is applicable to the case at bar. This is not an action to recover property in the sense that the principle claimed has application. Causes of action by the same party against the same party in the same right, where either may be prosecuted by the same kind of proceedings, may be joined in the same petition. Code, § 2630. This statute has often been under consideration by this court, and the case at bar is clearly within its provisions. The first count of the petition is for the use of the land; the second is for damages for trespass in the occupation and manner of its use; and the third is for injury to the land by the obstructing the streets and alleys in front of it.

8. On the question of the rental value of the lots the court permitted the plaintiff, on the cross-examination of certain witnesses, to inquire as to the actual value of the lots, and this is claimed to be error. It appears to us that it was proper to put before the jury the value of the lots, because that evidence to some extent tended to show what would be a fair rental value, especially where witnesses were giving opinions as to rental value. The jury, in determining the weight to be given to such opinions, ought to be in possession of all the facts as to the character and value of the lots. There are other questions on rulings on the admission and rejection of evidence which do not appear to us to require special consideration. We find no errors in them.

9. In the first paragraph of the charge to the jury it was said that plaintiff claimed to be the owner of certain lots "in said petition described," and the property is not more definitely referred to in the instructions, but is throughout named as "said premises, or property." This is claimed to be error, because the jury was referred to the petition for the description of the property. We do not understand that the jury was referred to the petition to ascertain the numbers of lots, or the description of the property. The property was so designated by the evidence that a technical description was wholly unnecessary. The court stated the description in a general way, and this was sufficient. The instructions clearly and plainly stated the issues, and the jury was not directed to the pleadings to ascertain the issues; and the cases of Fitzgerald v. McCarty, 55 Iowa, 702, 8 N. W. 646, and Porter v. Knight, 63 Iowa, 365, 19 N. W. 282, have no application to the question here presented.

10. The third paragraph of the charge to the jury was as follows: "The burden of proof in this action is cast upon the plaintiff to prove the various allegations of said petition that are denied by defendant, and to establish the same by a preponderance of the evidence, by which is not necessarily mean the greater number of witnesses, but th greater weight of testimony. In case tha you find from the evidence that plaintiff ha established any or all of the allegations con tained in her said petition, and denied b defendant, then the burden of the proof i upon her to establish the amount that she i entitled to recover therefor by a preponde ance of the evidence." Objection is made t the last part of the instruction. It is sai that it authorizes a recovery upon proof o any of the allegations of the petition denie by the defendant. The language of the in struction is not entirely clear. It attempt to fix the burden of proof, and, disconnecte from other parts of the charge, it might b wanting in clearness of statement. But i the preceding instructions the cause of ac tion in each count was plainly stated, an what was admitted and denied in the an swer was correctly explained. And imme diately following the instruction under con sideration it was stated in brief what eac count was for, and follows with a particula statement of the facts to warrant a recover thereon, so that there could not well be a mis apprehension as to the facts to be established and upon whom the burden was to establis them. When the whole charge is consid ered, there was no prejudicial error. Ther are other objections to instructions given b the court and to the refusal to give thos asked by the defendant. Those given fairl submit to the jury every material questio in the case, and they embrace all that was re quested by the defendant which we thin was applicable to the issues and facts dis closed in evidence. We discover no groun for reversal upon the defendant's appeal.

11. The plaintiff's appeal is from the re fusal of the court to enjoin the defendan from occupying the street and alleys wit lumber, cars, and other obstructions. On thi branch of the case it is sufficient to say tha the granting of such an order is within th sound discretion of the trial court. It re fused the order, and we discover no suc abuse of discretion as to justify the interfe ence of this court. Upon both appeals th judgment is affirmed.

STATE ex rel. MOORE v. ARCHIBALD.

(Supreme Court of North Dakota. Feb. 20, 1896.)

STATE HOSPITAL FOR THE INSANE — SUPERINTEND ENT — APPOINTMENT AND REMOVAL — MANDAMU — WHEN LIES — SUPREME COURT — ORIGINAL JU ISDICTION.

1. This court has original jurisdiction in case in which the writs named in the constitution ma be employed to initiate such jurisdiction. Bu that jurisdiction is limited to cases involving th sovereignty of the state, its prerogatives or fran chises, or the liberty of the citizen; this court judg

ing for itself in each case whether that particular case is within its jurisdiction.

2. The state hospital for the insane is by law under the general management and control of a board of five trustees, which has power to appoint the superintendent of such hospital and remove him at pleasure. The defendant having been removed by the board from the office of superintendent, and the relator having been appointed by the board to fill such office in his place, *held* that, in mandamus proceedings to compel the defendant to turn over to the relator such office, the sovereignty of the state was involved, in a direct and important sense, the right of the board of trustees to control and manage a great state institution being necessarily involved, and that therefore this court held original jurisdiction of such proceedings.

3. Mandamus is the proper remedy to compel one who has no color of title to an office to surrender it to one who holds the prima facie title to it.

4. The grant of power to appoint to public office, where no term of office is fixed by law, carries with it as an incident the absolute power of removal at any time, without notice or charges or a hearing, and without the cause for removal being inquired into by any court. Such power vested in a board cannot be limited by any action taken by such board, whether by appointing the officer for a fixed term, or by by-laws restricting the power of removal to cases where cause for removal exists.

5. A motion to remove the defendant having been made and seconded at a meeting of the board at which all the members were present, the chairman of the meeting refused to put the motion, on the ground that it was illegal. Thereupon it was put by the trustee who made the motion, and received the vote of three of the five members, the other two trustees refusing to vote. *Held*, that these proceedings were effectual to remove the defendant.

6. Also, *held*, that the relator was legally appointed to the office, the same proceedings being had on the motion that he be appointed.

7. Also, *held*, that the approval of his bond by the board was established by showing that the same proceedings were had on the motion to approve it.

8. The fact that the superintendent may be removed from office for the causes mentioned in section 197 of the constitution (assuming this to be the case) does not impair the power of the board to remove him at pleasure.

(Syllabus by the Court.)

Original application on the relation of Dwight S. Moore against O. Wellington Archibald for a writ of mandamus. Peremptory writ awarded.

Edgar W. Camp and Glaspell & Ellsworth, for petitioner. F. Baldwin and Newman, Spalding & Phelps, in opposition.

CORLISS, J. Application is made to this court to put forth its original jurisdiction by issuing the writ of mandamus to compel the defendant to turn over to the relator the possession of the office of superintendent of the State Hospital for the Insane. The defendant was appointed to such office by the trustees of that institution (which, for convenience, will be designated in this opinion as the "asylum") on the —— day of January, 1890; and before the time (one year) for which defendant was appointed had expired, he was removed from such office by a majority vote of the board of trustees, at a meeting called for that purpose, and at which all of the trustees were present; and by the same vote the relator was appointed superintendent in his place.

At the outset, this court is called upon to determine the question of its original jurisdiction in issuing the prerogative writs named in the constitution, and the scope of that jurisdiction if such jurisdiction exists. The task is at once delicate and difficult. We are to trace the line that marks the boundary of our power, as the people have drawn it in the organic law, careful not to usurp unwarranted jurisdiction, and yet as careful not to withhold the exercise of jurisdiction conferred. That we have power to issue these original writs in some cases, not merely in aid of jurisdiction, but to found jurisdiction, we entertain no doubt. We so held in State v. Nelson Co., 1 N. D. 88-101, 45 N. W. 33; and while the question was not discussed by counsel in that case, it was thoroughly gone into by this court, and the conclusion there reached was the result of a careful examination of the same arguments and cases which have been presented in this cause. However, while we feel bound by that decision, we would reach the same conclusion were the question open to debate. The grant of power to issue the specified writs to initiate jurisdiction, at least in some exigencies, is quite apparent.

The constitution, so far as it relates to this subject, provides as follows:

"Sec. 86. The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state and shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law.

"Sec. 87. It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction, and shall have authority to hear and determine the same; provided, however, that no jury trials shall be allowed in said supreme court, but in proper cases questions of fact may be sent by said court to a district court for trial."

These provisions, as we construe them, vest in this court—First, appellate jurisdiction; second, general superintending control over inferior courts; third, power to issue the writs specified, not only in furtherance of other jurisdiction, but also in the exercise of original jurisdiction; fourth, authority to issue such other original and remedial writs as may be necessary to the proper exercise of the jurisdiction vested in this court. This last grant was unnecessary, as we shall see, and was doubtless inserted for greater certainty. These ancillary writs are to be employed in furtherance of any jurisdiction possessed by this court, whether appellate, original, or superintending. If the writs specifically named are not to be issued by this court in the exercise of original juris-

diction, then two of them cannot be issued by this court at all, as two of them are not such writs as can be employed in aid of either the appellate jurisdiction or the power of superintending control conferred upon this court. This fact is fatal to the construction that the writs specified, as well as those included in the clause, "such other and remedial writs," etc., are to be resorted to only as the means of carrying into effect the appellate and superintending powers of this court. The writs particularly named constitute a class by themselves, and are to be issued independently of any other jurisdiction possessed by the court. It is true that some of them may be issued in aid of the other jurisdiction vested in this court. The other and unenumerated writs belong to a separate class, being only such writs as are necessary to be used in aid of jurisdiction, and these are to be employed by this court solely for that purpose. They are instrumentalities which this court would have had power to use for such purpose had the constitution been silent on the subject. The grant of appellate jurisdiction, and of the power of superintending control, carries with it all writs necessary to the proper exercise of such jurisdiction and of such power. Attorney General v. Chicago & N. W. R. Co., 35 Wis. 425–515; Marbury v. Madison, 1 Cranch, 137; Wheeler v. Irrigation Co., 9 Colo. 248, 11 Pac. 103. Said Ryan, C. J., in Attorney General v. Chicago & N. W. R. Co.: "The framers of the constitution appear to have well understood that with appellate jurisdiction the court took all common-law writs applicable to it, and with superintending control all common-law writs applicable to that; and that failing adequate common-law writs, the court might well devise new ones, as Lord Coke tells us, 'as a secret in law.'"

As among the writs specified there are two which cannot be used in aid of either appellate jurisdiction or superintending control, it is demonstrated that the use of the writs particularly specified was not to be restricted, but that they were to be used for all purposes,—as well to take original cognizance of a case as to aid and effectuate other jurisdiction. In U. S. v. Commissioners of Dubuque Co., 1 Morris (Iowa) 42–50, this position was recognized as sound. "The fact that the writ of quo warranto is mentioned (and perhaps some others), which could only be issued in the exercise of original power, negatives the idea that these writs are only to serve as auxiliaries in the exercise of appellate jurisdiction." Other courts have considered this point as cogent in favor of original jurisdiction. Attorney General v. Blossom, 1 Wis. 317–327 (top paging, 277–287); Wheeler v. Irrigation Co., 9 Colo. 248, 11 Pac. 103. Said Justice Smith, in Attorney General v. Blossom: "Under whatever aspect this court can view this clause of the third section, we are unable to harmonize the nature and office of the class of writs therein named with an intention on the part of the authors of them to render them merely ancillary to the exercise of a power of superintending control over inferior courts lawfully established, or to provide them as mere instrumentalities of appellate jurisdiction." If, bound together with other writs which can be used either to initiate jurisdiction or make effectual other jurisdiction, there were found only a single writ, which could be issued for only the former purpose, this would give character to all the rest. But, as a matter of fact, two such writs are there found,—injunction and quo warranto. The grant is unquestionably twofold with respect to the writs named, which can be used for both purposes. This court is thereby authorized to use them for either purpose,—to found jurisdiction, or in aid of jurisdiction. The writs of habeas corpus and mandamus belong to this class, while the writ of quo warranto, and also the writ of injunction, as used in the supreme court, can be employed only to bring the cause into court in the first instance. While the writ of injunction is not an original, but merely a remedial, writ, so far as courts of inferior jurisdiction are concerned, yet, since the decision in Attorney General v. Chicago & N. W. R. Co., 35 Wis. 426–522, that writ has become, with respect to its use in the supreme court, a quasi prerogative or original writ. And it was doubtless in this sense that it was employed when inserted in the constitution. It certainly is never used in aid of either appellate jurisdiction or superintending control. We find, therefore, in the constitution, two writs exclusively original in their character, in the position in which they are placed. They were placed there to give this court original jurisdiction, if for any purpose whatever; and we cannot, in effect, expunge them from the constitution by construction. Shall we, then, draw the line at these two writs, and say that this court has not original jurisdiction of the other specified writs with which these two are classed? Such arbitrary separation of the specified writs would be unjustifiable. The clause, "such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction," shows that the writs specified shall, so far as they can be issued in furtherance of jurisdiction conferred, be used for that purpose; while, on the other hand, the fact that two of the writs named can be employed only to initiate jurisdiction, and never in aid of appellate jurisdiction or superintending control, shows, with equal force, that such other of the writs specified as can be used as original writs may be issued by this court to found jurisdiction, as well as for other purposes. To the argument that the words "such other original and remedial writs as shall be necessary to the proper exercise of its jurisdiction," indicate that all the writs named were to be used only in aid of jurisdiction previously conferred, it is a complete answer, as we have already seen, that as to

two of these writs the language can have no such significance, because their very nature forbids—renders impossible—such a construction. Why should it have such significance as to the balance of the writs specified, when the other interpretation begets harmony, gives full force to all the language used, and yet does violence to none.

There is no force in the position that the words "original jurisdiction" are not used in connection with the grant of power to issue the writs named. It would not have been proper to have thus restricted the scope of the specified writs. The use of these writs in aid of other jurisdiction could not be founded on the clause, "such other original and remedial writs," etc. This grant is expressly limited to writs other than those named. Unless the power to employ the specified writs in furtherance of jurisdiction was elsewhere conferred, it might be urged that it did not exist,—that the power had been taken from the court by implication. Certainly, this would be the case if the use of the writs named were restricted to original jurisdiction of them. The silence of the constitution is therefore very significant. It carries, to our mind, the conviction that the writs named were to be used in all proper cases,—as well in furtherance of jurisdiction as to initiate it. The power to issue them was granted in unqualified terms, so that they could be used in aid of superintending control and of appellate jurisdiction, as well as in the exercise of original jurisdiction. The constitution refers to two classes of writs, distinct each from the other with respect to the purposes for which they may be sent forth from this court. With respect to the writs named, the power of the court is unrestricted. They summon parties to its bar of justice in the exercise of original jurisdiction. They also supplement and make efficacious its other powers; while, on the other hand, the authority of this court to issue the unnamed writs rests upon their being necessary to the proper exercise of jurisdiction conferred upon this court.

We find that the separation of these two classes of writs is none the less distinct because the conjunction "and" is not found between the last two of the specified writs, as well as between the last of them and the succeeding clause. This consideration appears to have influenced the decisions in Alabama and Florida. Ex parte Simonton, 9 Port. (Ala.) 383; Ex parte Mansony, 1 Ala. 98; Ex parte Henderson, 43 Ala. 392; Ex parte Croom, 19 Ala. 561; Ex parte White, 4 Fla. 165. We cannot concur in the reasoning of these cases; and although the constitutions of those states, construed in those cases, were somewhat different from the constitution of this state, yet, if this difference can be said to be sufficient to affect the force of those cases as authorities against our construction, we feel compelled to say that we do not regard them as sound, and cannot follow them. That original jurisdiction was intended to be conferred is inevitable from the opening sentence of section 86. "The supreme court except as otherwise provided in this constitution shall have appellate jurisdiction only." This clearly contemplates a grant of original jurisdiction of some kind to follow. When we find in the next section a grant of power to issue original writs, which can be construed as a grant of power to take original jurisdiction of them,—and can be construed in no other way with respect to two of such writs, i. e. injunction and quo warranto,—to what conclusion are we impelled? It is to just such jurisdiction that the exception refers; otherwise, it cannot refer to anything. And shall we disregard these words "except as otherwise provided in this constitution"? May we expunge them from the instrument by construction? What rule more elementary or reasonable than that which commands us to give every word in statute or constitution at least some significance, if possible? This view is supported by Wheeler v. Irrigation Co., 9 Colo. 248, 11 Pac. 103, where the court say, in answer to the claim that the court possessed no original jurisdiction of prerogative writs: "This position we consider untenable for the following reasons: First, section 2 itself, by the declaration 'except as otherwise provided in this constitution,' implies the conferring of some independent original jurisdiction." In Florida and Alabama, this clause was, without warrant from principle, torn from the constitution by interpretation. See cases already cited. In Iowa, on the contrary, the supreme court decided in favor of original jurisdiction, without the presence of such a clause in the constitution, the grant being expressly of appellate jurisdiction only. U. S. v. Commissioners of Dubuque Co., 1 Morris (Iowa) 42. Yet, as the constitution gave the court also power to issue certain specified writs, and all other writs necessary to the administration of justice, the court held that this was a grant of original jurisdiction, where necessary to be exercised by the court, notwithstanding the prior restriction of the power of the court to "appellate jurisdiction only." Therefore the court in that case inserted, by construction, an exception as to other jurisdiction than appellate jurisdiction only, to harmonize the two provisions. We are not called upon to insert, but merely to see, read, and give effect to such an exception already found in the constitution.

Nor is there any force in the position that the words "except as otherwise provided in this constitution," were inserted for an abundance of caution. It is not customary, in framing constitutions, to scatter throughout its length provisions relating to the jurisdiction of courts. They are invariably collected in a few consecutive sections. In our constitution, all the provisions relating to the jurisdiction of the supreme court are

found in two short sections, the one immediately following the other. The words enacted could not, therefore, have been inserted to save a possible clash of provisions because of an inconsistent provision in some unknown part of the instrument, but to prevent the word "only" conflicting with a further grant of power in these sections. In which section is this additional grant of power found? It is found in both. In section 86 there is a grant of superintending control. In section 87 there is a further grant of jurisdiction to issue the writs named, in the exercise of original jurisdiction. The language of the exception is significant. It is, "except as otherwise provided in this constitution," and not, "except as otherwise provided in this section." If the purpose had been to grant only superintending control, in addition to appellate jurisdiction, the language would have been "except as otherwise provided in this section"; for such section contains the express grant of the power of superintending control. There was no occasion to send the mind to look elsewhere for the satisfaction of this exception, if it was satisfied by the grant of the power of superintending control in the very section containing the exception. But the language used is of such a character as to prepare the mind for the discovery of a further grant of power in some other section. This expectation is not disappointed, if we hold, as the very nature of two of the specified writs compels us to hold, that there is in the next section a grant of original jurisdiction in those cases in which such writs can be used to bring a cause into court for the first time. If the sole purpose of section 87 was to give this court power to issue writs in aid of appellate jurisdiction and superintending control, why should any writs have been therein named? It was not necessary to name them for the purpose of showing what kind of writs should be issued for that purpose; for the very nature of the functions they would perform, on that theory of the object of section 87, would determine what writs could be employed. The section would have read, "It shall have power to issue such writs as may be necessary to the proper exercise of its jurisdiction." But five writs are named, and we must assume, if possible, that they were named for a purpose. By naming them, they were set apart in a class by themselves, to be used, so far as they could be used for that purpose, in the exercise of original jurisdiction. This is apparent, both because two of them can be issued for no other purpose, and also because in this way only can they be given a function different from the unnamed writs. The cases in Missouri, Wisconsin, Arkansas, and Colorado cannot be said to be conclusive authorities in favor of our construction. The grant of power in those states was to issue certain named writs, and other original and remedial writs, without anything added tending to qualify the purposes for which the writs should be issued, as in the case of our constitution, which gives the power to issue the named writs, and such other writs "as may be necessary to the proper exercise of its jurisdiction." It could not be said in those cases, as it can be urged in this with some plausibility, that all the writs—as well those specified as those not enumerated—are to issue only in aid of jurisdiction; that the qualifying clause refers to the specified writs as well as to the unnamed writs. Were this qualifying clause eliminated from our constitution, there would be nothing on which to hang a doubt. Still, these cases are not against our position, and some of the reasoning in the opinions supports it. See Wheeler v. Irrigation Co., 9 Colo. 248, 11 Pac. 103; Attorney General v. Blossom, 1 Wis. 277; Attorney General v. Chicago & N. W. R. Co., 35 Wis. 425; State v. Lawrence, 38 Mo. 535; State v. Vail, 53 Mo. 97; State v. Stewart, 32 Mo. 382; Vail v. Dinning, 44 Mo. 210; Price v. Page, 25 Ark. 527; State v. Johnson, 26 Ark. 281. See, also, State v. Griffey, 5 Neb. 161; State v. Stein, 13 Neb. 529, 14 N. W. 481; People v. Adam, 3 Mich. 428; People v. Sackett, 14 Mich. 244; State v. Ashley, 1 Ark. 279, 513. In the Florida and Alabama cases relied on, and heretofore cited, no weight was given to the fact that two of the writs found among the enumerated writs were writs which could be issued only in the exercise of original jurisdiction. Indeed, in one of these cases,—9 Port. (Ala.) 383,—this point was not discussed, and does not appear to have been considered by the court. The language following the words, "and such other original and remedial writs," was allowed to qualify and restrict the broad grant of power to issue the specified writs in all cases when the effect of such restriction was to annul the grant of power to issue the writs of quo warranto and injunction. In the Florida case, the opinion first construes the constitution, without considering this point, and then gravely asserts that the fact that these two writs cannot be used except in the exercise of original jurisdiction cannot be allowed to affect the interpretation built up by ignoring in the first instance this significant point. The fallacy of such reasoning requires no exposure. It was illogical to reach any conclusion as to the meaning of the constitutional provisions involved in those cases, without giving due weight to the fact that writs were specified which could never be issued in aid of appellate jurisdiction or of superintending control over inferior courts.

Having concluded that we have authority to issue the writs particularly specified in the constitution in the exercise of original jurisdiction, it remains to be determined whether that authority is as broad as the language of the section of the constitution, standing by itself, and abstracted from the character of the tribunal on which the power is conferred, would seem to warrant. We think not. The constitution vests in the district court the

power to issue these same writs. In most cases, application to that court for the remedies obtained by these writs affords ample redress to the suitor. It cannot be that it was designed to confer upon this court concurrent jurisdiction with the district court, in all such cases. Especially violent and unwarranted is such an assumption when the nature of this court, and the object of its creation, are considered. This is not a forum for the litigation of private rights in the first instance. The suitor comes here for final judgment, but only after he has appealed for redress to inferior courts. There must, therefore, be another class of controversies in which the judgment of this court may be invoked directly, and without the delay of previous trial in some inferior tribunal. The nature of these specified writs (or, at least, of all of them save injunction), which this court is commanded to issue in the exercise of that original jurisdiction, makes clear the scope of that power. They are, with the single exception of the writ of injunction, prerogative writs. The writ of injunction, since the pioneer opinion of Chief Justice Ryan in Attorney General v. Chicago & N. W. R. Co., 35 Wis. 425, 511–520, has become a quasi prerogative writ. Originally, these writs were issued for prerogative purposes solely. But they have come to be used for private, as well as for public, purposes; the sovereign power, through its proper representative, consenting to such use. Indeed, they are now writs of right, by the great weight of modern authority. It very little concerns the sovereign people which of two candidates for the office of constable shall hold the office. The litigation, to carry on which the state lends its prerogative writ of quo warranto, is often practically only a strife between two citizens for the honors and emoluments of office. Shall such controversies occupy the time of this court, when the district court is competent to grant full relief? When used for such purpose, or for any other private end, the writs named in the constitution cease to be in reality prerogative writs, although such in form and name. They become assimilated to the ordinary process by which inferior courts acquire jurisdiction of parties in private controversies. So common has become the resort to one of these writs—quo warranto—in the interests of private suitors, that in many jurisdictions a civil action has been substituted for, or given as cumulative to, the remedy by that writ. Finding that these writs are put to both private and public uses, and that jurisdiction to issue them is conferred upon the district court in all cases, to what can the grant of power to the supreme court, to issue them, refer, except to their issue in those cases in which the prerogatives of the sovereign power are directly, and in some public and important respect, involved, or the liberty of the citizen is at stake? If not, then we have concurrent jurisdiction with the district court to issue these writs in all cases; and in reaching such a conclusion, we will be forced to say that the judiciary committee of the constitutional convention, from whose hand came, without change in the convention, these sections as finally adopted, intended that this court, charged with higher duties, and vested with higher jurisdiction, should yet determine in the first instance the claims of every suitor to every office, however local and insignificant; should nevertheless command, in the exercise of original jurisdiction, the performance of every duty, however trifling and unimportant to the state,—with another court, of competent jurisdiction to administer such relief, always open, and in which such causes are uniformly litigated. We do not believe that that committee, at whose head was one of the foremost lawyers of the territory, entertained the thought of distracting the attention of this court with the original cognizance of these private controversies, which can be better tried in an inferior tribunal, knowing the importance of an undisturbed devotion to the important duties devolving upon the court of last resort in the decision of appeals. An inferior court having been invested by the constitution with full and ample jurisdiction of these writs in all cases, we are clear that the otherwise broad and comprehensive import of the words conferring original jurisdiction on this court must be limited, by the rank of this court in the judiciary of the state, and the character of the other powers vested in the court, so that its original jurisdiction shall comport with its dignity and its high place among the tribunals of the commonwealth; and thus harmony of powers will be preserved, the classes of jurisdiction conferred upon it—appellate, superintending, and original—all, under such construction, having for their objects exalted duties, the final review of the judgments of inferior courts, and the control of their actions, and the guarding and conserving of the great interests and prerogatives of the sovereign people, and of the liberty of the citizen, by original, prompt, and final action. This court will then be symmetrical in its jurisdiction. Its powers will then be homogeneous, all partaking of its high and sovereign character, and not a heterogeneous mixture of the jurisdiction of a supreme court with some of the jurisdiction which is uniformly vested in inferior courts. The important duties of this court will be best discharged, the main object of its creation will be the most regarded and most surely accomplished, when it gives to these higher trusts its whole energies and powers, undistracted by a multitude of suitors invoking its justice in private controversies which inferior courts can better hear and determine.

As we said before, all these writs, except that of injunction, were once exclusively prerogative writs. They were the voice of the sovereign commanding to justice, where ordinary judicial proceedings afforded no remedy. The king, as the fountain of all justice, in the exigencies of important public questions, exercised his prerogative of jus-

tice by the issue of extraordinary writs, thus bringing for decision such matters before the king's bench,—the court which represented the sovereign power in the kingdom, as our supreme court represents that power in the state. The philosophy of that system was the wisdom of having great questions, touching the important interests of the people as a nation, adjudicated in the higher court in the first instance. While these writs were purely prerogative writs, while they were unknown in private litigations, it was entirely fit that only the higher tribunal should have jurisdiction to issue them; but when they came to be used for the purpose of bringing private controversies into court, it was then proper—nay, necessary—that inferior courts, of original jurisdiction as to ordinary proceedings, should be vested with power to employ them. It is with this view that jurisdiction of them is given to the district court, although that court doubtless has power to issue them in the other class of cases; the sovereign people having the choice of the tribunal in which they will proceed. Yet there remains the same reason as before for jurisdiction in the higher court to issue them in cases affecting the great interests of the state or the liberty of the citizen. It was in continuation of this old policy that the constitution was so drafted as to give this court power to issue the specified writs. And it is equally true that it was not to initiate any change in that policy that this power was conferred. As prerogative writs issued for prerogative purposes only, the highest tribunal has, and should have, jurisdiction to employ them. As the means of instituting private litigations, the inferior court of original jurisdiction has, and should have, exclusive power to use them. Says the court, in Attorney General v. Chicago & N. W. R. Co., 35 Wis. 425, at page 521: "The same writs are granted to those [circuit] courts as to this. It is impossible for a lawyer to suppose that they are granted in the same sense, and with the same measure of jurisdiction, to this court as to those. Such a proposition would shock the legal sense of any professional man. And the distinction is to be looked for, and is readily found, in the general constitutions and functions of those courts and of this." We have had less difficulty in reaching this conclusion, because similar grants of jurisdiction had been thus construed at the time our constitution was framed; and it was undoubtedly in view of this almost uniform construction that the organic law was drawn. The cases sustaining our views as to the scope of our original jurisdiction are Attorney General v. City of Eau Claire, 37 Wis. 400–446; Attorney General v. Chicago & N. W. R. Co., 35 Wis. 425–522; State v. Baker, 38 Wis. 79; Wheeler v. Irrigation Co., 9 Colo. 248, 11 Pac. 103; State v. St. Croix Boom Corp. (Wis.) 19 N. W. 396; State v. Ashley, 1 Ark. 309.

It is impossible to define with precision the boundaries of this jurisdiction; but the general outlines have been marked to our satisfaction in Attorney General v. City of Eau Claire, 37 Wis. 400. We quote with approval the views there expressed: "It is not enough, to put in motion the original jurisdiction of this court, that the question is publici juris; it should be a question quod ad statum reipublicæ pertinet,—one 'affecting the sovereignty of the state, its franchises, or prerogatives, or the liberties of its people.' Attorney General v. Chicago & N. W. R. Co., 35 Wis. 425. It was repeated in that case, as it had been held in Attorney General v. Blossom, 1 Wis. 317, that this court takes the prerogative writs for prerogative jurisdiction, with power to put them to only prerogative uses proper. Prerogative writs often go in aid of private right or of local public right. But the original jurisdiction of this court is not only limited to the prerogative writs, but it is confined to prerogative causes. * * * And though the question did not arise in the case, it is quite evident from all that has any bearing on it in Attorney General v. Chicago & N. W. R. Co. that, to bring a case properly within the original jurisdiction of that court, it should involve in some way the general interest of the state at large. It is very true that the whole state has an interest in the good administration of every municipality; so it has in the welldoing of every citizen. Cases may arise, to apply the words of Stow, C. J., 'geographically local, politically not local; local in conditions, but directly affecting the state at large.' Cases may occur in which the good government of a public corporation, or the proper exercise of the franchise of a private corporation, or the security of an individual, may concern the prerogative of the state. The state lends the aid of its prerogative writs to public and private corporations, and to citizens, in all proper cases. But it would be straining and distorting the notion of prerogative jurisdiction to apply it to every case of personal, corporate, or local right, where a prerogative writ happens to afford an appropriate remedy. To warrant the assertion of original jurisdiction here, the interest of the state should be primary and proximate, not indirect or remote; peculiar perhaps to some subdivision of the state, but affecting the state at large, in some of its prerogatives; raising a contingency requiring the interposition of this court to preserve the prerogatives and franchises of the state, in its sovereign character; this court judging of the contingency, in each case, for itself. For all else, though raising questions publici juris, ordinary remedies and ordinary jurisdictions are inadequate. And only when, for some peculiar cause, these are inadequate, will the original jurisdiction of this court be exercised for protection of merely private or merely local rights." See, also, pages 445, 446, of this opinion. We further quote with approval the language of the court in Wheeler v.

Irrigation Co., 9 Colo. 248, 11 Pac. 103: "We are clearly of the opinion that original jurisdiction should be here entertained only in cases involving questions publici juris, and that the writs for this court should, in general, be put only to prerogative uses. But these writs are frequently invoked primarily for the enforcement of private rights, while the proceedings may also affect questions of public interest. The language used, and the general policy indicated, by the various provisions of our constitution relating to the judicial department, construed in pari materia, as they should be, indicate that it was not the intention to have the supreme court entertain original jurisdiction over controversies of the kind last above mentioned; that, even though questions publici juris might be indirectly or remotely involved, such cases were in general to be here considered only in the exercise of appellate jurisdiction. * * * We believe that original jurisdiction of the writs mentioned, except in cases presenting some special or peculiar exigency, should not be here assumed, save where the interest of the state at large is directly involved, where its sovereignty is violated, or the liberty of its citizens menaced, where the usurpation or the illegal use of its prerogatives or franchises is the principal, and not a collateral, question." This court, in State v. Nelson Co., 1 N. D. 88, 45 N. W. 83, cited these cases with approval, and declared that, "when the information makes out a prima facie case, the writ will issue only in cases publici juris and those affecting the sovereignty of the state, its franchises and prerogatives, or the liberties of the people." Tested by the rule recognised and declared by this court, we have concluded that the case is one calling for the exercise of our original jurisdiction. While the contest is nominally between two individuals claiming the office of superintendent of the state asylum, the real question involved is whether a state board—the board of trustees of the asylum—shall be allowed to exercise that portion of the sovereignty of the state vested in it by the statute giving the board the general management and control of this state institution, and the power to remove at any time the superintendent, and appoint a new superintendent in his place. Rev. Codes, § 992. This institution receives a large appropriation of state funds, and is placed by the legislature under the control of a board of trustees. It certainly concerns the sovereignty of the state, not remotely and in a trifling particular, but directly and in a very important sense, whether one citizen shall defy the sovereignty of the people, and, by retaining his office of superintendent after removal, usurp to that extent the control of a great and expensive state institution. This court does not give relief in this case out of any consideration for the private rights of the relator, but solely to uphold the sovereignty of the state against a direct attack upon it in a matter of great public importance. The fact that the attorney general has declined in this proceeding to represent the relator, to appear for the board or the state, is not decisive against our jurisdiction. It will not infrequently happen that such officer will be of opinion that the law is with the defendant, and will therefore be unwilling to initiate proceedings against him. While it is the proper practice, as we said in State v. Nelson Co., for the attorney general to make the application for the writ, yet, when it appears that he has declined to make application for it, we will not refuse to exercise our jurisdiction, but will protect the public interests by putting forth all the powers with which the people have invested this tribunal. In many cases the court has taken jurisdiction although the attorney general has not applied for the writ, and in some of the cases he has actually represented the defense. People v. State Auditors, 42 Mich. 422, 429, 4 N. W. 274; State v. Frazier (Neb.) 44 N. W. 471; State v. Cunningham (Wis.) 53 N. W. 35–52; State v. Doyle, 40 Wis. 175; State v. Hewitt, 3 S. D. 187, 52 N. W. 875. In the case at bar, the majority of the board of trustees—the majority which removed Dr. Archibald and appointed Dr. Moore—appear by counsel, and urge this court to sustain them in their exercise of the sovereign power of the state conferred upon the board of trustees, of which they form the majority, and therefore the controlling element. Under the peculiar circumstances of this case, we have no hesitation in holding that the refusal of the attorney general to apply for the writ affords no reason for our declining to issue it.

We now come to the merits of the case. That the board of trustees of the asylum had power to remove the superintendent, Dr. Archibald, without cause, without notice, and in the exercise of their own unfettered and unreviewable discretion, cannot admit of doubt, unless there is something in the by-laws to be hereafter referred to which interferes with that power. They were given the power of appointment, and no term of office was fixed. Rev. Codes, § 992. In such a case, the rule is, and on principle must be, that the power of arbitrary removal is vested in the person or board vested with the appointing power, as incidental to the power of appointment, unless the law places a limitation on such power. Mechem, Pub. Off. § 445; Throop, Pub. Off. §§ 304–361; Ex parte Hennen, 13 Pet. 230; People v. Robb, 126 N. Y. 180, 27 N. E. 267; Miles v. Stevenson (Md.) 30 Atl. 646–648; Lease v. Freeborn (Kan. Sup.) 35 Pac. 817; People v. Fire Com'rs of New York, 73 N. Y. 441; People v. Shear (Cal.) 15 Pac. 92; Newsom v. Cocke, 44 Miss. 352; State v. City of St. Louis (Mo. Sup.) 1 S. W. 757, 758; People v. Hill, 7 Cal. 97; Smith v. Brown, 59 Cal. 672. It is contended, however, that, the board of trustees having appointed Dr. Archibald for the term of one

year, which had not expired at the time the board assumed to remove him, and having adopted certain by-laws, it was powerless to remove him, except for cause, and after due notice to him, and an opportunity on his part to be heard with regard to the truth of the charges preferred against him. The by-laws were passed in 1885 by a board composed of persons different from the present board. There are two which it is claimed are material to this case. They are as follows: "Charges against officers of the institution must be submitted in writing, and a copy thereof shall be furnished to the officers against whom the charge is made at least one month before it is acted upon." "The superintendent, assistant physicians, steward, and matron shall reside in the hospital, and devote themselves entirely to its interests, and be subject to removal, for good and sufficient cause, at the pleasure of the board of trustees, and shall be known as the 'resident officers' of the hospital." These by-laws are to be construed in the light of the power of removal vested in the board. That power was absolute. To show that the board intended to strip itself of any portion of this power, explicit language to that effect should be pointed out. So far from there being anything in the words used to evince a purpose to divest itself of its discretion as to the sufficiency and existence of the cause for removal, the by-laws in terms declare that the superintendent shall be subject to removal for good and sufficient cause "at the pleasure of the board." They are to judge, finally, of the whole matter. Certainly, they did not, by this language, confer upon the courts the power to inquire into the sufficiency or existence of any cause for removal. They left the power as broad as they found it. Nor could they do otherwise. The by-laws which they are authorized to pass must not be repugnant to the laws of the state. The statute by necessary implication confers upon the board unlimited power of removal. This manifests the legislative policy with respect to this particular office. That statute cannot be annulled, neither can such policy be overthrown, by a by-law passed by the mere creature of the legislature. The people, under such legislation, have a right to demand that, whenever the board shall deem it for the public interests to remove the superintendent, its power of removal shall be the absolute power vested in it by the legislature, and shall not be fettered by any restriction whatever. This power is delegated to the board for the public good, and the people cannot be prejudiced by limitations of that power to which they have not consented, and which they have not authorized the board to impose. If the board may lawfully fix a term of one year, it may likewise give the incumbent a life tenure. If it can, with legal effect, declare that the superintendent can be removed for good and sufficient cause, it may narrow the ground of removal to a particular case, and thus place this portion of the discretion vested in the board for the public welfare beyond the possibility of exercise by succeeding boards for years to come. Thenceforth the board of trustees would, for a season, be shorn of the specified power of appointment, of the incidental power of removal, and to this extent of the power of general control and management granted to it by the statute. Even if the by-laws in question were explicit in their limitation of the power of the board, we would be compelled, for the reasons set forth, to treat them as without effect. The authorities are unanimous in support of this view. State v. Lane (N. J. Sup.) 21 Atl. 302; City of Newark v. Stout (N. J. Sup.) 18 Atl. 943; Williams v. City of Gloucester (Mass.) 19 N. E. 348; Higgins v. Cole (Cal.) 34 Pac. 678; Carter v. City of Durango (Colo. Sup.) 27 Pac. 1058; State v. Johnson (Mo. Sup.) 27 S. W. 399; Weidman v. Board of Education (Sup.) 7 N. Y. Supp. 309. We have not deemed it necessary to pass on the point whether these by-laws were legally repealed before Dr. Archibald was removed.

It is urged that the office of superintendent comes within the provisions of section 197 of the constitution. This may be conceded without at all affecting the absolute power of removal vested in the board by the statute. The constitution does not declare that the officers therein referred to cannot be removed in any other way. It merely provides that for certain causes they may be removed in such manner as the legislature shall prescribe. But they may be removed for other causes, too, or without cause, if the legislature so declares, provided they are officers whose offices are created by statute. The legislature created the office of superintendent of the State Hospital for the Insane, and have, by an implication as strong as an express declaration to that effect, conferred upon the board of trustees the absolute, unreviewable power of removal at any time. Section 197 of the constitution has not taken away or impaired the power of the legislature to provide that any officer whose office is created by the legislature shall hold his office, not for any fixed term, but during the pleasure of the board or officer appointing him.

It is urged that the board did not, in fact, remove Dr. Archibald, or appoint Dr. Moore in his place. This contention rests upon an alleged irregularity in the proceedings of the board in assuming to make such removal and appointment. The motion to remove Dr. Archibald having been made and seconded, the president of the board, who appears to have acted as chairman of the meeting, refused to put the motion, on the ground of its illegality. Thereupon the motion was put by the member of the board who made it, and three votes were cast in its favor; there

being no opposing votes, owing to the refusal of the two other trustees (one of them being the president) to vote. The same proceedings were had on the appointment of Dr. Moore. It is, perhaps, true that this presents a case of a failure to pursue the practice which ordinarily obtains when persons gathered together as a body are acting as a body. But it cannot be said that every violation of parliamentary usage will annul the action of the body guilty of such irregularity. The course of procedure rests largely with the discretion of the majority, provided the course adopted affords a reasonable guaranty that the sense of the body on the particular measure before it has been fairly taken. In large bodies slight deviations from established practice might be fatal, because, in such bodies, the confusion consequent on departure from settled modes of transacting business may seriously impair or utterly destroy the rights of the minority to be heard in argument, to the end that they may convert an adverse majority into a minority. But, in smaller bodies,—one, for instance, composed of five members, sitting around the same table, each under the eye and within reach of the voice of every other member,—a strict observance of all the formalities prescribed by parliamentary usages is not necessary. The question for the court in such cases is whether, in view of the size of the body, the proceedings which were had resulting in the adoption of the motion before the body afford a guaranty that the sense of that body was fairly taken on that particular motion. Tested by this rule, we have no difficulty in reaching the conclusion that the resolution removing Dr. Archibald was legally adopted. The only irregularity in the proceedings was in the refusal of the president of the board of trustees, who assumed to act as chairman of the meeting, to put the motion; this being done by the person making the motion, on such refusal being declared to the board. The motion was regularly made and duly seconded. The two members of the board opposed to it expressed no desire to be heard in opposition to it. Whether the chairman or another should put it before the board to be voted on was a mere matter of form. Had the chairman put the motion, the result would have been the same. Certainly, the chairman of a meeting cannot paralyze the action of the majority by a refusal to discharge the functions of his office. It would be a monstrous doctrine that one man in a body of several hundred could stop all business until some court (and the power of a court to interfere is doubtful) had issued a writ of mandamus to compel action on his part, each refusal being followed by the impotence of the majority until some tribunal should come to their aid. When the chairman of the meeting refused to put the motion to remove Dr. Archibald, all that was left for the majority to do, if they were not to be thwarted in their purpose, was to have some one of their number put the motion, and call for the vote upon it. This was done, and there is no pretense that it worked any injury to the minority, or that it deprived them of any of their rights as members of the board. And it is obvious that the same result would have been reached had the chairman himself put the motion, as it was his duty to do. He undoubtedly acted in good faith, believing that, at that time, Dr. Archibald could not be removed. But it is clear that whether such removal could then be made was a question of law, to be decided by the courts, and not by a single member of the board. As well might the speaker of a legislative assembly refuse to put the question and call for the vote on the passage of a law because he deemed it unconstitutional. It was the duty of the chairman to allow the majority of the board to take such action as they might see fit to take. What would be the legal effect of that action was purely a judicial question, to be decided in another place, and by a different branch of the government. If the chairman had ruled that the motion was out of order, and had the motion then been put by another without any appeal from the ruling of the chair, a different question would have been presented; but, even under such circumstances, we would hesitate long before adjudging a vote on the motion illegal. However, no such problem is before us; for the chairman merely declared that the point was illegal, and not that it was out of order. To declare that a motion violates law, and therefore should not be voted on, is one thing. Such a question neither the chairman nor the majority can pass upon with any legal effect. But to rule that a motion is out of order is to take an entirely different attitude with respect to it. It is a decision that some rule of the body or some practice established by parliamentary usage has been violated. This question the chairman must decide in the first instance, and above him sits the court of final review, the majority who, on an appeal from the ruling of the chair, settle the issue beyond the power of any court to change their decision. The reasoning on this point applies with equal force to the approval of the relator's bond. The chairman refused to put the motion to approve the bond, and thereupon it was put by one of the other trustees, and was carried; three of the trustees voting to approve the bond, and the other two not voting at all.

The only question left relates to the remedy. The relator, having received the appointment, and having qualified, is in a position analagous to one who holds a certificate of election and has qualified. This prima facie title gives him the right to the office, pending any investigation as to the ultimate title; the defendant not being, as to him, even a de facto officer, but holding the office without so much as a color of title. That it is proper to try, in mandamus pro-

ceedings, all questions relating to the prima facie title is not open to debate in this state, since our decision in Butler v. Callahan, 4 N. D. 481, 61 N. W. 1025. See, also, State v. Johnson (Fla.) 11 South. 845; Conklin v. Cunningham (N. M.) 38 Pac. 170; State v. Common Council of City of Duluth, 53 Minn. 238, 55 N. W. 118. The defendant has been removed from the office, and he is not in a position to contest the right of the relator to hold the office. The state might hereafter, in quo warranto proceedings, try the question of the relator's eligibility to the office; but a judgment of ouster against him would not show that the defendant in this proceeding had had any right to the office during the relator's incumbency. The person who holds the prima facie title prays this court to compel the one who has no title whatever to turn over to him (the former) the possession of the office, with all its books and paraphernalia. His right to the writ of mandamus under such circumstances is absolutely clear. The peremptory writ will issue as prayed for.

BARTHOLOMEW, J. (concurring). I concur in the conclusions reached in the opinion prepared by Justice CORLISS. I also concur in all the reasoning of that opinion, except so much thereof as pertains to the original jurisdiction of this court. On that point I rest my concurrence solely upon the rule of stare decisis. Six years ago, and a very few months after the adoption of our constitution, this court held, in State v. Nelson Co., 1 N. D. 88, 45 N. W. 33, that it had original jurisdiction in cases of this character. That decision has been repeatedly acted upon since that time, and has been adopted by the legislature, and forms a part of our statute law. Section 5165, Rev. Codes. The question should no longer be considered open in this state.

The CHIEF JUSTICE did not sit in this case, owing to his absence from the state.

MELMS et al. v. PABST BREWING CO.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

WIDOW'S ELECTION—HOMESTEAD—CONVEYANCE—OUTSTANDING TITLE—LIFE TENANT—SATISFACTION OF INCUMBRANCES — REMAINDER-MEN — LIABILITY.

1. 1 Rev. St. § 2171, provides that, when lands are devised to a woman by her husband, she shall elect whether she will take under the will or under the law, but that she shall not have both unless such appears to have been the intent of the testator. Section 2172 provides that, if she elect to take under the law, she shall have the same right to the homestead as if her husband had died intestate, leaving lawful issue. *Held*, that where a testator who was involved in debt, and whose estate was incumbered with mortgages, devised all his estate to his wife, with directions to continue his business, if possible, and pay his debts out of the same, but the widow waived the provision made for her in the will, and prayed that the homestead be set apart to her, she thereby acquired only a life estate in said homestead.

2. Where a widow, who had only a life estate in a homestead, conveyed the same to grantees, who agreed to extinguish sheriff's certificates issued on foreclosure sale thereof, but said grantees took an assignment of said certificates, and afterwards obtained a sheriff's deed to the premises, they cannot assert the title so acquired against the remainder-men.

3. Though the grantees of one who appeared of record to be a life tenant supposed that they acquired the fee to the premises conveyed, and paid off incumbrances on the property, pursuant to agreement with the life tenant, they cannot recover any portion of the sum so paid from the remainder-men. Marshall, J., dissenting.

Appeal from circuit court, Milwaukee county; Frank M. Fish, Judge.

Action by Franz Melms and others against the Pabst Brewing Company to remove a cloud from the title of certain real estate. From a judgment rendered, defendant appeals. Affirmed.

This is an action to remove a cloud from the title of certain realty in the city of Milwaukee. The facts are without dispute, and are substantially as follows: Charles T. Melms died February 19, 1869, leaving a widow and seven children, of whom the eldest was 20 and the youngest 3 years of age at that time. He owned a tract of land in the city of Milwaukee, of which the northern portion was occupied by a large brewery. On the southern portion, facing the south, he had constructed a large dwelling house, which was his homestead. The brewery and homestead were heavily mortgaged at the time of his death, and his unsecured debts amounted to about $100,000 over and above the mortgages. By his will he gave all his property to his wife, and appointed her guardian of their minor children, and also appointed her and his brothers William and Leopold his executors, with the express desire that, if possible, his business should be continued by his wife, and his debts paid out of the same. The will was proven in March, and the executors and executrix were thereupon appointed, and gave the required bond. The widow sought to carry on the business for a time, but in a few months apparently became convinced that she could not do so. She then caused to be surveyed a piece of land 90 feet square, in the center of which the dwelling house or homestead stood, and connected this with the street to the south by a strip 45 feet wide and 60 feet long, making in all an exact quarter of an acre. This is the piece of land involved in this action, and from which the plaintiffs asked to have certain clouds on the title removed. Mrs. Melms then, on the 15th of November, 1869, by petition in writing, made application to the county court of Milwaukee county, stating that she had become convinced that the estate had become insolvent, and would have to be sold for the payment of debts, waiving the provision made for her in the will of her husband, and praying that the homestead, described above, be set apart to her, and that her dower be assigned, and the statutory allowances made to her, all of which

was done by order of the county court, dated November 19, 1869. November 23, 1869, William and Leopold, as executors, made petition to the county court for license to sell the real estate, representing that the debts of the estate amounted to $104,000, besides such as were liens on the real estate; that the personal property was only of the value of $32,000. License was granted under this petition, and thereafter the sale was had of the whole brewery and premises, excepting the homestead above described, and the same was bid off in the name of Jacob Frey, subject to the incumbrances thereon, for the sum of $379.50. This sale was confirmed by the court May 25, 1870, and a deed of the premises was made by the executors on the same day. It appears as a matter of fact that this sale to Frey was a mere sham, and that Mrs. Melms was the person for whose interest the purchase was made, and Frey took the title merely as a cover. Mrs. Melms immediately made effort to sell both the brewery and the homestead, and on the 1st of November, 1870, she and Frey made a written agreement with Friedrich Pabst and Emil Schandein, whereby they agreed to sell and convey to them by warranty deed the entire premises, including the brewery and homestead, for the sum of $95,000. This consideration was to be paid as follows: $30,000 by paying and discharging an existing mortgage on the property to one Baker; $40,000 by the execution and delivery of a mortgage of that amount on the property by Pabst and Schandein; and the remaining $25,000 by paying and extinguishing two certificates of sheriff's foreclosure sale of that amount upon the whole property, upon which certificates deeds would be due in June or July of the following year. This agreement was carried out by Pabst and Schandein in all respects according to the contract, except that, instead of redeeming the $15,000 certificate of sheriff's foreclosure sale, they took an assignment of it from the holder, and in July, 1871, received a sheriff's deed covering the whole brewery and homestead property. Mrs. Melms and Frey had previously given Pabst and Schandein a warranty deed covering the entire property. Pabst and Schandein had conveyed the entire property to the Pabst Brewing Company prior to the commencement of this action, of which company Pabst and Schandein were officers and principal stockholders. It appears that the Pabst Brewing Company claims to own the homestead property in fee under the deed from Mrs. Melms and the sheriff's deed on foreclosure. The prayer of the complaint is that both the will of said Charles T. Melms, in question, with the said deed from Frey and Mrs. Melms, and the said sheriff's deed to Pabst and Schandein, so far as the homestead property is concerned, be adjudged null and void, and that it be decreed that the defendant holds said homestead premises only as tenant for life of Marie Melms, subject to the estate in fee in remainder of the plaintiffs therein. The circuit court granted the relief substantially as prayed for in the plaintiffs' complaint, and from that judgment defendant appealed.

Winkler, Flanders, Smith, Bottum & Vilas, for appellant. Bloodgood, Bloodgood & Kemper, for respondents.

WINSLOW, J. (after stating the facts). But two questions were seriously argued by the appellant: (1) Whether Mrs. Melms lost the fee to the homestead by the filing of her petition of November 15, 1869; (2) whether the defendant can assert title as against the heirs under the sheriff's deed on foreclosure.

1. It is argued that in some way Mrs. Melms' election to take under the law, and not under the will, did not affect the devise of the homestead, but that she retained title to the homestead under the will, while taking dower and personal property under the law; thus taking partly under the will and partly under the law. Sections 2171 and 2172, Rev. St., seem very clear on this subject. Section 2171 provides that, when lands are devised to a woman or other provision made for her in the will of her husband, she shall elect whether she will take under the will or under the law (not whether she will take partly under the will and partly under the law), but that she shall not have both unless such plainly appears by the will to have been the intent of the testator. Section 2172 provides for the filing of the notice of such election in the county court within one year from the husband's death, and then provides that "upon filing such notice she shall be entitled to the same dower in his lands and the same right to the homestead as if he had died intestate leaving lawful issue and the same share of his personal property as if he had died intestate." In treating of this very will and election in the case of Melms v. Pfister, 59 Wis. 186, 18 N. W. 255, it was said by the present chief justice that, by the filing of the election, "the will immediately became inoperative as to the real estate, the title of which at once upon such election, if not upon the testator's death, became vested in his heirs, subject to the mother's right of dower and the payment of the testator's debts. From that time forth, at least, the real estate must be regarded the same as though no will had ever been executed." Although the question as to the title to the homestead was not involved in that case, we are entirely satisfied that the same principles are applicable, and that from the time of the election the homestead also "must be regarded as though no will had ever been executed."

The claim is made that the will shows that it was the intent of the testator that his widow should take both under the will and at law, because the will gives her the entire property. It is true the will gives her the entire property, but, as to all the real estate except the homestead, she must take it (if she takes it under the will) subject to the

payment of unsecured debts of the deceased, which amounted to about $100,000. If she took under the will, she could claim no dower in it. Now, the will shows on its face that it was the intention of the testator that this entire property should be kept together. He gives her all his property, and desires that, if possible, his business should be continued by her, and his debts paid out of the same. Manifestly, it was not his intention that a dower estate be carved out of the brewery property by his wife. It would necessarily have to be kept together and used in its entirety in order to carry on the business and fulfill the wishes expressed in the will.

Again, it is said that this is not a case of election, because an election "is the choosing between one property and another, not the accepting of the whole or a part only of what is willed." The argument is specious, but not to our minds sound. Here were certainly two alternatives between which she might elect. If she took under the will, she took a fee in the homestead, subject to the mortgages thereon; also a fee in the brewery property, subject to the mortgages and the payment of the debts of the deceased. The evidence plainly shows that the mortgages and unsecured debts would at that time consume the entire property. Under the law as then existing, and until the passage of chapter 133, Laws 1870, it seems that the unsecured creditors could have insisted on the mortgage creditors first exhausting their security on the homestead. Hanson v. Edgar, 34 Wis. 653. They would have swept the homestead, and the unsecured creditors would have swept what was left of the nonexempt property, and the result would have been that Mrs. Melms would have received nothing save such allowances or interests in the personal estate as were preserved to the widow in cases of testacy and intestacy alike. On the other hand, if she took under the law, she took a life estate in the homestead, subject to the mortgages (which, under the circumstances, was intrinsically fully as valuable as a fee), and she could take free of claims for unsecured debts her dower estate in the remaining real estate. Whether this estate was more valuable than the one given her by the will may have been a question not easy to decide; but, however that may be, it was certainly an essentially different estate from the one given by the will, and there was plainly an opportunity for an "election," or, in other words, a choice between two different things. As the result of the election, the homestead descended to the plaintiffs, the children of the testator, subject to the life estate of the widow therein.

2. The fact being that Mrs. Melms had only a life estate in the homestead, or, to be more exact, an estate during widowhood, when she made her deed to Pabst and Schandein, the necessary consequence is that Pabst and Schandein acquired that estate, and no more, by that deed; and the question whether they can insist on their title under the sheriff's deed remains to be considered. They agreed both in their agreement to purchase, and by the covenants of the warranty deed, that they would pay and extinguish the sheriff's certificate of sale to the amount of $15,000; but, instead of doing so, they took an assignment of the certificate, and obtained a deed of the entire brewery and homestead premises. Can they assert this title successfully against the heirs? We think not. Mrs. Melms was a tenant for life in possession. Pabst and Schandein acquired her estate, and became tenants for life in possession. Barrett v. Stradl, 73 Wis. 385, 41 N. W. 439. If such a tenant purchase an incumbrance upon the estate, he cannot set up title under it as against his remainder-man, but is considered as holding it in trust for the joint benefit of himself and of the remainder-man. This principle is firmly established, has been adopted by this court, and needs no vindication now. Phelan v. Boylan, 25 Wis. 679. It is therefore certain that Pabst and Schandein cannot use this deed to cut off the title of the remaindermen, but that, if they are entitled to make any use of the title, it must be simply to compel the remainder-men to contribute their proportion of the incumbrance paid. Phelan v. Boylan, supra; 2 Pom. Eq. Jur. § 799. But we think they are precluded from doing this, and for a plain reason. They bought the title of Frey and Mrs. Melms for the agreed price of $95.000. It is true they apparently thought that they would secure a fee in the homestead, but that was a matter of their own lookout. The public records showed what Mrs. Melm's title was, and that it was a life estate only. Therefore, they were charged with knowledge when they bought that they were buying a fee in the brewery property and a life estate in the homestead. For these they contracted to pay, and did pay, $95,000. Part of this $95,000 they agreed to pay, and did pay, in a particular way; that is, by paying off an incumbrance. Now, they say: "True, this was a part of the consideration; true, we agreed to pay and discharge it for the benefit of Mrs. Melms, and incidentally for our own benefit; but Mrs. Melms did not give us title to the fee, as we expected she would (though we had no right to expect it); hence we will recoup from the heirs the damages which we have suffered by reason of our bad bargain with Mrs. Melms. We will make them pay back to us a part, at least, of the consideration money which by our agreement we paid to Mrs. Melms." Stripped to its ultimate conclusion, this is simply an attempt to recover from the remaindermen a part of the consideration paid to the life tenant for the life estate. Had they purchased the life estate, paid the consideration therefor, and gone into possession, and afterwards paid the mortgage to protect their estate, they might invoke the rule laid down in Phelan v. Boylan; but, when they paid the mortgage simply as a part of the considera-

tion for the life estate which they purchased, it is wiped out as to all parties. They cannot revive it as a claim against the remaindermen any more than they can claim that the remainder-men should reimburse them for any other part of the consideration which they paid Mrs. Melms, and which they now think they ought not to have paid her because she did not give them title to the fee.

There are no other questions which are seriously urged or which require attention. A supplemental case was printed, but it was not necessary. No costs will be taxed for it. Judgment affirmed.

MARSHALL, J. (dissenting). With the decision of this court to the effect that Mrs. Melms' election not to take under the will placed the title to the homestead in plaintiffs, subject to their mother's life estate, and that defendant cannot use the sheriff's deed obtained on the certificate which it was agreed should be redeemed out of the purchase money, to cut off plaintiffs' title I fully agree; but with the conclusion that by the deed from Mrs. Melms to Pabst and Schandein, and the use of the consideration, that measured the full value of the property, to pay off the incumbrances thereon so far as necessary to discharge or purchase the same, they obtained no other interest in such property than the mere life interest of their grantor, I respectfully dissent, and, without entering into any very extended discussion of the matter, I will state my reasons therefor.

The law is well settled that a life tenant, or any person having a partial interest only in land, is not bound to pay off a charge or incumbrance on the title; that, if such life tenant pays off such charge or incumbrance, he is presumed to do so for his own benefit, and, though such charge or incumbrance be in form discharged, in fact it is kept alive for his benefit, protection, and reimbursement. In all such cases, in the absence of proof to the contrary, the presumption is that the intention of the life tenant was that the lien should be preserved, and a court of equity will give effect to such intention. In 2 Pom. Eq. Jur. § 799, treating of this subject, it is said, in effect, that the payment of the mortgage constitutes the life tenant the equitable owner of an interest in the property to the extent of the incumbrance thereon, which he may hold for reimbursement over and above the proportion of the debt which he was bound to contribute. The interest so acquired will pass by deed of the life tenant to his grantee. Whitney v. Salter (Minn.) 30 N. W. 755. In the case cited, the following language is used: "The life tenant who pays off the charge will be subrogated to the rights of the parties who held such charge, and he will be entitled to hold the property until the other interested parties pay their share. He and those claiming under him occupy a position analogous to mortgagees in possession after condition broken who cannot be ejected until all sums due on the mortgage have been paid." To support the above-stated propositions, no citation of authority is necessary. They are elementary. And it follows that Pabst and Schandein, by the conveyance from Mrs. Melms, and the taking up or payment of the incumbrances out of the purchase money, gave to them the life estate of their grantor, and also vested in them, by actual or equitable assignment, all of such incumbrances; and their grantee, the defendant, is entitled to enforce the same against the plaintiffs' interest in the property to the amount or proportion which they should contribute according to the settled rules of equity jurisprudence pertaining to the subject, unless there is something in the deed or contract, pursuant to which it was made, not heretofore referred to, which renders inapplicable these principles.

It is said that Pabst and Schandein are chargeable with knowledge of the fact that Mrs. Melms had but a life estate, which is quite true, but that by no means prevented the passage to them, by force of the covenants in her deed, of all interest in the property acquired by her after the giving of the deed or their becoming owners by equitable assignment of the incumbrances paid off by them out of the purchase money pursuant to the contract. Taking the deed in connection with the contract, it is quite clear that, in effect, it transferred the property to Pabst and Schandein, subject to the incumbrances, for the amount mentioned in the deed less the amount which they agreed to pay in discharging such incumbrances; for, while the sum of $95,000 is mentioned in the deed as the consideration, and the conveyance was made subject to the incumbrances, it was stipulated in the contract that such consideration should be used to discharge such incumbrances. That the intention of the parties to the contract was that Pabst and Schandein should become the owners of the full title to the property, and necessarily of the incumbrances which formed a part of the title, covered by the consideration named in the deed, appears from the contract so clear as to be beyond all reasonable doubt. It was agreed that the title in fee absolute, subject to the incumbrances, should be conveyed; that such incumbrances should be paid out of the $95,000 agreed upon as the purchase price for all, including the brewery property. It was provided that the amount necessary to redeem from the certificates might be placed with a depositary; and, referring to that portion of the contract on this subject, the following language is used: "The object being to secure to both parties the payment of the amount necessary to redeem said certificates." The contract further provided as follows: "The title to all such real estate shall be conveyed free from all incumbrances whatever, except as herein

provided." The exception refers to the incumbrances which were to be paid out of the consideration named in the deed.

From the foregoing, it follows, in my judgment, that defendant, in addition to the life estate formerly owned by Mrs. Melms, is the owner of the mortgages and incumbrances mentioned; that defendant is entitled to have all such incumbrances kept alive for its protection, and to compel reimbursement by plaintiffs of the proportion of the amount paid for such incumbrances, over and above the amount chargeable to the life interest, such amount to be determined according to the settled rules of equity jurisprudence pertaining to the subject; that plaintiffs' rights are the same as if their mother had retained the life interest, and paid off the incumbrances; no greater and no less. They are not chargeable with interest or taxes or any sum paid out to improve the property, but are chargeable with their proportion of the principal of the debt as it existed at the time the inheritance came to them, and which has been paid off by the owner of the particular estate, which must terminate before their right of entry can vest. 1 Washb. Real Prop. §§ 95, 96; 6 Am. & Eng. Enc. Law, 882; Estabrook v. Hapgood, 10 Mass. 313.

The judgment should be reversed, and such proceedings be had that a decree may be entered as here indicated, and proper directions be made to secure that end.

YATES et ux. v. CITY OF MILWAUKEE et al.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—EXEMPTIONS—STATUTES—RETROACTIVE EFFECT—INJUNCTION.

1. Property exempt from "taxation" (Laws 1889, c. 450) is still liable for assessments for a public improvement.

2. Laws 1891, c. 82, which went into effect March 31st, exempting certain land leased by the state agricultural society from all "assessments for the year 1891," does not exempt it from liability on an assessment certificate issued in the preceding January in payment for a public improvement theretofore completed.

3. The owner of land is not entitled to enjoin the execution of a tax deed upon a certificate of sale embracing several assessments, on account of the invalidity of one of the assessments, without tendering the amount of the valid assessments.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Action by Theodore Yates and wife against the city of Milwaukee and others. From a judgment refusing to vacate an injunction, defendants appeal. Reversed.

This was an action to set aside certain assessments against the premises owned by one of the plaintiffs, Marion J. Yates, the wife of the plaintiff Theodore Yates, particularly known and described as the "Cold Spring Driving Park," containing about 60 acres of land, and to set aside the sale of the said premises for the amount of said assessment, and the execution of a tax deed thereof by reason of such sale. It appears, from the pleadings and motion papers, that by chapter 450, § 1, Laws 1889, the corporate limits of the city of Milwaukee were enlarged and extended so as to include certain territory of which the premises in question were a part, and added the same to the Fifteenth ward of the city; and the act declares that said territory shall "be subject to the laws, regulations and ordinances governing the said ward and said city. Provided, that portion of the property * * * known as 'Cold Spring Driving Park' be exempt from taxation so long as the same shall be leased, used and occupied by the Wisconsin State Agricultural Society for the purpose of holding the annual state fair"; that the plaintiff Marion J. Yates leased the said driving park, May 1, 1886, to B. B. Hopkins and others, for the term of one year from that date, and, at their option, after the expiration of said year, for five years thereafter, ending May 1, 1892; and said lessees sublet the same, April 1, 1887, to the Wisconsin State Agricultural Society, until May 1, 1892, "subject to all the obligations and conditions imposed upon said original lessees by their written lease,"—one of which was to pay or cause to be paid all taxes and assessments which should be assessed against the demised premises during the existence of the lease, and to save harmless the said lessor and her assigns against any liability from cost or damage by reason of such taxes and assessments; and the said agricultural society covenanted in the sublease, to wit, to pay all taxes, general or special, which should be lawfully assessed upon or against said premises during its term; and agreed to promptly pay the same to the proper officers during each year at the time the same may become payable by law. While said premises were in the occupancy of the said agricultural society under said lease, they became a part of the west sewerage district of the city; and an assessment was duly made March 7, 1890, against said premises for a 30-inch sewer along same, in Chestnut street from Washington avenue to Thirty-Third street, and in Thirty-Third street from Chestnut street to a point 12½ feet south of Highland Boulevard, amounting to $1,582.32. The board of public works, under a resolution of the common council, advertised and received bids for the construction of the sewer, and entered into a contract therefor with one Brand, the successful bidder, July 15, 1890, and the work was completed December 12, 1890. Upon the completion of said sewer, the usual certificate was duly issued, January 8, 1891, payable to the said Brand. The said assessment having been carried into the annual tax roll for 1891, and having been returned as unpaid and delinquent, February 3, 1892, the city treasurer sold the said lands for the amount due on the said assessment to the city of Milwaukee, and

certificate of sale No. 1,411 was thereupon duly issued to the said city, which was assigned, February 15, 1892, to the defendants John Q. Burnham and Charles T. Burnham, and was afterwards assigned by them to the defendant Sidney B. Knox, who claimed to be entitled to the tax deed. There was included in said certificate of sale the amount of two small assessments on the premises in 1891, for sprinkling streets,—one for $28.10 and the other for $27.07,—which had been returned as delinquent and unpaid; and the premises were sold for the amount of the sewer assessment, with these amounts added, and fees of sale, amounting to $1,637.74. By chapter 82, Laws 1891, the proviso of chapter 450, Laws 1889, exempting said lands from taxation, was so amended as to exempt same from "taxation and from any and all special taxes and assessments for the year 1891," so long as the same shall be leased, used, or occupied during said year by the Wisconsin State Agricultural Society. This act took effect March 31, 1891. The defendants the city of Milwaukee, C. W. Milbrath, treasurer, and Sidney B. Knox moved, upon these facts, to vacate the injunctional order theretofore granted restraining the issuing of a tax deed on said premises upon said certificate, and from transferring or assigning said certificate, until further order of the court. After hearing, said motion was denied, and the injunctional order was continued until further order of the court, from which order the defendants above named separately appealed.

Hoyt & Ogden, for appellants. Elliott, Hickox & Groth and Winkler, Flanders, Smith, Bottum & Vilas, for respondents.

PINNEY, J. (after stating the facts). In the case of Hale v. City of Kenosha, 29 Wis. 605, in considering the distinction between taxes and assessments, it was said that "assessments, as distinguished from other kinds of taxation, are those special and local impositions upon property in the immediate vicinity of municipal improvements, such as grading and paving streets, improving harbors or navigable rivers within the limits of the municipality, and the like, which are necessary to pay for the improvements, and are laid with reference to the special benefit which the property is supposed to have derived from the expenditure"; and the language of Bronson, J., in Sharp v. Speir, 4 Hill, 76, that "our laws make a plain distinction between taxes which are burdens or charges imposed upon persons or property to raise money for public purposes, and assessments for city or village improvements, which are not regarded as burdens, but as an equivalent or compensation for the enhanced value which the property of the person assessed has derived from the improvement," after citing the previous cases in this state on the subject, was declared to be "peculiarly applicable to our system of taxation and assessment." As such assessments are laid with reference to the special benefit which the owner of the property is supposed to have derived from the improvement, it is manifestly just that, to the extent which his property has been benefited, it should be charged with the cost of the improvement, and it would be inequitable to exempt it from such an assessment. No presumption, therefore, of an intention to exempt such property from assessment, can arise from the use of language which does not clearly show that the legislature intended such exemption, and to charge the special benefit thus derived by a private owner upon the funds raised by general taxation. While assessments are said, in strictness, to be made under the taxing power, they are "so far separated and distinguished from general taxation as to have obtained a distinct name, and that name 'assessments.' As such, they have been known and described for a number of years in the older states, in their contracts, laws, and constitutions. A clear distinction between it and other taxation was established." Weeks v. City of Milwaukee, 10 Wis. 243, 244. A familiar illustration of the popular understanding is found in the language used in leases, and in those before us, where general taxes, when so intended, are named simply as "taxes"; and when assessments are intended, the words "special taxes" or "assessments" are employed to express such intent. Legislative exemptions of property from taxation are to be strictly construed. This rule is universal. Cooley, Tax'n, 54; Weston v. Supervisors, 44 Wis. 256. In pursuance of this principle, it has been generally held that a law exempting property from "taxation" does not exempt it from assessment for street improvements; that the terms "taxes" and "assessments" are not synonymous, and that the latter is not included in the former. Lima v. Cemetery Ass'n, 5 Am. & Eng. Corp. Cas. 547, and note, where the cases on the subject are collected; Winona & St. P. Ry. Co. v. City of Watertown (S. D.) 44 N. W. 1072; City of Sioux City v. Independent Dist. of Sioux City (Iowa) 7 N. W. 488; 25 Am. & Eng. Enc. Law, 160, and numerous cases cited in note 2; Worcester Agricultural Soc. v. Mayor, etc., of Worcester, 116 Mass. 189, 191; Bridgeport v. New York & N. H. R. Co., 36 Conn. 255; McLean Co. v. City of Bloomington, 106 Ill. 209; Adams Co. v. City of Quincy, 130 Ill. 566, 22 N. E. 624; Zable v. Orphans' Home, 92 Ky. 89, 17 S. W. 212; State v. Mills, 34 N. J. Law, 177; Buffalo City Cemetery v. City of Buffalo, 46 N. Y. 506; Roosevelt Hospital v. Mayor, etc., 84 N. Y. 108; Railway Co. v. Decatur, 147 U. S. 190, 13 Sup. Ct. 293. The surrender of the right to make and levy assessments cannot be implied. All presumptions are against it, and all who insist on such exemption, by which private property is to be improved at public expense, must come prepared to establish it in clear

and unanswerable terms. End. Interp. St. § 356; Suth. St. Const. § 364; Tucker v. Ferguson, 22 Wall. 575; West Wisconsin Ry. Co. v. Board of Sup'rs, 93 U. S. 598; People v. Commissioners of Taxes, 95 N. Y. 554. We must hold, therefore, that the provision of chapter 450, Laws 1889, exempting the premises in question from "taxation," cannot be construed or extended so as to operate as an exemption of said premises from special taxes or assessments, so long as the same shall be leased, used, or occupied by the Wisconsin State Agricultural Society for the purpose of holding the annual state fair; that when brought within the corporate limits of the city they became at once subject to the provision of the city charter (section 12, subc. 20, c. 184, Laws 1874), which declares that "real estate exempt from taxation by the laws of the state, shall be subject to special taxes as other real estate under this act." Under the various provisions for selling and conveying lands charged with assessments, for nonpayment, it cannot well be doubted but that, within the meaning of these acts, an assessment may be said to be a tax, as there is no other method by which collection can be enforced save through the agency of the laws for the sale and conveyance of lands for the nonpayment of general taxes; and for this reason, and to that purpose, an assessment was regarded as a tax, as held in Dalrymple v. City of Milwaukee, 53 Wis. 187, 10 N. W. 141; Sheboygan Co. v. City of Sheboygan, 54 Wis. 421, 11 N. W. 598. These cases fall far short of holding that an exemption of property from "taxation" is an exemption of it from assessment or special taxation for local improvements. The amendatory act (chapter 82, Laws 1891) did not become operative until March 31st of that year. The assessment had been ordered, and the improvement contracted for, and the work constructed, during the previous year, and the usual certificate was issued to Brand, the contractor, January 8, 1891. He thereby acquired vested rights by virtue of his contract and the performance of the same, and was entitled to have the assessment collected by and through the ordinary instrumentalities. This was an inseparable incident of his contract attendant upon its performance, without which it would probably have been of little or no value, and any legislation to deprive him of his right to enforce the payment of the assessment against the land would doubtless be an impairment of his contract forbidden by the constitution. Robinson v. Howe, 13 Wis. 341–345. Besides, upon the face of this act, it is apparent that it was not intended to have a retrospective operation, but was enacted only as a rule for future cases. The proper construction and effect of the acts under consideration depend upon the fair meaning of the language used, and not upon the fact that the legislature in previous years had bestowed many favors upon the State Agricultural Society, nor upon its financial necessities, or the character or extent of its pecuniary obligations to the owner of the driving park to pay what is termed in the lease "a material part of the rent" of these premises, by paying the general and special taxes or assessments charged thereon while holding the same under the lease.

It does not clearly appear whether the two small assessments for street sprinkling were charged upon the property before or after chapter 82, Laws 1891, took effect; but if afterwards, the plaintiffs were not entitled to enjoin the execution of a tax deed upon the certificate of sale embracing the three assessments, without tendering the amount equitably and actually due thereon for the assessment for the sewer. Hart v. Smith, 44 Wis. 213, 215. For these reasons, we hold that the order refusing to vacate the injunctional order was erroneous. The order of the circuit court refusing to vacate the injunctional order is reversed, and the cause is remanded for further proceedings according to law.

WALSH v. MYERS.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

CONTRACT — CONSTRUCTION—MUTUALITY— BREACH —DAMAGES.

1. Plaintiff had been manufacturing tin cans for defendant for some time at an agreed price, when defendant wrote to plaintiff that he would take his entire output of cans if he would agree not to sell to a certain other person, and directing plaintiff to enter his order for a certain number of cans "as heretofore." Plaintiff accepted the proposition, and shipped cans which were paid for at the price theretofore agreed upon. *Held*, that the contract was not invalid for failure to definitely fix the price to be paid for the cans.

2. Such contract is not void for want of mutuality.

3. After notice from defendant to plaintiff of its refusal to receive cans, to be manufactured by plaintiff from material to be furnished by defendant, and after defendant has made a contract with another person to receive cans from him only, plaintiff is not required to further attempt to complete its part of the contract for the manufacture of the cans to enable it to recover from defendant for breach thereof.

4. The measure of damages for breach of a contract to receive from plaintiff a certain number of cans, to be manufactured from material to be furnished by defendant, is the difference between the contract price and the cost of manufacture.

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by Francis A. Walsh against Isaac Myers, as surviving partner. From a judgment for plaintiff, defendant appeals. Affirmed.

The defendants were manufacturers and shippers of lye and potash, under the name Eagle Lye Works. The plaintiff was a manufacturer of tinware, under the name F. A. Walsh & Co. The plaintiff had, for a long time, manufactured cans for the defendants, from material furnished by them, for an agreed price, for use in their business. On August 20, 1889, the parties made a new con-

tract, in writing, in the words and figures following: "August 20, 1889. Messrs. F. A. Walsh & Co., City—Gentlemen: In consideration that you will not ship to E. Meyers & Co., of St. Louis, either nickel or one hundred per cent. lye cans, we herewith agree to constantly employ and take your entire output of lye cans, and you will therefore enter our order, and continue to furnish us, as heretofore, our entire wants for cans, which will not be less than 10 M (ten thousand) cans per day. We will specify from time to time, as heretofore, any excess of one size can or other. We also agree to keep you supplied with ample material, such as taggers' iron (of a good brand), so as to keep your force constantly employed. This contract is to continue in force as long as the Eagle Lye Works use lye cans. Eagle Lye Works, per L. Meyers." "Accepted. August 20, 1889. F. A. Walsh & Co., per F. A. Walsh." The plaintiff manufactured all the cans which the defendants required in their business until May 8, 1891, when his factory was destroyed by fire. He at once proceeded to make arrangements to rebuild, and, in the meantime, to supply from other sources the cans which the defendants should require. Then the defendants informed him that they would receive no more cans from him. They had, in fact, on March 20, 1891, made a contract with Rosendale, Paine & Co. to receive all the cans to be used in their business from them, and to receive cans from no other source, with the purpose to terminate or repudiate their contract with the plaintiff. From that time they furnished him no more material, and refused to receive more cans from him. The action is to recover damages for a breach of the contract of August 20, 1889. It was tried by a referee, who found, at length and fully, the facts of which the foregoing is an epitome. The report of the referee was confirmed, and the plaintiff had judgment for $10,838.73 damages. This sum includes only a few small items besides an item of $10,299.98 for profits which the plaintiff would have made if the contract had been carried out "so long as the Eagle Lye Works use lye cans." The defendants' copartnership was terminated, by the death of one of the partners, June 23, 1894, and damages are estimated upon the profits which would have been made on the cans which were actually used in the defendants' business between the time of the breach and the death of the partner.

Winkler, Flanders, Smith, Bottum & Vilas, for appellant. Timlin & Glicksman, for respondent.

NEWMAN, J. (after stating the facts). It is urged that the instrument of August 20, 1889, is invalid as a contract, because it does not fix the price to be paid for the cans which were to be manufactured under it, and so was not a completed contract, but only inchoate, leaving most essential terms to be arranged by future agreement. If this is the real effect of the instrument, it cannot be deemed a completed contract, nor in force, so as to bind the defendants to receive cans from the plaintiff. But it appears that there had been a previous agreement, in writing, fixing the rate to be paid for such cans as this instrument provides for. The evidence shows that, from the date of that contract to August 20, 1889, the date of this last contract, like cans were furnished at the same prices, and were being then so furnished. It may well be deemed that the words of the contract, "You will therefore enter our order, and continue to furnish us, as heretofore, our entire wants for cans," contemplate the price as well as the size and quality of the cans. It is certainly competent that the court shall be informed of the situation of the parties, so that it can view the agreement from their situation and standpoint, and ascertain from that vantage point what the parties intended by the words used (Nilson v. Morse, 52 Wis. 240, 9 N. W. 1); and then such a construction is to be given, if possible, as shall sustain, rather than defeat, the contract (2 Pars. Cont. 621; Redman v. Insurance Co., 47 Wis. 89, 1 N. W. 393). And the fact that cans were furnished and paid for, without any new agreement fixing the price, down to the time of the fire, May 8, 1891, is entitled to weight as a practical construction, by the parties themselves, of this provision of the contract. Nilson v. Morse, supra; Cotton Mills v. Ford, 82 Wis. 416, 430, 52 N. W. 764. So it is considered that the words "as heretofore" imply as well the price as the size of the cans to be manufactured.

It is urged that the contract is void for want of mutuality. But this can hardly be; for, certainly, there are mutual promises which are good consideration for each other. The defendants agreed to furnish the material, and to receive not less than 10,000 cans per day, and the plaintiff agreed to furnish them "as heretofore." In form, he "accepted" the proposition made to him by the defendants.

The contract, by its terms, was "to continue in force as long as the Eagle Lye Works use lye cans." The notification to the plaintiff, by the defendants, at the time of the fire, especially when considered in connection with the contract previously made with Rosendale, Paine & Co., whereby they had bound themselves to receive no cans from any persons other than Rosendale, Paine & Co., was a complete excuse to the plaintiff from further performance of the contract upon his part. He might, at his option, consider the contract as rescinded (School Dist. v. Hayne, 46 Wis. 511, 1 N. W. 170); or he might treat the contract as broken, and bring an action at once for the breach. The plaintiff elected to treat this as a breach, leaving the contract still in force. This keeps the contract alive for the benefit of both parties, and made it necessary for the plaintiff to be in readiness to perform his part, if perform-

ance was demanded by the defendants. No such demand seems to have been made. There could be no breach or default on the part of the plaintiff, at this stage, unless he failed to perform on request. In the absence of such request, and failure, it is unimportant whether he was always ready to perform. Under the circumstances, he was not bound to incur useless expense. 2 Pars. Cont. (6th Ed.) 781; 3 Am. & Eng. Enc. Law, 904, 906; Cameron v. White, 74 Wis. 425, 43 N. W. 155; Corbett v. Anderson, 85 Wis. 218, 54 N. W. 727; Tufts v. Weinfeld, 88 Wis. 647, 60 N. W. 992; Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436.

No legal justification appears for the defendants' breach of the contract. It is clear that they no longer wished or intended to permit the plaintiff to manufacture cans for them. They did not afterwards request or furnish material for this manufacture, and had, previously, made an exclusive contract with others to make the cans. So the plaintiff is entitled to recover his damages. These are the profits which he would have realized if he had been permitted to make 10,000 cans per day during the life of his contract. In other words, he is entitled to recover the difference between the contract price and the cost of manufacture. Cameron v. White, supra; Corbett v. Anderson, supra; Allen v. Murray, 87 Wis. 41, 57 N. W. 979; Tufts v. Weinfeld, supra. The trial court assessed the damages on this rule of profits. It estimated them on a conservative basis. Instead of estimating for cans at the rate of 10,000 per day, it estimated on the number of cans which were shown to have been actually used by the defendants, which was a considerably less number. It considered that the contract terminated when, by the death of one of its members, the firm was dissolved. Then, if the damages were estimated on a smaller number of cans, and for a shorter period of time, that is favorable to the defendants, and not error against them. If the action had been tried soon after the breach, it would have been permissible to estimate damages for the full number of cans agreed to be received for, at least, the time from the breach, May 8, 1891, until June 23, 1894, the time of the dissolution of the partnership, which was a little more than three years. Treat v. Hiles, 81 Wis. 280, 50 N. W. 896. But it was possible, by a later trial, to ascertain more nearly the actual damages. It does not appear that the damages assessed are in excess of the damages properly recoverable. The judgment of the superior court of Milwaukee county is affirmed.

ERBACHER et al. v. SEEFELD.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

REAL-ESTATE BROKER—COMMISSIONS—PAROL EVIDENCE.

Where a written agreement provided that plaintiff was to receive a commission for procuring a purchaser for defendant, payable at the date when the price was to be paid by the purchaser, parol evidence was inadmissible to show that plaintiff was to wait for his commissions until the price was actually paid.

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by F. W. Erbacher and others against Gustav A. Seefeld. From a judgment entered on a verdict directed for plaintiffs, defendant appeals. Affirmed.

Markham & Nickerson, for appellant. Williams & May, for respondents.

CASSODAY, C. J. This action is brought by the plaintiffs, as partners, for services rendered by them, as such, to the defendant, in procuring a purchaser for the real estate described, and then owned by the defendant. The complaint alleges the employment, and agreement to pay $800, being 2 per cent. commission upon the selling price of the land, which was $40,000, and the performance of the contract on the part of the plaintiffs. The answer admits the original employment, but alleges nonperformance on the part of the plaintiffs. At the close of the trial the court directed a verdict in favor of the plaintiffs for $800, with interest from March 1, 1893. It appears, from the undisputed evidence, that on or prior to December 17, 1892, the plaintiffs procured one Winkler to purchase the land described on terms satisfactory to the defendant on that day; that Winkler paid the defendant on that day $100, for which the defendant gave him a receipt reciting the terms of payments; that, January 30, 1893, Winkler and the defendant again met, by an arrangement with the plaintiffs, and entered into articles of agreement for the sale by the defendant to Winkler of the land in question, pursuant to the receipt, but the times fixed therein for making some of the payments were somewhat different; that in each $1,000 was to be paid down, and $5,000 March 1, 1893; that neither mentioned the plaintiffs, nor referred to their commissions nor any agreement between the defendant and the plaintiffs; that, at the time and place of executing the articles of agreement, the defendant exacted of the plaintiffs an agreement in writing, and thereupon dictated to the scrivener a written agreement, signed by one of the plaintiffs, to the effect that, in consideration of the extra time given on the first payment, the plaintiffs would take their commissions, amounting to $800, on the account of such sale to Winkler, on March 1, 1893; that that was the only written agreement between the plaintiffs and the defendant respecting commissions. There is no dispute as to the amount of the commissions to be paid. Of course, in the absence of any agreement as to the time of payment, they would have been due immediately upon securing a purchaser; hence, the defendant exacted the written agreement mentioned. The only defense attempted to be proved was to the effect that

the plaintiffs were not only to wait for payment until the day when, by the terms of the articles of agreement, the $5,000 payment was to become due, but until it should in fact be actually paid, and that the scrivener failed to write the agreement respecting commissions as the defendant dictated the same. The testimony offered to prove such defense, or some of it, was, as we think, properly excluded, as tending to contradict the written agreement so made. It was unnecessary that it should be signed by the defendant to be binding upon him. He accepted it, and that was enough to make it binding. It follows that the verdict was properly directed in favor of the plaintiffs. The judgment of the superior court for Milwaukee county is affirmed.

CAWKER et al. v. SEAMANS.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

TRIAL—FAILURE OF PROOF—DIRECTING VERDICT.

Where a counterclaim in an action on a note alleged that it was given for the price of a newspaper, and that the sale of such paper was induced by fraudulent representations as to its value, and there was evidence that the payee, who was plaintiff's testator, had admitted making such representations, and that they were false in several particulars, it was error to direct a verdict for plaintiffs.

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by Sarah M. Cawker and others against S. H. Seamans on a promissory note. From a judgment entered on a verdict directed for plaintiffs, defendant appeals. Reversed.

George E. Sutherland, for appellant. Hoyt & Ogden, for respondents.

CASSODAY, C. J. It appears from the record that October 28, 1891, the defendant gave to the testator of the plaintiffs a promissory note bearing date on that day, for $500, due July 1, 1894, and interest thereafter, in part payment of the purchase price of what was known as the "United States Miller and Milling Engineer," a trade paper, which had been published in Milwaukee by such testator; and the plaintiffs brought this suit upon that note to recover the amount thereof. The defendant answered, and admitted the making of the note, and alleged, by way of defense and set-off or counterclaim, that such purchase was made upon the express representations made by said testator to induce the purchase, to the effect that the said "United States Miller and Milling Engineer" had an actual circulation of at least 1,000 bona fide paying subscribers, who were regularly paying therefor a sum exceeding $1,000 annually, and that it also had a large amount of actual, live, paying advertisements, inserted in such paper by actual bona fide paying advertisers, who were then patrons of such paper, and who were then paying therefor a sum exceeding $2,500 annually; that the defendant relied upon such representations, and purchased said property upon the strength thereof; that such representations were in fact false, to the damage of the defendant; and that such damages be adjudged to be a set-off and counterclaim to the amount of the note. The plaintiffs replied to the counterclaim. At the close of the trial, the court directed a verdict in favor of the plaintiffs for $524.25; and, from the judgment entered thereon, the defendant brings this appeal. There was evidence on the part of the defendant tending to prove that the testator had admitted that he made such representations to the defendant, and thereby induced him to make such purchase, and that such representations were false in several particulars. The evidence in the case was sufficient to take the case to the jury; and hence it was error to direct a verdict in favor of the plaintiffs. As there must be a new trial, it is unnecessary to say more. The judgment of the superior court for Milwaukee county is reversed, and the cause is remanded for a new trial.

GATES v. PARMLY et al.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—RELIEF IN EQUITY AGAINST FORFEITURE—CONTRACT CONSTRUED—RES JUDICATA—WAIVER OF VENDOR'S LIEN—MARKETABLE TITLE—TAX DEED—DAMAGES FOR FAILURE OF TITLE—CONTRACT FOR SALE OF STANDING TIMBER.

1. Where a vendor of land sues to enforce a specific performance of an executory contract by the purchaser, although the substantial part of the relief asked is the recovery of money, and though he also asks the enforcement of a vendor's lien, the action is clearly triable in equity.

2. When, at the time a deed to a large number of tracts of land was delivered, and one-half the purchase money paid, a further contract was made by which the vendor agreed by a specified date to furnish abstracts showing perfect title to all the lands, or, in default, that no further payment should be held to be due him for the land, such condition of forfeiture is one from which he may be relieved in equity, giving damages as compensation if they can be ascertained.

3. In such case one-half the purchase money retained by the purchaser, being so largely in excess of what might, and probably would, be the damages for a breach of the condition by the vendor in failing to show a perfect title to all the land, cannot be considered as liquidated damages for such breach, but must be held as having been intended as security for such damages as should be actually sustained.

4. An agreement by a vendor to furnish within a specified time an abstract showing a perfect title to the property conveyed binds him to furnish a marketable title, although his deed had been delivered.

5. A judgment of peremptory nonsuit against a plaintiff is not a bar to another action for the same cause.

6. The denial of the reformation of a deed, prayed for in a counterclaim, is not an adjudication that the deed is in accordance with the contract of the parties.

7. In a contract between a vendor and purchaser of land which recited the conveyance of the land and the payment of one-half the pur-

chase money, and provided for the payment of the remainder, a further provision that the contract should be construed as a personal one between the parties, and its terms and conditions should constitute no lien upon any real estate mentioned therein, was an express waiver of the right to a vendor's lien, which, in the absence of fraud, is binding on the vendor, though he may have been misinformed as to the legal effect of the language used.

8. Rev. St. § 1176, having provided that a tax deed shall vest in the grantee title in fee simple, and making it evidence of the regularity of all proceedings under which it is issued, such deed, if fair upon its face, is prima facie a marketable title, which the vendee is bound to accept as such unless specific objection is made, and on a hearing it is found not free from reasonable doubt.

9. In an action for specific performance, it is sufficient if a vendor is able to make title at any time before trial or decree.

10. Where a contract for the purchase of land embraces a number of separate tracts, and the title to some of them is unmarketable, and not accepted, the measure of damages to the purchaser is such fractional part of the whole consideration agreed to be paid as the value of the tracts to which the title is found defective bore to the value of the entire quantity purchased when the contract was made, with such interest as the terms of the contract render equitable.

11. A penalty for failure to furnish title, greater than the value of the land involved, will not be enforced.

12. An outstanding contract of sale of standing timber on a tract of land passes an interest in the land, and constitutes a defect in the title of the holder of the fee, which is not rendered marketable by parol evidence that all the timber sold has been taken off, in an action to which the holder of the contract is not a party.

Appeal from circuit court, Clark county; W. F. Bailey, Judge.

Action by James L. Gates against Samuel P. Parmly and Hattie S. Parmly, executors of Henry C. Parmly, deceased. Decree for plaintiff, and defendants appeal. Reversed.

This was an action brought by the plaintiff against Henry C. Parmly, as trustee for the defendants Charles A. Avery, Samuel K. Gray, Aaron M. Wilcox, Z. S. Wilson, and against him individually, to reform a certain contract concerning the sale and conveyance of about 20,600 acres of land in Clark county, and for a construction thereof, and for relief against an alleged penalty therein, and for judgment for the amount due the plaintiff for purchase money, and for strict foreclosure and other relief. It was alleged that the plaintiff was the owner in fee of the lands in February, 1888, described in the complaint, and that, in the transactions between him and the defendants, said Henry C. Parmly acted as such trustee for and represented his codefendants as well as himself; that on the 29th of September, 1888, the plaintiff executed and delivered to the said Henry C. Parmly, as trustee, a contract, which is set out at length, in which it was recited in substance that June 16, 1888, a previous contract had been made between the parties by which the plaintiff sold and agreed to convey by warranty deed to said Henry C. Parmly the said lands for $45,000, one-half cash, and the balance in one, two, and three years, in equal payments, with interest as therein stated, and guarantied to warran and defend the title to said land, and tha there were 10,000,000 feet of pine timber an lumber and 15,000,000 feet of hardwood tin ber and lumber, including basswood ther on, and had further agreed to furnish sai Parmly, trustee, an abstract of title to th said land, showing perfect title in him (sai Gates), and that he had a good and lawfu right to convey the same; that there had bee delay in furnishing abstracts of title, and th plaintiff had previously executed to Parmly trustee, a warranty deed of a portion of th lands, and had on that day, September 29, 188 delivered to him a warranty deed of all sai lands, confirming said prior deed, and desire to receive the cash payment of $22,500. Th said second contract recited that the plainti had furnished to Parmly, trustee, an abstrac of a portion of the land, and had transferre to him certain outstanding tax certificate thereon, and that Parmly, trustee, had pai the plaintiff $22,500 in cash, and it was stipu lated in consideration of the premises that th plaintiff should within four months furnis and deliver a complete abstract of title t said lands, and by August 15, 1889, he woul furnish and deliver to said Parmly, truste an abstract of title thereof showing a pe fect title in said plaintiff at the date of sai deed to Parmly, trustee, or showing the titl to have been made perfect prior to the mak ing of such abstract; that in case of failur "to furnish such abstract, or if the abstrac furnished failed to show a perfect title," a stipulated aforesaid, "no further sum of mo ey whatsoever shall be held due from sai Henry C. Parmly, trustee, to the said Jame L. Gates, for or on account of said propert under this contract, or under the contract o June 16, 1888, or otherwise, but that the sai Parmly, trustee, shall hold the title to th lands free and discharged of any claims wha soever for further purchase money, and th said $22,500 paid at this date shall be in th event the full consideration and purchas price of said property, unless the title shoul be defective as to 800 acres or less," in whic event Parmly was to have a deduction at th rate of five dollars per acre therefor, or a much more as it should be worth. In cas the plaintiff complied with the terms of th contract as stipulated, Parmly, as truste was to pay him the further sum of $22,50 in payments and with interest as therein sta ed; and said named agreement was to tak the place in all respects of the one of Jun 16, 1888. It was further stipulated that th second contract should be, and be construe "to be, a personal contract between the pa ties, and its terms and provisions shall co stitute no lien on any real estate mentione therein"; and the second contract containe the same guaranty as the former one as the quantity of lumber and timber, and tha if the amount of land fell short of 20,0 acres, the plaintiff was to pay five dollars pe acre for each acre it fell short, and pay o

demand to Parmly, trustee, the actual value of any deficiency of lumber and timber. It was alleged that Gates, at the date of said second contract, then being the owner in fee simple of said lands, sold the same to the defendants for $45,000, and by his deed set out in the complaint conveyed the same to Henry C. Parmly, trustee. The deed was one of special warranty only, as against persons claiming under the grantors. It was alleged that the plaintiff had fully performed said contract, and that the entire amount of purchase money had long since become due; that, although he had not performed to the fullest extent within the time expressly required, yet that time was not of the essence of the contract, and that extensions of time had been given after the four months specified in the contract; that the plaintiff had been to an expense of $3,000 in furnishing abstracts, and that the lands conveyed to the defendants in respect to the title of which there is no dispute, at the date of the deed, were and are of the value of $75,000; that the defendants had only paid the plaintiff $18,000, and the recital in the contract to the effect that the sum paid was $22,500 did not truly state the facts, and was retained therein by mistake and oversight; that the clause therein declaring the contract to be a personal one, and its terms and provisions should constitute no lien on the lands, was inserted therein through fraud, false representations, and connivance of the defendant Henry C. Parmly, trustee; "that, when the contract was read to the plaintiff, his attention was directed to it especially, and he inquired of said Parmly and his attorney, and was assured by both of them, falsely and fraudulently, that the clause cut no figure whatever in the contract, that it was merely formal, and that by it plaintiff released to the defendants no rights he had, either in law or equity," and he signed it relying on such statements. The plaintiff averred that, in an action commenced in the circuit court for Clark county by him against the defendants, wherein judgment was rendered March 7, 1891, it was adjudged that the said deed so executed as aforesaid was a full compliance with and performance by the plaintiff with the contract on his part; and the plaintiff insisted that the condition precedent stated in the contract should be construed and held to operate by way of penalty or forfeiture, and not as liquidated damages, and did not impose on the plaintiff the loss of $22,500, but only such damages as the defendants might show that they had in fact sustained, but the defendants were insisting upon said clause and a forfeiture of $22,500 under the same, and judgment was asked as above stated.

The defendants, in their answer, denied that the plaintiff was at any time the owner of all the lands described, and alleged that he had no title nor right of possession of a large part thereof, and could not and did not convey the same by said deed, and specified defects and failures of title of various kinds to a great part of the lands described therein, and that he had not since conveyed them to the defendants. They alleged that they paid on said purchase $22,500, and denied that any mistake in the recital of the contract on that subject occurred, or that any other sum ever became due, and denied that the plaintiff fully performed the said contract, and insisted that the condition precedent in respect to the second sum of $22,500 had not been performed, and pleaded the terms of the contract in that respect in bar of the plaintiff's claim, denying that the plaintiff delivered as required abstracts of title showing perfect title in all said lands, and that, as shown by said abstracts, the title to 6,000 acres of said lands had failed; that, as to over 100 40-acre tracts, the plaintiff had sold all the pine timber thereon to the Northwestern Lumber Company, and since the contract with said Parmly, trustee, it had entered thereon, and cut and removed a large quantity of valuable timber therefrom; that the title to a considerable portion of the lands was by tax deeds which had not been recorded three years, and they were liable to be attacked and held void; and that there were liens and incumbrances on other portions; and that some of said lands belonged to other parties,—all of which appeared by the abstracts. The defendants insisted that there had been a breach of the contract as to the amount of pine and hardwood timber on said lands at the time of the sale, and alleged that the plaintiff had sold and conveyed away such timber, so that, at the time of the execution of the contract, there were on said lands not to exceed 3,000,000 feet of pine timber or lumber, and 5,000,000 feet of hardwood, including basswood, and the defendants had been damaged, by reason of premises, $14,000. The defendants further pleaded in bar a part of the same judgment in the previous action by the plaintiff against the same defendants, rendered March 7, 1891, mentioned in the plaintiff's complaint, alleging that said action was for the same cause as the present action, and that judgment was given thereon on the merits dismissing the plaintiff's complaint, and that such judgment remained in full force, etc.

The court found, among other things, that the plaintiff, prior to January 1, 1889, delivered to the defendants a complete abstract of the lands described in the contract, showing complete title to the defendants through the plaintiff's deed, except as to tracts mentioned in groups under subdivisions 1 to 14. It was found that the plaintiff sold, or contracted to sell, the pine timber on 18 40-acre tracts to various parties, but the court was of the opinion that proof given on the trial to the effect that the timber had been cut off cured the defects of title; that October 13, 1887, the plaintiff had entered into a contract with the Northwestern Lum-

ber Company by which he agreed to cut, haul, and deliver to it all the pine timber standing and growing upon 108 40-acre tracts, and transferred the title to such timber to said company; that, during the winters of 1888–89 and 1889–90, the plaintiff cut off said lands 700,000 feet of pine, which completed the delivery of timber under said contract, and the said company conveyed to said plaintiff the said tracts October 14, 1890; that the defendants purchased with notice of said contract, and subject thereto. To 19 40-acre tracts, containing 760 acres, the plaintiff had no title, and conveyed none; and as to 10 other 40's the tax deed under which the plaintiff claimed was impeached, and the lands were recovered, because the notice of tax sale did not specify that the lands were to be sold "at public auction," but the court found in favor of its validity. The title to a few other tracts appears defective, and there were tax sales of some of the lands from which the defendants had to redeem, paying $206.93 on that account. The nine particular 40's of the land to which the plaintiff had no title were worth $2,880. As to 11 tracts, the plaintiff tendered to the defendants at the trial a warranty deed describing and an abstract of title showing corrections as found, but the defendants refused to accept the same; and as to 10 other 40's, the title to which was defective, there was no proof of value. In respect to the quantity of pine timber taken off the lands by the plaintiff for the Northwestern Lumber Company, found at 700,000 feet, of the value of $1,400, the evidence of an experienced estimator satisfactorily shows that the real amount was 2,000,000 feet, and there was really no competent evidence that it was any less. The evidence as to the title to the lands described in the deed is, in many respects, extremely unsatisfactory, and the abstracts are lengthy, and extend to between 400 and 500 tracts, and counsel differed widely as to the results shown by them. The court further found that the defendants, prior to September 29, 1889, knew that the plaintiff's title to the lands consisted in general of tax titles; that he was to give no other or better title, provided that such tax titles should appear valid on their face and superior to other titles thereto, with a covenant that the plaintiff had not, by any act of his, incumbered or clouded his title, such as it was; that after August 15, 1889, the plaintiff expended time and money in endeavoring to perfect the title to portions of the land, and the defendants knowingly received the benefit of it without objection; that the lands, at the date of the contract, were worth over $45,000; the evidence to show that the lands in question did not have on them the amount of timber and lumber specified in the contract was insufficient and unreliable; that it was adjudged and determined in the previous action between the parties that the plaintiff, by the terms of the contract, was not to, and did not, warrant the title to the lands embraced therein; and, as conclusions of law, that it was not the intent of the parties that the plaintiff must show and have a complete title to all the lands as a condition precedent to the payment of the deferred payment, but that the conditions of the contract were fully met when an abstract of title was delivered and furnished showing such complete title, and that the abstract as shown at the trial showed a complete title in the plaintiff except as to 760 acres; that the several conveyances of standing timber upon portions of said land did not constitute clouds upon the plaintiff's title, and that, when the timber was cut, such conveyances were exhausted, and the provisions of the contract that it should be construed as a personal one, and that it was not to constitute a lien upon any estate therein mentioned, constituted no bar to the enforcement of a vendor's lien, and the plaintiff was not bound by it; that the condition precedent in the contract was in the nature of a penalty for nonfulfillment, and not for liquidated damages; that, under the circumstances of the case, the plaintiff having completed and perfected the abstract before the case was finally submitted, there was such a compliance with the terms and conditions of the contract as to entitle him to recover the balance of the unpaid purchase money, less the value of the lands to which the abstract failed to show complete title, in no case less than $5 per acre, and less the value of the timber cut from the said lands subsequent to the making of said contract, and less the unpaid taxes and redemption money received by plaintiff according to the statement, which showed the balance due to be $15,949.06, for which plaintiff was entitled to a decree, without interest, and without costs to either party. The deductions allowed to the defendants were for $2,880, for nine 40's; the contract price of 10 other 40's, $2,000; $1,400, for 700,000 feet of timber cut on the Northwestern Lumber Company contract; and the amount paid for redemption and redemption money, $270.94. Numerous exceptions were taken to the material portions of the finding and in respect to the rejection of the evidence offered during the trial. Among other things, at a late period in the trial, and evidently out of its regular order, the defendants' counsel offered in evidence various tax deeds from Volume 20 of Deeds, under which it was claimed the plaintiff made out title for over 20 tracts of the land, and which the defendants' counsel claimed were void on their face, no objection being made to their reception. The court refused to receive them. The plaintiff's counsel then offered other abstracts showing the state of the title up to that time. Objection was made that over four years had elapsed during which time the plaintiff had failed

to perfect the abstracts according to the contract, and that the defendants had no time then to examine them. They were, however, received. Thereupon the trial closed. Such other matters as are material are stated in the opinion. The plaintiff had a money judgment in the usual form for $15,949.06, from which the defendants appealed.

O'Neill & Marsh, for appellants. J. M. Morrow and Winkler, Flanders, Smith, Bottum & Vilas, for respondent.

PINNEY, J. (after stating the facts). 1. The defendants' counsel contend that this is a legal action, in which they were entitled, as a matter of right, to a trial by jury; that the provision in the contract requiring the delivery of a complete abstract of title to the lands described in the contract and deed by August 15, 1889, and that in case of failure to furnish it, or if it failed to show a perfect title in the plaintiff at the date of the conveyance he had made to the defendant Parmly, trustee, or to have been made perfect in him prior to the making of such abstract, then no further sum of money should be held due to the plaintiff under the contract or otherwise, but that the said Parmly, trustee, could hold said lands free and discharged of any further claim for purchase money, and the $22,500 already paid should be the full price and consideration for the lands, was a condition precedent to the right to recover the second payment of $22,500 of purchase money, or any part thereof; and, as it was stated that such condition had not been performed within the time limited, the plaintiff could not recover any sum whatever, either in a legal or equitable action. The allegations of the complaint and prayer for relief show conclusively that the action is an equitable one, in the nature of an action for specific performance and for relief from a condition precedent, by way of a penalty or forfeiture, as security for performance on the part of the plaintiff, and was not a provision for liquidated damages. A vendor may maintain an equitable action against a vendee for specific performance of a contract for the sale and conveyance of lands when he agrees to convey to the vendee, and the latter merely promises to pay a certain sum as the price. Since the latter may, by a suit in equity, compel the execution and delivery of a deed of the premises, the vendor may also, by a similar equitable action, enforce the undertaking of the vendee, although the substantial part of his relief is the recovery of money. Pom. Spec. Perf. § 6. As the vendor in this action seeks relief from a penalty or forfeiture imposed by a condition precedent in the contract and to enforce a vendor's lien for unpaid purchase price, the jurisdiction of equity is undoubted, for in such a case he cannot have a complete and adequate remedy at law, as of these questions a court of law has no jurisdiction.

2. The rule is universal at law that the failure to perform a condition precedent is a perfect bar, and, in general, the rule is the same in equity unless there is some peculiar ground of equity to take the case out of the general rule. In Davis v. Gray, 16 Wall. 229, 230, it was said: "There is a wide distinction between a condition precedent where no title is vested, and none is to vest until condition performed, and a condition subsequent operating by way of defeasance. In the former case equity can give no relief. Failure to perform is an inevitable bar." And the case of Wells v. Smith, 2 Edw. Ch. 78, 83, was referred to. But the case of Davis v. Gray was that of a condition subsequent, and it was held that equity would interfere in such a case, and relieve, upon the principle of compensation, where that principle could be applied, giving damages if damages should be given and the proper amount could be ascertained. Equity will relieve against a penalty or forfeiture, and the authorities are quite generally agreed that it will do so even where it is in the form of a condition precedent, where it is evidently intended merely as a security for the payment of money or the performance of any act where failure to perform it may be compensated in money. It is not necessary that the penalty or forfeiture should be specified to be such in express terms; it is enough if such is the clear nature and substance of the provision. And, "although the distinction between conditions precedent and conditions subsequent is known and often mentioned in courts of equity, yet the prevailing, though not the universal, distinction between them, is between cases where compensation can be made and where it cannot be made, without any regard to the fact whether they are conditions precedent or conditions subsequent." Story, Eq. Jur. §§ 1315, 1316. And the same learned author says: "In cases of this sort, where the stipulation is in the nature of a security, and specific performance is sought to be enforced, and yet the party has not punctually performed the contract on his own part, but has been in default, and admitting of compensation, there is rarely any distinction allowed in courts of equity between conditions precedent and conditions subsequent." Id. § 1316 et seq.; Id. § 1320. Upon the execution of the contract, the defendants became, in the estimation of a court of equity, the owners of the land, and the plaintiff the equitable owner of the purchase money which they held in trust for him; and the condition in the contract operated as an imperfect mortgage or pledge of his equitable ownership of the purchase money, that he would furnish and deliver on or before the time specified, an abstract of title showing perfect title to the lands, and such imperfect mortgage or pledge would become redeemed or avoided upon what would be regarded as an equitable performance on his part.

If the vendee obtains title to the land or damages which can be regarded as compensation for partial failure, he gets all that, in justice, he is entitled to. This doctrine has been applied to many cases of breach of condition precedent where the parties could be put in the same situation as if the condition had been performed, and so it would seem that where the condition is security for the payment of money or the performance of any particular act, or in the nature of a penalty or forfeiture for nonperformance of such condition, such relief may be granted. Pom. Spec. Perf. §§ 391, 392; 3 Wat. Spec. Perf. § 435; Grigg v. Landis, 21 N. J. Eq. 494; Edgerton v. Peckham, 11 Paige, 352, 363; Sanders v. Pope, 12 Ves. 281; In re Dagenham Dock Co., 8 Ch. App. 1022. But, where there cannot be any just compensation decreed for the breach, equity will not interfere. It is insisted by the plaintiff's counsel that the defendants had, by their contract, waived the condition in question; but we do not find any evidence that would justify such a conclusion, and we think that, upon well-established equitable principles, the relief sought from the breach of the condition precedent in this case may be properly granted.

3. As the provision of the contract in question was evidently intended by way of security, quite as much so as if the penalty or forfeiture had been expressly provided for and named as such, we think it clear that the doctrine in respect to stipulated or liquidated damages is not applicable to the case. The contract sufficiently indicates that it was not intended that, in case of a breach of the condition, title to lands in excess of two-thirds or three-fourths or seven-eighths of the entire quantity of the lands, to which title had passed to Parmly, trustee, under the deed, was to be retained, and the second installment, $22,500, of the purchase price, as well, should be considered or held as liquidated damages. It is not expressly or in substance so provided. The great disparity between the damages which might thus be claimed for a breach or failure to convey title to a one-fourth or a one-eighth part of the land, and one-half of the entire amount, refutes the idea that the parties intended that the second payment of $22,500 should be retained as liquidated damages, by reason of the difficulty of proving the real damages, or as a possible or reasonable approximation to the damages which might arise. If the provision was designed as a forfeiture or penalty, or condition in the nature of such as security, like a bond for $22,500 for the performance of the condition, it could not well be maintained that a liquidation of damages at that sum was intended. There is no absolute rule as to when the sum named in the contract is to be treated as liquidated damages, but in each case the intention of the parties is to be looked at. Story, Eq. Jur. § 1318. The wide disparity between the sum named and the damages that the parties must have anticipated might occur inclines the court to reject the claim that it was intended as liquidated damages. The principal cases in this state relied upon by the defendants are considered in Manistee Iron-Works Co. v. Shores Lumber Co. (No. 142 of the present term) 65 N. W. 863. It would be clearly unreasonable to hold that the parties intended, in the case of a slight or inconsiderable breach of the condition, that the damages were to be liquidated at the sum of $22,500. Such a position is clearly untenable.

4. The second contract, under date of September 29, 1888, was a new one, and took the place of the former one thereafter, for all purposes relating to the land transaction between the parties. It was expressly so stipulated, in substance, "that, upon the execution and delivery of this contract, said contract of June 16, 1888, shall be void and of no force." The covenant in the second contract for the delivery, August 15, 1889, of an abstract of title to the lands embraced in the deed showing a perfect title in said Gates at the date of that deed, or to be made perfect prior to the time of making said abstract of said lands, could not be performed without a conveyance of what would be regarded as a marketable title, and it was necessary that it should be shown to be such by the abstract. The deed and contract must be construed together, and the contract was so far executory that the second payment would not become due until after a perfect title was made out in Parmly to the lands, as therein provided. There is nothing in the transaction between the parties to show that the defendants ever waived their right to insist upon such a title, or to accept tax titles or abstracts of such with a deed of the same, irrespective of whether it conveyed what would be regarded as a valid title; nor was it so adjudicated by the judgment in the suit at law by the plaintiff against the defendants. What would be regarded as a good title was of the substance of the transaction. Bateman v. Johnson, 10 Wis. 1; Falkner v. Guild, Id. 563; Taft v. Kessel, 16 Wis. 273; Davis v. Henderson, 17 Wis. 105.

5. Both parties have pleaded the judgment in the previous action,—the defendants, to show that the plaintiff is barred and concluded from obtaining relief in this action; and the plaintiff, as conclusively showing that the deed executed and delivered to Parmly, trustee, which, instead of being a warranty deed, as provided in the contract, was a deed with a special covenant only against persons claiming by, through, or under the plaintiff, was full performance on his part. The defendants' contention is clearly untenable. The judgment they plead was one of peremptory nonsuit against the plaintiff, and left him at liberty to bring another legal action for the same cause (Gummer v. Trustees, 50 Wis. 247, 6 N. W. 885); but, as his complaint here is upon an equitable cause of action not made the subject of litigation in the former one, the

adjudication is clearly no bar as against the plaintiff. The part of the judgment upon which the plaintiff relied was rendered upon a counterclaim by the defendants' claiming that the deed from the plaintiff to Parmly, trustee, ought to be reformed so as to insert therein the full covenants of a warranty deed. But the court denied the relief sought, and held only that they were not entitled to have the deed so reformed; nothing further was in issue or adjudicated.

6. The evidence does not warrant the conclusion that there was any error or mistake in the recital of the contract that $22,500 had been paid, and the circuit court properly regarded that as the principal sum remaining unpaid, subject to equitable deductions. The stipulation in the contract that it should "be construed as a personal contract between the parties, and its terms and provisions should constitute no lien upon any real estate mentioned therein," operated and was evidently intended as a waiver or relinquishment, on the part of the plaintiff, of any claim for a vendor's lien for unpaid purchase money. The plaintiff admits in his complaint that, when the contract was read to him, his attention was particularly called to this provision; but he claims, substantially, that the defendant Parmly or his attorney misrepresented its operation and effect. The plaintiff was sui juris, and not illiterate. He was dealing with these parties at arm's length, and he knew the facts, and was bound to know the law. There is no ground whatever shown for holding that the provision in question was improperly or fraudulently inserted, or that full force and effect ought not to be given to it according to its obvious meaning.

7. An important question in this case is whether a tax deed which the statute (Rev. St. § 1176) provides "shall vest in the grantee an absolute estate in fee simple in such land, subject however to all unpaid taxes and charges which are a lien thereon and for redemption as provided for in this chapter,"—by infants and persons under disability (Sanb. & B. Ann. St. § 1166),—and which, when duly witnessed and acknowledged, may be recorded "with like effect as other conveyances of land," and upon which the short limitation in favor of tax titles has not run, in the absence of any known defect in the tax deed or proceedings, will constitute what can be regarded as a marketable title which a vendee is bound to accept. The statute, in substance the same as the present one as to the effect of tax deeds, has been in force ever since 1850; and in the case of Delaplaine v. Cook, 7 Wis. 44, as early as 1856, this statute was sustained and applied, and it was held that the legal presumption attending a tax deed fair upon its face might be rebutted and overthrown by evidence on the part of the party attacking the deed, the onus probandi being upon him. This rule has been repeatedly affirmed. The latest case in which the validity of such a deed was fully considered is Hotson v. Wetherby, 88 Wis. 324, 60 N. W. 423; and the validity of the three-years statute of limitation, in favor of and against tax deeds, was sustained in Edgerton v. Bird, 6 Wis. 527, and Falkner v. Dorman, 7 Wis. 388, and has been uniformly upheld. At the same time, it has been as constantly affirmed that tax titles, being under a mere naked statutory power, are stricti juris, and that the statutory authority must be strictly complied with, or the title will be absolutely void. Potts v. Cooley, 51 Wis. 355, 8 N. W. 153, and cases cited. How easily the prima facie character of the deed may be impeached will appear from the following, among many other adjudications that might be cited: Lain v. Shepardson, 18 Wis. 59; Jarvis v. Silliman, 21 Wis. 607; Iverslie v. Spaulding, 32 Wis. 394; Sprague v. Coenen, 30 Wis. 211; Cotzhausen v. Kaehler, 42 Wis. 332; Scheiber v. Kaehler, 49 Wis. 301, 5 N. W. 817; Hebard v. Ashland Co., 55 Wis. 148, 12 N. W. 437; Ward v. Walters, 63 Wis. 48, 22 N. W. 844; Hiles v. Cate, 75 Wis. 91, 43 N. W. 802; Hiles v. Atlee, 80 Wis. 220, 49 N. W. 816; Easley v. Whipple, 57 Wis. 485, 14 N. W. 904; Curtis v. Morrow, 24 Wis. 664. But, if the statute has been in all respects complied with, a tax title is as good as any other. Harding v. Tibbils, 15 Wis. 232. And certainly, after the three-years statute of limitation has run in its favor, there is no reason to doubt such a title. Lindsay v. Fay, 28 Wis. 177; Dean v. Earley, 15 Wis. 100; Knox v. Cleveland, 13 Wis. 245. Whether such a title is a marketable one is a question in respect to which there is an almost entire want of authority. A tax title has nothing to do with the previous title. It does not in any way connect itself with it. It extinguishes the old title and all liens and equities depending upon it. Lessee of Neiswanger v. Gwynne, 13 Ohio, 74; Ross v. Doe, 1 Pet. 664. As a general rule, a title which is open to judicial doubt is not marketable; but what may be regarded as such doubt is not easily defined, depending much upon the discretion of the court. But in no case will a purchaser be compelled to accept and pay for a title which he can only acquire in possession by litigation and judicial decision, nor where it is evident that his possession must be defended in like manner. He is not bound to buy a lawsuit. Wat. Spec. Perf. § 411 et seq. Specific performance will not be decreed at the suit of a vendor whenever the doubt concerning his title is one which can only be settled by further litigation, or when the court can see that the purchaser will, with reasonable probability, be exposed to bona fide adverse claims on the part of third persons. As the decree in the suit binds only parties to it, and constitutes no obstacle to the enforcement of adverse rights asserted against the title, the legal effect of events or acts collateral to it, and capable of destroying its validity, can only be determined by another judicial proceeding. Pom. Spec. Perf. § 203; Shriver v. Shriver, 86 N. Y. 575; Ludlow v. O'Neil,

29 Ohio St. 182; Richmond v. Gray, 3 Allen, 27; Gill v. Wells, 59 Md. 492; Dobbs v. Norcross, 24 N. J. Eq. 327; Butts v. Andrews, 136 Mass. 221; Walsh v. Barton, 24 Ohio St. 28. But facts must be known at the time which fairly raise a reasonable doubt, and render the title doubtful, and not merely a possibility or conjecture that such a state of facts may be developed at some future time. In Cattell v. Corrall, 4 Younge & C. 237, Alderson, B., said in regard to a doubt from a fear of future litigation: There "must be a reasonable and decent probability of litigation. The doubt must be reasonable, and, so far as it depends upon contingent events and uncertain facts, their occurrence and existence must be fairly probable." Pom. Spec. Perf. § 204; Vreeland v. Blauvelt, 23 N. J. Eq. 483; Kostenbader v. Spotts, 80 Pa. St. 430, 434. As applied to the case of a tax deed prima facie valid on its face, there must be some known grounds or reasonable belief, and not mere conjecture of the existence of facts which, if shown, would probably destroy the prima facie character of the deed, and defeat the title. In Warv. Vend. 37, it is said that "a title raised by tax sale is a purely technical, as distinguished from a meritorious title, and depends upon a strict compliance with all the requirements of law, * * * but no presumption can be raised to cure radical defects in the proceedings, and the proof of regularity devolves upon the person asserting title; * * * that, owing to the complexity of procedure, the many errors which may arise, a tax title is regarded as among the poorest evidences of title to land, and is always taken with suspicion and viewed with jealousy." These observations are not, we think, applicable under a statute such as ours; and a tax title is just as meritorious in point of law as any other if the requirements of the statute have been complied with. A tax deed being prima facie evidence of title in fee simple, the title is not to be discredited by the courts in the absence of evidence showing a reasonable probability of the existence of facts which render its invalidity fairly probable. The only decision we have met with upon the question whether a tax title is a marketable one where the deed is prima facie evidence of title in fee simple and of the regularity of the proceedings up to and including the execution of the deed is in Kramer v. Ricke, 70 Iowa, 535, 25 N. W. 278, where it was held that such a deed was a title that would enable the vendor, upon objection to the title, to recover the purchase money, and that it was for the vendee to point out and sustain objections. After much doubt and hesitation, we have concluded that a tax deed, under our statute, fair upon its face, is prima facie a marketable title, which the vendee is bound to accept as such, unless specific objection is made, and at the hearing, or upon the usual inquiry or reference as to the state of the title, it is found not free from reasonable doubt.

8. The objection that the abstract tendered at the trial, which shows that the objection of want of title to many of the tracts conveyed to Parmly, trustee, had been removed, was not in time, is untenable. It is not claimed in this case that time was made, by express stipulation or otherwise, of the essence of the contract; and in such a case, if the vendor is unable to show good title at the commencement of his suit, it is sufficient if he perfects it before the final hearing or the report on title by the master or referee. Pom. Spec. Perf. § 376, and cases cited; Beach, Mod. Eq. Jur. § 612. Inasmuch as no such inquiry was directed here, it seems to be within the spirit of the rule to allow the abstract to be tendered at the trial, and the delay will be held immaterial, except upon the question of interest, if the vendor can make out his title at the time of the decree. Jenkins v. Fahey, 73 N. Y. 355; Pierce v. Nichols, 1 Paige, 244; Brown v. Haff, 5 Paige, 235.

9. A conveyance of all the lands included in the agreement was executed and delivered to the defendant Parmly, trustee, at the time of the execution of the second contract which was to be performed in the manner already stated. This fact, taken in connection with the express stipulation waiving the vendor's lien for unpaid purchase money, clearly shows that it was intended that the grantee should have immediate possession with the right to sell and convey the lands at will, and that he was to come at once into the full enjoyment of the estate stipulated to be conveyed, but that the time for making the title thereto was to be extended to the 15th of August, 1889, when the abstract showing title were to be delivered. The lands were purchased evidently for speculative purposes, and not because of their particular adaptation to any immediate use to which the vendees desired to devote them. It was stipulated in the agreement, in substance, that no part of the second installment should become due or payable until one year from the date of the furnishing by the plaintiff of the abstracts showing perfect title to the land, when $7,500 of said installment was to become due without interest and a like sum one year thereafter, with interest at the rate of 6 per cent. for said period of one year, and $7,500 two years thereafter, with interest at the rate of 6 per cent for said period of two years. Inasmuch as it appears that, up to the time of the rendition of the judgment appealed from, the plaintiff had failed to furnish such abstracts showing title as required by the contract no part of the second installment of $22,5[illegible] has become due or payable, and by reason of that fact, according to the stipulation of the agreement, that sum did not bear interest. The only relief to which the plaintiff can possibly be entitled is to have adjudged to him, on equitable grounds, the payment of such installment, less such equitable deduc-

tions and allowances, by reason of the failure of title to portions of the land by way of compensation to the defendants, as it shall appear ought to be made.

10. We have arrived at different conclusions from the circuit court as to the deductions and allowances to be made to the defendants, which will now be stated. The contract provided that "if the said title to the said lands as to 800 acres only, or less, shall prove or be shown by such abstracts to be not perfect in said Gates or said Parmly, trustee, the latter shall be allowed the sum of $5 per acre for each forty acres of said 800 acres to which the title shall so prove defective, and the sum of $5 per acre, and as much more than $5 per acre as such lands shall be actually worth." This was manifestly agreed upon as the rule of damages, and not by way of penalty or forfeiture. The circuit court found the title conveyed defective to the extent only of 760 acres, 360 of which were worth $8 per acre, or $2,880; and the value of the other 400 acres was fixed at $5 per acre, under the contract, or $2,000,—in all, $4,880. But there should be a further allowance of $5 per acre for one 40 to make up the entire 800 acres, requiring $200 to be added, making the deductions for the 800 acres $5,080. After a careful examination of the record, we find that the title to 2,141 acres, in addition to the 800 acres provided for by the contract, was defective, and not such as the defendants were entitled to receive under the contract, after allowing the plaintiff the benefit of all corrections and perfecting of title shown by the abstract produced at the trial. A list of such lands will be filed and remitted to the circuit court with the mandate herein, to the end that, upon a reference for that purpose, it may be ascertained what allowances or deductions from the unpaid purchase money shall be made on this account, there being no sufficient evidence in the record upon that subject. The defendant, Parmly, as trustee, at the hearing of such reference, is to tender and deliver to the plaintiff a quitclaim of all right, title, and interest in or to the lands, the title of which has been found defective and insufficient, acquired by, through, or under the said plaintiff by virtue of said contract, dated September 29, 1888, and the deed thereunder set out in the complaint, either directly or indirectly, upon paying to or crediting the defendants with all sums they have paid for taxes, and interest thereon from the time of such payment. The rule of damages to be applied is stated in Semple v. Whorton, 68 Wis. 626, 32 N. W. 690; and the defendants are to be allowed such fractional part of the whole consideration agreed to be paid as the value at the time of the purchase of the tracts to which the title is found defective and imperfect bears to the whole 20,000 acres agreed to be conveyed, with interest thereon from the 15th day of August, 1889, at which time there was a breach of the contract on the part of the vendor, by failing to make out his title to these lands according to its provisions; but for a period not exceeding six years. Such interest is to be allowed upon the ground that at the last-mentioned date the defendants were, by the contract, to have the beneficial use and enjoyment of these several tracts, and the right to sell and convey the same, as well as the use of the lands, or interest on the proceeds of their sale, so as to give them the full benefit of their contract, and place them as near as possible in the same condition as if the plaintiff had promptly performed on his part. The provision in the contract whereby the plaintiff agreed that, "if the amount of the land shall fall short of 20,000 acres, to pay $5 per acre for each acre it shall fall short," which would amount to $100,000 if the failure of title had extended to all the lands, whereas the purchase price was only $45,000, cannot be considered as a stipulation for liquidated damages, but is in the nature of a penalty; and the amount of deductions or allowances to the defendants cannot extend beyond the actual value of the tracts as to which the title was defective, to be ascertained in the manner above indicated. As to quite a number of such tracts, the plaintiff had previously made valid contracts of sale to others of the timber standing or growing thereon. These contracts passed an interest in these lands to the several parties with whom they were made (Young v. Lego, 36 Wis. 394; Daniels v. Bailey, 43 Wis. 566); and, as there was no competent evidence to show that such interests had ever been surrendered or released, the title was, to this extent, defective. The court received evidence tending to show that the parties holding these contracts had cut off the timber to which they were entitled, and held that the outstanding contracts constituted no defect of title; but as the persons holding them were not parties to this action, and could not be concluded by a finding or judgment in it, it is plain that the objection to the title was not removed. Beach, Mod. Eq. Jur. § 610; Fleming v. Burnham, 100 N. Y. 1, 9, 2 N. E. 905; Abbott v. James, 111 N. Y. 673, 19 N. E. 434; Chesman v. Cummings, 142 Mass. 65, 68, 7 N. E. 13; and cases hereinbefore referred to on this subject. We do not include in this category cases where the time within which the timber was to be cut and removed had been limited to a period which had already expired. As to another group of tracts, called the "Atlee Lands," it was shown that the tax deed under which the plaintiff claimed to make title was void for the reason that the lands were not, as the statute requires, advertised to be sold "at public auction." Atlee brought an action to recover the lands, and it was compromised by Parmly, trustee, quitclaiming the lands to him for $184.37, while acting in good faith on the theory, induced by the plain-

tiff's conduct, that the title was bad. The plaintiff, having certain tax certificates on these lands belonging to the defendant Parmly, trustee, and held with the view to perfect title, drew and retained certain redemption money thereon, to the amount of $64.01, which should be deducted from the $184.37; and the balance, $120.36, should be charged to the defendants in the adjustment of the final balance herein. Of the lands embraced in tax deeds which were void on their face, having been executed before the time for redemption had expired, and under which the plaintiff claimed to make title, as to 4 tracts the title has failed, but as to 920 acres included in such deeds the title was subsequently perfected. The court erroneously excluded these deeds; but, as the bill of exceptions shows that they were incurably void, the question is properly before the court, and the deeds were offered before the plaintiff had tendered his last abstract, and were not too late. There were other tracts where the tax titles relied on were void, for the reason that the lands were not subject to taxation; and as to very many others the titles appeared to be in other parties, who had not conveyed either to the plaintiff or to Parmly, trustee, his grantee; and as to still other tracts the testimony of the plaintiff shows that the tax deeds relied on did not convey any title to him or either of the defendants. The title to the lands known as the "Northwestern Lumber Company Tract" seems to have been perfected; but the allowance made to the defendants for 700,000 feet of timber cut off these lands, in performance of the plaintiff's contract with that company, and after he had made a deed of the same to Parmly, trustee, according to competent and uncontradicted evidence, should have been 2,000,000 feet, of the value of $4,000, for which sum the defendants are to be allowed accordingly. The evidence of the plaintiff was that he did not know what the amount thus cut from said lands was, but that he settled with the company for 700,000 feet. This was not competent evidence upon that subject. The allowance to the defendants for $206.93 for money paid to redeem portions of the lands from tax sales is to stand as made by the circuit court.

11. The evidence to show a breach of the guaranty in the contract that, at the time it was made, there were 10,000,000 feet of pine timber and lumber, and 15,000,000 feet of hardwood and lumber, including basswood, on the land, to the defendants' damage, is too vague, uncertain, and unsatisfactory to justify any allowance for damages under their counterclaim in this respect.

Upon taking and stating an account showing a balance in favor of the plaintiff according to the principles thus settled, he is to have a judgment therefor in his favor, without interest and without costs; but the defendants are to be allowed the proper costs of the reference herein directed. The volu minous character of the record and printe case, and the wholly unnecessary length o the appellants' brief, have rendered the ex amination and decision of the case unusuall difficult and laborious. In the taxation o costs, allowance will be made for only 4 pages of the 189 of the principal brief and re ply of the appellants. It follows that th judgment appealed from must be reversed The judgment of the circuit court is revers ed, and the cause is remanded for furthe proceedings in accordance with the opinio of the court.

NEWMAN, J., took no part.

HOYT v. CLARK.

(Supreme Court of Minnesota. Feb. 7, 1896.)

JUDGMENT — ENFORCEMENT OF TAXES—PRESUMP TIONS—ASSESSMENT ROLL—REDEMPTION —NOTICE.

1. Where a judgment in proceedings to en force taxes on real estate is in the form require by statute, the same presumption in favor of it regularity and validity exists as in respect t judgments in civil actions, but such presump tion is not conclusive. It may be shown, b evidence dehors the record, that the court ha not jurisdiction to render the judgment; as, fo example, by showing that the delinquent lis was not in fact published. But the presump tion in favor of the validity of the judgment i not overcome by the mere fact that no affidavi of publication has been filed. Bennett v. Blatz 46 N. W. 319, 44 Minn. 56, explained and quali fied.

2. Ditto marks under the word "Unknown," in the column in the assessment roll headed "I Whose Name Assessed," is a sufficient statemen that the owner's name is unknown.

3. In such case, a notice of the expiration o the time of redemption, addressed to "Un known," is sufficient.

(Syllabus by the Court.)

Appeal from district court, St. Louis coun ty; Charles L. Lewis, Judge.

Action by Herbert H. Hoyt against Melvi J. Clark. Judgment for defendant, and plain tiff appeals. Affirmed.

H. H. Hoyt, for appellant. Cash, William & Chester, for respondent.

BUCK, J. This is an action to determin adverse claims to a vacant quarter section o land in St. Louis county. The plaintiff prov ed his title direct from the United State government, and the defendant claims unde a tax title; and to sustain it, and thus over come the plaintiff's prima facie case, the de fendant introduced in evidence a certificat from the auditor of St. Louis county, date September 10, 1884, which showed that thi land was assessed for taxes for the year 188 and, the same being delinquent, the land wa sold to the state at a tax sale, September 1 1884, and the next day assigned by the stat to this defendant for the sum of $4.60, th amount of the tax and interest. The plain tiff, then, in rebuttal, introduced in evidenc

the judgment roll in the tax proceedings, from which it appeared that there was no affidavit of publication attached, made by the owner, publisher, manager, or foreman in the printing office of the newspaper in which the delinquent list was published, and filed with the clerk, stating the days in which such publication was made as provided by Gen. St. 1878, c. 11, § 74 (Gen. St. 1894, § 1583). The defendant then produced as a witness one W. S. Woodbridge, and proved by him that he was the owner and publisher of the Lake Superior News, a newspaper published in Duluth, St. Louis county, Minn., in the years 1883 and 1884, and further showed, by him, and by copies of said newspaper, on file as a part of said judgment roll in the tax proceedings, that the said delinquent list was duly published as required by law, and it was admitted that the said newspaper had been duly designated as the newspaper in which said delinquent list should be published. To all this testimony the plaintiff objected, as being incompetent and immaterial, and that it was not the evidence required by law in such cases, which objection was overruled by the court, and exceptions duly taken.

The defendant also offered in evidence a notice of the expiration of the redemption period, together with proof of service thereof, and affidavit of publication; and this was objected to by plaintiff upon the ground that the assessment roll for the year 1883 did not show that the land was assessed in the name of "Unknown," it further appearing that the notice of expiration of redemption period was addressed to "Unknown." Under the heading "In Whose Name Assessed," in the assessment roll, opposite the description of other land, appears the word "Unknown," and below this word, and opposite the description of the land in question, are dates or characters to designate that the name of the owner of the land is the same as the last preceding one, viz. "Unknown." We think that this is a sufficient designation of the fact that the owner's name was "unknown." Gen. St. 1878, c. 11, § 109 (Gen. St. 1894, § 1625). That the statute requiring notice to be given of the time when the redemption period will expire applies, although the name of the owner is stated in the assessment book as "unknown," is settled by the recent decision of this court in State v. Halden, 64 N. W. 568, and need not be further discussed.

Gen. St. 1878, c. 11, § 73 (Gen. St. 1894, § 1582), provides that, when the last publication shall have been made, the notice shall be deemed to have been served, and the court to have acquired full and complete jurisdiction to enforce against each piece or parcel of land, in said published list described, the taxes, accrued penalties, and costs. The form of the judgment to be entered in such cases is provided by statute. There is no question raised but what the judgment in this case conformed to the statute, and we must assume that it contained the recital required in said form, viz. that "the notice and list had been duly published as required by law." This recital, with others, forms a part of the judgment, and when such judgment is entered by the clerk in the real estate judgment book, "the same presumption in favor of the regularity and validity of the said judgment shall be deemed to exist as in respect to judgments in civil actions in said court." Gen. St. 1878, c. 11, § 76 (Gen. St. 1894, § 1585). After entering this judgment, and sale of the property thereunder by the county auditor, he issues a certificate of sale to the purchaser, and such certificate, in case the land is not redeemed, passes to the purchaser the estate therein expressed, without any other act or deed whatever. By Gen. St. 1878, c. 11. § 85 (Gen. St. 1894, § 1594), it is further provided that "such certificate or the record thereof shall in all cases be prima facie evidence that all the requirements of the law with respect to the sale have been duly complied with and of title in the grantee therein after the time for redemption has expired; and no sale shall be set aside or held invalid unless the party objecting to the same shall prove either that the court rendering the judgment pursuant to which the sale was made had not jurisdiction to render the judgment, or that, after the judgment and before the sale, such judgment had been satisfied or that notice of sale as required by this act was not given."

Applying the different provisions of the law to which we have referred to this tax judgment, presumptively regular and valid, if any grounds existed for avoiding the sale, the burden of proving this rested upon the plaintiff herein, the original owner of the land. Assuming, therefore, that the judgment was presumptively valid, did the plaintiff assail its validity in any such manner as to show that it was rendered without jurisdiction, and was therefore void? This is a collateral attack upon a judgment presumptively regular and valid. The court had jurisdiction to render it, if, in fact, the notice and list were published according to law. It was the existence of those facts, and not the affidavit or proof thereof, that gave the court jurisdiction. The affidavit of publication is no part of the notice, nor is it required to be published. The publisher is required to file it with the clerk, in order to preserve the evidence of the due publication of the notice and delinquent list. But, prior to the publisher doing this, the court had jurisdiction of the subject-matter. The filing of this affidavit is not made a condition precedent to the entry and validity of the tax judgment, and, the court having jurisdiction, proof of publication might be made subsequent to the entry of the tax judgment by a proper proceeding therefor. Even in the absence of any affidavit of publication in the judgment roll, the presumption obtained that the list was published, although this presumption might be overcome by evidence, dehors the

record, that the list was not published, under Gen. St. 1894, § 1594. Brown v. Corbin, 40 Minn. 508, 42 N. W. 481. The burden of proving that the list was not published rested on the plaintiff, and not on the defendant to prove that it was. This he did not do. The evidence offered by the defendant to support the presumption of the validity of the judgment, although incompetent, was wholly unnecessary, and its admission not prejudicial error. The omission from the tax judgment of the affidavit of the publication of the notice and list was an irregularity, which might be subsequently cured by a direct proceeding, and by proper proof; but it could not be done in the collateral manner here attempted.

Some things said in Bennett v. Blatz, 44 Minn. 56, 46 N. W. 319, might seem to be in conflict with the views above expressed, and as implying that the fact of publication of the list and notice must be made to affirmatively appear by affidavit. But in that case a purported affidavit of publication was filed, and the case was argued and submitted upon the question of the sufficiency of that affidavit. The question of the presumption in favor of the validity of the judgment, or as to the burden of proof, does not seem to have been suggested, or in the mind of the court. The plaintiff having offered no evidence sufficient to rebut the presumption in favor of the validity of the tax judgment, the judgment of the court below must be affirmed.

STATE ex rel. CHILDS, Attorney General, et al. v. O'LEARY.

(Supreme Court of Minnesota. Feb. 7, 1896.)

CLERK OF DISTRICT COURT — TERM OF OFFICE — VACANCIES—APPOINTMENTS—VALIDITY.

1. The term of office of a clerk of the district court is limited by the constitution (article 6, § 13) to four years. He is not empowered to thereafter hold the office until his successor is elected and qualified.

2. The effect of Laws 1891, c. 39, §§ 1, 2 (Gen. St. 1894, §§ 866, 867), was to create vacancies in the office of clerk of the district court, in all of the counties affected by the act, on the first Monday in January, 1896, which vacancies were to be filled by appointments in accordance with the provisions of Gen. St. 1894, § 865.

3. The general rule is that a prospective appointment to fill a vacancy sure to occur in a public office, made by an officer who, or by a body which, as then constituted, is empowered to fill the vacancy when it arises, is, in the absence of a law forbidding it, a valid appointment, and vests title to the office in the appointee.

(Syllabus by the Court.)

Quo warranto by the state of Minnesota on the relation of H. W. Childs, attorney general, and Charles H. Vorse, against John C. O'Leary. Judgment of ouster.

H. W. Childs, Atty. Gen., W. E. Culkin, and F. H. Lindsley, for relator. W. H. Cutting and Young & Fish, for respondent.

COLLINS, J. O'Leary, respondent in this proceeding, having theretofore been elected, was duly inducted into office as clerk of the district court for Wright county on the first Monday of January, 1892. The term of such officer is fixed at four years by section 13, art. 6, of the state constitution, and there is no provision for further retention of the office under any circumstances. The terms of judges of the district court and of judges of probate are also definitely prescribed in article 6, but no provision is made for either to hold over, while in the same article, in addition to specifying the terms of office of justices of the supreme court, of the clerk of that court, and of justices of the peace, it is expressly provided that each shall hold the office, when elected, until his successor is elected and qualified. No reason can be suggested why the framers of the constitution should make this distinction as to continuance in office after the expiration of the prescribed terms, but that it was done is significant and controlling. O'Leary's term expired at the end of the four years, January 6, 1896. This view of the constitutional provisions, in so far as they apply to the officers of clerks of the district court and judges of probate, was announced, without elaboration, in State v. Sherwood, 15 Minn. 221 (Gil. 172), and State v. Frizzell, 31 Minn. 460, 18 N. W. 316. But O'Leary's claim to possession of the office is also based upon the provisions of Gen. St. 1894, §§ 866, 867. These two sections were sections 1 and 2 of Laws 1891, c. 39. By section 1 (section 866) it was provided that in all counties in which the term of the office of clerk of the district court should expire on the first Monday of January, 1896, their successors should be elected at the November general election of that year. By section 2 (section 867) is was provided "that when vacancies shall occur in said offices under the provisions of section one of this act" (chapter 39) the office shall be filled as now provided by law. The purpose of these two sections is plain. It was the intention of the lawmakers to do away with existing conditions in respect to the office of clerk of the district court in some of the counties of the state, the result of the change from the annual to the biennial system of elections. These conditions were commented upon in the case of O'Leary v. Steward, 46 Minn. 126, 48 N. W. 603, in which this respondent's right to take possession of this same office in January, 1891, was disposed of. By postponing the election of clerks of the district court in a large number of counties where their terms, as fixed by the constitution, expired in 1896, from the general election held in November, 1894, until that held in 1896, the election laws of the state would be made more symmetrical, in that it would abolish, and for all time end, the necessary, but unfortunate and undesirable, practice of electing these clerks about 14 months prior to the day on which their terms of office would commence. This was the primary object in

the enactment of section 866. But as the terms of the incumbents in these various counties would expire by constitutional limitation on the first Monday in January, 1896, some nine months prior to the election of their successors, it became necessary to provide for the occupancy of the office so that there should be no vacancy or interregnum, and this led to the enactment of section 867, a part of its language having been quoted herein. It is claimed by respondent's counsel that, by providing for the election of successors to those who held these positions in 1895, it was intended to continue them in office for another year,—in other words, that immediate followers in office were meant by the use of the expression "successors thereto," in section 866. To so construe this expression would be to give as much force to it as if the legislature had expressly provided in apt and chosen language that the present occupants should continue to exercise the powers and discharge the duties of their respective offices for another year. If such had been the intent, it would not have been left in doubt or uncertainty; for, under any of the definitions of the word "successor," any future occupant of this office is the successor of the respondent, just as he is the successor of any of the incumbents who preceded him, no matter when. But the legislative intention does not wholly depend upon a construction of any part of section 866. It was well understood that, as the terms of office of the clerks of court in the counties affected by the law would terminate in January, 1896, some provision would have to be made for filling the vacancies necessarily to occur. This was the purpose of section 867. It expressly refers to vacancies occurring under the provisions of the preceding section, namely, by reason of a postponement of the election in 1894 and a failure to elect that year for the term commencing on the first Monday of January, 1896, and, referring to these vacancies, it simply provides that they shall be filled in the manner now provided,—that is, by appointment under Gen. St. 1894, § 865. The language used in section 867, "when vacancies shall occur in said offices under the provisions of section one of this act," refutes the idea, and completely demolishes the claim of respondent's counsel, that the vacancies referred to were those which might occur during the holding-over period by the happening of either of the events mentioned in Gen. St. 1894, § 892. We therefore hold that O'Leary's term expired on January 6, 1896, and that on the expiration of his term a vacancy would occur, to be filled by appointment in accordance with the provisions of section 865, supra.

The only question remaining for consideration under the facts now before us, is whether the appointment of the relator Vorse was regular and valid. All of the judges of the Fourth judicial district, in which is situated Wright county, united in a written appointment, of date December 27, 1895, and Vorse was thereby appointed to succeed O'Leary, and to hold the office of clerk of said court from and after the first Monday of January, 1896. It is urged that this appointment was premature, and should not have been made until after O'Leary's term expired,—not until there was a real vacancy. We do not concede the right of the latter to raise this question, but it is the general rule that a prospective appointment to fill a vacancy sure to occur in a public office, made by an officer who, or a body which, as then constituted, is empowered to fill the vacancy when it arises, is, in the absence of a law forbidding it, a valid appointment, and vests title to the office in the appointee. Haight v. Love, 39 N. J. Law, 14; State v. Van Buskirk, 40 N. J. Law, 463; Smith v. Dyer, 1 Call, 562. See, also, State v. Irwin, 5 Nev. 111. Cases to the contrary have been decided wholly upon local statutes. If there are any limitations upon, or exceptions to, this general rule, they have no application to the facts now before us. Let a writ issue ousting the respondent O'Leary from the office of clerk of the district court for Wright county.

THOMPSON v. CHICAGO G. W. RY. CO. et al.

(Supreme Court of Minnesota. Feb. 7, 1896.)

INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

In an action brought by a locomotive fireman to recover for personal injuries received in a collision between trains at a railway crossing, there was evidence which would have warranted the jury in finding that plaintiff was guilty of contributory negligence. *Held*, that a portion of the charge to the jury was erroneous, because it allowed the plaintiff to be excused from the consequences of his own negligence directly contributing to the injuries received.

(Syllabus by the Court.)

Appeal from district court, Mower county; John Whytock, Judge.

Action by Barney Thompson against the Chicago Great Western Railway Company and others. Verdict for plaintiff. From an order denying a new trial, the Chicago, St. Paul & Kansas City Railway Company appeals. Reversed.

Dan W. Lawler and French & Wright, for appellant. John A. Lovely and S. D. Catherwood, for respondent.

COLLINS, J. Action to recover for personal injuries received in a collision between a passenger train operated by defendant Chicago, Kansas City & St. Paul Railway Company and a freight operated by defendant Chicago, Milwaukee & St. Paul Railway Company, being the same collision in controversy in an action between these corporations considered by this court and reported in 56 Minn. 406, 57 N. W. 943. This plaintiff was fireman on the freight locomotive at the time of the disaster. The verdict in his favor was solely against the Kansas City road, and it

appeals from an order denying a new trial if the plaintiff should consent to a certain reduction of the verdict, which he has done. As we regard the case, but one point needs consideration, and that relates to a part of the charge given by the court and duly excepted to by appellant's counsel. There was evidence presented from which the jury might have found that plaintiff himself was guilty of such negligence as would prevent a recovery, by failing to watch for the coming of a train on appellant's road as his own train approached the crossing. But, notwithstanding this, the court charged, at the request of plaintiff's counsel, that, "even if the jury found that the plaintiff, Thompson, should, under the circumstances, have continued to watch the train of the Kansas City road, and was wanting in care in that respect, yet his contributory negligence would not exculpate the Kansas City Company, and disentitle him, the said plaintiff, from recovery of said company, if it be shown that such defendant might, by the exercise of reasonable care and prudence on the part of its engineer, after passing the stop board on its road, have avoided, by such exercise of ordinary care, the consequence of the plaintiff's negligence." The court then, of its own motion, added, "That is, notwithstanding, if the plaintiff himself was somewhat negligent, which perhaps would have contributed towards the accident, and the Kansas City Company did not exercise reasonable care to avoid the accident, and that thereby they produced the injury, it would not necessarily exonerate them from the charge of negligence." And when appellant's counsel took an exception to the giving of plaintiff's request, and also to the addition made, the court then stated, "I gave it in this manner, or intended to: If they were guilty of negligence, although he was guilty of contributory negligence, and they might have avoided the act which produced the injury, plaintiff would be entitled to recover." These statements of the law, as formulated in plaintiff's request, in the addition made by the court, and again in its explanatory remark, were erroneous. By them the jury were instructed, in substance, that if by the exercise of ordinary care the engineer in charge of the locomotive drawing the passenger train could have avoided the collision, plaintiff could recover, although himself guilty of contributory negligence. These instructions allowed the jury to excuse the plaintiff from the consequences of his own negligence, and wholly eliminated from the case a proper consideration of the evidence tending to fasten upon him the charge of contributory negligence. Under such instructions, the engineer of the passenger train, who, from his position on the east side of the cab, was expected to notice any train approaching the crossing on that side, as well as this plaintiff, who, as fireman, was on the south side of his cab, and was required to look out for and guard against collisions with trains coming to the crossing from the south, might easily obtain verdicts,—the engineer against the Milwaukee Company, and plaintiff against this appellant,—although one, or both, of these men were guilty of very great negligence, and directly responsible for the accident.

The instructions were erroneous because not applicable to the facts. There was no evidence which in the least tended to show that the alleged act of negligence on the part of appellant's engineer, in failing to notice the freight train, was intentional, or that he knew that it was anywhere in the vicinity of the crossing. He testified that the locomotive carried no headlight, and we can readily believe that he told the truth when he stated upon the witness stand that he did not hear the train, or see it, or know of its proximity, until the crash came. The doctrine laid down in the instructions in question is applied only where the dangerous position and perilous situation of the party injured, arising from his own negligence, is known to a defendant, and the consequences of such negligence could have been averted by the exercise of due care and caution. In cases where from the facts it appears that a defendant knew of a plaintiff's peril, and had either time or opportunity, by the exercise of any degree of care, to guard against it, and to avoid the infliction of an injury, this doctrine is applied because, under such facts, it is said that the defendant's negligence was the proximate, direct, and efficient cause of the injury. Such was the case largely relied upon by plaintiff's counsel. Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653. Order reversed.

BASTING v. ANKENY.

(Supreme Court of Minnesota. Feb. 7, 1896.)

INSOLVENT CORPORATIONS—POWERS OF RECEIVER—UNPAID SUBSCRIPTIONS—DEFENSES.

1. The receiver of an insolvent corporation, appointed in proceedings under Gen. St. 1894, § 5897, may maintain an independent action to enforce the collection of the amount of a call on unpaid subscriptions made by the board of directors in accordance with the by-laws, and due and payable prior to the commencement of the proceedings which resulted in the appointment of the receiver.

2. The regularity, propriety, and validity of the appointment of such a receiver can only be questioned in a direct proceeding to test that question.

3. *Held*, that certain alleged equitable defenses set forth in an answer in this action are not available to the defendant, but that his remedy must be enforced in the sequestration proceedings.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Robert D. Russell, Judge.

Action by Theo Basting, receiver of the Minneapolis Times Company, against William S. Ankeny. From an order sustaining

a demurrer to the answer, defendant appeals. Affirmed.

Harrison & Noyes and Geo. T. Halbert, for appellant. Cobb & Wheelwright, for respondent.

COLLINS, J. This was an action brought by the receiver of a corporation (appointed by virtue of Gen. St. 1894, § 5897) against a stockholder to recover the amount of a call upon his unpaid subscription for stock shares. The call was in accordance with the by-laws, was by the board of directors, and was made and was payable prior to the institution of the proceedings which resulted in the appointment of plaintiff as such receiver. On appeal from an order sustaining a general demurrer to the answer, defendant not only endeavors to uphold the sufficiency of his own pleading, but contends that the complaint itself fails to state facts sufficient to constitute a cause of action. Although he points out in detail the defects of the complaint, the real position of defendant is that an independent suit of this kind cannot be maintained; that, as plaintiff was appointed receiver under the provisions of said section 5897 (formerly section 9, c. 76, Gen. St. 1878), the remedies given by sections 5905–5908, inclusive (formerly section 17 et seq., c. 76), are exclusive, and must govern any proceeding brought to enforce defendant's liability. If it be true that these sections are exclusive, and that no other remedies are available to a receiver in sequestration proceedings, the complaint is noticeably defective, for no attempt was made to bring the action under any of said sections. It is an independent action brought to enforce defendant's liability for the amount due upon the call, precisely as an action would have been brought to enforce the collection of any other indebtedness due to the corporation when plaintiff was appointed receiver; and unless we can distinguish between a debt due to the corporation arising out of a call, and an ordinary debt, the complaint states facts sufficient to constitute a cause of action. We see no ground upon which such a distinction can be based, and nothing has been said in the cases cited by appellant's counsel to justify their position. All are cases where the liability grew out of, and as a necessary result of, the sequestration proceedings. All are cases where the object was to enforce a liability, not to the corporation, but to its creditors; and in none of them has the court been called upon to consider the right of a receiver to maintain an independent action to enforce the collection of a debt due to the corporation which came into his hands with other assets. Such is this case, for the call was an indebtedness due and payable prior to the initiation of the proceedings which resulted in plaintiff's appointment. The liability of the stockholder for an unpaid subscription for shares was a debt due the corporation itself, which it could have recovered even if there had been no creditors, and for which, as an asset of the corporation, a receiver may maintain an independent action. Spooner v. Syndicate, 47 Minn. 464, 50 N. W. 601. This disposes of the contention that the receiver cannot maintain this action, and that the complaint does not state facts sufficient to constitute a cause of action.

We now come to a consideration of the allegations of the answer as setting up an equitable defense. These are, briefly stated, that there was bad management of the business of the corporation by the board of directors, which caused many losses, especially in the selection of a business manager; that two of the directors, conniving with this incompetent manager, who was also a director, procured the publication of advertisements and notices of and concerning their own business matters in the newspapers published by the corporation, became indebted therefor in a stated amount, which has not been paid, nor has it ever been charged on account to said persons, and that the manager and the board of directors, and also the receiver, this plaintiff, have always refused to demand any accounting or payment therefor; that the directors and a majority of the stockholders fraudulently and collusively sold to another corporation certain of the corporation's assets, essential to a maintenance of its business, for $20,000, which were worth when sold $150,000, thus entailing great loss; that the proceedings leading up to plaintiff's appointment as receiver were collusively and fraudulently instituted by certain of the directors that payment of corporate debts due to them might be obtained; and also that plaintiff has now in his hands corporate property sufficient to pay all corporate debts, except those due to the directors engaged in the conspiracy. It was also alleged that the call in question was made as a part of the fraud and conspiracy. It is to be observed that it is nowhere alleged in the answer that other stockholders have refused to pay in response to the call, and the presumption is that all others have paid the assessed percentage. Taking these allegations for all that they are worth, it is obvious that none of them are available as a defense to plaintiff's cause of action as set forth in the complaint. The plaintiff's appointment as receiver cannot be attacked collaterally. The regularity, propriety, and validity of the appointment of such a receiver can only be questioned in a direct proceeding to test that question. Cook, Stock, Stockh. & Corp. Law, § 864; Wait, Insolv. Corp. § 245; Gluck & B. Rec. § 8.

As to the other allegations constituting, it is claimed, equitable defenses to the debt sued upon, it is sufficient to say that, in so far as they are meritorious, the remedy must be sought, and the relief and redress had, in

the sequestration proceedings. The remedy for the wrongs alleged to have been inflicted upon the corporation and its stockholders is not available to defendant as a defense to this suit. Order affirmed.

SAXE v. RICE.

(Supreme Court of Minnesota. Feb. 7, 1896.)

MORTGAGE FORECLOSURE—WAIVER OF IRREGULARITIES BY MORTGAGOR—ESTOPPEL OF MORTGAGEE.

Where a mortgagor is in position to waive an irregularity in foreclosure proceedings under a power of sale, and to confirm and validate a sale of the mortgaged premises to the mortgagee for the full amount of the debt, with interest and all costs,—there being no other person except the mortgagor who could at any time question the regularity of the sale,—and the mortgagor has, within a reasonable time, caused a deed to be tendered conveying perfect title to the mortgagee, the latter cannot insist upon the invalidity in the foreclosure proceedings, repudiate the sale, and maintain an action to recover upon the mortgage note.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Charles E. Otis, Judge.

Action by Mary E. Saxe against Charles O. Rice. Judgment for defendant. Plaintiff appeals.

Stiles W. Burr, for appellant. John B. & E. P. Sanborn, for respondent.

COLLINS, J. In August, 1890, plaintiff held defendant's note for $2,000, secured by a mortgage upon three vacant city lots, which mortgage was by its terms made a specific lien, for $700, each, on two lots, and for $600 on the other. In effect, it was a separate mortgage on each lot. Child v. Morgan, 51 Minn. 116, 52 N. W. 1127, and cases cited. In November, 1893, plaintiff mortgagee commenced foreclosure proceedings under the power, but the published notice was defective, in that it stated the amount claimed to be due, and for which the sale would be made, in gross, there being no specification of the amount claimed as due on each lot, and nothing to suggest that they would not be sold as one parcel for the entire debt, except as it might be inferred, from the description, that they did not join. A sale was had January 9, 1894, and the lots were struck off to plaintiff, in separate parcels, for a sum sufficient to cover the debt and costs of foreclosure. A sheriff's certificate was duly executed and recorded. The mortgagor had previously made an assignment for the benefit of his creditors, and his interest in this property constituted a portion of the assigned estate. By order of the court, and, in terms, subject to the conditions of the mortgage, these lots were duly sold and conveyed by the assignee to one A. T. Rice, in February, 1894. No redemption was made from the sale. About two months after the expiration of the year of redemption, plaintiff brought this action upon the note, and insists that she has a right to treat the foreclosure as void, and to recover as if it had never been made, because of the defect before mentioned in the notice of sale. Both the mortgagor and the purchaser at the assignee's sale had acquiesced in the foreclosure, in the sense that they had not questioned its validity, and, immediately upon the commencement of this action, they tendered to plaintiff a deed which conveyed all of their interest, and the interest of each, in the property, to her, thus formally acquiescing in and ratifying the foreclosure sale. The deed was also tendered upon the trial, and was then filed with the clerk of the district court. This deed, it seems to be conceded, gave plaintiff a perfect title to the property; and in this connection we call attention to what appears to be admitted, that the case is not complicated by any questions as to the rights of parties who might have been in position to redeem from the foreclosure sale, or to take advantage of the defect as incumbrancers or judgment creditors. It is a case where the mortgagor was in condition, when this action was brought, to ratify the irregular foreclosure, and to validate it, and to thus confer upon the mortgagee who purchased at the sale, and continued to hold the interest then acquired, an unquestionable title to the property. It is a case where no one but the mortgagor and the purchaser at the sale made by the assignee had the right to, or could, take advantage of a defective foreclosure, and both of these persons were residents of the county in which the property was situated and the foreclosure had. And it is a case where the mortgage was given, and the defective proceedings in foreclosing had, subsequent to the act of 1883,—Gen. St. 1894, § 6054. As to the effect of this act in a case of this kind, see Marcotte v. Hartman, 46 Minn. 202, 48 N. W. 767, and Bitzer v. Campbell, 47 Minn. 221, 49 N. W. 691. From the time of the sale, the only parties to be feared by the mortgagee purchaser were those who now insist upon being permitted to ratify all that has been done, to cure and validate an invalidity for which plaintiff was alone responsible, and upon which her right of action on the note is made to stand. Upon the precise facts now before us, we think the case easily distinguishable from any of those cited by counsel for appellant, nor has it been claimed that any of them are directly in point, while it is obvious that the case of Blake v. McKusick, 8 Minn. 338 (Gil. 298), again reported in 10 Minn. 251 (Gil. 195), is authority for the position now taken that the court below was right when it held that the irregularity in the sale could be ratified and validated by those who alone could question it, and that the tender of a deed conveying a perfect title operated as a bar to plaintiff's right to recover upon the note. "This was all that the plaintiff could, in reason, ask. The courts will not tolerate anything that savors of speculating upon errors of a party's own commission." Judgment affirmed.

SAXE v. WOMACK et al.

(Supreme Court of Minnesota. Feb. 7, 1896.)

USURY—WHAT CONSTITUTES—INTENT.

1. The price of property sold in good faith may be included in the same security with money loaned, and the fact that the price was large, and more than the property could have been sold for, does not necessarily condemn the transaction as usurious. The inquiry in such a case is whether, upon the evidence, there was any corrupt agreement or device, or shift, to receive or take usury; and in this aspect of the case the quo animo as well as the acts of the parties is most important.

2. Such a transaction is not per se illegal, though it may be so. And, because an article is depreciated in the market, it does not follow that the owner is not entitled to demand or receive a higher price, as a condition for parting with it.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Charles E. Otis, Judge.

Action by James A. Saxe against Patty C. Womack and others. There was a finding for plaintiff, and from an order denying a new trial defendants appeal. Affirmed.

Briggs & Countryman, for appellants. Stiles W. Burr, for respondent

COLLINS, J. Action upon a promissory note secured by a mortgage. Defense, usury. The court below, trying the case without a jury, found against defendants, and from an order denying a new trial they appeal. Stated as briefly as possible, the controlling facts are these: Plaintiff, a nonresident, had made a few loans in the city of St. Paul, taking real-estate security. One Griggs collected interest and principal for him as it became due, remitting as collected. Through the foreclosure of a mortgage given to secure the payment of one of these loans, plaintiff, in 1893, became the owner of five unimproved and unproductive city lots, in which he had thus invested about $1,300. It had always been represented to him by Griggs and others that these lots were worth the amount invested. He came to St. Paul in the summer of 1893, and then learned that because of the depression in values, and the stringency in money matters, the lots could not be sold for $1,300; but, from information received, he did believe that their fair market value was $1,000, and that a sale for that sum might be made. He was exceedingly anxious to dispose of them, that the proceeds might be invested so as to draw interest, and authorized Griggs to make a loan of money in connection with the sale at $1,300, if such a loan would induce and secure a purchaser. The court found that, because of the depression and stringency before mentioned, these lots could not have then been sold, nor could they have since been sold, for a sum exceeding $500, and that this was their fair market value, and that Griggs knew this, but concealed it from plaintiff. The court also found that at all times plaintiff believed that, by waiting for a revival in business, the lots could be disposed of so that his investment would be made good. Thereafter defendants applied to Griggs to procure a loan for them of $5,000, to be secured by a mortgage upon certain real property; proposing to pay him what his services were reasonably worth, if he should succeed. Griggs submitted the application to plaintiff, and it was finally agreed that, although defendants did not want to buy the lots, and, upon personal inspection, thought the price too high, plaintiff should loan the $5,000, and defendants should purchase the lots at $1,300, and that for the total sum, $6,300, defendants should give their note bearing 7 per cent. interest, secured by the mortgage before mentioned. The defendants duly executed and delivered to Griggs two separate notes, each secured by a mortgage upon separate tracts of land, while plaintiff conveyed the lots by deed to defendant Patty Womack. Plaintiff was then a married man, but concealed the fact from defendants, and his wife did not join in the deed. The action was upon one of these notes, and, as before stated, the trial court found that the transaction was not tainted with usury.

We are of the opinion that the order denying defendants' motion for a new trial must be affirmed, and, for the purpose of disposing of the case, shall assume that Griggs' knowledge of the market value of the lots, and that they could not be sold for more than $500, must be imputed to plaintiff. We therefore proceed upon the assumption that because of the stringency of the money market, and the depression in real-estate values, the plaintiff had been informed that the lots could not be presently sold for a sum exceeding $500, although it was his belief that in time he could sell for enough to cover and make good all that he had invested. It is well to say here, because of the low rate of interest agreed upon, and the length of time given for payment of the $6,300, that a usurious contract could not have been founded on this feature of the transaction, if the market value of the lots had actually exceeded the sum of $865. In this case the burden rested, as it does in all cases of this character, upon the party asserting the transaction to have been usurious, to show it. It is not a necessary inference from the fact that plaintiff compelled defendants to purchase his property, or because his price was greater than the actual market value. Whether the purchase of property, in connection with a loan, as a part of the consideration and an inducement therefor, is in fact a cover for usury, must ordinarily be determined as a question of fact. Stein v. Swensen, 46 Minn. 360, 49 N. W. 55. And while it is true that proof of any great discrepancy between the actual value and the pretended purchase price of property frequently characterizes the nature of the transaction, and serves to establish it as nothing but a device to evade the usury law, the effect is not conclusive by any means. Lewis v. Wil-

lougby, 43 Minn. 307, 45 N. W. 439. The case of Bank v. Waggener, 9 Pet. 378, is a leading case, and is specially in point here. The facts were that a loan of $5,000 was negotiated at full legal interest, on condition that the borrower should accept $1,100 of the amount in depreciated bank notes, at their par value, although their current value was only 60 or 70 per cent. of the par value. After laying down some general rules in respect to usurious contracts, the court said: "The case then resolves itself into this inquiry: Whether, upon the evidence, there was any corrupt agreement or device, or shift, to receive or take usury; and in this aspect of the case the quo animo as well as the acts of the parties is most important. * * * Such an exchange is not per se illegal, though it may be so if it is a mere shift or device to cover usury. * * * Because an article is depreciated in the market, it does not follow that the owner is not entitled to demand or receive a higher price for it because he consents to part with it. * * * In our opinion, the instruction * * * ought not to have been given. It * * * puts the bar to recovery substantially upon the ground that the bank notes loaned were a known depreciated currency, * * * and were passed at their nominal amount by plaintiff to defendant." This last remark was in reference to an instruction to the jury in the trial court, and a verdict for defendant was reversed because the instruction was erroneous. Another case in point is that of Thurston v. Cornell, 38 N. Y. 281, where it was said that no one questions but that the price of property sold in good faith may be included in the same security with money loaned, and also that the fact that the price was large, and more than it might have been sold for, does not necessarily condemn the transaction as usurious. See, also, Chase v. Loan Co., 49 Minn. 111, 51 N. W. 816.

Now, let us examine the facts in this case. Plaintiff was not a dealer in real estate, but had a few thousand dollars loaned out in the city of St. Paul. He was a young man, just about to commence the practice of law at his place of residence in the East. He was in great need of the income which came from his loans as the annual interest, and, from the evidence, it quite clearly appears that his agent had not made the best of investments. His interest was not being paid when due, and the letters from Griggs to him show that the former was endeavoring to smooth matters over, and was concealing the fact that the loans made were not first-class. Through a foreclosure, the lots in question became plaintiff's property, and he realized that they would greatly increase the unpleasantness of his condition. He believed that in time the lots would prove a remunerative investment at what they cost, $1,300, although, attributing to him his agent's knowledge, he knew that their present market value did not exceed $500. Exceedingly anxious to dispose of them, and thus to have the money earning something, he conceived the plan of making a loan of sufficient size to induce a purchaser at $1,300. Not only was he willing to make the loan of such an amount of money as was necessary to bring a buyer for the lots, but the record fails to disclose that he ever limited the amount to be loaned. Apparently, he was as willing to loan $20,000 as $5,000, if good security could be had. The amount to be loaned was left open, and if plaintiff did not have it of his own when the application came to hand, he was to borrow it of some moneyed friends. And when Griggs sent in the application the plaintiff raised no question as to the amount of money desired by the borrowers, all that he cared for being the adequacy of the security. Again, the rate of interest demanded was but 7 per cent. per annum, 3 per cent. less than the rate which may be lawfully charged. And the time given was such that, coupled with the low rate of interest, no claim of usury could have been successfully asserted if the lots had actually been worth $865, instead of but $500. Or, to put it in another form, if plaintiff had sold his lots for $865, instead of $1,300, no charge that the contract was usurious could be sustainable. These facts tend to demonstrate that the loaning of money at an usurious rate of interest was not in the plaintiff's mind at all, but that his anxiety was to dispose of his unproductive real estate so that he would lose nothing,—to find another willing to carry it until times should so far improve as to permit a sale without any loss to the latter. In passing upon what was intended, we are not to lose sight of the fact that plaintiff believed that ultimately there would be no loss to any one. And we must also bear in mind that we are dealing with a case in which city lots were sold, the value of which, present and prospective, is largely, almost wholly, a matter of opinion, and that a transaction of this kind cannot be treated as we would one in which some staple article, having an easily ascertained and certain value, had been the property sold to a borrower. In the one case the discrepancy between actual market value and the price is frequently very great,—largely based upon the seller's or the buyer's idea of what the future prospects may be,—while, with the staple article of commerce, the market price of to-day is almost always controlling. Real estate is frequently valued by the owner at what he thinks may be its prospective value, and is often bought because the purchaser believes its prospective value is so far above the market value as to warrant an investment. Now, in the case at bar, the defendants' contention that the sale was a mere pretense of sale, used and intended as a disguise with which to cover the taking of usurious interest, is based on nothing but the fact that the property was

sold for more than it was worth. The price paid, in comparison with what it could have been sold for, is made the sole test by which to ascertain the intent in making the sale and the loan. Nothing else indicates the corrupt and unconscionable bargain, and, as before stated, if it had happened that the market value of the lots was $865, instead of $500, no claim of usury could have been made. It was said in a recent case, "As usury works an absolute forfeiture of the entire debt, the proofs on which it rests should be scrutinized, and the rule as to the effect of a fair preponderance applied, with more strictness than in ordinary civil actions." Bank v. Cook (Minn.) 63 N. W. 1093. We cannot hold, as against the findings made below, that the contract was tainted with usury.

The point is made that the note must be held usurious because of the amount of commissions paid by defendants to Griggs for his services. We are of the opinion that the findings of fact on this matter of commissions or compensation to the agent, paid by defendants, were supported by the evidence; and hence the conclusion of law, in so far as this feature of the case is concerned, was warranted.

Finally, the appellants' counsel contend that the decision of the trial court must be reversed, and it must be held that the transaction was usurious, because plaintiff was a married man when he deeded the lots, and his wife did not join in the deed. As the wife retained her inchoate statutory interest, which, should her husband die first, would ripen into a perfect title to an undivided one-third, the lots, or such part as defendants acquired title to, were worth but two-thirds of $500. This, in effect, is a claim that the corrupt bargain is shown because plaintiff did not convey a perfect title. It is evident that, because plaintiff concealed the fact that he was a married man, defendants did not get what they bargained for, and it is also evident that they are not remediless. But the circumstance is not evidence of an intent on the part of the parties to enter into a corrupt bargain. It is really against it, for parties who attempt to evade the usury laws are usually very careful to have the transaction appear complete and perfect on its face. Ordinarily, too much care in this respect is manifested, instead of too little. Order affirmed.

CORBIN v. WINONA & ST. P. RY. CO.

(Supreme Court of Minnesota. Feb. 7, 1896.)

INJURY TO BRAKEMAN — NEGLIGENCE — QUESTION FOR JURY.

1. *Held*, in an action to recover damages caused by the alleged negligent killing of plaintiff's intestate, a brakeman upon one of defendant's freight trains, while he was coupling a flat car, loaded with rails which projected over the deck of the car, that defendant's negligence in attempting to haul the car in its then condition was for the jury to determine.

2. The law is that there must be a want of ordinary care, under the circumstances of the case, contributing to the injury as an efficient and proximate cause thereof, before contributory negligence can exist. But if the negligence, amounting to the absence of ordinary care, shall contribute, proximately, in any degree, no recovery can be had.

3. It was also for the jury in this cause to pass upon the question of plaintiff's contributory negligence.

(Syllabus by the Court.)

Appeal from district court, Lyon county; B. F. Webber, Judge.

Action by James J. Corbin, administrator of the estate of J. R. Corbin, against the Winona & St. Peter Railway Company. Verdict for plaintiff. From an order refusing a new trial, defendant appeals. Affirmed.

Brown & Abbott, for appellant. M. E. Mathews and Geo. W. Somerville, for respondent.

COLLINS, J. Plaintiff's intestate, his son, aged about 19 years, was killed while in defendant's employ as a brakeman upon one of its freight trains, and, alleging negligence as the cause of the death, plaintiff brought this action to recover damages. A verdict was rendered against defendant, and this appeal is from an order denying its motion for a new trial. No dispute exists over the main facts. The deceased had been in defendant's employ as a freight brakeman about four months, when killed. On the night of December 21, 1892, he was acting as head brakeman upon a freight train going westerly from Waseca, on defendant's road. The engineer, fireman, conductor, rear brakeman, and deceased composed the train crew. A flat car, loaded with steel rails, which had been used elsewhere, had been taken up, and were being transported westerly, had been side-tracked the night before at what was known as "Traverse Siding." At this siding there was no depot, nor was there any person in charge. The cause or reason for leaving the car at Traverse was not shown, nor did the testimony disclose its exact condition when it was side-tracked. But the conductor and one brakeman of the train which left it noticed at the time that the ends of several of the rails projected a few inches over the west end of the deck of the car, the result of careless loading, or displacement while in transit (the latter being a common occurrence, according to the testimony of a number of railroad men). Some time during the night first mentioned, the train upon which the deceased, Corbin, was employed, came to Traverse siding. The conductor found the car, and in a box, kept for the purpose, found the way bill which accompanied it. He caused it to be put into his train immediately in rear of a box car destined for Sleepy Eye, about 40 miles west. The train reached this point after daylight, about 7:30 a. m., on December 22d,

and the conductor then uncoupled the box car, to be left there, from the flat car on which were the rails. He testified that all of the rails projected more or less over the deck of the car, and that he uncoupled, in the usual and only safe way under such circumstances, by stooping under the rails, pulling the pin, and then backing out without raising his head. He also testified that at this time Corbin stood within a few feet, looking at him. Some two or three cars at the rear of the train were also uncoupled, at a street crossing, so that it was then in three sections. The locomotive was then used in switching and setting out cars billed for Sleepy Eye, for about 40 minutes, and when through with this work, the conductor told Corbin that nothing more was to be done, to couple onto the cars on the main track, and (pointing it out, a few feet distant), "to look out for that car, as the rails stick over." The locomotive, with a few box cars, the first section of the train, was then close by, on a side track. Corbin stepped on the rear car, rode out past the switch, turned it, and as the section was backed down slowly he walked beside the box car to be coupled onto the flat. At this time the conductor was going to the depot. The rear brakeman stood at the street crossing, waiting for the train to back down so that he might make the coupling there. The last seen of Corbin alive was when the box car was near the flat, and he then stood outside, but close by, the track, giving to the engineer what is known as a "half-car" signal,—that is, a signal that the cars to be coupled are about half the length of a car apart. From the time the locomotive commenced to back down the main track towards the flat, its movements were under Corbin's control, and it was shown that it moved slowly and carefully. No one saw just how the accident happened. Corbin made the coupling, but did not come out from between the cars. When found, his head was pinioned between the end of the box car and the end of a rail which projected 14 inches beyond the deck of the flat on which the rails were, his face being towards the draw bars. This particular rail was 4 feet 1 inch from the ground, while Corbin was 5 feet 11 inches in height. Counsel for appellant contends that from the evidence it clearly appears that he stooped under the projecting rails, as he should have done to do this particular work, and that while backing out after making the coupling he raised his head too quickly, and in this way was caught. The known facts indicate that this contention is correct, for he could not have reached under the load of rails and have made the coupling without stooping, nor would his head have been caught by the rail, 49 inches from the ground, unless he had been in a stooping position. We accept this as being the manner in which the accident occurred. We also assume that Corbin saw the projecting rails when he stood by and saw the conductor uncouple the flat car from the box car west of it; and also that he understood the conductor's cautioning words about the rails; and, further, that as Corbin walked down towards the flat, and at the time he stooped down to do the coupling, he knew that the rails projected over; and also that he realized the danger of the undertaking. From the evidence, it cannot be said that Corbin did not know or appreciate the risk.

The first question for consideration is whether appellant company was negligent, either in permitting the car to be put into the train at Traverse siding, where it had been side-tracked for about 24 hours, or in allowing it to remain in the train after its condition was seen by the conductor when he uncoupled it from its leader at Sleepy Eye, some 30 minutes before the accident. It is to be remembered that this was not a case where, from the size or shape of the articles carried, they must of necessity project over one or both ends of a car, as will heavy sticks of timber, or heavy castings, or threshing machines, but it is a case where the load is capable of being placed so that no part of it will extend beyond the deck of the car; and that if the ends of the rails do project, it is because of careless loading, or is the result of displacement in transit; and, further, that such displacement is not an uncommon occurrence,—in fact, according to defendant's witnesses, it is to be expected. It is also to be noticed that, according to these same witnesses, whenever such material projected so far as to endanger an adjoining car, it was customary to put the rails in place, either by moving them by hand, or by pushing them back, using heavy timbers and a locomotive, —"butting" them, as one witness expressed it. The evidence as to the condition of the car when left at Traverse was not very clear or convincing. That the rails had commenced to slide out of place, and were becoming more or less dangerous to those who might be called on to couple the flat to another car, and that this was known by one or two of the men at work upon the train which left the flat, was shown. This evidence of what was seen and known when the car was left on the siding some 30 hours before Corbin was killed tended to show that the condition of the load made the car, actually or prospectively, dangerous to handle, and that the company knew, or was bound to know, that it was unfit to be taken up in any other train. If the company knew, or should have known, of the danger which actually existed, or which was to be apprehended, can it be said that, with means at hand to change the conditions, it was not negligent when it allowed the car to be removed from the siding. Now, when the car came to Sleepy Eye its condition was seen and specially noticed by the conductor. He would not testify upon the trial that it was then a "bad-order" car, and under the rules of the company should have been set out of

the train and reported, but he admitted that its load was not in good order for further transportation, and that it was hazardous to handle. Evidently, it was for this reason that he cautioned Corbin to look out for the rails when he gave him the order to bring the sections of the train together. We think, taking into consideration the condition of the car when it was left at Traverse, the time it remained there, the fact that it was well known that this kind of freight was very apt to slide back and forth and become perilous to the men in charge, the fact that its positively dangerous condition was specially noticed and appreciated by the conductor when the train reached Sleepy Eye station, that there was then afforded an opportunity to remove the danger, either by side-tracking the car as in bad order or by adjusting the load of rails in one of the ways heretofore mentioned as customary when other cars were liable to be injured, we cannot say as a matter of law that appellant company was not negligent in permitting the flat to remain in the train, a continuing menace to the life and limb of the trainmen.

We now reach the question of contributory negligence, and the established law is that there must be a want of ordinary care, under the circumstances of the case, contributing to the injury as an efficient and proper cause thereof, before contributory negligence can exist. If the negligence, amounting to the absence of ordinary care, shall contribute, proximately, in any degree, no recovery can be had. If, then, Corbin exercised ordinary care and prudence in the discharge of his duty, he cannot be charged with negligence of the character demanded to defeat a recovery. We have stated the manner in which the accident happened, in so far as it was ascertainable from the surroundings. Corbin must have properly and carefully performed all that was required of him up to the time that he undertook to withdraw his stooped body and his bowed head from beneath the protruding rails, as the cars moved slowly along the track, immediately after the connection was made. He was in a hazardous place, and had to act with some haste, for the cars were not wholly stationary. He could not act with the deliberation of one who, in the same position of the body, is retreating from beneath a fixed object, and no such deliberateness of movement could be expected of him. He raised his head a second too soon, and a trifle too high, and it was immediately pinned against the box car by the end of a rail, four feet and an inch from the ground. He miscalculated the distances, or misjudged his position; and yet he may have been taking great care to avoid doing that very thing, for is it not a matter of common experience and knowledge that persons stooped down and engaged in backing out from beneath some stationary object may do as did Corbin, although exercising great care to avoid it? He was in the discharge of his duty in placing himself in a perilous position, a duty the performance of which was known to, was sanctioned, and even required by, the defendant company. The fact that he was in such a position does not absolutely prove that he was not exercising the care required of him. The question of due care in such a case depends on the manner in which Corbin performed the duty incumbent on him,—whether he acted with due skill and caution, and observed ordinary care. That he was caught at the last moment, just as he was about to escape from the danger, is not conclusive upon the question of negligence on his part. It was proper, therefore, to submit it to the jury for determination. We have carefully examined the various assignments of error, and conclude that further reference to or discussion of them is unnecessary. Order affirmed.

BUCK, J., absent, took no part.

COMMERCIAL NAT. BANK OF OMAHA v. MERCHANTS' EXCH. NAT. BANK OF NEW YORK et al.

(Supreme Court of Nebraska. Feb. 18, 1896.)

STIPULATIONS—CONSTRUCTION—ESTOPPEL.

In an action begun to subject goods and the proceeds of sales of goods in the hands of an agent of defendants to the payment of a claim held by the plaintiff and the defendants, the plaintiff is *held* not to have disclosed a right superior to that of the defendants by merely showing that the goods and proceeds sought to be reached had originally been taken possession of by an agent of defendants by virtue of defective mortgages, especially in view of the fact that there was, subsequent to such possession taken, an agreement made by the parties that the action should proceed to judgment according to the rights of each after the proceeds of the sales of the goods had been remitted to defendants, which remittance had accordingly been made; there being no evidence of fraud practiced or participated in by the defendants, against whom judgment is sought for the amount of such proceeds.

(Syllabus by the Court.)

Appeal from district court, Douglas county; Wakeley, Judge.

Action by the Commercial National Bank against the New York & Omaha Clothing Company, the Merchants' Exchange National Bank of New York, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Montgomery, Charlton & Hall, for appellant. Hall, McCulloch & English, for appellees.

RYAN, C. On the 24th of November, 1888, the Commercial National Bank of Omaha filed its petition in this case in the office of the clerk of the district court of Douglas county. The defendants named were the New York & Omaha Clothing Company, the Merchants' Exchange National Bank of New York City, the Western National Bank of New York City, M. J. Newman, Richard S. Hall, and James H. McCulloch. The New

York & Omaha Clothing Company was described as a Nebraska corporation, and the two New York banks as corporations doing business under the national banking laws in the state of New York. It was averred in this petition that the New York & Omaha Clothing Company had become the debtor of the plaintiff in a large sum, of which over $5,000 still remained unpaid, and that the defendants R. S. Hall and James H. McCulloch, as a partnership firm of attorneys at law in Omaha, had taken, and still retained possession of and were selling, all the goods of the clothing company, by virtue of its two pretended mortgages to the national banks named; each of which mortgages was to secure payment of over $20,000. It was also alleged that the clothing company was insolvent. It was averred by the plaintiff that the aforesaid mortgages had not been executed in such a manner as to create a mortgage lien upon the goods of the clothing company. In the view which we take of this case, this contention need not be considered; for it appears from the averments of the petition, admitted by the answers of all the defendants, that the firm of Hall & McCulloch as the agent of the two national banks named as defendants, before the petition was filed, had taken possession of the goods sought to be reached, and, from the evidence adduced, that this possession has never been interrupted. As plaintiff sought to assert a right superior to that implied from the possession of the agent of the New York banks, it is necessary to examine carefully plaintiff's description of the origin of this alleged paramount right, and to consider whether such right is enforceable under the facts disclosed by the proofs. It must be conceded that the conduct of the clothing company's managers was unfair towards the plaintiff, in leaving it entirely unsecured as it did, and it was quite satisfactorily shown that the credit upon the faith of which this unsecured debt was created was procured by false representations. Our concern, however, is with plaintiff on the one hand, and the two national banks of New York City on the other.

Plaintiff, to show its right to be paid out of the mortgaged stock of goods in possession of Hall & McCulloch, averred in the petition that about July 3, 1888, plaintiff commenced an action in the district court of Douglas county against the Omaha & New York Clothing Company for the recovery of the amount of the aforesaid indebtedness due from the latter to the former; that in said action an order of attachment was issued and delivered to the sheriff of Douglas county; and, together therewith, there was likewise issued and delivered a notice in garnishment, which notice was duly served upon the New York banks, as garnishees, such service being accepted by Hall & McCulloch, as attorneys for the aforesaid garnishees; and that such garnishees had never answered as such. About October 27, 1888, it was alleged in the petition, plaintiff recovered judgment in the action just described for the sum of $5,454.22; that in due time an execution was issued for the collection of said judgment, and was returned unsatisfied, for want of goods and chattels of the clothing company whereupon to levy. It was averred by plaintiff that, at the time its petition was filed in the case at bar, there remained in the possession of Hall & McCulloch goods of the clothing company of the value of $10,000. The prayer of the plaintiff's petition was that there might be issued an injunction to prevent the turning over to the New York banks of the proceeds of sales which had already been made; that Hall & McCulloch might be required to account for the proceeds of such sales, and for the goods still in their possession, and for the proceeds of such sales as the said firm might afterwards make; that a receiver might be appointed to take possession of and sell the goods not yet sold, and apply the proceeds as the court should direct; that the mortgages to the New York banks should be decreed fraudulent, illegal, and void; and that plaintiff be adjudged to be entitled to be paid out of the proceeds of sales of the clothing company's goods. There was duly allowed an injunction, and a bond accordingly was executed and approved. On the 8th day of July, 1889, the firm of Hall & McCulloch filed a motion to dissolve this temporary injunction, accompanied by answers of all the defendants in denial of the material averments by which it had been sought to impeach the validity and good faith of the mortgages made to the New York banks. Under date of February 27, 1891, the following journal entry appears in this case: "Pursuant to stipulation herein made in open court by the parties hereto, this action is hereby dismissed as to the defendants Hall & McCulloch, and it is ordered that the injunction heretofore granted herein be, and the same is hereby, dissolved; this dissolution to be and have effect as of August 10, A. D. 1890." The above entry in the journal was probably based upon the following quotation from the bill of exceptions, evidencing a stipulation with which the trial of this cause began on February 26, 1891: "Pursuant to a verbal agreement made between the plaintiff and the defendants Hall & McCulloch, the Western National Bank and the Merchants' Exchange National Bank, both of New York City, New York, before the answers of the said last-named banks were filed, and in view of which they were filed, it is hereby agreed that the injunction heretofore granted be dissolved; and the defendants waive damages on account thereof, and the costs to follow the result of this case on its merits. And the defendants Hall & McCulloch, pursuant to said verbal agreement, having sold such of the property mentioned in the petition as was in their possession at the time

of the commencement of this action, and having remitted the proceeds of such sales to the said above-named New York banks, upon the agreement that the said New York banks would personally appear and file answers in this case, in which event the said case was to be dismissed as to defendants Hall & McCulloch; and in consideration of which, also, it was agreed that the controversy should be proceeded with as against the said New York banks, and any judgment which might be rendered be rendered against said banks, provided on hearing the plaintiff is entitled to judgment,—it is hereby agreed and stipulated that the said action be and hereby is dismissed, as against Hall & McCulloch. The above stipulation is entered into in open court." There was upon this trial a judgment in favor of the defendants, from which plaintiff appeals. There was no evidence introduced which tended to show that there was due either of the New York banks less than the amount claimed to be owing each of them; neither was there any attempt to show any unfair means resorted to by these banks, either for the purpose of obtaining security for, or payment of, the debt due to each of them. It may be conceded that the mortgages were not executed under a power conferred by the board of directors of the clothing company, as required by its articles of incorporation; and yet, with the assent of the officers of the clothing company, the New York banks, by the firm of Hall & McCulloch, took possession, and were selling the goods to pay the debts due them. While Hall & McCulloch were in possession, they acknowledged service of a garnishment notice upon the New York banks, their principals, but nothing further was done to render effective this garnishment. In the judgment taken upon the claim of the Commercial National Bank of Omaha against the New York & Omaha Clothing Company, there was no mention of the garnishment which had been had of the New York banks. For the collection of this judgment there was issued an ordinary execution, which was returned unsatisfied for want of goods whereon to levy. In the case at bar there was obtained a preliminary injunction to restrain Hall & McCulloch from paying over to the New York banks the proceeds of sales of goods already or thereafter to be made. There was, in the petition upon which this injunction was obtained, a prayer that Hall & McCulloch be required to account for the proceeds of such sales, and that plaintiff be decreed entitled to receive the same. In the oral argument of this case, counsel for appellant suggested that, instead of pressing the injunction proceedings and that for the appointment of a receiver, it was deemed advisable to permit the firm of Hall & McCulloch to proceed to sell, and look to them, rather than to a receiver, for the proceeds of the sales of goods; and that it was upon this theory that the verbal agreement, referred to in the stipulation at the opening of the trial, had been made. In the stipulation just referred to, there was an admission that, pursuant to the aforesaid verbal agreement, Hall & McCulloch had sold such of the goods as were in their possession when this action was begun, and had remitted the proceeds of such sales to the New York banks, upon the agreement that said banks would appear and file their answers in this case, and that, upon such answers being filed, there should be a dismissal as to Hall & McCulloch, and the controversy should be proceeded with as against the banks, and a judgment be rendered against said banks, if, upon a hearing, plaintiff should be entitled to the judgment. In view of this stipulation, in which is recited certain acts done pursuant to verbal agreements between the parties, it is quite difficult to determine whether, in advance, it had been orally agreed that Hall & McCulloch might make sales and remittances, or not. In any event, appellant relies upon this verbal agreement to entitle it to proceed against the New York banks in this action. Whether or not the mortgages to the New York banks were authorized by the board of directors, as required by the articles of incorporation of the New York & Omaha Clothing Company, became immaterial when the plaintiff consented that Hall & McCulloch should sell the goods in their possession and remit the proceeds to their principals. Thenceforward, there could be no question made by plaintiff as to the means by which the New York banks had become possessed of the goods of the clothing company, but plaintiff was limited to the question whether or not plaintiff was entitled to recover such proceeds from said banks. If, before this agreement, the garnishment proceedings had not been abandoned, there was by the agreement a complete abandonment of rights predicated upon the garnishment. It admits of grave doubt whether the Commercial National Bank of Omaha, as plaintiff, could recover judgment against the New York banks, as defendants, merely because these latter two banks have been more diligent or more fortunate than plaintiff in making collections from a common debtor,—and this, as we understand it, is the sole matter now in controversy in this case. In any event, appellant could claim no more than that the banks of another state should be held accountable because of fraud by which had been obtained the advantage which they possess. A careful examination of the evidence convinces us that there was shown nothing in the conduct of the New York banks or their agents which justifies, or even tends to justify, such an imputation of fraud. The judgment of the district court is affirmed.

CITY OF HARVARD v. CROUCH.

(Supreme Court of Nebraska. Feb. 18, 1896.)

MUNICIPAL CORPORATIONS—CHANGE OF GRADE OF STREETS—MEASURE OF DAMAGES—WITNESSES—CREDIBILITY.

1. A judgment will not be reversed on account of a mere difference of opinion between this court and the trial judge or jury regarding the weight of the evidence.

2. Under the constitution of this state providing that private property shall not be taken or damaged for public use without compensation, a city is liable for damage resulting from a material change of the grade of its streets from the natural surface. Harmon v. City of Omaha, 23 N. W. 503, 17 Neb. 548.

3. The measure of damage in such cases is the depreciation in the value of the property, occasioned by the change of grade. Railroad Co. v. McDermott, 41 N. W. 648, 25 Neb. 714.

4. It is not error to advise the jury that, in determining the credit which should be given to the defendant's witnesses, their interest in the result of the suit may be taken into consideration. Barmby v. Wolfe, 62 N. W. 318, 44 Neb. 77.

(Syllabus by the Court.)

Error to district court, Clay county.

Action by W. H. Hammond, for whom, on his decease, was substituted L. P. Crouch, administrator, against the city of Harvard. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Leslie G. Hurd, for plaintiff in error. L. P. Crouch, in pro. per.

POST, C. J. A former opinion in this cause is reported under the title of Hammond v. City of Harvard, 31 Neb. 635, 48 N. W. 462. The plaintiff below, Hammond, having died in the meantime, the cause was prosecuted to judgment in the name of L. P. Crouch, as administrator. The facts essential to an understanding of the controversy are set out at length in the opinion referred to, and need not be here repeated. It is sufficient for our present purpose that the cause of action alleged is (1) the grading of Clay avenue, in the city of Harvard, so as to collect and discharge the surface water upon the lot of the deceased adjacent thereto, and against a certain brick building situated upon said lot; (2) the raising of the sidewalk in front of the plaintiff's said building from 14 to 16 inches above the level of the floor, and exposing it to invasion of the floods at certain seasons of the year.

We have carefully read the evidence in the record, and are unable to say that the amount of the verdict, $310, is excessive. Were the question an open one for a finding in accordance with what to us appears the weight of the evidence, we would feel constrained to assess the plaintiff's damage at a sum considerably less than that awarded by the jury; but, as has frequently been said, a judgment will not be reversed on account of a mere difference of opinion between this court and the trial judge or jury regarding the weight of the evidence.

Exception was taken during the trial in various forms on the ground that the fact alleged and proved do not constitute a cause o action against the city. Such objections ap pear to rest upon the proposition that the de ceased, Hammond, in the construction of th building in question, evidently anticipate the action of the city in the improvemer of the street upon which it abuts, and mus be held to have contemplated the inconver lence which is naturally incident to suc improvement; or, as said in Callender Marsh, 1 Pick. 418: "Those who purcha house lots bordering upon streets are su posed to calculate the chance of such eleva tions and reductions as the increasing popu lation of the city may require; * * * an as their purchase is always voluntary, the may indemnify themselves in the price of th lots which they buy, or take the chance of fu ther improvements, as they shall see fit Such is, undoubtedly, the rule of the commo law. 2 Dill. Mun. Corp. §§ 990-995a. Bu under our constitution, which prohibits th taking or damaging of private property fo public use without compensation, that ru can have no application. Harmon v. City Omaha, 17 Neb. 548, 23 N. W. 503; Har mond v. City of Harvard, 31 Neb. 635, 48 W. 462; City of Plattsmouth v. Boeck, Neb. 298, 49 N. W. 167. And the views e pressed in the cases cited are in harmon with the decisions of other courts under lik constitutional provisions. City Council Montgomery v. Townsend, 80 Ala. 491, South. 155; Railroad Co. v. Williamson, Ark. 436; City of Atlanta v. Green, 67 G 386; City of Ft. Worth v. Howard (Tex. Ci App.) 22 S. W. 1059; Davis v. Railroad C (Mo. Sup.) 24 S. W. 777.

Among other instructions asked by the d fendant below, and refused, is one to the e fect that the purchaser of property abutti upon a street is presumed to have consent to such changes in the surface of the stre as are obviously necessary in order to su serve public rights and interests. But w will not at this time determine the questi of the soundness of the instruction asked, whether it may be harmonized with the ru above stated, since we agree with the d trict court that it was altogether unwarra ed by the evidence.

Exception was also taken to the refus of the court to charge that "it is the plai tiff's duty to protect his property from inju or damage by any reasonable means in h power, and any loss or damage suffered him which he might by reasonable mea have prevented is not chargeable to the city This instruction was rightly refused. T measure of damage is the depreciation in t value of the property occasioned by the gra ing of the street. Railroad Co. v. McD mott, 25 Neb. 714, 41 N. W. 648. Eviden was received by the trial court tending prove that it was possible, at a trifling co to protect the property in question again the water discharged upon it as a result

the improvement of the street. Such evidence was admissible as bearing directly upon the present value of the property, but the ultimate inquiry is, as already suggested, how much, if at all, has the property depreciated in value in consequence of the improvement complained of?

Exception was taken to the giving of the following instruction: "In passing upon the testimony of the witnesses for the defendant, you have a right to take into consideration any interest which such witnesses may feel in the result of the suit, if any is proved or appears, growing out of their relationship or interest in the defendant or otherwise, and give to the testimony of such witnesses only such weight as you think it entitled to under all the circumstances proved on the trial." The witnesses for the defendant city were mostly, if not all, residents and taxpayers therein, and had to that extent a pecuniary interest in the result of the trial, from which it is argued that the effect of the instructions quoted was to discredit their testimony. Practically the same question was presented for consideration in Barmby v. Wolfe, 44 Neb. 77, 62 N. W. 318, and decided adversely to the contention of the plaintiff in error. It is there said, referring to Housh v. State, 43 Neb. 163, 61 N. W. 571, and Carleton v. State, 43 Neb. 373, 61 N. W. 699: "In the two latest cases, doubts were expressed as to the policy of such instructions, but the question was no longer deemed an open one." The rule thus stated follows logically from the doctrine of the earlier opinions of this court, and is decisive of the question here presented.

The remaining assignments of error present in different forms the questions already examined, and do not require further notice at this time. We discover no error in the record, and the judgment will be affirmed.

BURNHAM v. RAMGE (MOORES, Garnishee).

(Supreme Court of Nebraska. Feb. 18, 1896.)

ATTACHMENT—SUFFICIENCY OF AFFIDAVIT—OBJECTIONS—WHO MAY RAISE.

1. An affidavit for an attachment, setting forth the grounds therefor in the language of the statute, is sufficient.

2. Error cannot be predicated by a judgment debtor upon the making of an order upon a garnishee to pay money into court, or the refusal to vacate such order, when such debtor disclaims any interest in the money garnished.

(Syllabus by the Court.)

Error to district court, Douglas county; Davis, Judge.

Action by Frank J. Ramge against Nathan J. Burnham. Frank E. Moores was summoned as garnishee. There was judgment for plaintiff, and an order requiring the garnishee to pay the money into court, and defendant brings error. Affirmed.

Slaubaugh & Rush, for plaintiff in error. Parke Godwin, for defendant in error.

NORVAL, J. Plaintiff recovered a judgment in the court below against defendant in the sum of $79.90 and costs of suit, and Frank E. Moores, garnishee, was ordered to pay into court the money garnished in his hands. At the commencement of the action plaintiff filed an affidavit for attachment, and an order of attachment and notice in garnishment directed to Frank E. Moores were issued and served. Subsequently, the defendant moved the court to discharge the attachment, upon two grounds: (1) The facts stated in the affidavit are insufficient to justify the issuing of the writ; (2) because the affidavit is untrue. This motion was overruled. After the rendition of the judgment, and the making of the order upon the garnishee to pay the money into court, the defendant filed a motion (which was overruled) to set aside the order made upon the garnishee. These rulings of the court are assigned for error.

No error was committed in overruling the motion to dissolve the attachment. The affidavit for attachment is in the usual form, the grounds for attachment being set forth in the language of the statute, viz.: "That said defendant fraudulently contracted the said debt on which said suit has been brought." This was sufficient to sustain the writ, without a statement of the facts showing the ground of attachment to be true. Hilton v. Ross, 9 Neb. 406, 2 N. W. 862; Steele v. Dodd, 14 Neb. 496, 16 N. W. 909.

The affidavit read on the motion to dissolve the attachment failed to deny the existence of the debt which is the basis of the suit, or to disprove the averment in the attachment affidavit, that the debt was fraudulently contracted. The ground for attachment is nowhere denied. The evidence adduced in support of the motion was merely for the purpose of showing that the moneys garnished in the hands of Frank E. Moores were held by him in his official capacity as clerk of the district court. But such evidence does not disclose that the moneys did not belong to the attaching defendant. Moreover, it is stated, in substance, in the motion to set aside the order on garnishee, as well as in brief of plaintiff, that the moneys garnished did not belong to Burnham, and that he had no interest therein. If this be true, the latter certainly cannot complain that it was applied to pay the judgment against him. Langdon v. Martin, 10 Ohio St. 439; Mitchell v. Skinner, 17 Kan. 563. Moores, to protect himself, could have objected, but he makes no complaint of the order of the court.

It is insisted that there was error in denying the motion to vacate the order on the garnishee, because the garnishee did not answer in the case; and further that, as the money was held by Moores as clerk of the district court, it was in custodia legis,

and therefore not subject to garnishment. Whether the order was made upon the garnishee without his appearing and disclosing the amount of money in his hands belonging to the defendant, or whether the moneys in the hands of Moores could be garnished in this case, are immaterial inquiries, in the light of this record. Plaintiff having disclaimed any interest in the moneys ordered paid over by the garnishee, both upon the record and in his brief, clearly he cannot be heard to complain that the order was erroneous. No prejudicial error having been shown to exist, the judgment of the district court is affirmed.

HOME FIRE INS. CO. v. KENNEDY.

(Supreme Court of Nebraska. Feb. 18, 1896.)

INSURANCE — BREACH OF CONDITION — WAIVER — AGREEMENT TO ARBITRATE — REVOCATION — WAIVER.

1. An insurance company, which, after a loss of the property covered by its policy, with a knowledge of acts amounting to a breach of warranty by the insured, fails to declare such policy forfeited, but, on the contrary, continues to recognize its liability thereon by demanding repeated proofs of loss, and by insisting upon arbitration under a stipulation which applies to the measure of damages only, will be *held* to have waived all defenses based upon such breach of warranty and resulting forfeiture of the policy.

2. So *held* notwithstanding the secretary of the defendant company, in returning the proof of loss for correction, added, "This company neither admits nor denies its liability nor waives any of its rights under said policy."

3. A stipulation for arbitration, which does not provide for submitting the matters in dispute to a particular person or tribunal, but to one or more persons, to be mutually chosen, is revocable by either party, and will not oust the jurisdiction of the courts having cognizance of the subject of the controversy.

4. An insurance company, by denying its liability on the ground of a forfeiture of the policy by reason of a breach of warranty by the insured, waives whatever right it may have had to insist upon arbitration as a means of determining the amount of the plaintiff's damage.

(Syllabus by the Court.)

Error to district court, Douglas county; Doane, Judge.

Action by Catherine Kennedy against the Home Fire Insurance Company. There was a verdict for plaintiff, and defendant brings error. Affirmed.

J. Fawcett, for plaintiff in error. Martin Langdon and I. J. Dunn, for defendant in error.

POST, C. J. This was an action by the defendant in error, Catherine Kennedy, against the plaintiff in error, the Home Fire Insurance Company of Omaha, upon a policy of insurance. The defendant company, for answer, admitted the insuring of the plaintiff's property, to wit, a two-story frame and brick building, and that said building was destroyed by fire within the period covered by said policy. It, however, alleged that said policy was not in force at the time of the loss, for reasons which will be hereafter noticed. A trial was had in the district court for Douglas county, resulting in a verdict and judgment for the plaintiff below, which has been removed into this court for review by the defendant company.

It is first contended that the risk was increased in violation of the policy (1) from the fact that the building described therein was at the time of the loss used and occupied as a tenement house, whereas it was insured as a private dwelling only; (2) by the use and keeping therein of gasoline in excess of the amount permitted by the policy. In support of the first of the alleged violations we are referred to the following questions and answers shown by the application for the policy: "Q. Is the house occupied for private dwelling only? A. Yes. Q. By owner? A. Yes." And also to the following conditions of the policy: "Or if the risk be increased in any manner without consent indorsed thereon, * * * then this policy shall be null and void." It is not claimed that the representations of the insured respecting the occupancy of the premises at the date of the policy were false as to any essential facts. The only evidence we discover bearing upon that question is the following testimony of the defendant in error, Mrs. Kennedy: "Q. Who was occupying the house at the time the policy was issued, March 30, 1889? A. I could not say whether there was any one but myself or not. Q. The house was not complete at the time the policy was issued? A. No, sir." It is, however, contended that the foregoing condition of the policy, in connection with the application, is to be construed as a continuing warranty of affirmative agreement; that the validity of the said policy should depend upon the literal fulfillment of the contract by the insured. Applying the rule thus asserted to the facts disclosed by this record, counsel argue that the policy is void and of no effect, for the reason that there were at the time of the loss, in addition to the family of the insured, consisting of herself and son, three families occupying rooms in said house, although the record is silent respecting the number of such occupants or the character of their tenure. It is deemed unnecessary to review the many authorities cited in support of that contention, since it is, we think, conclusively shown that the defendant company has, by the action subsequent to the loss, waived whatever right it may have had to declare the policy void on account of the facts stated, or by reason of the violation of the condition regarding the keeping of gasoline in the building insured. The company, according to the testimony of its own witnesses, was fully advised of the facts constituting the alleged violation of the contract by the insured five days after the loss, to wit, on March 16, 1891. Fourteen days later, on March 30th, the plaintiff below served upon the defendant what appears to be formal proof of loss,

sworn to before a notary public, and attested by two disinterested neighbors in the presence of a justice of the peace. On the same day Mr. Barber, secretary of the defendant company, acknowledged receipt thereof, as follows: "Omaha, Neb., March 30, 1891. Mrs. Catherine Kennedy, Holder of Policy No. 30,715, issued by the Home Fire Insurance Company of Omaha, Nebraska: Papers purporting to be proofs of an alleged loss under said policy have been received, but same are irregular, defective, and deficient, in that they do not comply with the terms of the said policy, in that it requires that proofs duly executed and sworn to by the assured under the said policy be made and furnished the said company. You have been required, and are hereby required, to render, under oath, a particular account of said alleged loss, setting forth the date and circumstances of the same, together with title, occupancy, and other insurance, if any, and itemized estimate of the value of the property destroyed; said proofs to be signed and executed in accordance with the terms of said policy. No estimate of the said building insured under the said policy, nor the alleged damage thereto, made by J. P. Gardiner, nor any other person, have been furnished this company by you. The papers purporting to be proofs of loss are not signed and sworn to by you, and are defective and deficient as to every requirement of said policy. The same are herewith returned declined. The said company neither admits nor denies liability nor waives any of its rights under said policy. Very truly, Chas. J. Barber, Secretary Home Fire Insurance Co." In accordance with the direction contained in the above communication, the plaintiff, on April 1st, served upon the company an additional, or, as described by the witnesses, an amended, proof of loss, which was likewise returned, accompanied by the following letter: "Omaha, Neb., April 3, 1891. Mrs. Catherine Kennedy, Holder of Policy No. 30,715, issued by the Home Fire Insurance Company of Omaha, Nebr.—Madam: Papers purporting to be proof of your alleged loss and damage under the said policy have been received, but same are defective, deficient, and incomplete, in that they do not fully set forth the occupancy of the said building alleged to have been damaged, nor are they accompanied by an itemized estimate of value of property destroyed, nor are said alleged proofs signed by two disinterested neighbors, nor by nearest magistrate, as required by terms of the said policy. The estimates given in said proof are in lump, and not itemized, and are not made by competent party. The estimate must be specific and in detail, in order to be an itemized estimate. The papers are therefore herewith returned declined. Very truly, Chas. J. Barber, Secretary Fire Insurance Company." And on April 6th the plaintiff prepared and served a third statement of her loss, which, so far as appears, conforms to all the suggestions of the defendant company. She was in the meantime notified by the defendant of its election to arbitrate the differences between them by letter of Mr. Barber under date of March 31st, in the following language: "Omaha, March 31, 1891. Mrs. Catherine Kennedy, Holder of Policy No. 30,715, issued by the Home Fire Insurance Company of Omaha—Madam: Arbitration of the differences that have arisen between you and the said company as to the actual damages by fire to building insured under the said policy is hereby demanded. Please name arbitrator and date agreeable to have said arbitration take place. The said company, by calling for arbitration, neither admits nor denies liability nor waives any of its rights under the said policy. Very truly, Chas. J. Barber, Sec. Home Fire Insurance Company." The foregoing was followed by communications bearing dates of April 3d, 4th, 8th, and 24th, each in positive terms demanding arbitration in accordance with a provision of the policy for the adjustment by that means of controversies relating to the amount of loss or damage by the insured.

In Hollis v. Insurance Co., 65 Iowa, 454, 21 N. W. 774, the rule is thus stated: "Where the insured, at the time of the loss, has forfeited his right to recover on the policy, and the company, knowing the facts, continues to treat the contract as of binding force, thereby inducing the insured to act and incur expense in that belief, the company thereby waives the forfeiture." And in Titus v. Insurance Co., 81 N. Y. 410, we observe the following language: "But it may be asserted broadly that if, in any negotiations or transactions with the insured after knowledge of the forfeiture, it (the insurer) recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is, as matter of law, waived; and it is now settled in this court, after some differences of opinion, that such a waiver need not be based upon any new agreement or an estoppel." See, also, Webster v. Insurance Co., 36 Wis. 67; Cannon v. Insurance Co., 53 Wis. 585, 11 N. W. 11; Insurance Co. v. Norton, 96 U. S. 234; Silverberg v. Insurance Co., 67 Cal. 36, 7 Pac. 38; Marthinson v. Insurance Co., 64 Mich. 372, 31 N. W. 291; Eddy v. Insurance Co., 72 Mich. 651, 40 N. W. 775; Insurance Co. v. Gibson, 53 Ark. 494, 14 S. W. 672. The foregoing, among the many cases in harmony therewith, serve to illustrate the rule applicable to the present controversy. The demand for successive proofs of loss after knowledge of all the facts, upon grounds which are, to say the least, highly technical, thus imposing upon the insured the labor and expense incident to their preparation, and the repeated peremptory calls for arbitration in accordance with the terms of the

policy, relating to the measure of damage only, cannot be construed otherwise than as a waiver of the alleged forfeiture. And the rulings complained of, so far as they relate to that branch of the case, if erroneous, are manifestly not prejudicial to the plaintiff in error. Nor are we unmindful of the fact that Mr. Barber, on the return of the first proof of loss, disavowed the admission thereby of any liability on the part of the defendant company of a waiver of any of its rights. But such a disavowal will not vary the legal effect of his actions in behalf of defendant. In Marthinson v. Insurance Co., supra,—a case in point,—the managing officer of the company, on returning the proof of loss for correction, used this language: "You will further take notice that in returning said papers and making the objection thereto, and in all other matters herein, the company waives none of its rights and defenses under their said policy, but expressly reserves each and every one thereof unto itself." In commenting upon the foregoing, the court, by Morse, J., say: "We do not think this general reference to other possible defenses was sufficient. It devolved upon the defendant to specifically state its defenses, or some of them, if it had any other than those going to the defects in the proof of loss. If the company had frankly stated that it refused to pay the alleged loss because of the breaches of warranty and forfeiture by the conditions of the policy, the knowledge of which it then possessed, the assured would have, in all probability, gone no further into cost and trouble to perfect such proof of loss, as its refusal to pay on other grounds would have rendered it unnecessary. This loose and general reservation of its rights cannot be considered as an adequate notice of the defenses insisted upon at the trial, and it must be held that such defenses were waived by its conduct."

The only remaining question relates to the effect of the provision of the policy for determining, in case of loss, by arbitration, of the amount of damage. It has been repeatedly held that a stipulation for arbitration which does not provide for submitting the matters in dispute to a particular person or to a particular tribunal, but to one or more persons, to be mutually chosen, is revocable by either party, and will not oust the jurisdiction of the court having cognizance of the subject-matter of the controversy. Hostetter v. City of Pittsburgh, 107 Pa. St. 419; Assurance Co. v. Hocking, 115 Pa. St. 407, 8 Atl. 589; Donnell v. Lee, 58 Mo. App. 288; Rison v. Moon (Va.) 22 S. E. 165; Canfield v. Insurance Co., 55 Wis. 419, 13 N. W. 252; Insurance Co. v. Etherton, 25 Neb. 505, 41 N. W. 406. The last-mentioned case furnishes an additional reason for the rejection of the defense based upon the refusal of the plaintiff below to arbitrate, viz. that the denial by the defendant company of the liability under the policy is a waiver of whatever right it may have had to insist upon the means therein provided for ascertaining the amount of the plaintiff's damage. The judgment of the district court is right, and must be affirmed.

FIRST NAT. BANK OF CHADRON v. McKINNEY et al.

(Supreme Court of Nebraska. Feb. 18, 1896.)

SALE — RESCISSION FOR FRAUD OF BUYER — ELECTION — EVIDENCE.

1. Proof of false statements knowingly made by the purchaser of goods, whereby he is shown to be possessed of a large amount of property over and above his liabilities, is admissible under an allegation that, being insolvent, he knowingly concealed his insolvency from the vendor.

2. A vendor who is induced to part with possession of property through the fraud of the purchasers had his election to rescind the contract and reclaim the property sold, or to ratify the sale and pursue his ordinary remedy by an action on the contract.

3. But such remedies are not concurrent, and by electing to pursue one, with a knowledge of the facts, he waives his right to the other.

(Syllabus by the Court.)

Error to district court, Dawes county; Rinkaid, Judge.

Replevin by Albert McKinney and others against the First National Bank of Chadron and others. There was a judgment for plaintiffs, and the bank brings error. Reversed.

Albert W. Crites, for plaintiff in error. Spargur & Fisher and Bartlett, Baldrige & De Bord, for defendants in error.

POST, C. J. This cause was before us at the January, 1893, term, at which time it was held that the petition below stated a cause of action against the defendant therein (the plaintiff in error), for the recovery of merchandise sold to one Charles F. Yates; the plaintiffs below having elected to rescind the contract of sale on account of the fraud of said Yates, through whom the defendant claims by virtue of a chattel mortgage. McKinney v. Bank, 36 Neb. 629, 54 N. W. 963. Since then a second trial has been had in the district court for Dawes county, resulting in a verdict for the plaintiffs therein, in accordance with the peremptory instruction of the court. A motion for a new trial having been overruled, judgment was entered upon the verdict, which has been removed into this court for review, by means of the petition in error of the unsuccessful party.

The first proposition to which we will give attention is that there is a fatal variance between the allegations of the plaintiffs below and the proofs. But that argument is without force. The charge of the petition is that Yates, being insolvent at the time of the purchase of the goods, concealed his insolvency from the plaintiffs, whereas the evidence received over the objection of the defendants tended strongly to prove false repre-

sentations by him (Yates) respecting his financial standing, whereby he was shown to be possessed of a large amount of property over and above his liabilities. The false statements proved certainly tend to sustain the allegations that Yates concealed his insolvency at the time of purchase of the goods in controversy, and were therefore rightly received in evidence.

It is contended that the peremptory instruction was unwarranted by the evidence, there being no proof of Yates' insolvency when he purchased the goods which are the subject of this controversy. But in that view we are unable to concur. On the contrary, we have no doubt, from a careful examination of the record, that Yates was at the time in question, within his own knowledge, hopelessly insolvent. According to the record offered in evidence, and which is made a part of the bill of exceptions, the defendants in error, before the commencement of this action, brought suit against Yates for the contract price of the identical bill of goods now in controversy, which is still pending in the district court for Dawes county, and in which there was issued an order of attachment upon the filing of an affidavit in due form by F. M. Dorrington, as attorney for plaintiffs therein, pursuant to which the plaintiff in error was served with garnishee process as the supposed debtor of said Yates. On the offer of said record, Mr. Baldrige, attorney for defendants in error, testified that in the year 1889 he was a member of the firm of Baldrige, Blair & Green, engaged in the practice of the law in the city of Omaha; that, some time during said year, defendants in error telegraphed his said firm to protect their interests with respect to their claim against Yates; and that "we were then, and ever since have been, one of the attorneys for the plaintiffs in this suit. I never authorized any attachment papers to be filed that I have any recollection of. I consulted with my partners at the time the claim was telegraphed to us. That is as much as I can say of my own knowledge." And on cross-examination he was asked if Mr. Dorrington, who appeared for the defendants in error as plaintiffs in said action, was not associated with him or his firm, to which he answered: "I don't know; I understood Spargur & Fisher were." And to the inquiry, "Was not Dorrington the first attorney your firm employed?" he answered: "I don't know. The only correspondence I remember was with Spargur & Fisher. I don't recollect of any correspondence with Mr. Dorrington." Counsel thus sought to prove that the action against Yates for the price of goods was unauthorized by defendants in error. But for that purpose the evidence quoted is, for obvious reasons, wholly insufficient. A vendor who is induced to part with possession of property through the fraud of a purchaser has his election to rescind the contract and reclaim the property sold, or to ratify the sale, and pursue his ordinary remedy by an action ex contractu. But such remedies are not concurrent, and by electing to pursue one, with knowledge of the facts, he waives his right to the other. Morris v. Rexford, 18 N. Y. 552; Rodermund v. Clark, 46 N. Y. 354; Bach v. Tuch (N. Y.) 26 N. E. 1019; Shoe Co. v. Block (Ark.) 12 S. W. 1073; Herm. Estop. § 1051.

True, the suit against Yates may have been unauthorized or brought without knowledge of the fraud alleged as ground for the rescission of the contract of sale; but such facts will not be presumed, and, if relied upon, must be affirmatively shown by the party asserting them. It follows that the record should have been admitted in evidence, and that its rejection was error, for which the judgment must be reversed, and the cause remanded for trial de novo. There are other errors assigned which need not be noticed at this time, since they involve questions of practice mainly, and which may not arise in the further prosecution of the cause. Reversed.

CHILDERSON v. CHILDERSON.

(Supreme Court of Nebraska. Feb. 18, 1896.)

ERROR ON APPEAL — ELECTION — BILL OF EXCEPTIONS — AUTHENTICATION.

1. Where a case is presented for review to this court within the time allowed in which to perfect an appeal, but a petition in error is filed therewith, the party bringing the case here will be presumed to have elected the remedy by error, and the case will be so considered.

2. Where the bill of exceptions is not properly authenticated by the certificate of the clerk of the district court, as required by law, it need not be examined by this court.

(Syllabus by the Court.)

Error to district court, Clay county; Hastings, Judge.

Action by John W. Childerson against Mary A. Childerson. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Thos. H. Matters, for plaintiff in error. Leslie G. Hurd, for defendant in error.

HARRISON, J. The plaintiff herein alleges the relationship of husband and wife as existing between himself and the defendant; that, as the outcome of difficulties and dissensions during the course of their married life, the wife left the home, and abandoned the plaintiff, and he, as a consideration for her return to him, and the family relations and duties, and continuance thereof and therein, did, during the year of 1889, convey by deed to the wife certain lands in Clay county, Neb.; that, on or about the 8th day of December, 1891, the defendant violated her promise and contract, and again departed from the home of the parties, and abandoned the plaintiff, by which act he became entitled to the property conveyed to her. Hence, he prays a decree against her, requiring its reconvey-

ance to him. The wife, in answer to the pleas of the plaintiff herein, admits the assumption of the marriage relation by and between plaintiff and herself, and that, after some years of married life, disagreements and contentions arose and prevailed, and finally to such an extent that she forsook the home and her marital rights, and also the duties, or was forced to do so; but she affirmatively states that at the time of the marriage to plaintiff she was the owner of certain property, both personal and real, the proceeds of which the plaintiff reduced to his possession and used, in such manner and for the purpose by him desired; and the lands which the plaintiff conveyed to her were so conveyed to her in payment and to reimburse her for the appropriation of the proceeds of her separate property. To this answer of defendant there was filed a reply, which in effect denied the affirmative matter contained therein, or avoided its force, and reasserted the substantive matters set forth in the petition, in so far as it related to the consideration for the conveyance of the lands from plaintiff to defendant. At the close of the trial of the issues, the court rendered a decree favorable to defendant, by which the action was dismissed, and the costs taxed against the plaintiff, and the case is presented here for review.

The record here is entitled as in an appeal, but a petition in error was filed, and a summons in error was caused to be issued. Under such circumstances, it will be presumed that the plaintiff has elected to present the case to this court by error proceedings. Woodard v. Baird, 43 Neb. 311, 61 N. W. 612; Monroe v. Reid, 46 Neb. 316, 64 N. W. 983; Burke v. Cunningham, 42 Neb. 645, 60 N. W. 903. If this is treated as an error proceeding, then the errors assigned in the petition cannot be reviewed, for the reason that no motion for a new trial was filed in the district court. Where a party does not move for a new trial in the lower court, he cannot raise any question on error to this court. Zehr v. Miller, 40 Neb. 791, 59 N. W. 384, and cases cited; Brown v. Ritner, 41 Neb. 52, 59 N. W. 360; Scroggin v. National Lumber Co., 41 Neb. 195, 59 N. W. 548; Appelget v. McWhinney, 41 Neb. 253, 59 N. W. 918.

The transcript in the case at bar was filed within the time for effecting appeal to this court; and if we were at liberty, under the rules, to consider it as an appeal, the questions raised and discussed in the brief of counsel for the unsuccessful party in the trial court all depend, for their proper understanding and decision, on an examination and consideration of portions of the evidence introduced at the trial. This necessitates, in any case, the presentation of the evidence to this court, properly preserved in a duly-authenticated bill of exceptions, and, in the absence of such bill of exceptions, the evidence need not be investigated. There was no certificate of the clerk of the district court attached to what purported to be the bill of exceptions. It was not legally authenticated, and is not properly before this court. Martin v. Fillmore Co., 44 Neb. 719, 62 N. W. 863; Yenney v. Bank, 44 Neb. 402, 62 N. W. 872; Felber v. Gooding, 47 Neb. —, 66 N. W. 39. We have, however, reviewed the testimony, and our conclusion is that, as to the points argued by the complaining party, it is conflicting, but sufficient to sustain the findings and judgment of the trial court; and had the case been suitably presented here for review, as to such questions the findings and judgment would not have been disturbed or reversed. The judgment of the lower court is affirmed.

ROMBERG v. FOKKEN.

(Supreme Court of Nebraska. Feb. 18, 1896.)

BILL OF EXCEPTIONS—AUTHENTICATION—MOTION FOR NEW TRIAL—CERTIFICATION.

1. A bill of exceptions in a cause tried in the district court must be authenticated by the certificate of the clerk of such court, to entitle it to be considered in the supreme court.

2. A paper purporting to be a motion for a new trial cannot be considered, unless certified to in the transcript by the clerk of the district court.

(Syllabus by the Court.)

Error to district court, Cuming county; Norris, Judge.

Action by Gerhard Fokken against John Romberg. There was a judgment for plaintiff, and defendant brings error. Affirmed.

M. McLaughlin and J. C. Crawford, for plaintiff in error. T. M. Franse and C. C. McNish, for defendant in error.

NORVAL, J. This is an action at law, by a lessee against his lessor, to recover damages for the failure of the defendant to put the plaintiff in possession of the leased premises according to the stipulations in the lease. From a verdict and judgment against the defendant, he prosecutes error to this court. A reversal is sought upon two grounds: (1) The verdict is contrary to, and is unsupported by, the evidence. (2) The court erred in giving and refusing certain instructions.

The assignment that the verdict of the jury is not sustained by sufficient evidence cannot be considered by this court, for the reason that the bill of exceptions, purporting to contain the evidence adduced on the trial, is not authenticated. That which purports to be a bill of exceptions, and which is attached to the transcript, does not appear to have been filed in the district court; nor has the clerk of that court certified that it is either the original bill of exceptions settled and allowed in the cause, or a copy thereof, as required by law. The pretended bill, therefore, must be ignored, and cannot be considered for any purpose. Aultman v. Patterson, 14 Neb. 57, 15 N. W. 350; Hogan v. O'Niel, 17 Neb. 641, 24 N. W. 213; Flynn v. Jordan, 17 Neb. 518, 23 N. W. 519. But it may be said the omis-

sion of the clerk's certificate authenticating the bill must be deemed to have been waived by the parties, inasmuch as they have conceded the validity of the bill of exceptions by raising no objections thereto in this court. Yates v. Kinney, 23 Neb. 648, 37 N. W. 590, recognizes such rule, but we do not hesitate to say that it is unsound. In the exercise of its appellate jurisdiction, this court reviews the proceedings of the district court; and our only means of ascertaining what proceedings were had and taken in the trial court in any case, or what pleadings were filed therein, is the transcript of the record of that court, duly authenticated by the proper officer. If the parties may waive the certificate of the clerk of the district court to the original bill of exceptions, then there is no reason why they may not likewise waive the authentication of the transcript of the final judgment or order sought to be reviewed, and the pleadings in the case. The statute requires both the transcript and the bill of exceptions to be authenticated by the certificate of the clerk of the district court, and we have no right to ignore or disregard its mandatory provisions. Moore v. Waterman, 40 Neb. 498, 58 N. W. 940; Otis v. Butters, 46 Neb. 492, 64 N. W. 1093; Martin v. Fillmore Co., 44 Neb. 719, 62 N. W. 863; Yeney v. Bank, 44 Neb. 402, 62 N. W. 872.

There is another reason why this evidence cannot be considered. It has been frequently asserted by this court that the sufficiency of the evidence to support the verdict, as well as errors in the giving and refusing of instructions, must be called to the attention of the trial by a motion for a new trial. The record shows that a motion for a new trial was overruled by the court below, and while a paper purporting to be such a motion is contained in the transcript, it lacks authenticity. Attached to the transcript is the following certificate: "State of Nebraska, County of Cuming—ss.: I, Emil Heller, clerk of the district court of Cuming county, do hereby certify that the foregoing is a true transcript of the petition, answer, instructions, and journal entries, as the same are of record and on file in my said office. Witness my hand and the seal of said district court, this 2d day of April, A. D. 1892. Emil Heller, Clerk of the District Court." It will be observed that the certificate makes no reference to the motion for the new trial, but particularly enumerates which papers contained in the transcript are certified to be true copies of the originals on file. In this condition of the record, we are unable to say that the alleged motion for a new trial included in the transcript is a copy of the one passed upon by the district court. Therefore it cannot be considered by us. Haggerty v. Walker, 21 Neb. 596, 33 N. W. 244; Chamberlain v. Brown, 25 Neb. 434, 41 N. W. 284; Burlingim v. Baders, 47 Neb. —, 63 N. W. 919. It follows that neither the instructions nor the evidence can be reviewed. No question which has been argued in the brief is presented by the record. The judgment is affirmed. Affirmed.

ROMBERG v. HEDIGER.

(Supreme Court of Nebraska. Feb. 18, 1896.)

BILL OF EXCEPTIONS—AUTHENTICATION—ASSIGNMENTS OF ERROR.

1. In the absence of a certificate of the clerk of the district court authenticating the bill of exceptions, it will be presumed that every essential averment in the petition, not negatived by the verdict, was proven, and that the instructions refused were properly denied.

2. Instructions not excepted to when given cannot be reviewed in the appellate court.

3. The fifth paragraph of the court's charge to the jury not considered, because the giving was not properly assigned for error, in either the motion for a new trial or petition in error.

(Syllabus by the Court.)

Error to district court, Cuming county; Norris, Judge.

Action by Rudolph Hediger against John Romberg. There was a judgment for plaintiff, and defendant brings error. Affirmed.

M. McLaughlin and J. C. Crawford, for plaintiff in error. T. M. Franse and Uriah Bruner, for defendant in error.

NORVAL, J. Rudolph Hediger sued John Romberg, in the court below, to recover damages alleged to have been sustained by reason of his having been ejected from a certain farm in Cuming county at the instance of the defendant, under a writ of restitution on a judgment in an action of forcible detainer, wherein Romberg was plaintiff and Hediger was defendant, after an appeal undertaking had been filed by said Hediger, and after the justice before whom said cause was tried had recalled said writ of restitution. To the petition in the case before us the defendant answered, admitting certain averments therein, and denying others. Upon the trial, plaintiff recovered judgment, and the defendant brings the cause to this court on error.

It is argued that there is an entire failure of proof to sustain the allegation in the petition that the defendant leased to the plaintiff the premises from which he was evicted. Whether this is true or not we are unable to determine, since there is no certificate of the district court authenticating the bill of exceptions. Romberg v. Fokken, 47 Neb. —, 66 N. W. 282.

Complaint is made in the brief of the refusal of the court to give the following instructions, requested by the plaintiff in error: "(2) You are instructed that the plaintiff has not shown any right of property or right of possession in the premises described in the petition, and you will therefore find for the defendant. * * * (4) You are instructed that the plaintiff has not shown that he had leased the premises for the year commencing March 1, 1890, nor that he had

paid anything for the use of said premises. Hence, he cannot recover the value of the use of said premises. (5) Under the evidence and the law in this case, the plaintiff is not entitled to recover more than nominal damages." These requests to charge can only be considered in connection with the evidence adduced on the trial. The testimony not being properly before us, we are unable to determine whether the trial court erred in refusing to give the above instructions. Willis v. State, 27 Neb. 98, 42 N. W. 920. Error must affirmatively appear. It is never presumed. We must indulge the presumption that there was evidence before the jury which made the defendant's instructions inapplicable.

Objection is made in the brief to the fifth paragraph of the court's charge to the jury, on the ground that it incorrectly states the measure of damages. The assignment relating thereto in the petition in error and in the motion for a new trial is in the following language: "The court erred in giving the first, second, third, fourth, fifth, sixth, and seventh instructions given by the court on its own motion." The first two instructions, given briefly, yet accurately state the issue in the case. They are free from errors. The fourth instruction correctly stated the rule as to the burden of proof, and counsel has not suggested that it is erroneous. No exceptions were taken in the court below to the giving of the sixth and seventh instructions. Hence, they are not reviewable. The assignment of error above quoted, not being well taken as to all the instructions mentioned therein, it, under the familiar rule, must be overruled, without considering the instruction of which complaint is specifically made in the brief.

It is true there is another assignment in the motion for a new trial and petition in error, based upon the fifth instruction; but it presents alone the question of its intelligibility. The language in which the instruction is couched is plain, and its meaning easily comprehended. If the learned counsel for plaintiff in error regarded the instruction as unintelligible, they have been very remiss in not pointing out to us wherein it is so. The conclusions reached lead to an affirmance of the judgment. Affirmed.

LUNDGREN v. CRUM.

(Supreme Court of Nebraska. Feb. 18, 1896.)

COURTS—JURISDICTION—TRESPASS—PLEADING.

1. An action of trespass was begun in the county court. After issues joined there, a stipulation was entered into transferring the case to the district court. The pleadings were then refiled in the district court, and a trial was there had. It turned out that the vital issue concerned the title and boundaries of land. *Held*, that the stipulation was equivalent to one dismissing the case in the county court and recommencing it in the district court, with appearance of parties, and that the district court had jurisdiction, although the county court might not.

2. A petition charging an unlawful entry and damage to plaintiff's land states a cause of action for trespass, although it prays treble damages, and does not charge that the trespass was willful, as required by Code, § 636, as a basis for treble damages.

3. Where the evidence is conflicting, this court will not disturb the verdict as unsupported by the evidence.

(Syllabus by the Court.)

Error to district court, Antelope county; Bartow, Judge.

Trespass by James Crum against J. A. Lundgren. There was a judgment for plaintiff, and defendant brings error. Affirmed.

C. F. Bayha and R. R. Dickson, for plaintiff in error. W. H. Holmes and N. D. Jackson, for defendant in error.

IRVINE, C. Crum was the owner of that part of the N. W. ¼ of section 10, township 25, range 7 W., in Antelope county, lying south of the Elkhorn river, as the course of that river lay in 1883; and Lundgren was the owner of that portion of the quarter section lying north of the river. Lundgren brought an action in the county court, charging that Crum had unlawfully entered upon his land, and cut and removed timber to the value of $90. Crum filed an answer, which was in effect a denial of any entry upon or cutting of timber from the lands of Lundgren. Thereupon a stipulation was entered into that the cause should be transferred to the district court, and there stand for trial as though originally commenced in that court, waiving all questions of jurisdiction, and agreeing that the costs should follow the result of the suit. A transcript was filed in the district court, and thereafter the original pleadings were refiled, which was followed by an amended petition filed by Lundgren. There was a verdict and judgment for the plaintiff for three dollars, and the defendant prosecutes error. The issue between the parties was the boundary between their lands, the timber having been cut on a tract which each claimed; the plaintiff claiming that at the time of his grant this tract lay south of the Elkhorn river, but, by avulsion in 1888, the stream formed a new channel, whereby the land in dispute was cast to its north. This was the issue tried.

It is first insisted by the plaintiff in error that, the action having been begun in the county court, and that court being without jurisdiction in matters wherein the title or boundaries of land may be in dispute (Comp. St. c. 20, § 2), the district court acquired no jurisdiction of the subject-matter. This contention is based on the doctrine that, where the court in which an action originates is without jurisdiction of the subject-matter, an appellate court acquires no jurisdiction on appeal, although it might have had jurisdiction of an original action for the same purpose. But this contention ignores the fact that this case did not go to

the district court, by appeal or otherwise, by course of law. It went there, before trial in the county court, by stipulation of the parties. The stipulation had the same effect as if it had been for the dismissal of the case in the county court, and its recommencement in the district court, with the entry of appearance by the defendant. The parties filed their pleadings in the district court, and proceeded to trial. The district court had jurisdiction of such actions, and as it was prosecuted there as an original action, and not for the purpose of reviewing any judgment or order of the county court, the original want of jurisdiction in the county court was immaterial.

It is next argued that the amended petition does not state a cause of action. This petition alleges that the plaintiff was the owner of the land described, and in possession thereof; that the defendant, in the summer of 1888, and at various times thereafter, wrongfully, and without consent of the plaintiff, entered upon said premises, and cut and removed timber therefrom to the value of $30, whereby the defendant became liable to pay the plaintiff the sum of $90; and the prayer is for judgment for $90. The objection urged to the petition is that it fails to state a cause of action under section 636 of the Code of Civil Procedure, whereby, for willful trespass, etc., the trespasser is rendered liable for treble damages. It is stated that the petition is defective in not charging that the trespass was willful. No exceptions were taken to the instructions submitting the case to the jury under this statute; and the objection that the petition does not state a cause of action does not reach the point. The petition certainly states a cause of action for trespass, independent of the statute, and the prayer for treble damages does not vitiate it.

Finally, it is contended that the verdict is not sustained by the evidence; but the very candid brief of the plaintiff in error discloses that on the controverted issue the evidence was conflicting. As has been repeatedly held, it is not the province of this court, in the exercise of its appellate jurisdiction, to weigh conflicting testimony. Judgment affirmed.

SHARPLESS v. GIFFEN.

(Supreme Court of Nebraska. Feb. 18, 1896.)

ACTION ON NOTE—PLEADING—DISMISSAL.

1. Want of consideration in an action on a promissory note is new matter, which must be specially pleaded, and is not available as a defense under a general denial.

2. The plaintiff may, as a matter of right, under section 430 of the Code of Civil Procedure, dismiss his action without prejudice at any time before its final submission to the court or jury.

(Syllabus by the Court.)

Error to district court, Lancaster county; Tuttle, Judge.

Action by David T. Sharpless against R. E. Giffen on a note. There was a judgment for defendant, and plaintiff brings error. Reversed.

Harwood, Ames & Pettis, for plaintiff in error. Atkinson & Doty, for defendant in error.

POST, C. J. This cause originated before a justice of the peace for Lancaster county, from whence it was taken by appeal to the district court for said county, and where a trial was had to the court, a jury being waived, resulting in judgment for the defendant therein, which it is sought to reverse by means of this proceeding. The cause of action alleged in the petition below is a note for $144.80, bearing date of May 14, 1881, payable on demand to S. E. Sharpless, and in due form assigned to the plaintiff. The answer is a general denial. The defendant was, by the district court, permitted, over the objection of the plaintiff, to introduce evidence tending to prove a want of consideration for the note sued on, and which ruling is now relied upon for a reversal of the judgment. In admitting the evidence complained of the district court erred. The general denial put in issue the execution of the note only. Want of consideration is new matter within the meaning of the Code, which, to be available as a defense, must be specially pleaded. Railroad Co. v. Washburn, 5 Neb. 117; Jones v. Seward Co. 10 Neb. 154, 4 N. W. 946; Mordhorst v. Telephone Co., 28 Neb. 610, 44 N. W. 469; Cady v. Bank, 46 Neb. 756, 65 N. W. 906. It is clear from an inspection of the record that the finding of the district court rests upon the alleged want of consideration. The case is not, therefore, within the exception recognized by this court, viz. that a judgment in a case tried without a jury will not be disturbed on account of the admission of immaterial evidence, when there is in the record sufficient competent evidence to sustain the finding complained of.

2. On the production of the evidence, and before the final submission of the cause, the plaintiff asked leave to dismiss his action without prejudice, which was refused, and which is also assigned as error. Section 430 of the Code confers upon the plaintiff the right to dismiss his action without prejudice at any time before its final submission to the court or jury, and in refusing the request in this instance the court erred. Smith v. Railroad Co., 15 Neb. 583, 19 N. W. 638, and Railroad Co. v. Richardson, 28 Neb. 118, 44 N. W. 103, cited in support of ruling of the district court, are not in point. It was in the cases cited held that there was sufficient evidence to submit to the jury, and that they could not, therefore, be dismissed over the objection of the plaintiff. The judgment is reversed, and the cause remanded for trial de novo. Reversed.

WAKEFIELD v. CONNOR et al.

(Supreme Court of Nebraska. Feb. 18, 1896.)

APPEAL—SUFFICIENCY OF EVIDENCE.

There is presented in this case only a question of fact, which the district court determined upon conflicting evidence. Its judgment is therefore affirmed.

(Syllabus by the Court.)

Appeal from district court, Douglas county; Hopewell, Judge.

Action by John A. Wakefield against Peter Connor and others, impleaded with Louis Schroeder. From the decree rendered, Schroeder appeals. Affirmed.

E. W. Simeral, for appellant. Meikle & Perley, for appellees.

RYAN, C. This action was brought by John A. Wakefield in the district court of Douglas county on March 24, 1890, for the foreclosure of a mechanic's lien on lots 21, 23, 25, 27, and 29, block 4, in Campbell's addition to the city of Omaha. On March 18, 1892, this lien was paid by a party representing Mr. Schroeder, one of the defendants. A decree was entered October 20, 1892, in which there was determined in favor of Bates, Smith & Co. against Louis Schroeder the sole matter of controversy then in issue. In his answer to the petition of John A. Wakefield, and by way of an affirmative cause of action against the firm of Bates, Smith & Co., his codefendant Louis Schroeder alleged that previous to December 13, 1889, he had been the owner of the lots against which the mechanic's lien was claimed by Wakefield; that about December 13, 1889, he conveyed said real property to his codefendant Michael Donnelly for the consideration of $16,500; that at the time said deed was executed Bates, Smith & Co. verbally agreed that, in consideration of said Schroeder waiving his right to the first mortgage, and taking a second mortgage to secure payment of the above $16,500, the said firm of Bates, Smith & Co. would lend said Donnelly the sum of $16,800 for the sole and only purpose of erecting and completing buildings on the aforesaid lots, taking to secure payment of said sum of $16,800 a first mortgage on the property. It was further alleged by Louis Schroeder that Bates, Smith & Co. further covenanted and agreed with him to hold and use all of the said first mortgage loan of $16,800 in making payments for the erection of said buildings, and that Bates, Smith & Co. covenanted to and did become trustees of that fund for said purpose, the said Donnelly assenting and agreeing thereto. In reliance upon said covenants and agreements of said Bates, Smith & Co. the said Schroeder averred that he was induced to and did accept Donnelly's second mortgage for the purchase price of the lots sold to him, and that, notwithstanding the said covenants and agreements, said firm had wrongfully and fraudulently withheld out of the said $16,800 the sum of $9,000, and had diverted said last-named sum to its own use. Louis Schroeder further alleged that on May 1, 1890, the contractor who had undertaken for Donnelly the erection of eight buildings on the above-described lots ceased work because he could not get his pay from Donnelly, who was utterly insolvent, or from the firm of Bates, Smith & Co.; and that said Schroeder, to preserve his security, and save said buildings from destruction, was compelled to and did, at his own expense, complete said buildings; that in completing said buildings he had paid $7,632.75, exclusive of the claim of Wakefield (of $1,792.57); and that, if all the money in the hands of Bates, Smith & Co. had been rightly and justly used in the erection of said buildings, defendant Schroeder would not have been compelled to pay said sum, or any other amount, for said buildings could have been erected and completed for said sum of $16,800, the amount of Bates, Smith & Co.'s mortgage. It was further averred that Bates, Smith & Co. had transferred the aforesaid first mortgage to innocent purchasers. The prayer of Louis Schroeder was as follows: "Wherefore defendant prays that an accounting may be had of the amount of money paid by said Bates, Smith & Co. in the erection of said buildings, and that said defendants be decreed to pay to said Schroeder so much of said $16,800 as was in fact not paid out in the improvement of said property, as said Bates, Smith & Co. agreed to do, and for such other and further relief as in equity and justice he may be entitled to." In the reply of Bates, Smith & Co. there was a denial that such firm had agreed with Schroeder that it would see that the proceeds of the $16,800 loan would be applied to the payment of any particular class of indebtedness of Donnelly, or upon the construction of the buildings to be erected; and there was a further denial that any sum had been improperly paid or withheld by said firm. The judgment of the district court was, upon conflicting evidence, favorable to Bates, Smith & Co., and, as there is presented no other question, its judgment is affirmed. Affirmed.

ESTABROOK v. STEVENSON et al.

(Supreme Court of Nebraska. Feb. 18, 1896.)

LEASE—PROVISION FOR TERMINATION—CONSTRUCTION.

In a lease for the term of 10 years it was provided that the lessor might terminate the lease at the end of 5 years by giving 60 days' notice, and paying the lessee the value of such improvements as meantime such lessee should have placed upon the premises. Before the lessor had the right to give the required notice, the lessee assigned his interest in the lease to another party, who in turn made still another assignment of such interest. *Held* that, upon giving notice as required, the lessor was not bound to pay to the lessee the value of the aforesaid improvements as an indispensable condition precedent to his right to terminate the lease, but that, having tendered

in a court of equity payment for the improvements to whomsoever should be found entitled thereto in such amount as upon an accounting should be found due, the court had jurisdiction to declare the lease to have been terminated at the end of five years of its existence, and grant full relief between the parties litigant.

(Syllabus by the Court.)

Appeal from district court, Douglas county; Doane, Judge.

Action by Experience Estabrook, for whom on his death was substituted Caroline A. Estabrook, executrix, against Samuel J. Stevenson and another. From a judgment for plaintiff, defendants appeal. Affirmed.

A. C. Wakeley, for appellants. Estabrook & Davis, for appellee.

RYAN, C. On May 1, 1884, Experience Estabrook entered into a written contract with Samuel G. Stevenson, by the terms of which Mr. Estabrook leased to Mr. Stevenson the south 44 feet of lot 1 in block 43 in the city of Omaha for the term of 10 years. Immediately following the description of the term 10 years, there was this language: "Provided, that said Estabrook shall have the privilege of terminating said lease at the end of five (5) years by giving sixty (60) days' notice in writing to said Stevenson of his intention so to do, and by paying said Stevenson the value of his improvements, to be determined by arbitrators, one to be chosen by each of the parties hereto, and they to choose a third in the event of disagreement." On January 30, 1889, Mr. Estabrook caused to be served upon Samuel G. Stevenson the following notice; "To Samuel G. Stevenson, Omaha, Nebr.—Sir: In pursuance of the terms of your lease made the first day of May, 1884, I hereby notify you of my election to declare said lease at an end on the first day of May, A. D. 1889, and that I will pay you at that time the value of your improvements; such value to be determined by arbitration, as provided in said lease. I hereby nominate as the arbitrator to act in my behalf, Mr. James H. Baldwin, of Omaha, who will be ready to meet and arrange with such arbitrator as you may select at such time and place as you may indicate, and who will be present on the ground on said first day of May, 1889. You are further notified that the ground covered by said lease, and to which this notice applies, is south forty-four (44) feet of lot one (1), block forty-three (43), in said city of Omaha, Douglas county, Nebraska. Dated at Omaha, Neb., January 30th, 1889. E. Estabrook." Before May 1, 1889, Samuel G. Stevenson selected an arbitrator, —one John H. Harte,—who, with James H. Baldwin, above named by Mr. Estabrook, on the date therein indicated drew up and signed the following document: "May first, 1889. Messrs. E. Estabrook and S. G. Stevenson, City: We, James H. Baldwin and John H. Harte, have examined buildings Nos. 414 and 416 North 16th street, city of Omaha, and appraise them at thirty-one hundred and 00/100 dollars ($3,100.00). James H. Baldwin. John H. Harte." Mr. Baldwin, on the day following, met Mr. Estabrook, who had meantime heard of the amount agreed upon, and by the manifested dissatisfaction with the amount fixed was prevented from giving him a copy of the above award. On the 26th day of September, 1885, Samuel G., and his wife, Mary E., Stevenson signed, acknowledged, and delivered to Louis Bradford a written assignment of the above-mentioned lease. This assignment was filed for record in the office of the county clerk of Douglas county October 1, 1885, and was recorded in Book 61 of Deeds. On July 8, 1886, Louis Bradford, by an indorsement upon the written assignment to himself, transferred said assignment to Mary E. Stevenson, and at the same time executed to her an unacknowledged quitclaim conveyance of his interest in the parcel of land described in the lease. Neither of these was recorded, and it was shown by the testimony of Samuel G. Stevenson that he never informed Mr. Estabrook that such transfers had been made. At the time the award was made in favor of Samuel G. Stevenson he had, therefore, no beneficial interest whatever in the lease to which originally he had been a party. If Mr. Estabrook had paid to Mr. Stevenson the amount of the award made in his favor of $3,100, he could have protected himself against being compelled to pay Mrs. Stevenson only by proving that in some way she was represented by her husband in receiving the payment which he did receive, or by showing that he was entitled to credit against her by reason of the want of notice of her interest as assignee of the lease. This, Mr. Stevenson, after he had parted with all his rights in the lease, was certainly not in a position to insist upon. On the 9th day of May, 1889, Experience Estabrook filed in the office of the clerk of the district court of Douglas county his petition, wherein Samuel G. Stevenson and Mary Stevenson were named as defendants. In this petition he copied the aforesaid lease, and the notice to terminate the same, and, having set out the award, and alleged its invalidity for want of precedent notice, he alleged that Samuel G. Stevenson was not the owner of this lease, and that he had been unable to discover who was its owner. In this connection the plaintiff alleged that he had always been willing to pay for the improvements the actual value thereof to whomsoever was entitled to receive such payment, and offered to give such bond as the court should require for the payment of any amount found due upon an investigation had between himself and such party as was the holder of the lease in question. It is insisted by appellants that by the terms of the lease not only was there 60 days' notice required, but there should have been payment of the award of $3,100 to Samuel G. Stevenson, to terminate the lease according to its terms.

It is true that the condition precedent seems to have been nominated in the lease, but the manifest injustice of requiring payment to be made to one who, by his own assignment, had constituted himself a stranger to the lease, requires no argument to demonstrate. Samuel G. Stevenson has no right to complain of nonpayment to himself under these circumstances, and it requires no Portia's specially borrowed learning to point out that the technical construction which requires payment to Samuel G. Stevenson forbids that this condition for a forfeiture should be extended to any one else. The lease itself, while it provided that payment for the improvements should be made to S. G. Stevenson, recited that its covenants and agreements should be succeeded to and be binding upon the respective heirs, executors, administrators, and assigns of the parties thereto. There was, therefore, open to Mr. Estabrook but one safe course, and that was to implead as defendants in a court of equity such parties as he knew claimed an interest in the lease; and, having tendered the performance of his part of the contract in favor of whomsoever was thereto entitled, pray that the lease should be adjudged to have been terminated by his performance of all that it was possible to him to perform. The jurisdiction of a court of equity having been invoked, such a court properly proceeded to the enforcement of complete justice between all parties concerned with respect to the subject-matter involved upon issues duly joined and presented for determination. As was to be expected in making an accounting, on the one hand as to the value of improvements, and on the other as to the liabilities for rents of the premises involved in this litigation, the witnesses differed greatly, but they came as near agreeing in their estimates as witnesses ordinarily do under like circumstances. The court very properly treated the lease as having been terminated on May 1, 1889, and upon conflicting evidence made an accounting of the liabilities of each of the litigants, which seems to us to have been fully warranted by the evidence, which we need not review. The judgment of the district court is affirmed. Affirmed.

IRVINE, C., not sitting.

BURLINGIM v. BADER.

(Supreme Court of Nebraska. Feb. 18, 1896.)

APPEAL—RECORD—AUTHENTICATION.

Where there is no error sufficiently assigned in the petition in error to challenge the attention of the supreme court, except such as are claimed to have arisen upon the alleged giving or refusal to give instructions, an entire failure to authenticate these alleged instructions precludes the consideration of assignments of error with respect thereto.

(Syllabus by the Court.)

On rehearing. Affirmed.

For former opinion, see 63 N. W. 919, 45 Neb. 673.

RYAN, C. There is contained a clear statement of the issues and facts herein involved in a former opinion in this case, reported in 45 Neb., on page 673 et seq., and 63 N. W. 919. After the above opinion had been filed, there was granted a rehearing, upon which errors alleged have again been argued and submitted for consideration.

The assignments in the petition in error that "the court erred in admitting evidence over the objection of the plaintiff in error," and that "there was error in excluding evidence offered by the plaintiff in error, to which ruling exception was duly taken," are too indefinite to receive attention. This is also true of the assignment that the court erred in overruling the motion for a new trial. There was sufficient evidence to sustain the verdict of the jury, and, as no good purpose could be subserved by rehearsing it, the general conclusion stated must answer every purpose.

No question aside from the above is presented by this petition in error, except such as are urged with reference to the alleged giving, or refusal to give, instructions. The authentication which follows the record is as follows: "I, George A. Merriam, clerk of the district court in and for said county, do hereby certify that the above and foregoing contains and is a true and perfect copy of all the pleadings on file and used in said entitled cause, and also of all the orders of the court entered of record in said case, as the same appears of record and on file in the clerk's office of said court, and that the attached bill of exceptions is the original bill of exceptions as settled in the case. In witness whereof," etc. In this certificate there is no reference to instructions either given or refused, and the assignments pertaining to instructions of either class must therefore be ignored. The judgment of the district court is affirmed. Affirmed.

ISSITT v. DEWEY et al.

(Supreme Court of Nebraska. Feb. 18, 1896.)

DEED—CONSTRUCTIVE DELIVERY.

1. Where a mother executes a deed to her son, and voluntarily places the same upon record for the purpose and with the intent of passing title to the grantee, actual manual delivery and formal acceptance are not essential to the validity of the conveyance.

2. Evidence *held* to support the findings and decree.

(Syllabus by the Court.)

Appeal from district court, Gage county; Bush, Judge.

Action by Margaret A. Issitt against William L. Dewey and another. From the decree rendered, plaintiff appeals. Affirmed.

Hugh J. Dobbs, for appellant. Griggs, Rinaker & Bibb, for appellees.

NORVAL, J. This lawsuit is over a house and lot situate in the city of Beatrice, which plaintiff conveyed to her son W. L. Dewey, one of the defendants, and which conveyance plaintiff seeks by this proceeding to have canceled, and the title to the property quieted and confirmed in herself. The trial court, by its decree, awarded the premises in dispute to the son, subject to a life estate, which was given the plaintiff. The undisputed evidence shows that on the 26th day of September, 1887, the plaintiff, by deed of general warranty, conveyed the property in litigation to defendant W. L. Dewey; that one of the purposes of the plaintiff in placing the title in the name of her son was to prevent her husband, who was living apart from her, from having any interest in the property in the event he should survive her.

It is insisted that no consideration is shown for the deed. Mr. Dewey swears that he paid plaintiff $10 in cash, and agreed to pay future taxes and insurance on the property, which he has so far done; and, further, that he has contributed money to plaintiff's maintenance and support. While plaintiff explicitly denies the cash payment of $10 and the agreement to pay future taxes and insurance, yet it cannot be said that there is an entire lack of proof to establish a good and valuable consideration for the conveyance. Whether it was adequate or commensurate to the value of the property is immaterial, as there is no charge or proof of fraud or undue influence in the case.

It is further argued that the deed was never formally delivered by the plaintiff to the grantee. Upon this branch of the case there is a conflict in the proof adduced on the trial. It is, however, established, without dispute, that plaintiff voluntarily filed the deed for record, for the purpose and with the intent of passing title to the grantee. Actual manual delivery and formal acceptance were therefore not necessary to make the conveyance effectual. Glaze v. Insurance Co., 87 Mich. 349, 49 N. W. 595; Cecil v. Beaver, 28 Iowa, 246; Palmer v. Palmer, 62 Iowa, 204, 17 N. W. 463; Compton v. White, 86 Mich. 33, 48 N. W. 635; Bowman v. Griffith, 35 Neb. 361, 53 N. W. 140.

From a careful consideration of the evidence in the cause, we are led to the conclusion that it is sufficient to sustain the decree, and that the allegata et probata agree. Affirmed.

MONELL v. IREY et al.

(Supreme Court of Nebraska. Feb. 18, 1896.)

TAX SALE—PRESUMPTION OF VALIDITY.

Where the plaintiff's right to have enjoined the issuance of a treasurer's deed depends upon his affirmatively showing that the sale pursuant to which such deed is to be issued was made in violation of an injunction prohibiting it, there must, to entitle to the relief prayed, be evidence of the very essential fact that, at the time of the tax sale, such decree was in existence.

(Syllabus by the Court.)

Appeal from district court, Douglas county; Hopewell, Judge.

Action by Lucinda Monell against H. B. Irey, county treasurer, and others, for injunction. From a judgment for plaintiff, defendants appeal. Reversed.

Balliet & Points, for appellants. Lake, Hamilton & Maxwell, for appellee.

RYAN, C. Lucinda Monell, the appellee, brought this action in the district court of Douglas county, July 13, 1892, alleging in her petition that she had been the owner of lot 6, block 106, of the city of Omaha, for 10 years before the commencement of this action, and, by virtue of her continued ownership, she prayed the relief which afterwards was granted. As her grounds for this relief, she alleged that on July 16, 1890, Adam Snyder, the then treasurer of Douglas county, had offered the said lot for sale, and had made a pretended sale thereof to the defendants Grant & Grant, for an alleged unpaid and special assessment levied and assessed against the said premises by the said city of Omaha in the year 1879, for curbing and guttering Douglas street, in the said city, and had delivered to said Grants a certificate of sale therefor; and that thereupon the said Grants, on the same day, had paid to the said county treasurer purported county taxes assessed against said premises, unpaid and delinquent for the years 1866 and 1867, and on the 22d of July, 1890, had paid to said county treasurer a purported city tax assessed against said premises unpaid and delinquent for the year 1864. It was further alleged in the petition that at the time the aforesaid paving and guttering tax was levied and assessed, in 1879, Gilbert C. Monell was the owner of the aforesaid lot; and that about May 20, 1881, said Gilbert C. Monell brought his action in the district court of Douglas county against W. F. Heins, treasurer of said county, to procure the said paving and guttering tax to be decreed void, and to have the collection and enforcement of the same perpetually enjoined; and that in February, 1886, this relief was granted, from which it resulted that a tax sale to Grant & Grant was utterly void, and vested said Grants with no title, claim, lien, or interest in said lot 6, block 106, of the city of Omaha. To defeat the right of Grant & Grant to be subrogated to the rights of the county with respect to taxes by them paid after their purchase of said lot, it was alleged that, when these taxes were assessed, the lot was the property of the Second Presbyterian Church of the city of Omaha, and was then used for church purposes. The prayer of the petition in the case now under consideration was that the county treasurer of Douglas county be

enjoined from issuing a tax deed to Grant & Grant upon their certificate of purchase, and that the cloud thereby and by the subsequently paid taxes be removed, and for general equitable relief. The defendants admitted in their answer that the county treasurer had been correctly named in the petition; that the lot in question had been sold to Grant & Grant; that said firm of Grant & Grant had paid taxes, as in the petition had been alleged; and that notice of the application for the treasurer's deed on said purchase had been applied for, as plaintiff in her petition had alleged. There was, in effect, a denial of the allegations of the petition not above admitted. In the decree from which this appeal has been prosecuted, there was the following language: "It being unnecessary, in the court's opinion, to a proper decision of the case, no finding is made on the question as to said premises being church property, and exempt from taxation, during the years 1864, 1866, and 1867, and the court does not determine the same." In respect to appellants' rights as to all the taxes outside the paving and guttering tax, we shall follow the line pursued by the district court, and shall consider the case as though the only rights involved were such as depend directly upon the paving and guttering tax.

In the course of the trial in the district court, there was by the appellants offered in evidence the county treasurer's certificate showing the sale of the aforesaid lot on July 16, 1890, to Grant & Grant, for $422.51, the amount of a paving and guttering tax. By the appellee there was offered in evidence the following record: "Gilbert C. Monell vs. William F. Heins et al. Decree. Now come the parties herein, by their attorneys, and thereupon this cause came on for hearing on the pleadings and evidence, and was submitted to the court, on consideration whereof, and all parties consenting thereto, the court do find on the issue joined for the plaintiff, and that the plaintiff is entitled to the relief prayed for. It is therefore considered and decreed that the defendants be, and they hereby are, perpetually and forever enjoined from in any manner collecting the curb and gutter tax levied on lot 6, block 106, in the city of Omaha, Douglas county, Nebraska. It is further considered that the plaintiff recover from the defendant his costs herein expended, taxed at $———." There is neither in this decree, nor in any evidence offered in connection with it, any indication of its date. As this action, upon the theory of the appellee, was only maintainable upon the theory that, the enforcement of the paving and guttering tax having been enjoined, the said tax no more justified a sale of the lot than though such paving and guttering tax had never existed, it devolved upon the party relying upon the decree to show that the sale called in question had been made notwithstanding the fact that this decree was then in existence. No presumption of the performance by the county treasurer of his duty aid us in this matter, for the presumption t he would not have made a sale in violation the decree is as strong as any other that be invoked. It may be, as alleged in the tition, that this decree was entered on M 1886; but this, with other averments, put in issue by the answer, and, as has ready been stated, there was no showing proofs what in fact was the date of this cree. There was in evidence, as we h seen, a certificate showing the sale for satisfaction of this paving and guttering t and this was not met by proof that at time of this sale there was in existence a cree that forbade it, and against its valid no other defense had been pleaded. judgment of the district court is theref reversed. Reversed.

IRVINE, C., not sitting.

PHENIX IRON-WORKS CO. v. McEVO

(Supreme Court of Nebraska. Feb. 18, 189

REPLEVIN—PLEADING AND PROOF—SALE—RES SION—TENDER OF PRICE—BONA FIDE PURCHASER.

1. A plaintiff in replevin may, under a tion alleging general ownership and right of session in himself and a wrongful detention defendant, prove fraud inducing a previous by plaintiff to defendant, and a rescission bec thereof. It is not necessary to specially pl the fraud.

2. One who takes a pledge or mortgage of sonal property to secure a pre-existing debt is entitled to protection as a bona fide purch against an action to rescind a sale of the prop previously made to the pledgor or mortga Tootle v. Bank, 52 N. W. 396, 34 Neb. 863, lowed.

3. In general, when a vendor seeks to res a sale for fraud, he must return or offer to turn any portion of the purchase money whic may have received. But he need not do so w the property has been damaged by the fr ulent vendee to an amount equal to the purch money so received.

(Syllabus by the Court.)

Error to district court, Holt county; kaid, Judge.

Replevin by the Phenix Iron-Works C pany against H. C. McEvony, sheriff. Th was a judgment for defendant, and plain brings error. Reversed.

R. R. Dickson, for plaintiff in error. H. Uttley, for defendant in error.

IRVINE, C. This was an action of plevin by the plaintiff in error against defendant in error to recover an engine, t er, and other machinery. The plaintiff ba its claim on former ownership of the pro ty, which had been parted with in pursua of a contract of sale which the plaintiff cla ed it had been induced to enter into by fra ulent misrepresentations. The defendant, sheriff of Holt county, denied plaintiff's o ership and right of possession, and also leged a sale by the plaintiff of the prop

to one Donald McLean, followed by a pledge of the property to secure a debt of $700 to one Mathews. The defendant also justified under a writ of attachment issued at the suit of the State Bank of O'Neill against Donald McLean, and levied upon the property subject to the lien of Mathews. The case was tried to the court, and there was a finding and judgment for the defendant.

A question which must be disposed of in limine is that presented by the argument of the defendant that the judgment was correct, regardless of any assignments of error, for the reason that the petition did not state a cause of action. The petition was in the ordinary form in replevin cases where a general ownership is claimed, charging merely, in general terms, ownership, right to the immediate possession of the property described, and the wrongful detention thereof by the defendant. The contention of the defendant is that, inasmuch as the plaintiff based its claim on fraud, this petition was insufficient, because not pleading the facts constituting the fraud. The defendant, we think, mistakes the rule. When it becomes necessary to plead fraud, a general allegation of fraud is insufficient. The facts must be specifically pleaded. But it is not in all cases that it is necessary to plead fraud, although that question may turn out to be in issue. In ejectment a defendant under a general denial may prove fraud in the procurement of a deed under which plaintiff claims, for the purpose of disproving plaintiff's right of possession. Franklin v. Kelley, 2 Neb. 79; Staley v. Housel, 35 Neb. 160, 52 N. W. 888. A certain analogy exists between ejectment and replevin under the Code. One is an action to recover the possession of land; the other to recover the possession of personal property; and the pleadings in both actions depart somewhat from the general rules of code pleading. See, as to replevin, 2 Kinkead, Code Pl. § 1079. As said in School Dist. v. Shoemaker, 5 Neb. 36, the Code takes actions of replevin out of the general rule in regard to pleadings. In Haggard v. Wallen, 6 Neb. 271, it is said: "A petition in replevin should state that the plaintiff is the owner of the goods sought to be recovered (or has a special property therein, stating its nature), that he is entitled to the immediate possession of such goods, and that the defendant wrongfully detains the same." Where a special ownership only is claimed, greater particularity in pleading is required. Curtis v. Cutler, 7 Neb. 315; Musser v. King, 40 Neb. 892, 59 N. W. 744; Randall v. Persons, 42 Neb. 607, 60 N. W. 898; Sharp v. Johnson, 44 Neb. 165, 62 N. W. 466; Camp v. Pollock, 45 Neb. 771, 64 N. W. 231. But from the time of the early cases cited it has always been considered that a general allegation of ownership, right of possession, and unlawful detention is sufficient, however the plaintiff might deraign his title on the trial; and the reports are full of cases where such petitions have been treated as sufficient, although the proof of the case involved an issue of fraud. That the general rule as to pleading fraud has no application to actions of replevin under the Code was held in Sopris v. Truax, 1 Colo. 89. In Tootle v. Bank, 34 Neb. 863, 52 N. W. 396, the petition, after the general allegations, pleaded the fraud specially. In discussing this the court said that, had the pleader stopped at the general allegations, "it is conceded that the petition would have been sufficient." This was reaffirmed on rehearing. 42 Neb. 237, 60 N. W. 569. The objection so raised by the defendant could hardly, in any event, go to the general sufficiency of the petition, but would rather go to the admissibility of evidence of fraud thereunder; but, however raised, we hold the objection not well taken.

The defendant also contends that the petition in error contains no sufficient assignments to reach the other questions argued. This may be true in a general way, but there is an assignment that the finding was not sustained by sufficient evidence. This we may consider. Most of the facts in the case were settled by a stipulation thereof embodied in the bill of exceptions. From this it appears, among other things, that on September 18, 1890, the plaintiff sold and delivered to Donald McLean the property in controversy; $700 to be paid during the erection of the machinery at O'Neill, and the remainder 60 days after erection; the total price being $2,888. McLean was the president of the Pacific Short Line Railroad, and represented that he desired to purchase the property for said railroad, for the purpose of heating and lighting a roundhouse at O'Neill; that he had authority to purchase such property, and bind the railroad for the payment; that the railroad was solvent, and on a prosperous and solid financial basis. Relying on these representations, the plaintiff sold the property. In fact McLean had no authority to purchase for the railroad. He was not acting for the railroad, but for himself. The property was not desired for heating and lighting the roundhouse, but for carrying on an electric system owned by McLean for lighting the city of O'Neill; and the railroad was insolvent. The plaintiff had no knowledge of the falsity of the representations until shortly before this action was instituted, and after all intervening rights, if any, accrued. The plaintiff put in the machinery according to its contract. About January 1, 1891, the plaintiff received the payment of $700 from McLean; McLean borrowing the money from the State Bank of O'Neill, the plaintiff knowing that fact, but not knowing that the loan was a personal one of McLean's, and the payment not that of the railroad. McLean then entered into possession of the property with the consent of the plaintiff. In December, 1890, McLean made to Mathews his note for $2,000.

This note was purchased by the bank, which, on December 22, 1891, commenced a suit against McLean thereon, and caused the property in controversy to be attached. It was further stipulated that at the time of bringing the action the property had been damaged while in the possession of McLean to the amount of $900. In addition to the foregoing facts, it appears from parol testimony, and in part by the stipulation, that after the bank had lent McLean the $700 to make the first payment on the machinery, one of its officers insisted upon security therefor, and some kind of a writing, not disclosed by the evidence, was prepared, whereby the property was pledged to Mathews, the president of the bank, to secure the loan; and there was also some kind of a constructive delivery of the property by McLean to Mathews. There is much controversy in the briefs as to this transaction, but we do not deem its precise nature material, because the same result must be reached, even though there was a complete pledge or mortgage. There is no room for doubt that under these facts a case of fraud was established which would have entitled the plaintiff to recover the property from McLean. McLean procured it on the representation that he was acting on behalf of a solvent corporation, purchasing the property for a particular purpose; whereas he was purchasing for himself, for another purpose. The corporation was not bound, and was insolvent, even if it had been bound. It may be added, also, that there is sufficient to show McLean's insolvency. It has been several times held, directly or by plain inference, that one who takes personal property as security for a pre-existing debt is not a bona fide purchaser, so as to be protected from the rescission of a contract whereby such property was sold to the pledgor or mortgagor. Symns v. Benner, 31 Neb. 593, 48 N. W. 472; Tootle v. Bank, 34 Neb. 863, 52 N. W. 396; Id., 42 Neb. 237, 60 N. W. 569; Work v. Jacobs, 35 Neb. 772, 53 N. W. 993. The case of Tootle v. Bank is directly in point. The bank, when it lent the money, did not take the property as security. It was only after the loan had been perfected that it sought security. The interval of time was only a day, but that makes no difference. The bank did not part with the money on the faith of this property as security, and the pledge, mortgage, or whatever it was to Mathews was one to secure a pre-existing debt. The plaintiff has made no offer to return the $700 received by it, but it is stipulated that the property was damaged to the amount of $900 while in McLean's possession. A question is thus presented as to whether, under the circumstances, it was necessary to offer to return the money. We think not. The rule that one, in order to rescind a contract procured by fraud, must return or offer to return what he has received thereunder, is not one of universal application. In Bank v. Yocum, 11 Neb. 328, 9 N. W. 84, the rule was stated that in such case a party seeking to rescind must put the subject-matter of the contract as near in statu quo as may be under the circumstances; or upon the trial must give a reason why the same could not be reasonably done. It is well established that no offer to return is necessary when the party guilty of fraud has rendered a return impossible; and it would seem to be equally true when the party guilty of fraud has rendered a return unjust to the other party. In Symns v. Benner, supra, $100 had been paid on the purchase money, but goods to the value of $47 had been sold. It was held that an offer to repay $53 after the value of the sold goods had been ascertained was sufficient; and in Tootle v. Bank, supra, the same doctrine was reaffirmed. If, then, McLean had sold a portion of this machinery to the value of $900, the remainder might be replevied without offering to return the $700 received. We can see no difference in principle between the sale of a portion of the property and its deterioration in value by damage or use while in the vendee's possession. Under our view of the law, as above stated, the evidence did not sustain the finding of the court. Reversed and remanded.

NORWEGIAN PLOW CO. v. BOLLMAN et al.

(Supreme Court of Nebraska. Feb. 18, 1896.)

JUDGMENT — EQUITABLE RELIEF — TRANSCRIPT ON APPEAL.

1. A party cannot predicate error upon a ruling which he procured to be made.
2. The transcript of appeal is the exclusive evidence of the proceedings in the trial court.
3. A court of equity will not enjoin a judgment at law, upon the ground of fraud, where it does not appear that such judgment is inequitable, or where it is disclosed that plaintiff has not exercised due diligence in the assertion of his rights.

(Syllabus by the Court.)

Appeal from district court, Madison county; Sullivan, Judge.

Action by the Norwegian Plow Company against Reuben Bollman and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

H. C. Brome and R. A. Jones, for appellant. D. A. Holmes and Robertson & Wigton, for appellees.

NORVAL, J. This was a suit to enjoin the collection of a judgment of the district court of Madison county, rendered in an action at law wherein Reuben Bollman was plaintiff, and H. A. Pasewalk and others were defendants, which judgment was affirmed by this court at the January, 1890, term, the

opinion being reported in 29 Neb. 519, 45 N. W. 780. The injunction case was dismissed, and plaintiff appeals.

The order of dismissal is as follows: "The Norwegian Plow Co. v. Reuben Bollman et al. Now, on this 17th day of December, 1892, this cause came on to be heard on the motion of the plaintiff for judgment of dismissal upon the issues presented by the pleadings herein filed, and the court, being fully advised in the premises, sustains said motion, and said cause is dismissed at plaintiff's costs, to all of which rulings and judgment of the court plaintiff at the time excepted," etc. It will be observed from the foregoing that plaintiff has appealed from an order sustaining his own motion to dismiss the cause. He having expressly invited this decision to be made, if erroneous, it is his own error, and not the error of the court, and he is thereby precluded from assailing the ruling. Insurance Co. v. Maxwell, 38 Neb. 358, 56 N. W. 1028; Weander v. Johnson, 42 Neb. 117, 60 N. W. 353. It may be said that the journal entry is incorrect wherein it is stated that the motion to dismiss was made by the plaintiff; that, in fact, it was defendant's motion. There is nothing in the record to show that such a mistake was made. The motion is not included in the transcript, and the journal entry contains the written approval of the attorneys for the respective parties indorsed thereon, as well as authenticated by the certificate of the clerk of the trial court. It is well settled that the transcript of appeal is the sole and exclusive evidence of the proceedings in the court below. Weander v. Johnson, 42 Neb. 117, 60 N. W. 353; Dryfus v. Moline, 43 Neb. 233, 61 N. W. 599; Davis v. Snyder, 45 Neb. 415, 63 N. W. 789.

The same result is reached upon a ground less technical. Conceding that plaintiff did not ask the order of dismissal to be made, as counsel in their briefs assume to be the case, yet there must be an affirmance upon the merits, as we shall proceed to show. Before doing this, a statement of the issues presented by the pleadings will be necessary to a proper understanding of the case, since the decision was predicated upon them alone.

The petition alleges, in substance, that the defendant Bollman was sheriff of Knox county, and Rothwell was his deputy; the other defendants, Tyrell and Losey, are, respectively, the clerk of the district court and sheriff of Madison county; that the plaintiff recovered certain judgments before a justice of the peace of Knox county against one Fred Fisher, and caused executions to be issued thereon, which were delivered to said Rothwell for collection; that, on the same day, plaintiff caused to be executed and delivered to Rothwell an undertaking signed by H. A. Pasewalk, J. S. McClary, and A. P. Pilger, as sureties, for the purpose of indemnifying the sheriff on account of the levy of said executions upon certain goods and chattels, then in the possession of Fisher, but claimed by Deere, Wells & Co. and others. (A copy of this bond, as set forth in the petition, is set out in the opinion in 29 Neb. 517, 45 N. W. 780, and need not be here given.) The petition further avers that the deputy sheriff levied these executions upon, and sold, certain property then in the possession of Fisher (described in Exhibit A, attached to the petition), and applied the proceeds arising from such sale to the payment of plaintiff's judgments; that, at the same time, Bollman and Rothwell fraudulently and unlawfully, and for the purpose of cheating and defrauding plaintiff, and without his knowledge or consent, or that of the sureties upon the indemnifying bond, took into their possession, and converted to their own use, certain other property claimed by Deere, Wells & Co. (described in Schedule B, attached to the petition); and that no accounting has ever been made to the plaintiff or said sureties for the property so taken and converted by said sheriff and his deputy. It is further alleged that subsequently Deere, Wells & Co. brought an action in the circuit court of the United States for the district of Nebraska, against said Bollman and the sureties on his official bond, for the conversion of all the goods so taken by the officer, and recovered therein a judgment against the defendants for the sum of $3,416.65, damages and costs of suit, for the goods taken at the request, and appropriated to the use and benefit, of the plaintiff herein, as well as for the goods described in said Exhibit B; that subsequently Bollman instituted an action in the district court of Madison county against said McClary, Pilger, and Pasewalk upon said indemnifying bond, for the purpose of compelling the plaintiff herein to pay for the property described in Exhibit B, and for and on account of the said judgment recovered by said Deere, Wells & Co.; that Bollman, in his said action on said bond, for the purpose of cheating and defrauding the Norwegian Plow Company, unlawfully and fraudulently averred that the said judgment of Deere, Wells & Co. was recovered on account and for goods taken by Bollman upon said executions, although in fact said judgment was not obtained for such purpose, as Bollman well knew at the time of bringing his suit, but on account of and for the goods described in Exhibit B, as well as for the goods mentioned and set forth in Exhibit A. The petition further charges that Bollman prosecuted his said action to final judgment, recovering therein, against Pilger, McClary, and Pasewalk, the sum of $3,797.87, for the value of the goods, including those converted by him; that the undertaking was for the use and benefit of plaintiff, and that the latter is liable to the sureties for any and all moneys they may be compelled to pay Bollman on account of the giving of said undertaking; that the judgment obtained by Bollman is in full force and unpaid; that plaintiff is now, and at all times has been, ready and willing

to account to Bollman for all property taken upon said executions, and to indemnify and save him harmless for all costs and damages resulting from such seizure, and is ready and willing and offers to pay into court for his benefit all moneys justly due Bollman on account thereof, together with all costs and expenditures incurred by him, which plaintiff ought equitably and fairly to pay on such account; that Bollman and Rothwell are insolvent; that the former has caused execution to be issued upon his judgment, and placed the same in the hands of said defendant Losey, as sheriff, who threatens to levy the same upon the property of Pilger, McClary, and Pasewalk. The petition contains other averments, which will be adverted to further on. The defendants, for answer, admit that Tyrell is clerk of the district court and Losey is sheriff of Madison county; that Bollman was sheriff of Knox county, and Rothwell was his deputy; admit the recovery of the judgments in the justice's court by Norwegian Plow Company, the levy of the execution by the deputy sheriff upon the goods in the possession of Fisher, the recovery of the judgment by Deere, Wells & Co. in the circuit court against Bollman, the institution of the suit by the latter, and the recovery of the judgment against the sureties on the bond; and deny all other averments of the petition. The defendants also allege that, at the time the suit was commenced by Deere, Wells & Co., the plaintiff herein was notified thereof, and employed counsel to defend the same, and had exclusive control of the defense therein; and that, upon the institution of the said suit against the sureties, the Norwegian Plow Company was notified of the fact, employed counsel to defend it, and had full control of the defense, and paid all the expenses in connection with the defense of said action. For reply, plaintiff admits that it was advised of the fact of the commencement of the actions referred to in the petition; denies all other allegations of the answer; and alleges that at the time of the commencement of the action in the circuit court, and at the time of the rendition of the judgment, plaintiff had no notice or knowledge that Bollman or his deputy had converted to their own use a large portion of the property for the value of which said suit was brought, and had no knowledge of such conversion until after the recovery of the judgment sought to be enjoined herein.

Judgment having gone against the plaintiff in the case at bar upon the pleading, in reviewing the decision of the trial court we must regard as true every fact well pleaded in the petition, and that every allegation of the answer put in issue by the reply should be taken as not true. In other words, if the facts set up in the petition, taken in connection with the admission of the plaintiff in the reply that it had notice at the time of the pendency of the action of Deere, Wells & Co. against Bollman, and that of Bollman against the sureties on the indemnifying bond, were insufficient to entitle the plaintiff to enjoin the enforcement of the judgment in question, the order of dismissal was properly entered.

It is too well settled by the courts of this country to require the citation of authorities in support thereof that, in a proper case, equity will grant relief against a judgment fraudulently obtained, when a meritorious cause of action or defense is shown. An exception to this general rule is that a judgment at law obtained through the fraudulent conduct of the judgment creditor will not be enjoined where the defense could have been made at law. Stated differently, a court of equity will not interfere because of fraud alone, but the person aggrieved must make it appear that a good reason existed why the defense was not interposed in the original suit. As stated by Mr. High in his valuable work on Injunctions: "Where defendant has allowed a suit to proceed to judgment without any attempt on his part to obtain proof, an injunction will not be allowed on the ground of fraud in the original transactions on which the suit was founded. So, where the fraud relied upon might have been used as a defense to the action at law, but it does not appear whether it was so used, or whether defendant neglected to avail himself of it, the judgment will not be restrained." 1 High, Inj. § 194.

Applying the principles already stated to the case made by the pleadings, it is plain that plaintiff is not in a position to invoke the aid of equity to prevent the enforcement of the judgment obtained against the sureties upon the ground of fraud. The act of fraud imputed to Bollman and his deputy consisted in converting to their own use certain property of Deere, Wells & Co. at the time of the levying of the executions against Fisher, and in suing for and recovering the value thereof against the sureties upon the indemnifying bond. It is true that both in the reply and in one place in the petition it is stated that plaintiff had no knowledge of such conversion until after the rendition of the judgment in favor of Bollman and against the sureties; but such allegation is inconsistent with the following averment of the petition: "Plaintiff further alleges that prior to the bringing of said action against said Pilger, McClary, and Pasewalk, and against this plaintiff, the Norwegian Plow Company offered to account to and pay said defendant Bollman for all the property levied upon by him or by said defendant Rothwell on said judgment in favor of this plaintiff and against said Fisher, together with all damage, costs, or other expenditures occasioned or incurred by said Bollman or Rothwell, or either of them, on account of, and for the seizure and sale of, property claimed by Deere, Wells & Co. under and by virtue of said executions; and that said defendant Bollman, unlawfully and

fraudulently, and for the purpose of cheating, wronging, and defrauding this plaintiff for property so taken and sold, but then demanded that this plaintiff should account to and pay said defendant Bollman for the property taken by said defendants Bollman and Rothwell, and converted by them to their own private use." The foregoing quotation from the petition is an admission, it seems to us, that plaintiff, prior to the inception of the suit in which the judgment sought to be enjoined was pronounced, was fully cognizant of the alleged fraudulent conduct of Bollman and his deputy of which complaint is now made. If that is not a fair inference to be drawn from said averment of the petition, we are at a loss to know why this plaintiff offered to pay merely for the property seized and sold under the executions, together with costs. He must have been apprised that property belonging to Deere, Wells & Co. other than that applied upon the executions had been taken by the sheriff, and for which the latter claimed compensation; since the petition avers that, when the proposition of settlement was made by plaintiff, Bollman "then demanded that this plaintiff should account to and pay said defendant Bollman for the property taken by said Bollman and Rothwell, and converted to their own use." The allegation of want of notice in the reply must be disregarded. As to the petition alone, we must look for the statement of the facts constituting plaintiff's cause of action. Two allegations of the petition in regard to notice or knowledge of the alleged fraud being inconsistent with each other, we must regard as true and give effect to the one which is against the interest of the plaintiff. This is but an application of the rule that a pleading, when attacked by demurrer,—and such is the nature of the motion to dismiss,—is to be construed most strongly against the pleader. It does not appear that plaintiff exercised due diligence. Having notice of the alleged fraud, he should have urged that as a defense to the suit on the bond of indemnity. We know, although outside of the record before us, from the opinion in Pasewalk v. Bollman, 29 Neb. 522, 45 N. W. 780, which cannot properly be considered here, that the sureties in their answer interposed the defense that the judgment recovered by Deere, Wells & Co. "was for the conversion of goods by plaintiff and his agents other than the goods taken by Rothwell under said executions."

Moreover, the petition herein is defective for another reason. It contains no averment as to the value of the goods not levied upon by the sheriff which it is claimed he converted to his own use. The petition refers us to Exhibit B for the value of the property, but it is not there stated, except a trifling sum appears opposite a few of the articles alone. For all that this record shows, they may have been of little or no value. It does not appear that the judgment obtained by Bollman exceeded the value of the property sold, and applied on the executions in favor of the Norwegian Plow Company, including Bollman's damages and costs growing out of the transaction. For this reason, there is no equity in the bill. Scofield v. Bank, 9 Neb. 316, 2 N. W. 888.

Affirmed.

BURKE et al. v. UTAH NAT. BANK.

(Supreme Court of Nebraska. Feb. 18, 1896.)

ESTOPPEL IN PAIS—WHAT CONSTITUTES.

1. To constitute an estoppel in pais, the person sought to be estopped must have conducted himself with the intention of influencing the conduct of another, or with reason to believe his conduct would influence the other's conduct, inconsistently with the evidence he proposes to give.

2. B. & F., live-stock commission merchants at South Omaha, wrote to the U. Bank a letter, saying, "We will pay H. & M.'s drafts, until further notice, for the cost or value of stock shipped to us here, with or without bill of lading attached." *Held*, that B. & F. thereby obligated themselves to accept drafts made in pursuance of such letter of credit, provided they were in fact for the cost or value of stock then shipped; the bank, in discounting drafts, taking the risk of that fact; but the risk being transferred to B. & F. upon their acceptance of the drafts.

3. Under the letter of credit above quoted, a draft was drawn October 23d, and accepted October 29th. On October 29th, a large shipment of stock was made. November 8th, another draft was drawn, not covered by stock shipped, unless the shipment of October 29th should be applied thereto. There was no evidence that the bank, in receiving the last draft, relied on the acceptance of the former as not including the shipment of October 29th. *Held* that, under the circumstances, B. & F., in defense of an action based on their refusal to accept the last draft, were not estopped from showing that the earlier draft had been covered in part by the shipment of October 29th, the day of its acceptance.

4. An instruction, under such circumstances, to the effect that the bank had a right to rely, from the acceptance of the earlier draft, upon the fact that stock to cover it had been shipped prior to the date of its acceptance, and that B. & F. could not apply the shipment made on that day to its payment, was erroneous.

5. The estoppel contended for would not arise, beyond forbidding B. & F. to apply to the payment of the earlier draft shipments of stock of which they could not reasonably have known at the time of accepting such draft.

(Syllabus by the Court.)

Error to district court, Douglas county; Hopewell, Judge.

Action by the Utah National Bank against George Burke and James A. Frazier, partners as George Burke & Frazier, on a draft. There was a judgment for plaintiff, and defendants bring error. Reversed.

Hall & McCulloch and Schomp & Corson, for plaintiffs in error. Isaac E. Congdon and J. R. Clarkson, for defendant in error.

IRVINE, C. In 1888, one Hall and one Moore, partners under the name of Hall & Moore, and engaged, or intending to engage, in the business of purchasing live stock in the then territory of Utah, and shipping the

same to market, opened negotiations with the Utah National Bank, with a view to transacting business with that institution. At Hall & Moore's request a letter was written to the South Omaha National Bank inquiring as to the standing of George Burke & Frazier, a firm engaged in the live-stock commission business at South Omaha, with which Hall & Moore contemplated transacting their business. This letter was referred by the South Omaha National Bank to George Burke & Frazier; and in response thereto, a letter, dated August 4, 1888, was addressed to the Utah National Bank by George Burke & Frazier. The letter began as follows: "The cashier of South Omaha National Bank referred your letter to us today, in regard to paying Mess. Hall & Moore's drafts. In reply, would say we will pay Mess. Hall & Moore's drafts, till further notice, for the cost or value of stock shipped to us here, with or without bill of lading attached." The remainder of the letter is not material to the decision of the case. This letter was received by the Utah National Bank August 8th, and on that day its cashier addressed to George Burke & Frazier the following: "Your favor 4th inst. has been received. We will advance Messrs. Hall & Moore such moneys as they may want to draw for on you, which is, from what I can from Mr. Hall, for the cost of the cattle here. I will cheerfully reply to any who may ask regards to your standing, etc. I have been in cattle myself, and will, as far as I can, look and see what kind and how many cattle Mr. Hall will ship next week." On that day, the Utah Bank discounted a draft of Hall & Moore on George Burke & Frazier for $1,330, dated August 7th, and from that time until October 23d continued to receive from Hall & Moore drafts in various amounts on George Burke & Frazier, all of which were paid. In this way, something over $50,000 was drawn and paid. On October 23d, a draft was drawn for $9,000, which was accepted October 29th, and paid November 1st. November 8th, a draft was drawn for $16,000, which was in due course presented, and acceptance refused. There was thereafter paid thereon about $7,000; and this action was brought by the Utah Bank against George Burke & Frazier to recover the remainder, of about $9,000. There was a verdict and judgment for the plaintiff for $7,746.66, and the defendants prosecute error.

The assignments of error are quite numerous. We are practically precluded from an examination of those relating to instructions given by the court of its own motion, because in the motion for a new trial the assignment relating thereto is directly against all the instructions given, en masse. Many of them are manifestly free from error, and the others cannot, therefore, be considered. A similar obstacle presents itself to assignments of error relating to the refusal of instructions requested by the defendants. Complaint is, however, made of the giving of the twelfth and fourteenth instructions requested by the plaintiff; and as, in our opinion, they were both erroneous, the assignment of the two together in the motion for a new trial was sufficient. As the judgment must be reversed because of error in these instructions, we will not consider the other assignments, which relate to rulings upon the evidence, as the questions thereby presented may not recur.

In addition to the facts already stated, it appeared that, from October 29th to November 8th, there had been drawn checks by Hall & Moore upon the Utah bank, which resulted in an overdraft, on November 8th, to the amount of $15,549.94. The $16,000 draft was then drawn, but its amount not placed to the credit of Hall & Moore, although, after November 8th, several other small checks were paid. The evidence was very meager, but possibly sufficient to show that, after the drawing of the $9,000 draft on October 23d, there was shipped by Hall & Moore to the defendants live stock to the value of $16,000 and upwards; but, in order to reach this result, we must include in these shipments a large shipment made October 29th, the day the $9,000 draft was accepted. The plaintiff proceeded upon the theory that the acceptance of a draft by the defendants estopped them from asserting that there had not at that time been shipped live stock to meet it; and in accordance with that theory the instructions complained of were given, as follows: (12) "You are instructed that when defendants had accepted and paid the $9,000.00 draft drawn on October 23, 1888, that plaintiff had the right to presume and rely upon the fact that stock had been shipped, prior to the date of such acceptance and payment, sufficient to cover the draft, and were warranted in making the advances to Hall & Moore for the purchase of stock to be shipped thereafter to the defendants, and defendants, as against the plaintiff, had no right to apply the proceeds of such future shipments to the payment of said $9,000.00 draft." (14) "If you find from the evidence that stock to the cost or value of the $16,000.00 draft was shipped, on and after the date of the acceptance of the $9,000.00 draft by the defendants, then you are instructed that it is immaterial what the condition of the defendants' account was with Hall." Now, we construe the contract, so far as is material to these instructions, as follows: By the letter of credit of August 4th, the defendants obligated themselves to the plaintiff to accept drafts of Hall & Moore for the cost or value of stock shipped to South Omaha by Hall & Moore. The phrase, "with or without bill of lading attached," extended their obligation this far: That no duty was imposed upon the plaintiff to insist that bills of lading should be attached to the drafts; and that therefore, if a draft should be drawn without bill of lading, the defendants

were bound to accept it, provided it was for the cost or value of stock then shipped to the defendants,—that is, that in accepting a draft the defendants assumed the risk of their receiving the stock to cover it. It was a condition of the letter that drafts should only be accepted to cover the cost or value of the stock shipped; and the bank, in discounting drafts, took the risk of their being within the terms of the letter of credit. We think, therefore, there was a substantial ground for the general application of a doctrine of estoppel, based on the acceptance of the drafts; but we do not think that the instructions given stated the true rule. We realize the force of what was said in Campbell v. Nesbitt, 7 Neb. 300,—that, in regard to estoppels in pais, "there can be no fixed and settled rules of general application to regulate them, as in technical estoppels; that in many, and probably most, instances, whether the act or admission shall operate by way of estoppel or not must depend upon the circumstances of each case." Still, there are some general rules applicable to the doctrine of equitable estoppel. Under the circumstances of this case, we would not go so far as to hold, as many courts have done (and probably correctly, under the facts before them), that there must be some misrepresentation or concealment of facts, known to one party and not known to the other. On the contrary, we think the following statement by the supreme court of Dakota (Parliman v. Young, 2 Dak. 175, 4 N. W. 139, 711) is correct, and applicable to such transactions as the present: "To establish an estoppel in pais it must be shown, first, that the person sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, inconsistent with the evidence he proposed to give, or the title he proposed to set up; second, that the other party has acted upon, or has been influenced by, such act; third, that the party will be prejudiced by allowing the truth of the admission to be proved." But it is also true, as said in that case, that "estoppels must be certain, to every intent; for no one shall be denied setting up the truth, unless it is in plain and clear contradiction to his former acts." We take it, that to constitute an estoppel in pais the conduct of the party estopped must have been such as to warrant the other party in acting on the belief that the facts were as indicated by such conduct,—that he must so have believed and acted. Now, the fourteenth instruction was to the effect that, if stock to the cost or value of $16,000 was shipped on and after the date of the acceptance of the $9,000 draft, then the condition of defendants' account with Hall & Moore was immaterial. In view of the evidence, this meant, and could only mean, that the acceptance of the $9,000 draft estopped the defendants from asserting that stock to its full amount had not been shipped before the day it was accepted. As we have said, a large shipment of stock was made the very day of its acceptance; and the plaintiff could only recover, under the terms of the letter of credit and the evidence, by calculating the value of the shipment of October 29th, as a portion of the sum for which the $16,000 draft was drawn. This the instruction, in effect, required should be done, although the fact might be otherwise. It was not necessary for the plaintiff to go back to the beginning of the transaction, and prove that the aggregate cost or value of the stock shipped was equal to the aggregate of the drafts made. Where a draft was accepted, the plaintiff had a right to presume that the defendants found that it had been drawn in accordance with the letter of credit, and that stock to the cost or value of its amount had then been shipped; but the plaintiff had no right to presume that acceptances were given based solely on shipments made prior to the day of the acceptance. In accepting a draft, the defendants did not give the plaintiff to understand anything more than that stock in value equal to the amount of the draft had at the time of the acceptance been shipped. These are days of the electric telegraph, and on the presentation of a draft for $9,000 on October 29th, the defendants might accept it on the faith of information in their position that stock had that very day been shipped to cover it. We do not say that there is evidence to support this view; but we are not dealing with the actual facts; we are merely considering what the defendants' conduct gave the plaintiff a right to rely on. The shipment of October 29th might have been, so far as the evidence discloses, before the $9,000 draft was accepted. The plaintiff was bound to know that this might be so. It had no right, in making future advances, to presume that it was not so. And, more than that, the evidence fails to show that in making such advances the plaintiff relied on the acceptance of the $9,000 draft, as showing that the shipment of October 29th was not yet drawn against. The estoppel contended for, therefore, could not arise, beyond forbidding the defendants to apply to the payment of earlier drafts shipments of stock of which they could not reasonably have known at the time of the acceptance of such drafts; and the instruction was erroneous in that it held the defendants estopped from proving the application to the payment of the $9,000 draft of the shipment of stock made the day of its acceptance. The twelfth instruction is similar in its effect to the fourteenth, except that its language leaves it uncertain whether the acceptance or the payment of the $9,000 draft created the estoppel. Now, the obligations of the defendants were fixed by acceptance, and payment after acceptance and in pursuance of that obligation—at least, where the paper was, or was supposed to be, in the hands of a holder

for value—created no new estoppel. Aside from the injection of this element, and the uncertainty created thereby, the instruction is open to the same objections as the fourteenth. Reversed and remanded.

HICKMAN v. LAYNE et al.

(Supreme Court of Nebraska. Feb. 18, 1896.)

EVIDENCE — INSTRUCTIONS — HARMLESS ERROR — ARGUMENT OF COUNSEL—RIGHT TO OPEN AND TO CLOSE—WAIVER.

1. Evidence examined, and *held* to support the verdict.
2. Instructions given and refused not reviewed, because insufficiently assigned for error in the motion for a new trial.
3. Plaintiff introduced in evidence an itemized account of materials furnished, which the jury took to their room when considering their verdict. *Held* not prejudicial error.
4. Error cannot be predicated on the admission of certain testimony, where ample testimony of the same nature was admitted without objection.
5. The party upon whom rests the burden of the issue is entitled to open and close the evidence and arguments to the jury on the trial of the cause.
6. Where the party holding the affirmative waives the opening argument to the jury, he is not thereby deprived of closing the case after his adversary has made his argument.

(Syllabus by the Court.)

Error to district court, Lancaster county; Hall, Judge.

Action by Isaac N. Hickman against John Layne and Fred W. Krone, partners as Layne & Krone, and others. There was a judgment for certain defendants, and plaintiff brings error. Reversed.

Wm. Leese and Stewart & Munger, for plaintiff in error. Pound & Burr, for defendants in error.

NORVAL, J. This action was brought upon the bond hereinafter mentioned by Isaac N. Hickman against John Layne and Fred W. Krone, partners as Layne & Krone, George Martin, N. Westover, George Sherer, A. B. Beach, J. E. Stockwell, N. N. Menard, Fred Voight, and W. Henegan, to recover for materials alleged to have been sold and delivered to Layne & Krone by one John Ellis, and used by them in the erection, for the state, at Beatrice, in 1887, of a building for the institution for the feeble-minded. Layne & Krone entered into a written contract with the board of public lands and buildings to furnish the materials and labor, and to erect said building, for a stipulated price, payable as the work progressed, on the monthly estimates of the superintendent of construction, which contract contained a provision to the effect that Layne & Krone should pay off and settle in full, with all parties entitled thereto, claims that should become due by reason of labor or materials furnished or used in the construction of the building. A bond for the faithful compliance with the contract was given to the state by Layne & Krone, which was also signed by the other defendants, some of them as sureties, and others as witnesses to its execution merely. This bond, with the exception of the parties, date, and amount of the penalty, being identical with the one involved in Sample v. Hale, 34 Neb. 220, 51 N. W. 837, will not be set out in this opinion. Subsequent to the execution of the bond and contract aforesaid, John Ellis furnished the contractors the stone and concrete, used in the building, amounting to $2,124.16, upon which has been paid $1,902.02, and no more, leaving a balance due therefor of $222.14. The account for the materials so furnished has been duly transferred by Ellis to this plaintiff, who brings this action to recover said balance against the principals and sureties upon said bond. Layne interposed no defense. The other defendants answered the petition by a general denial, and, as a second defense, alleged that, prior to the furnishing of the materials for which compensation is demanded, the firm of Layne & Krone had dissolved, said Krone retiring from the firm, of which plaintiff and his assignor had knowledge and notice, and that Layne alone is liable for the payment of said materials. By stipulation of the parties in open court, the jury returned a verdict for Menard, Voight, and Henegan; they having signed the bond as witnesses. The jury found for plaintiff, against the defendant Layne, for the full amount claimed, and also in favor of the other defendants.

That the bond given to the state inured to the benefit of the subcontractors of Layne & Krone, and that such subcontractors could maintain an action for a breach of the conditions of the bond, is settled by repeated decisions of this court. Sample v. Hale, 34 Neb. 220, 51 N. W. 837; Habig v. Layne, 38 Neb. 747, 57 N. W. 539; Lyman v. City of Lincoln, 38 Neb. 794, 57 N. W. 531; Doll v. Crume, 41 Neb. 655, 59 N. W. 806; Heating Co. v. McClay, 43 Neb. 649, 62 N. W. 50; Kauffmann v. Cooper, 46 Neb. 444, 65 N. W. 796. The first question, therefore, to be considered, is whether the materials, for the value of which this suit is brought, were furnished by plaintiff's assignor, Ellis, to the firm of Layne & Krone, or under a contract with them, or to John Layne alone, on his individual account. The partnership of Layne & Krone was dissolved on November 9, 1887, the defendant Krone retiring from the firm, and the business was thereafter conducted by Layne in his own name, who completed the building. A considerable portion of the materials had already been furnished by Ellis at the date of the dissolution, and payment therefor has been made. The amount claimed in this action is for a part of the materials delivered since November 9th. It is claimed, by plaintiff, in argument, that all the materials were delivered under a contract entered into by Ellis with Layne & Krone about October 1, 1887, and during the existence of the partnership. This, the defendants insist, is incorrect. The testimony on behalf

of the plaintiff, adduced on the trial, and which is embodied in the bill of exceptions, fully sustains the theory and contention of the plaintiff. On the other hand, the inference could be properly drawn, from portions of the testimony of the defendant Layne, that no contract was made with his firm whereby it agreed to furnish any certain amount of stone for the erection of the building; that prices were named on the different kinds of stone, but the firm did not agree to take, nor did Ellis agree to deliver, what stone should be required to complete the building or any part thereof; that the stone was ordered as it was needed from time to time,—that after the dissolution in the name of Layne, and a portion of this was paid by the individual check of the latter. While the testimony of this witness is, in some particulars, weak and evasive, we cannot say that the jury were not warranted in finding that the materials in dispute were not furnished under and in pursuance of a contract with the firm of Layne & Krone, although the preponderance of the evidence would have justified a different conclusion. In this connection, it may not be amiss to state that no express contract with Layne & Krone for the furnishing of the materials is averred in the petition, the allegation being that they were furnished at their request. It is true, as argued by counsel, that partners are not released from unfulfilled contracts and obligations by the dissolution of the firm. Such was the decision in Swobe v. Light Co., 39 Neb. 587, 58 N. W. 181. But this principle could only be invoked by the plaintiff in case he established that Layne & Krone agreed with Ellis to take from him all the stone required for the erection of the building, and all that was received was delivered under such agreement. The jury having found against the plaintiff on the facts, the principle of law, invoked by plaintiff, that partners cannot, by dissolving, release themselves from unfulfilled contracts, is not applicable to the case under consideration.

Complaint is made, in the brief, of the third and fourth instructions given by the court on its own motion, and the refusal to give the plaintiff's third, fourth, and sixth requests. The court's charge consists of five separately numbered paragraphs, and the giving of them all, as well as the three requests refused, is assigned for error, in the motion for a new trial, as follows: "(5) The court erred in giving paragraphs of instructions numbered 1, 2, 3, 4, and 5, on its own motion. (6) The court erred in refusing to give paragraphs of instructions numbered 3, 4, and 6, asked by the plaintiff." The first and second instructions were properly given. The first briefly stated the nature of the action, and the second told the jury that, under the stipulation of the parties, they should return a verdict for Menard, Voight, and Henegan. There being no error in either of these instructions, the fifth subdivision of the motion for a new trial was not well taken. It is needless to cite authorities in support of this familiar rule.

Plaintiff's fourth request was as follows: "If you find, from the evidence, that the plaintiff entered into the contract with Layne & Krone to furnish the material sued for prior to a dissolution of such firm, but did not deliver the same until after a dissolution, both Layne & Krone, together with the sureties on their bond to the state, would be liable for any balance due plaintiff for such material." The doctrine enunciated in this instruction is clearly expressed in the fourth paragraph of the charge to the jury. It was not error to decline to repeat it. The request being properly denied for the reason stated, the assignment based upon the refusal of instructions must be overruled, without considering the other requests of which complaint is made.

Plaintiff introduced in evidence his itemized account of the stone furnished, and, over his objection, the jury were permitted to take the same to their room when considering their verdict. Error is assigned upon this action of the court. We fail to comprehend how plaintiff could have been prejudiced by allowing the jury to inspect the account, since it was introduced by himself. True, it was made out against Layne alone; but, if plaintiff had any explanation to make concerning that matter, he should have done so in his testimony. This he did not do, and this circumstance may have militated against him with the jury. If so, he has no one but himself to blame therefor.

It is next argued that error was committed in permitting the witnesses Coldiron and Cain to give testimony to the effect that the dissolution of the partnership between Layne and Krone was a general subject of conversation in and about the building in question during its erection. To this argument there are two answers. In the first place, while objection was made by plaintiff to this class of testimony, one, if not both, of the witnesses named testified to the same fact without any objection whatever. Again, the purpose of this testimony was to show that Ellis had notice or knowledge of the dissolution. Whether such evidence was competent or not we shall not determine. It is enough to know that Ellis himself testified that he was cognizant of the report current upon the streets that Layne & Krone had dissolved, and it is undisputed that Layne told him of the dissolution soon after it occurred. Plaintiff's assignor having had actual notice of the dissolution, the testimony of the two persons mentioned, if erroneous, was error without prejudice.

It is finally urged that the trial judge committed an error in refusing to permit counsel for the plaintiff to make the closing address to the jury. It appears, from the transcript of the journal entry of the case, that, after the evidence on both sides was adduced, counsel for the plaintiff waived the opening

argument; and, after the summing up by counsel for defendants was made, defendants objected to plaintiff's counsel making the closing argument, which objection the judge sustained, and an exception was taken to the ruling. Section 283 of the Code of Civil Procedure specifies the order of proceedings in jury trials, which order must be followed unless the court otherwise directs. The sixth subdivision of this section reads thus: "Sixth. The parties may then submit or argue the case to the jury. In the argument, the party required first to produce his evidence shall have the opening and conclusion." Under this provision the party having the affirmative of the issue, or against whom judgment would have gone had no evidence been introduced, has the right to open and close the argument to the jury. Vifquain v. Finch, 15 Neb. 505, 19 N. W. 706; Rolfe v. Pilloud, 16 Neb. 21, 19 N. W. 615, 970; Railroad Co. v. Walker, 17 Neb. 432, 23 N. W. 348; Osborne v. Kline, 18 Neb. 344, 25 N. W. 360; Rea v. Bishop, 41 Neb. 202, 59 N. W. 555. Under the quoted statutory provision and the foregoing authorities, counsel for the plaintiff in the case at bar was entitled to make the opening and closing addresses to the jury, had he so desired. But he expressly waived the opening. Did he thereby waive the right to close? We do not so understand the rule and practice to be. Had counsel for defendants waived an argument, then the case would have gone to the jury without any argument whatever. Plaintiff took that chance when he waived his opening. The defendants not having waived argument on their part, the plaintiff has the right to close, notwithstanding he made no opening address. Trask v. People, 151 Ill. 523, 38 N. E. 248. But, it is said, if plaintiff had made the closing address, he could have replied alone to the argument of defendants' counsel; and, as the record does not affirmatively show there was anything to reply to, therefore the ruling was without prejudice. Conceding it to be the rule, without deciding the point, that the closing must be confined to a strict reply to the argument on the other side, and that such matters rest largely in the discretion of the trial court, it does not follow that counsel for the plaintiff, to save his exception, was required to preserve the speech of his adversary in the bill of exceptions, in order to make error affirmatively appear. If the verdict was the only one which could have been found under the evidence, then the denial of the right to close would have been without prejudice. In such case there would have been no abuse of discretion. In the case at bar, the evidence was sharply conflicting upon the real litigated issue in the case, namely, whether the materials were furnished under a contract with Layne & Krone, or to Layne alone, upon his own responsibility. Therefore, the right to make the closing argument upon the evidence was of no inconsiderable advantage. Had plaintiff's counsel been permitted t close the case, who knows but what his el quence and logic may not have turned th scales. Much discretion rests with the tri judge as to the scope of arguments of cou sel, either as to time or relevancy, and suc discretion will not be interfered with by reviewing court, except where an abuse shown. Such discretion, however, cannot b extended to the denial of the right to mak any argument to a jury where there is a co flict in the evidence, or where different co clusions may be legitimately drawn from th facts proven. Houck v. Gue, 30 Neb. 11 46 N. W. 280; Hettinger v. Beller, 54 Il App. 320; Railroad Co. v. Bryan, 90 Ill. 12 Railway Co. v. Thomason, 59 Ark. 140, S. W. 598; Huntington v. Conkey, 33 Bar 218; Harley v. Fitzgerald, 84 Hun, 305, N. Y. Supp. 414. The denial to plaintiff the right to make the closing argument is fatal error, for which the judgment must b reversed, and the cause remanded for a ne trial. Reversed and remanded.

FIRST NAT. BANK OF GREENWOOD v. CASS COUNTY et al.

(Supreme Court of Nebraska. Feb. 18, 1896.)

BILL OF EXCEPTIONS—AUTHENTICATION.

Where the bill of exceptions purporting contain the evidence in a case is not authenticat by the certificate of the clerk of the trial cou it is not properly before this court, and will n be examined, and assignments of error dependi upon matters of evidence cannot be decided.

(Syllabus by the Court.)

Error to district court, Cass county; Cha man, Judge.

Action by Cass county and another again the First National Bank of Greenwood a others. There was a judgment for plaintiff and the bank brings error. Affirmed.

Marquett, Deweese & Hall, for plaintiff error. H. D. Travis and Byron Clark, f defendants in error.

HARRISON, J. This is an action by Ca county and its county treasurer against t plaintiff in error, hereinafter called t "bank," to recover the sum of $551.79, a leged to be due as interest on county fun on deposit with the bank under the provisio of the act of the legislature of 1891, e titled "An act to provide for the depositing state and county funds in banks (Sess. Law 1891, p. 347, c. 50). The petition stated t corporate character of the county, and al of the bank; that Louis C. Eickoff was t duly elected, qualified, and acting coun treasurer of the county, and collected a had the custody and control of the mone and funds of the county. The propositi and its terms of the bank to the county f the reception of county funds on deposit, i acceptance, the presentment and approv of the bond as required by the law, and t deposit by the treasurer of the funds of Ca

county in the First National Bank of Greenwood, in accordance with the terms of the contract, were pleaded; also, the failure and refusal of the bank to pay the interest agreed upon in the sum of $551.79. The bank filed an answer as follows: "Now come the defendants, and, for answer to plaintiff's petition, deny that they owe the plaintiff $551.79, interest on the county funds deposited with the First National Bank of Greenwood, by the county treasurer of Cass county, or any other sum; but, on the contrary, allege the fact to be that the defendant the First National Bank of Greenwood, Nebraska, has paid to the county of Cass, through its county treasurer, all of the interest due and owing to the said county funds so deposited with the said First National Bank of Greenwood, Nebraska." To this answer there was, in reply, a general denial. A trial of the issues resulted in a verdict and judgment against the bank, and in its behalf the case is presented here for review.

It is contended by the bank that the evidence adduced in the case disclosed that the major portion of the demand upon which the action was based was composed of interest on state funds or money collected by the county treasurer and the taxes levied for state purposes, and the other, of interest on school district moneys and the district road fund; that these are not current funds belonging to the county; and that the law under which the transaction herein involved was made only provides for the deposit by the treasurer "of money in his hands belonging to the several different current funds of the county treasurer"; and that no recovery could be legally had of interest on a deposit of any other than current funds; hence none could be allowed in this case. It does not appear from the pleadings that interest is claimed herein on other than "county funds," and the disposition of the contention on behalf of the bank calls for an examination of the testimony, for which reference must be made to a bill of exceptions. The document attached to the record in this case which purports to be the bill of exceptions is not identified as the bill of exceptions by the certificate of the clerk of the trial court, or is not authenticated as required by law; and, as a general rule, the evidence, not being properly before the court, will not be examined, and questions raised which depend upon matters of evidence cannot be decided. It follows that the judgment of the district court must be affirmed.

WAUGH et al. v. GRAHAM et al.

(Supreme Court of Nebraska. Feb. 18, 1896.)

PETITION FOR LIQUOR LICENSE — SUFFICIENCY — APPEAL—RECORD—REVIEW.

1. In an appeal from the action of a body authorized to hear and decide applications for license to sell intoxicating liquors, in order to properly present any evidence which may have been introduced at the original hearing to the appellate court, it must be reduced to writing, filed in the office of application, and transmitted to the appellate court.

2. A petition filed in an application for license to sell intoxicating liquors should contain such a description of the premises where it is proposed to conduct the business as indicates the exact location; and, if it does this, it is sufficient.

3. Persons remonstrating against the issuance of a liquor license should make and present the objections they desire to urge to the body authorized by law to pass upon applications for such licenses. Ordinarily, questions not raised before the original tribunal need not, or will not, be considered in the appellate court.

4. The authority to pass upon applications for liquor licenses vests in the body upon which is by law conferred a discretionary power. Its action is judicial and not merely ministerial.

5. Where questions of fact have been determined by the body authorized to pass upon applications for licenses to sell intoxicating liquors, and also by the district court, to which an appeal has been taken from the decision of the licensing body, and the findings or conclusions agree, they will not be disturbed, in error proceedings to this court, unless manifestly wrong.

(Syllabus by the Court.)

Error to district court, Lancaster county; Holmes, Judge.

Application by A. L. Hoover to Frank A. Graham and others, the excise board of the city of Lincoln, for a license to sell liquor. M. J. Waugh and others filed remonstrances, and from a judgment dismissing their appeal from the granting of the license, they bring error. Affirmed.

A. G. Greenlee, for plaintiffs in error. L. W. Billingsley and R. J. Greene, for defendants in error

HARRISON, J. A. L. Hoover, of defendants, applied to the excise board of the city of Lincoln for license to sell liquors, as was stated in the petition of the applicant, "at No. 229 M street, in said city, situated on lot 12, block 66, city." To this application remonstrances were filed, and, after a hearing, the excise board granted a license to A. L. Hoover to sell intoxicating liquors at 229 South Thirteenth street, from which action an appeal was taken to the district court of Lancaster county, which court, after a hearing, dismissed the appeal. Plaintiffs in error have presented the case to this court by proceedings in error.

We will first notice the condition of the record presented here, and as before the district court. If considered upon the merits in the district court, it must have been upon the testimony introduced at the hearing before the excise board, and upon this alone. State v. Bondsfield, 24 Neb. 517, 39 N. W. 427. In order to properly bring such evidence before the district court, it was necessary that it be reduced to writing, and filed in the office of application, and transmitted to the district court to which an appeal was taken. Comp. St. c. 50, § 4. It was said, by Maxwell, J., in Lydick v. Korner, 13 Neb. 10, 12 N. W. 838: "The testimony taken before the city

council must be reduced to writing, and should be certified by the presiding officer as all the testimony taken, as the statute seems to require the judge of the district court to decide the case upon such evidence alone." And, in the opinion in Powell v. Egan (written by Irvine, C.) 42 Neb. 483, 60 N. W. 932, it was stated, after quoting the section to which reference has been made: "The statute, therefore, requires the certification of the evidence to the district court." There was a finding on this question by the judge before whom it was tried in the district court which was as follows: "That the purported evidence, taken before said board upon the hearing of plaintiff's remonstrance, and filed herein, was never filed with the city clerk or the excise board, as provided in section 4, c. 50, of the Compiled Statutes of 1881; and that the same is not certified by the said clerk or presiding officer of the said board, as required by law, and was not transmitted by said clerk, or any officer of said board, to this court, and is not, therefore, properly or sufficiently authenticated as the testimony taken upon said hearing." This, we think, was correct, and the rule announced a true one.

It is contended, for plaintiffs in error, that the application for a license to sell intoxicating liquors at 229 M street did not give the excise board jurisdiction to grant a license to open and conduct a saloon at 229 South Thirteenth street. To thoroughly understand the question here raised it will be necessary to refer to the description of the location of the prospective saloon, contained in the several papers filed, as required, in the proceedings preliminary to the issuance of the license. In the petition of the applicant it was set forth as "at No. 229 M street, in said city (referring to Lincoln), situated on lot 12, block 66, city." In the published notice of the application it was stated to be "in building situated at 229 South Thirteenth street, on lot 12, block 66, fronting on Thirteenth street in said city." Counsel for plaintiffs in error contends that the excise board could not, upon a petition for license to run a saloon at 229 M street, issue it for one to be conducted at 229 South Thirteenth street; that the places so designated are in different wards of the city; that the petition fixed the location of the proposed saloon in the Second ward of the city, and the license as issued was for a location in the Fourth ward. The section of our statute governing in the particular involved states that the petition for a license shall be sufficient if signed by 30 of the resident freeholders of the ward where the sale of the liquors is to take place. We agree with counsel that this implies that the location of the saloon business for which license is sought shall be stated or described more or less accurately in the application for the license. Of a set of rules adopted by the excise board in regard to the license and regulation of the sale of intoxicating liquors within the city of Lincoln, was one whi required quite a definite and specific descr tion of the location of any proposed salo to be given in the application for the licer therefor. A petition filed in an applicati for a license to sell intoxicating liquors shou comply with the requirements of the law, a include all things which the law prescrib shall appear therein; but it will not be co strued in accordance with strict rules. I substance or import will be mainly cons ered in determining whether it is sufficie Mere informalities will not be regarded. T description of the premises where it is p posed to conduct the business is sufficient so reasonably full and certain as to indica the exact location. Black, Intox. Liq. § 1 p. 198, and cases cited. In the matter und consideration, the petition described the lo tion of the proposed business as on lot block 66, of the city. The notice describ the same lot and block, and gave the sa number, and, dropping the "M," designati the street, substituted in its stead the wor "South Thirteenth." The remonstrators (so of them) in their objections filed with t board, remonstrated against "the granting a license for a saloon on lot 12, block 6 and others, stating that they were freeho ers, owners of property in block 66 of L coln, remonstrated against the issuance of license for a saloon to be operated on any in above block,—from which it is very e dent that all persons interested knew, fr the portion of the description, "Lot 12, blo 66," just exactly where the saloon, for t opening and operating of which the petiti asked a license, was to be located, and it do not appear that any one was in any manr or to any extent misled in regard there This being true, the description served t purpose for which it was intended, and f filled the intention and requirements of t law in respect to it.

Another contention of counsel for plainti in error is that the statute requires the ap cation or petition for liquor license to signed by 30 of the resident freeholders the ward in which it is expected to condu the business, and, further, that by one of t rules of the excise board it was enacted th "before the petition or bond, as provided rule 3 hereof, shall be filed with the cle the applicant shall be required to procure certificate of the register of deeds of the co ty of Lancaster, to be indorsed on said pe tion, certifying that each of the persons sig ing the same is a resident and freehold within the ward where the sale of such l uors is to take place"; that the certificate the clerk which was indorsed upon the pe tion merely stated that the signers were fr holders within the Fourth ward, and did n state that they were residents; that this w not enough, and the board did not acqu jurisdiction to entertain and hear the app cation, or to issue a license. This questi was not raised by the remonstrances again

the issuance of the license filed with the excise board. Fairness to all parties would seem to demand that objections to granting a license should be made before the body to which the application is presented, in the first trial tribunal. If not made there, they need or will not be considered in the appellate court. Livingston v. Corey, 33 Neb. 366, 50 N. W. 263.

The judge of the district court, after reaching and announcing the conclusion that the testimony taken at the hearing before the excise board was not authenticated or transmitted to the district court as required by law, and need not be made the subject of inquiry, examined and considered it, and passed upon its weight and sufficiency. In one of its findings it was stated by the court that the granting of a saloon license was a matter resting in the discretion of the excise board, governed and controlled by the various provisions of law in relation to the issuance of such licenses; and, unless it affirmatively appeared from the evidence that its granting of a license for conducting a saloon business at any assigned location was an abuse of the discretionary power of the board, its order to that effect would not be disturbed. It is urged by counsel for plaintiffs in error that the court, by this finding, in effect, refused to pass upon this application on its merits, refused to give its judgment as to whether or not a license should be issued, or refused to give the remonstrators a hearing upon the evidence, or examine it, for the purpose of determining whether a license ought to issue. We do not think the language of the court, when read and considered in connection with the other findings, can fairly be construed to have the meaning stated by counsel. After holding that the testimony introduced before the excise board was not authenticated as provided by law, and not properly before the court, it is further said, in the findings and decision: "But the court, having fully examined the evidence filed by plaintiff's counsel herein, and heard arguments thereon, finds." And here follow statements from which it clearly appears that all the evidence given before the excise board was considered by the court; that it, in effect, tried the matter on the same testimony, heard it upon its merits, and made a finding on each of the contested questions, and in each instance reached the same conclusion as did the board. A careful perusal of the whole of the findings, and judgment of the court, convinces us that the evident meaning of the language used to which the objection applies, or intended to be conveyed by the court, was that, in the matter of the hearing on the application for a liquor license, the excise board did not act ministerially, but judicially, and, after listening to the evidence, exercised their discretion or judgment in determining whether, in view of all the facts and circumstances, a license should be granted or refused, and that, if the appellate or district court, after scanning all the same testimony, reached a different conclusion on any vital point involved, the decision of the excise board must be reversed, as a wrong exercise of the right to decide,—of the discretion vested in it; or, if the court's conclusions agreed with those of the board, its judgment must also agree. It is clear that the licensing body is vested with discretionary power; that its action is judicial, and not merely ministerial. "In far the greater number of states the doctrine is now well settled that the court or board charged with the duty of issuing licenses is vested with a sound judicial discretion, to be exercised in view of all the facts and circumstances in each particular case, as to granting or refusing the license applied for. The principle is that the licensing authorities act judicially, and not merely in a ministerial capacity. In determining the nature as well as the existence of this discretion, much will depend upon the language of the local statute, and this, of course, should be carefully scrutinized. But the general disposition, under all the diverse forms of statutory provisions, is to leave a wide margin of discretion to the court or board hearing the application." Black, Intox. Liq. p. 211, § 170; State v. Cass Co., 12 Neb. 54, 10 N. W. 571.

It is further urged that the findings and order of the excise board were not supported by the evidence. The testimony was listened to and passed upon by the excise board, and was again investigated, and the questions raised decided by the district court. We have carefully studied it, and cannot say that the conclusions of the board and of the district court in respect to the points involved were manifestly wrong. Hence, they will not be disturbed. The judgment of the district court is affirmed. Affirmed.

BOASEN v. STATE ex rel ZIMMERMAN et al.

(Supreme Court of Nebraska. Feb. 18, 1896.)

MANDAMUS—VALIDITY—COLLATERAL ATTACK.

1. A writ of mandamus to compel county officers to pay judgments against the county is not void because the judgments were void.

2. In such case the nullity of the judgments was a defense to the application for a mandamus. The district court, having jurisdiction of the parties, had jurisdiction to determine the validity of the judgments; and a writ of mandamus issued in that case cannot be resisted because the issue was erroneously determined.

(Syllabus by the Court.)

Error to district court, Kearney county; Beall, Judge.

Peter C. Boasen was convicted of contempt of court, and brings error. Affirmed.

Ed. L. Adams, for plaintiff in error. A. S. Churchill, Atty. Gen., and Stewart & Hague, for defendants in error.

IRVINE, C. Certain judgments were entered against Kearney county in the district court of that county. The judgment

creditors applied to the district court for a writ of mandamus to require the clerk and the chairman of the board of supervisors to issue warrants in payment of the judgments, it being alleged that there were funds available sufficient for their payment. A peremptory writ was allowed. Thereafter the plaintiff in error succeeded to the office of the chairman of the board of supervisors, and the writ was served upon him. He refused to comply therewith, and the present proceeding was instituted for contempt in refusing such obedience. He was found guilty, and sentenced to be confined in jail until he complied with the requirements of the writ. Error is prosecuted by him from that sentence.

No question is raised as to the writ's binding the plaintiff in error, if it is a valid writ, but the sole question raised is as to the jurisdiction to allow the writ at all; and the objection urged against the jurisdiction of the court is that the judgments which the mandamus was issued to enforce were void for want of jurisdiction of the court to render them. The fact, however, if it be a fact, that such judgments were void, did not defeat the jurisdiction of the court in the mandamus case. The district court has jurisdiction to issue writs of mandamus to compel county officers to perform duties enjoined upon them by law. It had jurisdiction of the parties in this case. If the judgments were valid under the other facts disclosed by the record, it was the duty of the officers to issue the warrants. If they were not valid for want of jurisdiction of the court rendering them, that would have been a defense in the mandamus case; and it actually was pleaded as a defense.

The judgment of the district court in favor of the relators in that proceeding adjudicated the validity of the judgments. In the mandamus case the district court had jurisdiction to determine whether or not the judgments were void. Jurisdiction is the power to determine, and not merely the power to determine rightly; and the judgment in the mandamus case cannot be defeated because the court in that case erroneously determined a question properly presented to it there for determination. The remedy was by appellate procedure, but the proceedings were not void, and the mandamus was conclusive until reversed. State v. Judge of Hardin Co., 13 Iowa, 139. Judgment affirmed.

McAULEY et al. v. COOLEY.

(Supreme Court of Nebraska. Feb. 18, 1896.)

SURETIES ON BOND OF PARTNER—DISCHARGE.

1. The decision in relation to certain questions in this case, which were announced in a former opinion, for a report of which see 63 N. W. 871, 45 Neb. 582, herein reaffirmed, and, having been stated in the syllabus, will not be here restated.

2. Parties who signed the bond of one of the members of a copartnership, conditioned for the due and faithful performance of his duties in and concerning the business in which the firm engaged, *held* not released from their obligation thus assumed by an increase in the amount of the capital invested in the business.

(Syllabus by the Court.)

On rehearing. Affirmed.

For former opinion, see 63 N. W. 871, 45 Neb. 582.

J. M. Ragan, J. B. Cessna, and Capps & Stevens, for plaintiffs in error. Dilworth, Smith & Shockey and B. F. Smith, for defendant in error.

HARRISON, J. In October, 1888, J. H. Cooley and George A. Bentley formed a copartnership, and, under the firm name and style of J. H. Cooley & Co., engaged in the business of dealing in lumber and coal in the town of Holstein, this state. The firm continued its operations until on or about July 31, 1889, when it was dissolved. The written agreement or contract for the formation of the partnership, and to govern in conducting its affairs, was, in part, as follows: "Articles of agreement made and entered into this 12th day of October, 1888, by and between J. H. Cooley, of Kenesaw, and G. A. Bentley, of Holstein, Neb., as follows: The said parties above named have agreed to become copartners in business, and by these presents do agree to be copartners together under the firm name of J. H. Cooley & Co., in buying, selling, and vendoring of lumber, lath, shingles, coal, and other business of like nature, and to that end the said J. H. Cooley shall contribute a stock of lumber, lath, shingles, coal, real estate, and improvements, etc., for which the whole investment shall not exceed three thousand ($3,000) dollars, and is not required to do any more work than he shall elect; and the said G. A. Bentley shall, and he is hereby firmly bound to, give all his time and use his best efforts to promote the interests of this business. The said G. A. Bentley is to keep the books of the firm in a careful and workmanlike manner, and to render a just, true, and accurate account of all goods, wares, commodities, merchandise, moneys, and accounts at any time required, and to do all the work required to be done in the business as long as one man can do it, after which the expense of hiring a man shall be borne equally out of the business, and G. A. Bentley be allowed to draw his personal expenses, not to exceed the sum of forty ($40) dollars, which amount shall be charged to his personal account, and come out of his share of the profits." W. S. McAuley and Charles H. Furer signed a bond with George A. Bentley, as principal, by which they obligated themselves as follows: "Whereas, on the 12th day of October, 1888, the above-named G. A. Bentley and the said J. H. Cooley entered into a copartnership for

the purpose of carrying on business of lumber, coal, etc., in the village of Holstein, in the county of Adams, in the state of Nebraska: Therefore the condition of this obligation is such that if the above-named G. A. Bentley shall do and perform all the acts of the written contract entered into by and between the said parties of the above date, and shall carry out the obligations therein required of him strictly according to its spirit and terms, then these obligations to be void; otherwise to remain in full force and effect." The present action was instituted by J. H. Cooley against the plaintiffs in error upon the bond which they had signed, the object being to recover the aggregate amount of sums which it was claimed had been paid to Bentley, and of which he had made no entry in the books of the firm, and for which he had failed to account. Defendant in error was successful in the district court, and to reverse the judgment there rendered in his favor the parties sureties on the bond presented the case to this court by petition in error. On hearing in this court the judgment of the trial court was affirmed. For report of the decision then announced, see 45 Neb. 582, 63 N. W. 871. A motion for a rehearing was filed, which was sustained, and the cause has been argued and again submitted for our consideration and adjudication. The conclusion of the former decision in relation to the dissolution of the firm and accounting or settlement of its affairs between the partners, and the right of defendant in error to maintain an action at law, were not attacked at the present hearing, and, without discussion or further notice now, they will be adopted and reaffirmed.

The argument of counsel for plaintiffs in error on rehearing was an effort to maintain the proposition advanced by them that there had been such a modification of the contract of partnership by the parties to it as released the sureties on the bond which was executed with reference to and reliance upon such contract, and its performance in strict accordance with its terms. The facts in respect to the modification or change which it is claimed was made in the agreement are as follows: It was stated in the contract that "J. H. Cooley shall contribute a stock of lumber, lath, shingles, coal, real estate, and improvements, for which the whole investment shall not exceed three thousand dollars," and he put into the business property and money to the amount of, in round numbers, $5,000. It is urged on behalf of the plaintiffs in error that, inasmuch as the obligation of their bond was that Bentley should "do and perform all the acts required of him by the written contract, enter and carry out the obligations therein required of him strictly according to its spirit and terms," the terms of the contract became of the substance of the bond, and, if it was changed in any material particular without the consent of the sureties, it effected their release; that the change in the amount invested by Cooley was a material one; that thereby greater opportunity was afforded the principal in the bond to commit the alleged acts by which it is claimed the damages sought to be recovered in this suit were occasioned; that the sureties may have thought that Bentley could successfully manage a business in which was invested $3,000, and were willing to become responsible for his acts in and concerning such a business, and not one in which there was to be handled a larger amount. They state that the theory upon which their argument is based is that the articles of copartnership and the bond must be construed together as one instrument in determining the liability assumed by the parties who signed the bond. The rule of law relied upon by counsel for plaintiffs in error, as stated in their briefs, is that in determining the liability of a surety it must be borne in mind that he is a favorite of the law, and has a right to stand upon the strict terms of his contract, when such terms are ascertained. A surety is bound for the due performance by his principal of the precise contract to which the guaranty referred, and, if that contract has been changed or modified without the consent of the surety, he is discharged. This is an established doctrine, and, variously worded, it has been applied by the courts, both federal and state. It has been recognized and applied in this state. See Curtin v. Atkinson, 36 Neb. 110, 54 N. W. 131; Crane Co. v. Specht, 39 Neb. 125, 57 N. W. 1015. Accepting and proceeding according to the theory advanced for plaintiffs in error in respect to construing the bond and contract in this case as one instrument, there must, conjointly with the rule of law quoted in regard to sureties, and applicable to their obligation, be applied one which is here equally as forcible and proper. Another rule, equally binding upon the courts, is that in the construction of the contract of a surety as well as of every other contract the question is, what was the intention of the parties as disclosed by the instrument read in the light of the surrounding and attendant facts and circumstances? 1 Brandt, Sur. § 80; Lionberger v. Krieger, 4 West. Rep. 431. The bond and contract involved in this action, when construed together, and viewed in the light of the facts and circumstances surrounding and attendant upon their inception and existence, when fairly and reasonably construed, seem to indicate that the limit placed by the terms of the contract of partnership upon the amount of capital to be at its beginning invested by Cooley was for his benefit, and might be waived by him in favor of a larger sum, if he so desired. That it was in direct contemplation of the parties that the business might grow and increase in volume, and necessarily the capital to sustain it in its larger workings, appeared in and was directly pro-

vided for in the contract, wherein it is stated that Bentley was to do "all the work required to be done in the business as long as one man can do it, after which the expense of hiring a man shall be borne equally out of the business"; and certainly it must have been clear to and within the expectation of all the parties to both contract and bond that, if the business was successful, the principal in the bond would have the management and handling of a capital considerably more than $3,000 during the times when the profits remained, for longer or shorter periods, mingled with the other funds in the business. The increase in the investment may have rendered the duties devolving upon Bentley, the principal in the bond, to some extent more arduous and laborious, but it did not effect any change in the character or nature of the acts to be performed by him, and for the due performance of which the sureties were bound. The acts he was obliged to do were the same. The province of his duties was not changed, though the subject-matter was increased, which was possible at all times by additions of profits; and for the damages which accrued through the failure of the principal in the bond to perform acts included and covered by the obligations of the bond the sureties were and remained bound. Railroad Co. v. Loring, 138 Mass. 381; Bank v. Carleton, 136 Mass. 226; Bank v. Wollaston, 3 Har. (Del.) 90; Railroad Co. v. Goodwin, 3 Exch. 320; Strawbridge v. Railroad Co., 14 Md. 360; Gaussen v. U. S., 97 U. S. 584; Bank v. Rogers, 7 N. H. 21; Lionberger v. Krieger, 4 West. Rep. 431. Whether the recovery could be more than the $3,000 we are not called upon at this time to discuss, and do not express any opinion, as the amount recovered was much less than that sum. The judgment of the district court is affirmed.

RAGAN, C., not sitting.

STATE ex rel. MARROW v. AMBROSE, Judge.

(Supreme Court of Nebraska. Feb. 18, 1896.)

BILL OF EXCEPTIONS—TIME FOR PREPARING.

Where a trial has been had and a motion for a new trial sustained, the time for preparing a bill of exceptions embodying the evidence on that trial is fixed at the latest, by the term at which the motion for a new trial was sustained, and not by the term at which final judgment was rendered, or at which a new trial was had, or a new trial after such second trial denied.

(Syllabus by the Court.)

Original application, on the relation of Regina Marrow, against George W. Ambrose, district judge. Writ denied.

V. O. Strickler, for relator. William O. Gilbert, for respondent.

IRVINE, C. This is an original application for a writ of mandamus, requiring the respondent, one of the judges of the Fourth judicial district, to settle and sign a bill of exceptions in the case of the relator, Regina Morrow, against Emily Hespeler, tried before the respondent. An answer to the alternative writ was presented, raising the issues of fact; and a referee appointed by the court for the purpose has made a report of the evidence taken, together with his findings of fact and conclusions of law. The relator moves for a confirmation of this report. The respondent moves to set it aside and for judgment.

Our conclusion on one question of law, presented by findings of fact which are not attacked, renders it unnecessary to consider any of the other exceptions to the report. The referee finds: That the action of Marrow v. Hespeler was tried at the May, 1894, term of the district court, and a verdict returned in favor of the plaintiff, the relator in this action, for $4,000. That on the same day a motion for a new trial was filed by the defendant, which was on the following day sustained. That the May, 1894, term adjourned July 14, 1894. At the September, 1894, term, the cause was again tried, resulting, November 17, 1894, in a verdict for the defendant, and 40 days (thereafter extended to 80 days) from the adjournment of that term was allowed for preparing and serving a bill of exceptions. That the September term adjourned January 26, 1895. February 19th Emily Hespeler died, and February 26th William O. Gilbert was appointed special administrator, and the action revived in his name. On April 13th the bill of exceptions which defendant seeks to compel the respondent to allow was served on the defendant, who returned it, refusing to take action for the reason that it had not been served within the time provided by law, and for a further reason not necessary to consider. That the bill of exceptions so tendered contained only the evidence and proceedings on the first trial of the case at the May, 1894, term, resulting in the verdict which was set aside. Final judgment was entered November 17, 1894, at the September term.

It will be observed that the foregoing facts present the question as to whether, when a trial has been had, and the verdict set aside, a party seeking to procure a bill of exceptions preserving the evidence on that trial must move in the matter within the statutory period after the first trial, or whether he may wait until final judgment or the overruling of a motion for a new trial after a subsequent trial, and have his bill settled as of the later term. The statute as it stood when this controversy arose was, so far as material, as follows: "When the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions

to writing within fifteen (15) days, or in such time as the court may direct, not exceeding forty (40) days from the adjournment of the court sine die, and submit the same to the adverse party or his attorney of record for examination and amendment if desired." Code Civ. Proc. § 311. By a later clause, the judge, for cause shown, may grant 40 days' additional time. The question now before us seems to be here presented to this court for the first time. Although there has been much controversy from the ambiguity of the statute as to whether the term referred to meant the term at which the verdict was returned, or the term at which the motion for a new trial was overruled, the act of 1895, fixing the latter time, has set this question at rest. Sess. Laws 1895, p. 311, c. 72.

The course of decision under the old statute, we think, leads to a certain conclusion in this case. There are many decisions holding that the term referred to in the statute is the term at which the verdict was returned, and not the term at which the motion for a new trial was ruled on. Monroe v. Elburt, 1 Neb. 174; Wineland v. Cochran, 8 Neb. 528; Scott v. Waldeck, 11 Neb. 525, 10 N. W. 409; Donovan v. Sherwin, 16 Neb. 129, 20 N. W. 26; City of Seward v. Klenk, 27 Neb. 615, 43 N. W. 407; Id., 30 Neb. 775, 47 N. W. 85. In Dodge v. Runels, 20 Neb. 33, 28 N. W. 849, it was held that, where the setting aside of a verdict was saved by the entry of a remittitur at a term following its rendition, the time for settling the bill ran from the later term. But this was placed upon the ground that, had it not been for the remittitur, the verdict would have been set aside, and the party seeking the bill would have had no occasion for one. In State v. Hopewell, 35 Neb. 822, 53 N. W. 990, the court held that the term fixing the time in an equity case was that at which the decision was announced, and not that of its formal entry upon the journal of the court. This is really in line with the first cases cited, and not, as the relator contends, in support of her position, because in a case tried to the court the findings take the place of the verdict. The case did not distinguish between the time findings were announced and the time judgment was announced on the findings. It quite clearly appears, as is usual in equity cases, that the findings and judgment were concurrent acts. In State v. Walton, 38 Neb. 496, 57 N. W. 18, a decree of foreclosure was rendered April 18, 1892; and June 26, 1893, a deficiency judgment entered. It was thereafter sought to have settled a bill of exceptions containing the evidence leading to the original decree; but the court held it was too late. This was evidently upon the ground that, although the deficiency judgment only was attacked, it had been the duty of the defeated party to preserve his bill of exceptions within the statutory time after the proceedings which led to the findings fixing his personal liability, and that it was not sufficient to proceed after the final judgment enforcing that liability. This case, therefore, is directly opposed to the relator's contention that she might wait until final defeat, and then preserve the record of the first trial. In Schields v. Horbach, 40 Neb. 103, 58 N. W. 720, it was held that, where it is sought to preserve a bill of exceptions embodying the evidence on an interlocutory motion, this must be done within the statutory period after the term at which the motion was ruled on, and not after the trial of the case.

We think all these cases lead irresistibly to the conclusion that the term referred to in the statute is, if not the term at which the evidence was taken, at latest the term at which an order was made based on that evidence. It is immaterial to the present case how the old controversy should have been settled, because the trial was here had and the motion ruled on at the same term. But, if any regard is to be paid to the long line of decisions to which we have referred, we must hold that the bill should have been settled within the statutory period after that term expired. The relator argues that such holding imposes an unnecessary burden upon litigants; that, until final judgment, it is uncertain that a party defeated at one step of the case will meet ultimate defeat; and that he should therefore be permitted to await the final event before incurring the labor and expense of preparing a bill of exceptions. In support of this argument, it is urged that there is in each court a shorthand reporter, who is a public officer, whose notes are public records, and that no difficulty arises in obtaining a true bill even after great lapse of time. The authenticity of the reporter's notes was left in some doubt by Spielman v. Flynn, 19 Neb. 342, 27 N. W. 224, and Lipscomb v. Lyon, 19 Neb. 511, 27 N. W. 731; but these cases were explained in Smith v. State, 42 Neb. 356, 60 N. W. 585, where the true character of the shorthand reporters and their records is discussed. The notes are not public records. The reporter's certificate to a transcript thereof does not authenticate them so as to permit their introduction in evidence. Parties in preparing, and the judge in settling, a bill of exceptions, are not bound by the reporter's transcript. There is, indeed, nothing to require parties to resort to such transcript in the preparation of a bill. The settlement of a bill rests finally upon the judge's determination of what occurred at the trial; and, when the accuracy of a proposed bill is properly challenged, the judge must settle the matter in accordance with the truth, and not blindly, in accordance with a reporter's transcript. Therefore, the policy of the law requires that the bill of exceptions should be settled within such reasonable time, fixed by statute, after the taking of the evidence sought to be preserved, that the parties and the judge may bring to their aid their own recollec-

tions; and this is a much more important consideration than the saving to the parties of labor and expense. The referee evidently based his conclusion of law in favor of the relator on the cases of Scott v. Waldeck, and City of Seward v. Klenk, supra. In each it was held that a bill settled after the trial term would be considered to ascertain whether the evidence sustained the verdict. These cases, in that feature, have for years not been followed in the practice of this court; and to that extent they have been recently overruled by Jones v. Wolfe, 42 Neb. 272, 60 N. W. 563, and Bank v. Thomas, 46 Neb. —, 65 N. W. 895.

The plaintiff, after the final trial, endeavored to preserve her rights by moving for a rehearing of the first motion for a new trial. This proceeding, however, did not operate to extend her time for settling the bill here presented.

The foregoing considerations dispose of the case. The parties argue quite extensively, and with some bitterness, questions affecting the merits of the Hespeler case, and the regularity of the court's action in sustaining the first motion for a new trial. These questions are, however, all foreign to the merits of this proceeding. The referee's conclusion of law on this branch of the case must therefore be set aside, the findings of fact confirmed, and the writ denied. Writ denied.

In re PETRY.

(Supreme Court of Nebraska. Feb. 18, 1896.)

HABEAS CORPUS—FUGITIVE FROM JUSTICE—EXTRADITION—CONSTITUTIONAL LAW.

1. Errors and irregularities of the trial court in a criminal prosecution must be corrected by direct proceeding for a review of the final judgment or order complained of. The writ of habeas corpus is never allowed as a substitute for an appeal or writ of error.

2. A fugitive from justice, surrendered by one state upon the demand of another, may, notwithstanding his objection, be prosecuted by the latter for any extraditable offense committed within its borders, without first having had an opportunity to return to the state by which he was surrendered. Lascelles v. Georgia, 13 Sup. Ct. 687, 148 U. S. 537.

3. A fugitive is not, in such case, denied any rights, privileges, or immunities secured to him by the constitution or the laws of the United States.

4. In re Robinson, 45 N. W. 267, 29 Neb. 135, distinguished.

(Syllabus by the Court.)

Original application by Edward Petry for a writ of habeas corpus. Writ denied.

J. O. Detweiler, for petitioner. A. S. Churchill, Atty. Gen., and George A. Day, Dep. Atty. Gen., for respondent.

POST, C. J. This is an application addressed to this court in the exercise of its original jurisdiction for a writ of habeas corpus in behalf of Edward Petry, who is, according to the complaint which is the basis of the proceeding, unlawfully imprisoned by the respondent, George W. Leidleigh, as wa den of the penitentiary. It is unnecessary t copy at length from the record, as the m terial facts may be briefly stated, viz.: O the 4th day of April, 1895, application w made to the governor of this state for a re uisition upon the governor of Illinois for t surrender of the relator, an alleged fugiti from justice, who was charged by the co plaint of one Jewett with burglariously e tering the house of the said complainant, the county of Douglas, in the night seaso and with stealing therefrom jewelry a clothing of the value of $50. Upon said a plication a requisition was allowed, in pu suance of which a warrant was issued by t governor of Illinois for the apprehension the relator, and upon which the latter w on March 7th, arrested, and immediate thereafter conveyed to Douglas county, this state, for trial. Having waived a pr liminary hearing upon the charge mentione he was committed to the jail of said count and on the 3d day of May an informati was filed by the county attorney, chargi him with the identical offense specified in t extradition papers, to which he interposed plea of not guilty, and was remanded f trial. On the 20th day of June, 1895, t said relator, without having had an opp tunity to depart from this state, and witho his consent, was taken before a magistra in and for Douglas county, and requir to answer another and different charge, wit, of burglariously entering the house one Thomas H. O'Neill, and stealing the from jewelry of the value of $37.50, and up which charge he was committed for tri Afterwards, during the May, 1895, term the district court, an information was the in filed by the county attorney, charging t relator with the last-mentioned offense, a to which the latter, at a subsequent day the term, entered a plea of not guilty, companied by an affidavit challenging the risdiction of the court over his person, which the matters here stated are set out detail. His objection to the jurisdiction the court being overruled, a trial was ha resulting in a conviction of the offense ch ged in said information, and which judgme the respondent relies upon as a justificati in this proceeding.

It is, in the first place, contended by the torney general that, conceding the acti complained of to be irregular, it is at m voidable, not affecting the jurisdiction of t district court, and that the relator's reme is accordingly by direct proceeding to secu a review of the judgment of convicti There appears to be no doubt of the sou ness of that proposition, either upon reason authority. The accused, in the language the statute, "shall be taken to have waiv all defects which may be excepted to by motion to quash or a plea in abatement by murring to an indictment or pleading in b or the general issue." Cr. Code § 444. T

writ of habeas corpus, as said by this court in State v. Crinklaw, 40 Neb. 759, 59 N. W. 370, "is not a corrective remedy, and is never allowed as a substitute for appeal or writ of error"; and the same principle is distinctly recognized in Ex parte Fisher, 6 Neb. 309; In re Betts, 36 Neb. 282, 54 N. W. 524; In re Havlik, 45 Neb. 747, 64 N. W. 234. But there exists a fundamental objection to this proceeding. The right of a demanding state, upon the surrender of a fugitive from justice, to try him upon a charge other than that specified in the extradition papers, has long been the subject to judicial controversy. Arrayed on one side are cases which appear to rest upon the inherent justice of the claim that a court cannot acquire jurisdiction over the person of one accused of crime through the fraud, duplicity, or abuse of process by an officer or agent intrusted with the impartial administration of the law. On the other hand are cases holding that a fugitive surrendered by one state on the demand of another may, under the constitution and laws of the United States, be prosecuted for any extraditable offense committed within the territorial jurisdiction of the latter, on the ground that there exists no right of asylum as applied to interstate extradition, and that it would be a useless and idle ceremony to return a fugitive to another state in order to again demand his surrender for trial.

The constitutional provision upon the subject is found in subdivision 2, § 2, art. 4, of the constitution of the United States, viz.: "A person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." The acts of congress bearing upon the subject (sections 5278, 5279, Rev. St. U. S.) are designed merely to carry into effect the constitutional provision, without assuming to enlarge or restrict the rights of the several states thereunder. During every stage of the discussion the courts have agreed substantially upon one proposition, viz. that the subject involved is a construction of the national constitution, and therefore, in its broadest sense, a federal question. It is worthy of note, too, that until a comparatively recent date the diversity of opinion among federal judges respecting the true interpretation of the foregoing provision was no less radical than existed between state courts. But in Lascelles v. Georgia, 148 U. S. 537, 13 Sup. Ct. 687, which was a writ of error to the supreme court of Georgia, the subject was by the supreme court considered in all of its phases, and the conclusion announced fully sustains the power of the demanding state to try a fugitive surrendered pursuant to the constitution of the United States for any crime committed within its borders, whether specified in the extradition warrant or not; and that one so tried is not thereby deprived of any rights, privileges, or immunities secured to him by the constitution or laws of congress. As that case must be regarded as an authoritative construction of the constitutional provision governing the subject, and binding alike upon state and federal tribunals, we feel warranted in here quoting at some length from the opinion of the court by Mr. Justice Jackson: "But it is settled by the decisions of this court that, except in the case of a fugitive surrendered by a foreign government, there is nothing in the constitution, treaties, or laws of the United States which exempts an offender brought before the courts of a state for an offense against its laws from trial and punishment, even though brought from another state by unlawful violence or by abuse of legal process. Kerr v. Illinois, 119 U. S. 436, 7 Sup. Ct. 225; Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. 1204; Cook v. Hart, 146 U. S. 183, 13 Sup. Ct. 40. To apply the rule of international or foreign extradition as announced in U. S. v. Rauscher, 119 U. S. 407, 7 Sup. Ct. 234, to interstate rendition, involves the confusion of two essentially different things, which rest upon entirely different principles. In the former the extradition depends upon treaty contract or stipulation, which rests upon good faith, and in respect to which the sovereign upon whom the demand is made can exercise discretion, as well as investigate the charge on which the surrender is demanded, there being no rule of comity under and by virtue of which independent nations are required or expected to withhold from fugitives within their jurisdiction the right of asylum. In the matter of interstate rendition, however, there is the binding force and obligation, not of contract, but of the supreme law of the land, which imposes no conditions or limitations upon the jurisdiction and authority of the state to which the fugitive is returned." In re Robinson, 29 Neb. 135, 45 N. W. 267, has been cited as supporting the claim of the relator, but that contention is based upon apparent misconception of what is there decided, viz. that one forcibly and unlawfully carried into this state will not be held to answer to a criminal charge without an opportunity to return to the state from whence he is brought. What is there said in regard to the right of the state to prosecute a fugitive regularly extradited is mere obiter, and not intended as decisive of the question now before us. To what extent that case is to be regarded as authority when applied to the same or a similar state of facts in view of the decision in Lascelles v. Georgia is a question foreign to this controversy, and does not call for notice. It follows, however, that the writ must be denied, and the relator remanded to the custody of the respondent. Writ denied.

BROWN et al. v. EDMONDS.

(Supreme Court of South Dakota. Feb. 19, 1896.)

EXEMPTIONS—WATCH.

Under section 5127, Comp. Laws, which makes absolutely exempt "all wearing apparel and clothing of the debtor and his family," a watch and chain owned and habitually worn by the debtor is absolutely exempt, as wearing apparel.

(Syllabus by the Court.)

On rehearing. For former opinion, see 59 N. W. 731.

HANEY, J. This case is now before us on rehearing. Our former opinion will be found in 59 N. W. 731. Defendant, a judgment debtor, was ordered, in proceeding supplementary to execution, to deliver to the sheriff a gold watch and chain owned by him, and which he had carried constantly for three years. In the former opinion it was held that these articles were not exempt as "household furniture." Appellant now contends that they are exempt, under section 5127, Comp. Laws, which makes absolutely exempt "all wearing apparel and clothing of the debtor and his family." Whether a watch carried constantly by the debtor should be regarded as wearing apparel, within the intent of the statute, is the only question to be determined.

Under a law providing that the "necessary wearing apparel owned by any person, to the value of $100," shall be exempt, if selected, the supreme court of Oregon held that a watch not exceeding $70 in value should be considered as an article of "wearing apparel," and quoted with approval from the language of Hammond, J., in Re Steele, 2 Flipp. 324, Fed. Cas. No. 13,346, as follows: "It would not be doing any great violence to the meaning of the term 'wearing apparel,' as used in the bankrupt act, to include in it a gold watch of moderate value. The definition of the word 'apparel,' as given by lexicographers, is not confined to clothing. The idea of ornamentation seems to be rather a prominent element in the word, and it is not improper to say that a man 'wears' a watch or 'wears' a cane." Stewart v. McClung, 12 Or. 431, 8 Pac. 447. In Rothschild v. Boelter, 18 Minn. 362 (Gil. 331), it was held that a silver watch and chain, worth $40 or $50, worn by the debtor, is not exempt under the statute as "wearing apparel of the debtor and his family." The court say: "That an article may be worn does not make it wearing apparel within this statute. The words are to be construed in this case according to the common and approved usage of the language, namely, as referring to garments or clothing generally designed for wear of the debtor and his family." It will be observed, however, that the Minnesota statute exempts "all wearing apparel of the debtor and his family"; our statute, "all wearing apparel and clothing of the debtor and his family." If the exemption was to be limited "garments or clothing generally designat for wear of the debtor and his family," was unnecessary to use both terms "wearin apparel" and "clothing." All authorities d fine "apparel" as including more than "clot ing." Presumably, the legislature employe both terms advisedly, and for the purpose including in the exemption more than wou be understood by the term "clothing." Th exemption is not limited in value, nor the word "necessary," found in most sta utes. Watches are as essential to the co fort and convenience of men in nearly all v cations as are hats or coats; in many th are absolute necessities. The same conc tion, in perhaps a less marked degree, pr vailed when the statute under discussi was enacted. While the question is not fr from difficulty, and one upon which cour may easily differ, we are inclined to hold th defendant's watch and chain were absolut ly exempt as wearing apparel. Adhering the views formerly announced upon the que tions then presented, it follows that the o der appealed from must be reversed. Th former order as to costs in this court w not be modified, appellant being allow costs on rehearing. All the judges concur.

In re CHAPTER 6, SESSION LAWS O 1890.

(Supreme Court of South Dakota. Feb. 25 1896.)

OPINION OF SUPREME COURT—REQUEST OF GO ERNOR.

Const. art. 5, § 13, provides that the g ernor shall have authority to require the opini of the judges of the supreme court upon import questions of law involved in the exercise of executive powers and upon solemn occasio *Held*, upon request by the governor for an op ion upon the construction of Sess. Laws 1890, 6, with reference to the appointment of regents education, involving the duration of the terms office of certain regents, that an opinion there should not be given, as involving rights of p sons not given an opportunity to be heard.

In the matter of the construction of cha ter 6 of the Session Laws of South Dako of 1890.

Supreme Court Chambers.

Pierre, February 25, 1896

His Excellency, Charles H. Sheldon, G ernor of South Dakota.

Sir: We are in receipt of your commu cation of recent date, wherein you requ our opinion upon the construction of chap 6, Session Laws of 1890, with reference to t appointment of regents of education, and which you state: "The original appoi ments which were made by my predecess the then governor, are shown by the appoi ment register kept in the office of the sec tary of state, which is herewith present for your examination, to have been made on the 9th day of March, 1890, for the te

of six, four, and two years, although at least one of the commissions issued to a six-year appointee bears date the 12th of March, 1890. The question at issue is whether the governor should not have strictly complied with the law, and have made these appointments not later than the 1st of March, 1890, and whether, having been made at a later date, they would not of necessity expire, although made for six years, not later than the 1st of March, 1896. The further question as to whether appointments made to fill vacancies, although including the appointment of more than one person, must not expire when the original appointment would have terminated if the original appointee had held the full term of his appointment, notwithstanding the language of the commission, is also involved."

With great respect to yourself and a sense of our serious official responsibilities, we have the honor to make the following reply:

The request of your excellency must be considered with reference to the authority and purpose of section 13, art. 5, of the constitution, which reads as follows: "The governor shall have authority to require the opinion of the judges of the supreme court upon important questions of law involved in the exercise of his executive powers and upon solemn occasions." This section of the constitution is an enlargement of the usual duties of the judiciary. We believe but few state constitutions contain analogous provisions. It is a fundamental principle of our political system, recognized and respected by all thoughtful citizens, that, so far as possible, each department of government should act independently of the others. Unless carefully guarded, the section of the constitution in question may lead to frequent discussions of delicate distinctions between executive and judicial duties. We believe the operation of its provisions should never be extended beyond the manifest intent of its terms. Its language should be given a restricted, rather than an enlarged, interpretation. Only upon important questions of law and upon solemn occasions should the ex parte opinion of judges be required or given.

It is impossible to announce any rule applicable to all cases for determining what questions are of sufficient importance, or what occasions are of sufficient solemnity, to warrant the employment of this unusual proceeding. These are matters which must rest largely in the discretion of both the executive and the judiciary; for, while the executive will have to first judge whether any given question justifies a request for the opinion of the judges, upon the latter must devolve the responsibility of deciding whether it is one upon which the constitution contemplates an opinion should be given. It is submitted, however, that, for many excellent reasons, great caution should be employed both by the executive and the judges in exercising the discretion conferred upon each. In re Constitutionality of Senate Bill No. 65, 12 Colo. 466, 21 Pac. 478.

It is evident that a construction of the statute to which our attention is called would substantially affect the rights of persons now acting as regents of education. To determine such rights in advance of any contention on their part, and without such persons having an opportunity to be heard, seems to us exceedingly undesirable, and not in accord with the methods usually employed in judicial proceedings. See In re Construction of Constitution, 3 S. D. 548, 54 N. W. 650. If no doubt exists as to the construction to be given this statute, an opinion would seem unnecessary; if doubts do exist, its proper interpretation would involve difficulties, for the solution of which we should have the research and assistance of counsel charged with the important duty of representing and protecting the interests and rights of all concerned,—an essential and efficient aid in the due administration of justice.

After mature and thoughtful consideration of your excellency's communication and our duties under the constitution, we beg leave to respectfully announce that we are forced to the conclusion that our opinion should not be given upon the construction of the statute mentioned therein.

Most respectfully,

DIGHTON CORSON,
H. G. FULLER,
D. HANEY,

Judges of the Supreme Court of South Dakota.

DIELMANN v. CITIZENS' NAT. BANK OF MADISON.

(Supreme Court of South Dakota. Feb. 19, 1896.

ACTION ON NOTE—LIMITATION—BURDEN OF PROOF.

1. When a party has pleaded the statute of limitations as a defense to a promissory note, and such note is introduced in evidence by the opposing party, and it appears upon its face to be barred by the statute,—the court taking judicial notice of when the action was commenced,—the burden of proving such facts as will show the note is not in fact barred devolves upon the party claiming under the note.

2. In such case, if the party claiming under the note fails to rebut the prima facie case which the introduction of the note in evidence makes for the party pleading the statute, the court is justified in finding that the note is barred.

3. The note, though appearing upon its face to be barred by the statute, cannot be held to be barred, until the opposing party has had an opportunity to rebut such prima facie case made by the note itself.

(Syllabus by the Court.)

Appeal from circuit court, Lake county; Frank R. Aikens, Judge.

Action by Charles Dielmann against the Citizens' National Bank of Madison. From a judgment for plaintiff, defendant appeals. Affirmed.

Murray & Porter, for appellant. J. H. Williamson, for respondent.

CORSON, P. J. This was an action by a bank depositor to recover from the defendant bank the balance claimed to be due him as such depositor. The defendant answered, denying many of the allegations of the complaint; and pleaded, as a counterclaim or defense, a balance of $273.59, claimed to be due the defendant on a promissory note executed by one Rice to the plaintiff, and indorsed by said plaintiff, and which had become the property of the defendant bank, and which amount it had deducted from plaintiff's account. To this counterclaim or defense the plaintiff, in a reply, pleaded the statute of limitations in bar. The plaintiff recovered judgment for the full amount of his deposit, and the defendant appeals. The note on which the counterclaim is based bears date July 28, 1884, and was by its terms payable on or before July 28, 1885. The plaintiff, as payee, transferred the note before its maturity. This action was commenced subsequently to December 1, 1891, more than six years after the maturity of the note, and the defendant bank claims to have applied the sum of $273.59 of the plaintiff's deposit to the payment of the balance due on said note, at about the latter date. On the trial, the plaintiff introduced evidence tending to prove that on December 9, 1891, he had on deposit with said bank the sum of $478, which the defendant, on proper demand, refused to pay him; and rested. The defendant, thereupon, to prove its counterclaim or defense, introduced in evidence the promissory note in controversy set out in its counterclaim or defense, with the indorsement of the plaintiff thereon, and evidence tending to prove that there was due and unpaid thereon on December 1, 1891, the sum of $273.59, and that on July 25, 1885, certain payments were indorsed upon the note, and that on March 22, 1889, the receipts of the proceeds of a sale of foreclosure of a mortgage, given to secure the payment of said note by the maker, were indorsed upon the note at that date; and rested. The plaintiff offered no further evidence, and the case was thereupon submitted to the court, which found, among other facts, the following: "That the plaintiff therein is a resident of Lake county, South Dakota, and has been a resident of said Lake county during all the times mentioned in the pleadings in this action." "Third. That the plaintiff deposited money in the defendant bank at various times, and that on the 9th day of December, 1891, plaintiff had on deposit in defendant bank the sum of $478. Fourth. That on the 9th day of December, 1891, plaintiff presented his check on defendant bank, payable to himself, for $478, at the counter of said defendant bank, during the business hours, and that said check was then and there refused. Fifth. That said defendant bank had in its possession, on said December 9, 1891, a certain note drawn by Elbert N. Rice, payable to plaintiff, dated July 28, 1885, for $400, and on the back of which was written the name of the plaintiff, preceded by the words, 'Pay to the order of W. F. Smith.'" The statement in the abstract given in the fifth finding of the court, that the note bears date of July 28, 1885, is clearly a clerical error, as the note, as copied in the record and as set out in the answer, bears date of July 28, 1884, and was made payable on or before July 28, 1885. In the briefs of counsel it is treated as bearing date of July 28, 1884, and it appears to have been protested for nonpayment July 31, 1885. We shall therefore assume that the date of the note as stated in the fifth finding was intended to be read 1884, instead of 1885. The court concludes, as matters of law, as follows: "Second. That due and legal demand of payment of said sum was made by said depositor on said December 9, 1891, by presenting his check for said amount at the counter of said bank, during business hours, payable to himself. Third. That no part of said money has ever been paid said plaintiff by defendant, but there is now due the plaintiff from defendant the sum of $478, and interest thereon at 7 per cent. per annum from December 9, 1891. Fourth. That the note held by defendant, and introduced in evidence and marked 'Exhibit A.' came due July 28, 1885. Therefore more than six years had elapsed since the maturity of said note, before the commencement of this action, and hence action on this note is barred by statute of limitation."

Appellant contends, first, that the evidence is insufficient to support the finding that a demand was made upon the bank for the money due the plaintiff, prior to the commencement of the action. Without intimating any opinion as to the necessity for such a demand, we think there was, in the absence of any conflicting evidence, proof sufficient to support the finding of the court. This brings us to the important question involved in this case, namely, was the evidence that the note was barred by the statute sufficient to support the plaintiff's reply and the court's conclusion of law? Appellant contends that the court erred, in its conclusion of law that the note was barred, for the reason that the plaintiff gave no evidence in support of his reply, and that the facts pleaded in his reply, being deemed in law to be controverted by the defendant, must be regarded as not proven. This contention of the appellant is not tenable, under the facts proven in this case. The plaintiff pleaded the statute, as he was required to do to avail himself of the bar; but when the defendant introduced the note in evidence, the court taking judicial notice of when the action was commenced, it proved prima facie the allegations in plaintiff's reply (Searls v. Knapp [S. D.] 58 N. W. 807), as it appeared upon its face to be barred by the statute; and defendant's evidence further proved that the indorsement of payment of March 22, 1889,

agent; and that the securities exchanged for the discharge of the mortgage were their individual property, and not the property of the bank, although, prior to that time, they had belonged to the bank. The bank book and documents offered in evidence tended to sustain the oral evidence above set forth.

Upon the evidence submitted the court found, among others, the following facts: "(11) I find that, on or about the 9th day of January, 1889, the said Huron National Bank purchased the said lot and building of said Hazen & Fowler, and paid them, then, therefor, in cash or its equivalent, the sum of $16,500, and that said Hazen & Fowler then conveyed the same to said bank by warranty deed, containing the usual covenants of warranty, and among which was one warranting the said property to be free and clear of all incumbrances whatsoever; that said mortgage was at that time a lien upon said property so conveyed, but that said Hazen & Fowler agreed to pay the same; and that said Huron National Bank in no way whatever assumed the payment thereof, nor agreed to pay the same. I further find that said loan was not negotiated to said bank, nor for its benefit, and that said bank never agreed to pay the same, nor become liable therefor in any manner whatsoever. (12) I find that the plaintiff, on or about November 1, 1890, released and satisfied the mortgage described in plaintiff's complaint, upon certain representations made by L. S. Hazen, but that said L. S. Hazen was not in any sense authorized to act for the said bank in procuring such release, but was acting wholly for said L. W. Hazen and John A. Fowler." "(14) I further find that said L. S. Hazen did not make any representations of matters of fact, during the transaction referred to, which were false, or which were known to him to be false. (15) I further find that said debt was a debt of John A. Fowler, guarantied by L. W. Hazen and Walker & Rhomberg, for which the defendant bank was in no way liable. (16) I further find that said L. S. Hazen, in negotiating the transaction complained of, was the agent of said John A. Fowler and L. W. Hazen, and was not in any way authorized to act for or represent the defendant bank. (17) I find no evidence whatever that plaintiff, in releasing the mortgage, relied upon or believed what said L. S. Hazen said, simply because he said so; but if he believed his statements at all, it was because they were substantiated by other matters within plaintiff's knowledge, or that he presumed he knew. (18) I further find no evidence that plaintiff has ever offered to rescind his contract whereby he released his mortgage, but that he has at all times retained, and still retains, the same, and the benefits thereof." These findings were excepted to by the plaintiff as not being sustained by the evidence. The evidence was to some extent conflicting, but there was not such a preponderance of the evidence against the findings as would justify this court in disturbing them.

The questions presented are mainly those of fact, and only one or two questions of law seem to require consideration. Appellant contends that, as L. W. Hazen was president of the bank, and he and his family were the principal owners of its stock, that as John A. Fowler was its cashier, and L. S. Hazen, who negotiated for the discharge of the mortgage, was a director and stockholder in the bank, the bank is charged with knowledge of the transactions relating to the discharge of the mortgage; and, having received the benefit of such discharge, it became liable to the plaintiff for the loss he sustained by reason of such discharge. Appellant further contends that, "before the bank sold the property, there can be no question about the right of plaintiff to have had the mortgage restored. Jones, Mortg. § 966. The bank not only did not part with anything to secure the discharge aside from the securities, but was certainly a party to the wrong. The bank furnished the worthless securities, and all of its officers knew the use to which the securities were to be put, and a director of the bank appeared in Dubuque with the securities, and upon representations made by him he secured the discharge. When the discharge was delivered to the bank, the bank had knowledge of the whole transaction, and it parted with nothing to secure the release. The bank, when Fowler conveyed the property, in effect paid Fowler the full value of the property. Hence, when the discharge was delivered, it was not called upon to pay anything more, and did not do so. From this it will be seen that the production of the discharge by Fowler & Hazen did not induce the bank to part with anything of value, or in any manner alter or change its condition on the strength of the discharge. If the plaintiff could have avoided the discharge, as against the bank, so long as the bank owned the property, can it be said that the bank, by a conveyance of the property, could defeat the plaintiff's rights? I think that the conveyance had the effect of cutting off the plaintiff's right to pursue the property, but justice would certainly require that plaintiff be permitted to impress the fund derived from the sale of the property. If the plaintiff had a right to the property, he certainly had as good a right to its proceeds, when the bank, a party to the wrong, has by its act placed the property beyond the reach of the plaintiff."

The first proposition is not tenable. If the discharge of the mortgage was in fact obtained by L. S. Hazen, as the agent of L. W. Hazen and John A. Fowler, and for them, and not for the bank, and the property given in exchange for such discharge of the mortgage was in fact the individual property of said L. W. Hazen and John A. Fowler, and not, at the time of the exchange, the property of said bank, then the bank corpora-

tion incurred no liability, by reason of such discharge, to pay to the plaintiff his loss sustained thereby. The bank had, for its security against said mortgage, not only the covenants of warranty on the part of John A. Fowler, but the further agreement to discharge it on the part of L. W. Hazen and said Fowler; and the discharge of the mortgage was evidently procured by them to protect themselves against their covenants and agreements with the bank. The bank, therefore, not being a party to the note or mortgage, or liable thereon, and not being in any manner a party in procuring the discharge of the mortgage, we can discover no principle of law under which the bank could be held liable to the plaintiff for any loss sustained by reason of said discharge, obtained by Hazen & Fowler, through their agent, L. S. Hazen.

The second proposition, that the bank property, if the defendant had still remained its owner, would have been held by the bank, subject to the right of the plaintiff to have the discharge canceled, and his mortgage restored of record, would present an interesting question, if the court had found that the discharge of the mortgage was actually procured by misrepresentations of facts of which the bank was chargeable with actual notice, and the plaintiff had promptly rescinded the contract by which the discharge was obtained, and had restored to the parties the securities obtained in exchange for such discharge. But, with the findings of the court that there were no false representations, and that plaintiff did not rescind the contract, it does not seem necessary to determine that question on this appeal.

But, were appellant's contention on this second proposition correct, it would by no means follow that the plaintiff could impress the proceeds arising from the sale of the property with a trust in plaintiff's favor for the amount of his loss. The theory under which the mortgage lien might possibly have been restored, if the bank had still remained the owner of the property, is that the defendant would seem to sustain no loss by reason of such restoration, as it had made no new advances or payments to Hazen & Fowler on the faith of the discharge, and it would still be able to rely upon the covenants and agreements of Hazen & Fowler for its protection, and it would not be placed in any different position than it occupied before the discharge. But, in such case, it would not become liable to the plaintiff, to make good his loss, otherwise than to hold the property subject to the mortgage. But, when the bank conveyed the property to an innocent purchaser for value, it did not thereby assume any liability to the plaintiff, and, not being so liable, the proceeds of such sale could not be impressed with the trust in favor of the plaintiff. After the sale of the bank property freed from the mortgage, Fowler & Hazen were discharged from their covenants and agreements with the bank to pay off the mortgage and save the bank harmless as against the same. The bank, therefore, after the sale, occupied an entirely different relation to the property and to Hazen & Fowler. To hold, therefore, that the plaintiff could follow the proceeds would be in effect to require the bank to pay the plaintiff his loss by reason of the discharge, for which we hold the bank is not liable. It will not be necessary to pursue this discussion further, as we are clearly of the opinion that, under no view of the case, can the appellant's contention be sustained. The judgment of the circuit court, and its order denying a new trial, are affirmed.

SOUTHARD v. SMITH et al.

(Supreme Court of South Dakota. Feb. 15, 1896.)

RES JUDICATA.

Where, in an action to foreclose a lien, under the mechanic's lien law of this state, one claiming an interest in the property was made a party defendant, and it was alleged in the complaint that such defendant, naming her, "has or claims to have some interest in the land, * * * but she has no claim prior or superior to that of plaintiffs," and such defendant admits such allegation in her answer, and fails to set up or claim any superior or paramount title to the property involved in the action, she is concluded by a verdict of a jury in such action finding all issues in favor of the plaintiff, and a judgment rendered thereon, and she cannot be permitted to litigate or dispute the title to such property, as against one who claims the same under and by virtue of a sale of the property made under the said judgment.

(Syllabus by the Court.)

Appeal from circuit court, Lincoln county; J. W. Jones, Judge.

Action by Emily Southard against Isabella M. Smith and others. Judgment for plaintiff, and defendant Charles E. Judd appeals. Reversed.

O. S. Gifford and Davis, Lyon & Gates, for appellant. Stoddard & Wilson, for respondent.

CORSON, P. J. Emily Southard, the plaintiff, being the owner of a certain lot in the city of Canton, entered into a contract, usually denominated a "bond for a deed," with the defendant Isabella M. Smith, by which she agreed, upon the payment of $3,000 at the time therein specified, and the performance of certain covenants therein, to convey to her said lot. One of the covenants on the part of said Isabella M. Smith was that she would erect a building of the dimensions and of the material therein specified upon the said lot, and expend at least $1,000 in said improvements within 30 days after the date of said contract. Upon this contract the said Isabella M. Smith paid $1,758.41, and partially completed said building. Failing, on demand, to pay the balance due upon said contract, Emily Southard brought this action to foreclose the

said contract, and subject the said lot and improvements to the payment of said balance due her. Isabella M. Smith, W. & A. McArthur, the St. Croix Lumber Company, and the Oshkosh Lumber Company, with others, were made parties defendant; but, during the progress of the case, Charles E. Judd succeeded to all their respective interests, and was substituted for them in the action, and is the only party who appeals. The case was referred to a referee, who found the facts and stated his conclusions of law thereon. From the findings of fact, it appears that W. & A. McArthur, the St. Croix Lumber Company, and the Oshkosh Lumber Company set up in their answers proceedings in actions brought to foreclose mechanics' liens, resulting in the sale of the interests of said Isabella M. Smith in the property, and which, appellant contends, also divested Emily Southard of her title to the property. Whether or not these foreclosure proceedings under the mechanic's lien law did divest the title of Emily Southard is the only question in the case. From these findings of the referee it further appears that, in erecting the building specified in the contract, Isabella M. Smith became indebted, for material furnished for the same, to W. & A. McArthur, who duly filed a lien therefor, and subsequently instituted an action to foreclose the same, making, among others, Isabella M. Smith and Emily Southard, the plaintiff herein, parties defendant. W. & A. McArthur alleged, in their complaint in that action, that the lumber was furnished "by virtue of a contract with the defendant Isabella M. Smith, through her agent, one E. E. Carpenter." The complaint further states "that the defendant Emily Southard, plaintiffs are informed and believe, has or claims to have some interest in the land upon which said building stands, but she has no claim prior or superior to that of plaintiffs." To this complaint, which is in the usual form in other respects, the defendants, including said Emily Southard, filed an answer denying all the allegations of the complaint not therein admitted, and among other admissions is the following: "(5) Defendant Smith admits that she is the owner by purchase contract of the premises described in the complaint, and defendants admit the sixth, seventh, and eighth counts in the complaint." The term "counts," as used above, evidently means paragraphs, as the complaint contains but one cause of action, divided into paragraphs, and the seventh paragraph is the one hereinbefore given. The answer concludes with the following prayer: "Wherefore the defendants pray judgment for a dismissal of the complaint, for costs and disbursements, and for a decree adjudging the lien filed by plaintiffs a cloud upon defendants' title, and that the same be canceled of record, and for such other and further relief in the premises as is just and equitable." The case was tried by a jury, which found all the issues in favor of the plaintiffs therein, W. & A. McArthur, and thereupon the court made its decree, in which it is decreed as follows: "It is further ordered and decreed that all the right, title, and interest of the defendant Isabella M. Smith in the building and premises described in the complaint, * * * or so much thereof as may be necessary, be sold to satisfy the judgment, with interest, costs, etc. * * * And it is further ordered and decreed that the defendants, and all persons claiming under them, or either of them, after the giving of said deed, and the confirmation of sale thereof, be forever barred and foreclosed of all right, title, interest, and equity of redemption in and to said premises so sold, or any part thereof, unless the same shall be redeemed within one year from the day of such sale, as provided by law." The referee, after finding the facts as to the other two lien-foreclosure actions, which were quite similar, except that in the second one Emily Southard made no answer, and in the third she was not named as a party defendant, the referee made the thirty-fourth finding, which is as follows: "That it appears from the judgment roll in this action, introduced in evidence, that Isabella M. Smith never acquired any interest in the premises in question under and by virtue of the contract entered into between her and the plaintiff, Emily Southard, and it is not shown by defendant that Isabella M. Smith ever complied with the terms of said contract or that her successors in interest ever did so." The referee states his conclusions of law as follows: "That as the decrees in which the St. Croix Lumber Company and W. & A. McArthur are plaintiffs, being the only action in which the plaintiff, Emily Southard, was made a defendant, did not pretend to sell anything but the interest of Isabella M. Smith in and to the premises in controversy; and, as it does not appear that Isabella M. Smith ever acquired any interest in said premises, but, on the contrary, it appearing that said Isabella M. Smith never did acquire any interest in said premises, the attempt in said decrees to bar the plaintiff, Emily Southard, from all interest in said premises was wholly inoperative and void, and the purchasers or their successors at the sale under said decrees did not acquire any interest in the land when in controversy."

Subsequently the case was referred to the referee for further findings, and thereupon he made the following additional findings: "(1) I find as a fact that the defendant Isabella M. Smith never performed the conditions of the contract entered into between the plaintiff herein and said Isabella M. Smith, set out in finding No. 1 of the original findings, in this: that said Isabella M. Smith never paid or offered to pay the plaintiff the amount required to be paid by her, under and by virtue of the terms of said contract, nor did said Isabella M. Smith make improvements on the premises as required by said contract. (2) That the only sum ever paid by said Isabella M. Smith,

or by any person for her, was the sum of seventeen hundred and fifty-eight dollars and forty-one cents ($1,758.41). (3) That the sum due under said contract was demanded of said Isabella M. Smith, or her agent, by the plaintiff, Emily Southard. (4) That there is now due and owing by the said Isabella M. Smith to the plaintiff, Emily Southard, the sum of $1,660, with interest thereon at the rate of ten per cent. per annum from the 10th day of August, 1883. * * * (5) That no part of the sums of money in these additional findings found to be due said Emily Southard has ever been paid to her, although demand has been made therefor. (6) That the plaintiff, Emily Southard, by virtue of the contract entered into between herself and the said Isabella M. Smith, and by virtue of the statute giving a vendor a lien for purchase money, said plaintiff, Emily Southard, has a valid lien upon the premises in controversy, which is superior to any lien or claim of any of the defendants hereto." And states further conclusions of law as follows: "(1) That the plaintiff, Emily Southard, has a lien upon the premises in controversy superior to any claim of the defendants for the amount due upon the purchase price of said premises and the interest thereon, and the amount of taxes and interest on the same, as set forth in findings of fact. (2) That the plaintiff, Emily Southard, is entitled to judgment against the said Isabella M. Smith for the sums of money so found to be due for principal and interest and taxes. That the said plaintiff, Emily Southard, is entitled to a decree of the court foreclosing her lien against all of the defendants in said action and now defending, and against all of the defendants in this action, if the same have not already been foreclosed by the sale of the said premises ordered by a former decree of the court in this action; and said plaintiff is entitled to have the premises in controversy, and described in the findings of fact herein, sold, according to the rules and practice of this court, and the statute regulating the sale of real estate on execution." These findings of fact and conclusions of law were adopted by the court, and a judgment and decree thereupon rendered for the plaintiff, Emily Southard.

Respondent makes the objection that exceptions were not duly taken to the findings of fact; but, in the view we take of the case, this question does not become material, as the appeal will be disposed of upon the theory that the only question presented is one of law as to the effect to be given to the judgments in the actions of W. & A. McArthur and the St. Croix Lumber Company to foreclose their liens, under the mechanic's lien law, and in which Emily Southard, the plaintiff in this action, was made a defendant. The referee, in his conclusions of law, and the court, in its judgment, have, in effect, entirely ignored the judgments in the actions of W. & A. M Arthur and the St. Croix Lumber Compa and treated them as in no manner affecti the plaintiff's right to recover in this tion. Undoubtedly, the referee's conc sions of law would be correct, under t decisions of this court in Pinkerton v. Beau, 3 S. D. 440, 54 N. W. 97, if his vie are correct as to the judgments referred We shall assume that the rules applica to the foreclosure of mortgages, and as the effect of making prior or adverse clai ants parties, are applicable to foreclosu of liens under the mechanic's lien laws this state, as the positions of such mo gagee and a lien holder are very much t same. Neither can, save in exceptio cases, by their foreclosure proceedings, fect the rights of prior parties, where su prior parties take the proper steps to p tect their rights. But, while such pr and adverse claimants are neither necessa nor proper parties, yet, if they are ma such, and fail to so plead as to protect th rights, their claims may be cut off by t judgment in such action. As a general ru courts of equity will not undertake, in foreclosure action, to determine the valid of a prior mortgage or prior adverse ti and where a party who claims under su a prior mortgage or prior adverse title p sents that fact to the court under a pro answer or plea, the action should, on mand, be dismissed as to such party. H ner v. Insurance Co., 123 U. S. 747, 8 S Ct. 337; Wilts. Mortg. Forec. §§ 420, 4 In the late revision of that work, the learn author says, in section 420: "The only qu tions that can be determined concerning t title upon the foreclosure of a mortga are such as affect the equity of redempti The plaintiff has no right to make a th person, who claims an adverse title, derived from either the mortgagor or mortgagee, and who cannot be affected the judgment, a defendant for the purp of litigating his claim to a paramount titl But, in section 421, the same author sa "But where a person claiming a paramou title is made a party to a foreclosure, der an allegation that he claims an est in, title to, or lien upon the property mo gaged subsequent to the plaintiff's mo gage, and such party answers by filing general denial, the decree will be bind on him, if a judgment is rendered agai all the defendants, foreclosing their equ of redemption, and he will not be again titled to litigate matters which he co have set up in the foreclosure. * * * I where a party, who is made a defendant a subsequent incumbrancer or purcha sets up in his answer a claim of title pr to the mortgage, such title cannot be pr erly investigated; and the complaint of plaintiff should be dismissed as to such fendant, unless the plaintiff is prepared

prove that such claim in fact arose subsequent to the mortgage. Where this is not done, and a judgment in the usual form is entered against all the defendants, it will not bind his prior interest, and will be reversed on appeal, even though made after hearing on the pleadings and proofs, because there can be no foundation in the complaint for a decree upon a question of paramount title." Helck v. Reinheimer, 105 N. Y. 470, 12 N. E. 37; Wolfinger v. Betz, 66 Iowa, 594, 24 N. W. 228, was an action to foreclose a mortgage. Betz defended upon the ground that he had foreclosed a mortgage in which he had, in his complaint, alleged that Martin Groshaus, the plaintiff's intestate, and others named, "have or claim to have an interest or lien in and to the property, * * * but that the interest or lien of defendants, if any such exists, is inferior, subsequent, or junior to that of the plaintiff's mortgage." Martin Groshaus, though properly served with process, failed to appear and answer, and a decree was rendered for plaintiff, Betz. Betz became a purchaser of the property. In the opinion the court says: "But, in the view we take of the case, it is not necessary to consider these questions, as we are compelled to conclude that Groshaus' administrator is estopped by the prior adjudication in the action brought by Betz. Groshaus' rights were directly put in issue in this case. He had an opportunity, and was called on to establish his rights, if he had any; and by the default he admitted that they were inferior to the mortgage of Betz. It is a familiar rule that a party cannot relitigate matters which he could have set up in a prior action, but which he failed to do. Hempstead v. City of Des Moines, 63 Iowa, 36, 18 N. W. 676; Mally v. Mally, 52 Iowa, 654, 3 N. W. 670; Newby v. Caldwell, 54 Iowa, 102, 6 N. W. 154; Bank v. Stevens, 46 Iowa, 429; Painter v. Hogue, 48 Iowa, 426; Patton v. Loughridge, 49 Iowa, 218; Hackworth v. Zollars, 30 Iowa, 433."

With these preliminary observations as to the law applicable to this case, we proceed to an examination of the pleadings and decree in the case of W. & A. McArthur v. Isabella M. Smith et al., in which Emily Southard, the present plaintiff, was made a party defendant. As before stated, in the complaint in that action it was alleged, in terms, that "the defendant Emily Southard * * * has or claims some interest in the land upon which said building stands, but she has no claim prior or superior to that of the plaintiffs." She is thus distinctly notified that the plaintiffs claim that their lien is prior or superior to her interest in the land. She was therefore called upon to assert her paramount title, if she deemed it to be superior to that of the plaintiffs' lien. But she failed to assert such paramount title, or set up her prior title to the property, and to ask for a dismissal of the action as to her, and she failed to even deny that the lien of the plaintiffs was not prior or superior to her interest in the land. But, on the contrary, she joined Isabella M. Smith in denying any indebtedness to the plaintiffs, admitted the allegations of the plaintiffs that she had no claim prior or superior to that of plaintiffs, and, with Isabella M. Smith, demands, as relief, a decree adjudging plaintiffs' lien to be a cloud upon defendant's title, and that the same be canceled. Upon a trial by a jury all the issues were found in favor of the plaintiffs, and a decree was thereupon entered, in which it is ordered and decreed "that the defendants, and all persons claiming under them, or either of them, * * * be forever barred and foreclosed of all right, title, interest, and equity of redemption in and to said premises." From this decree no appeal was taken, and the judgment stood in full force and effect when the present action was tried. The court had jurisdiction both of the subject-matter and of the person of Emily Southard, and full power and authority to make the decree. Under this decree the property was regularly sold, and a sheriff's deed executed, and, there being no redemption by the said Isabella M. Smith or Emily Southard, the title became absolute in the purchaser, and was vested in the appellant, Judd. It is contended by the respondent that the premises were not decreed to be sold, but only the right, title, and interest of Isabella M. Smith in the premises. This is, however, the usual form of a decree in foreclosure cases, whether of mortgage lien or of mechanic's lien. It was alleged, in the complaint in that action, that Isabella M. Smith was the owner of the premises by virtue of the land contract, and this she admits in her answer. Emily Southard, when called upon in this action, makes no denial of the alleged fact, but admits it, in effect, by admitting that the plaintiffs' lien was "superior and prior" to that which she claimed; and her right, title, and interest in the premises were forever barred by the decree. We are therefore reluctantly forced to the conclusion that Emily Southard's interest in this property was divested by these proceedings, as against persons claiming under that decree. We can discover no principle of law which would preclude this decree from being a complete bar, as against the plaintiff, Emily Southard, in this action, unless we take from the judgments of courts the sanctity with which the law has clothed them. Having arrived at the foregoing conclusions, we do not deem it necessary to discuss the effect of the foreclosure proceedings in the action of the St. Croix Lumber Company v. Isabella M. Smith et al., in which the said Emily Southard was made a party defendant. If the effect of the foreclosure proceedings in the McArthur suit was to divest the said Emily Southard of her paramount title, as against parties claiming under the decree in that case, it necessarily follows

that the decree in the case at bar must be reversed; and it is so ordered, and a new trial is granted.

ANDERSON v. ALSETH.

(Supreme Court of South Dakota. Feb. 19, 1896.)

TRIAL BY COURT—FINDINGS OF FACT.

In an action at law tried to the court without a jury, material issues tendered by the complaint, and admitted or not denied in the answer, require no findings of fact.

(Syllabus by the Court.)

Appeal from circuit court, Kingsbury county; J. O. Andrews, Judge.

On rehearing. Affirmed. For former opinion, see 62 N. W. 435.

C. A. Savage, for appellant. Chas. S. Whiting, for respondent.

FULLER, J. This case, now before us for the second time, is an action in claim and delivery to obtain the immediate possession of certain grain for the purpose of foreclosing a statutory lien for threshing the same. There was a trial in the court below without a jury. Judgment was entered against the defendant upon findings of fact and conclusions of law favorable to plaintiff, and the defendant appeals. The judgment was reversed, and upon application of respondent's counsel a rehearing was awarded. A full statement of the facts is contained in our former opinion, reported in 62 N. W. 435, and, so far as we shall adhere to the law applied thereto, a reproduction thereof is unnecessary. At the former hearing respondent's counsel made no argument, and no brief was filed in his behalf. It was contended by counsel for appellant then, as now, that there was no evidence or finding that S. J. Flynn (respondent's assignor) was the owner of and operated the machine with which the grain in controversy was threshed, and that the court failed to find "that said S. J. Flynn has made an account in writing, stating the kind of grain and the number of bushels threshed, the price agreed upon for such work, and that the same was not in excess of the price usually charged for such services, the name of the person for whom such threshing was done, and the description of the land upon which said grain was grown, and that he made oath to the correctness of the account." So far as essential to a determination of the questions which we find it necessary to reconsider, chapter 88 of the Laws of 1889, creating a lien for threshing, is as follows: "Every person or persons owning and operating a threshing machine shall have a lien from the date of threshing upon all grain threshed by him with such machine for the value of the services so rendered in doing such threshing. * * * Any person entitled to a lien under this act shall make an account in writing stating the kind of grain and the number of bushels threshed, the price agreed upon for such work, which shall not be in excess of the price usually charged for such services, the name of the person for whom said threshing was done and a description of the land upon which said grain was grown and after making oath to the correctness of the account shall file the same in the office of the register of deeds of the county in which the person owning such grain resides." As stated in our former opinion, the trial court made no finding, "either in terms or in substance, that the assignor of the plaintiff owned and operated the threshing machine by which the grain was threshed," and under the above-quoted provision, and upon the authority of Parker v. Bank (N. D.) 54 N. W. 313, we rightfully concluded as a matter of law that the omission to find this vital question in favor of plaintiff was sufficient to require a reversal of the judgment; but now, upon an examination of the complaint and answer in the case, to which our especial attention is directed for the first time by counsel for respondent, we find that the question was in no manner at issue.

It is alleged in the complaint and admitted in the answer that the plaintiff, S. J. Flynn, owned and operated the threshing machine with which, and at the time, the grain in controversy was threshed. The question not being at issue, no finding of fact thereon was necessary. Humpfner v. D. M. Osborne & Co., 2 S. D. 310, 50 N. W. 88; Barto v. Himrod, 8 N. Y. 483. While the court's findings of fact, like a special verdict of a jury, when considered with the pleadings in the case, must support the judgment based thereon, issuable facts, tendered by the complaint, and admitted or not denied in the answer, require no findings by the court. Fox v. Fox, 25 Cal. 587; Swift v. Muygridge, 8 Cal. 445. It is clearly obvious that the remaining objections to the findings of fact, when considered with the undenied, and consequently admitted, averments of the complaint, must yield to the force of the rule herein announced; and that said averments, admissions, and findings, when considered together, show a substantial compliance with every statutory requirement, entitling respondent to the benefits of the lien which he seeks to enforce. So far as the same is consistent with respondent's right to recover, we adopt without further discussion the reasoning of our former opinion, and by disaffirming, as we must, the result there reached, we are led to affirm in all things the judgment of the trial court; and it is so ordered.

LINDSAY v. PETTIGREW (KIRBY, Intervener).

(Supreme Court of South Dakota. Feb. 19. 1896.)

ATTORNEY'S LIEN—SETTING OFF JUDGMENTS.

An attorney's lien is so far subject to the equities arising out of and existing between the parties to an action that a judgment on appeal for costs against the plaintiff may be set off pro tanto against a similar judgment in the same action in plaintiff's favor, without regard to such lien of the attorney.

(Syllabus by the Court.)

Appeal from circuit court, Minnehaha county; J. W. Jones, Judge.

Action by Elisha E. Lindsay against Frederick W. Pettigrew. Joe Kirby intervenes. From an order of the trial court denying an application to set off a judgment for costs in defendant's favor against a judgment in plaintiff's favor, defendant appeals. Reversed.

Bailey & Voorhees, for appellant. Joe Kirby, for respondent and intervener.

FULLER, J. This appeal is from an order of the trial court denying an application to set off pro tanto a judgment for costs, entered in defendant's favor against plaintiff, in an action in which plaintiff obtained the judgment against defendant, which is sought to be made the subject of a set-off. Practically, but one question of law is presented, and the essential, undisputed facts are, in effect, as follows: The original trial of the cause resulted in a judgment for plaintiff, which was reversed on appeal to this court (52 N. W. 873), and a new trial was ordered. The costs were taxed herein against the plaintiff in defendant's favor at $188.25, and judgment therefor was accordingly entered in the circuit court. A retrial in that court resulted in a judgment for defendant, which was also reversed on appeal, and the costs were taxed in plaintiff's favor against defendant at $69.85. Immediately after judgment therefor was docketed in the court below, the intervener herein, Joe Kirby, Esq., who had been plaintiff's attorney at all times during the litigation, filed an attorney's lien for the full amount of said judgment, and caused execution to be issued thereon, and the property of the defendant to be seized thereunder. All interested parties were before the court. Plaintiff was insolvent; the lien was effectually docketed as required by subdivision 4 of section 470 of the Compiled Laws; and there is no dispute as to the reasonableness of the amount claimed as attorney's fees. The judgments are mutual, final, and for costs, having the effect and force of judgments of the circuit court. Respondent's contention that the application to set off one against the other cannot be entertained because the same was not made in this court is without merit. Comp. Laws, § 5109; Laws 1893, c. 58. The question is, was the defendant, notwithstanding the attorney's lien, entitled to have his judgment set off pro tanto against plaintiff's judgment, obtained in the same court and in the same action?

While an attorney's lien asserted and perfected as required by statute, prior to an application to set off mutual judgments obtained in the same court, though in different actions, is superior to the right of a judgment debtor (Hroch v. Aultman & Taylor Co., 3 S. D. 477, 54 N. W. 269), we are inclined to believe that a different rule should be applied to judgments rendered in the same action. For the protection of the lawyer through whose exertions his client's interests have been preserved and his rights secured, a lien equitable in its nature is allowed upon the interest of such client in the judgment obtained; but, when each litigant has obtained a judgment in the same action, there are equities which may be adjusted between the parties without reference to the lien of the attorney for either. In the case before us the plaintiff is insolvent; and, by the order appealed from, the defendant, although a prevailing party, is, in effect, required to pay plaintiff's attorney. Our conclusion that the judgments rendered in this action should be set off pro tanto one against the other, although plaintiff's attorney be thereby deprived of a portion of the amount secured by his lien, in no manner intrenches upon our former decision, and is amply sustained by authority. Weeks, Attys. at Law (2d Ed.) 770; Yorton v. Railway Co., 62 Wis. 367, 21 N. W. 516, and 23 N W. 401; Irvine v. Myers, 6 Minn. 562 (Gil. 398).

Cases inconsistent with the view herein expressed are, indeed, few in number, and were apparently decided without careful consideration. Under the well-established equitable rule, a solicitor's lien could not be enforced in a manner that would interfere with equities existing between the parties, arising out of the same action or proceeding, but an attorney's lien could not be defeated by setting off judgments for costs, rendered in different actions between the same parties. Mr. Jones, at pages 216, 217, of the first volume of his work on Liens, states the prevailing rule and declares the governing principle to be that, "where a solicitor is employed in a suit or action, he must be considered as having adopted the proceeding from the beginning to the end, and acted for better or worse. His client may obtain costs in some matters in the suit or action, and not in others, and the solicitor takes his chance and may ultimately enforce his lien for any balance which may appear to be in favor of his client. * * * The lien of an attorney upon a judgment is upon the interest of his client in the judgment, and is subject to an existing right of set-off in the other party to the suit. In other words, an attorney can have a lien for an amount no greater than what is actually found to be owing by the opposite party to his client. It is subject to the equitable claims of the parties in the cause." Shirts v. Irons, 54

Ind. 13; Renick v. Ludington, 16 W. Va. 378; Bank v. Eyre, 8 Fed. 733; Porter v. Lane, 8 Johns. 357; Ross v. Dole, 13 Johns. 306; Cooper v. Bigalow, 1 Cow. 206. In Porter v. Lane, supra, the court says: "The plaintiff's attorney has a lien for his costs only in the net balance due, after the defendant's charges in that suit are deducted. The attorney acts upon the credit of his client, and his lien cannot interfere with the equitable arrangement between the parties. It is subject to the equitable claims of the parties." From the headnotes in Dunkin v. Vandenbergh, 1 Paige, 622, we quote the following: "A party against whom a decree for costs has been made will not be permitted to offset against such costs a decree or judgment in his favor in relation to a distinct matter, to the prejudice of the solicitor's lien. But where different claims arise in the course of the same suit, or in relation to the same matter, they may be arranged and offset agreeable to equity, without reference to the lien of the solicitor. The solicitor's lien is only on the clear balance due to his client after all the equities arising out of that particular litigation are settled."

Where judgments are rendered in the same action, the weight of authority, as well as the better reason, sustains the rule that an attorney's lien, being upon the interest of his client only in the judgment obtained, is subject to the right of set-off given by the statute to the parties. The judgments, therefore, against and in favor of each party to this action, should be set off in accordance with defendant's application. The order appealed from is reversed, and the case is remanded for further proceedings not inconsistent herewith

HART v. GRANT.

(Supreme Court of South Dakota. Feb. 19, 1896.)

ORDER FOR ARREST—SUFFICIENCY—PLEADING.

1. An affidavit for an order of arrest must either be positive, or upon information and belief; and where a material part thereof is made upon information and belief, the facts upon which the information and belief are founded must be stated. Comp. Laws, § 4947.

2. An affidavit which asserts that the facts are stated upon the personal knowledge of the affiant, but which, from the facts detailed, must necessarily have been stated upon information and belief, and the grounds of such information and belief are not given, is insufficient to support an order of arrest.

3. To authorize an order of arrest, the plaintiff must allege, in his complaint and affidavit, where the cause of arrest is identical with the cause of action, facts which will, prima facie, justify the making of the order.

4. The complaint and order in this case examined, and *held* insufficient to sustain the order of arrest.

(Syllabus by the Court.)

Appeal from circuit court, Lyman county; D. Haney, Judge.

Action by R. B. Hart against G. S. Grant. From an order vacating an order of arrest, plaintiff appeals. Affirmed.

Morrow & Wright, for appellant. Edwin Greene, for respondent.

CORSON, P. J. Appeal by the plaintiff from an order vacating an order of arrest. The order of arrest vacated in this case was made upon the complaint and affidavit of plaintiff. The affidavit, which states substantially the same facts alleged in the complaint, is, omitting the formal parts, as follows: "That the defendant in the foregoing described action, G. S. Grant, is justly indebted to him in the sum of two hundred and sixty-nine dollars and ninety-six cents ($269.96), with interest thereon from the 29th day of June, A. D. 1894, at the rate of seven per centum per annum. And that such indebtedness, which the said G. S. Grant refuses to pay to this affiant, originated and was incurred in the following manner: One J. Leslie Thompson, being indebted to affiant in the amount named ($269.96), the said Grant wrongfully, fraudulently, and falsely represented to him, the said Thompson, that he, the said Grant, had been authorized by this affiant to receive the said sum of money, when in truth and in fact neither this affiant, nor any one for him, had authorized the said Grant, either directly or indirectly, to receive the said sum or any part thereof. And that the said Thompson, acting upon the representations of the said Grant that he was authorized to receive the same, paid and turned the said sum of money over to him, the said Grant. And that, coming possessed of the said sum of money, in manner and form as just stated, he, the said defendant, G. S. Grant, has wrongfully and fraudulently detained and converted the same to his own use and benefit. And that the foregoing facts are stated upon the personal knowledge of affiant. Wherefore affiant prays that the defendant be arrested and held under bail, as provided by law in such cases." The ground of the motion to vacate the order was that there was no legal justification for such order; and the motion was made upon the files, papers, and orders in the case, and the affidavits of the defendant and one J. Leslie Thompson. It does not appear, from the vacating order made by the court, upon what ground that order was made. The appellant assigns two errors, as follows: "First, the cause of action did not arise out of, nor was it founded upon, a contract, but originated through the false and fraudulent representations of defendant; second, the cause of arrest is identical with the cause of action, and it does not clearly appear from the affidavits and pleadings that plaintiff cannot recover upon the final hearing."

The learned counsel for appellant contend that the affidavit upon which the order of arrest was made, stating, as it does, that the facts were within the personal knowledge of the plaintiff, was sufficient to sustain the order of arrest, and that the court committed error in vacating the order, as it did not

clearly appear from defendant's affidavit that the plaintiff could not recover in the final hearing. But it is insisted by the respondent that the affidavit upon which the order of arrest was made was insufficient to justify the order, for the reason that the facts, though asserted in the affidavit to have been made upon the plaintiff's own personal knowledge, must, nevertheless, have necessarily been made upon his information and belief, and that the facts upon which such information and belief were founded were not stated in the affidavit, as required by section 4947, Comp. Laws. It is quite evident, from the nature of the transaction, that the plaintiff could have had no personal knowledge of the representations made by the defendant to Thompson, or of the payment of the money by Thompson, or of the conversion of the money by the defendant. If the plaintiff was actually present when the alleged false representations were made by the defendant to said Thompson, it would have been his duty then and there to have notified Thompson of their falsity; and it is reasonable to presume that, had he been present, and made objection, the money would not have been paid over by Thompson to defendant. If he was not present when the alleged representations were made by the defendant to Thompson, and the money paid over by Thompson, he could have had no personal knowledge of the facts. It is quite clear, therefore, that the plaintiff incorrectly assumed that, as he had been informed of these facts, and believed them, they were within his own personal knowledge. But such an assumption is not permissible in an affidavit for arrest. If the facts stated are not, in fact, within the actual knowledge of the plaintiff, but are stated upon information and belief, he should so state in his affidavit, stating also the facts upon which his information and belief are founded. Finlay v. Castroverde, 22 N. Y. Supp. 716, 68 Hun, 59; Sheridan v. Briggs (Mich.) 19 N. W. 189. An affidavit, though stating the facts as within the personal knowledge of the plaintiff, when clearly they are not, is insufficient to sustain an order of arrest.

But, if the court should be in error in its conclusion that the affidavit was insufficient in form to sustain the order of arrest, there seems to be a further ground which fully justified the court below in making its order, and that is that the complaint and affidavit fail to state a cause of action upon which the plaintiff was entitled to the order of arrest. It is well settled that, to authorize an order of arrest, the plaintiff must state, in his complaint and affidavit, where the cause of arrest is identical with the cause of action, facts which will, prima facie, justify the making of the order. The appellant claims that the order of arrest was made under the provisions of subdivision 4, § 4945, Comp. Laws, which reads as follows: "(4) When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought or in concealing or disposing of the property for the taking, detention or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit." It will be observed that, under this subdivision, the defendant may be arrested "when he has been guilty of a fraud in contracting the debt, or incurring the obligation." It would seem that, by a fair construction, the fraud contemplated by the subdivision which will constitute a cause for arrest is a fraud perpetrated upon the person with whom the debt is contracted, or upon the person to whom the liability is incurred, or their duly-authorized agent. It must be a fraud practiced upon the complaining party or his agent, by means of which such party will be directly affected, and by which he is wrongfully deprived of his money or property. It would seem that no such construction should be given to this provision as would enable a person to avail himself of a fraud committed upon a third person, not the agent of the complaining party, and which does not necessarily affect such complaining party or his property. As will have been observed, it appears from plaintiff's complaint that the fraud complained of was committed, not upon the plaintiff or his agent, but upon one J. Leslie Thompson, who was induced by the fraudulent representations of the defendant to pay over to him the money due from him (Thompson) to the plaintiff, and which the defendant had no authority from the plaintiff to collect or receive. Taking these facts as true, Thompson is the only party injured by the fraud, as he is still liable to the plaintiff for the amount of his indebtedness to him. His payment of the money due to plaintiff to one not authorized to collect or receive it can in no manner affect the plaintiff's right to his money, or constitute any defense by Thompson to an action by the plaintiff to recover the same. Had the defendant, by fraudulent representations made to the plaintiff, obtained an order or other authority to collect the money from Thompson, and by virtue of such authority collected it, in such manner as to relieve Thompson from further liability to the plaintiff, or had the defendant, having authority from the plaintiff to collect money, collected it and converted it to his own use, plaintiff might have had a cause of action against him; but no such case is presented by this complaint.

It is difficult to discover any principle of law upon which the order of arrest can be sustained. If the action is based upon the fraud committed upon J. Leslie Thompson, he, and not the plaintiff, would be the party entitled to recover for that fraud. If the action is based upon the conversion of the money by the defendant, the plaintiff cannot recover, as, under the facts stated, the

money converted was the money of J. Leslie Thompson, wrongfully obtained from him, and not the money of the plaintiff. If the cause of action arose through false and fraudulent representations of the defendant, to whom were those false and fraudulent representations made? Certainly not to the plaintiff in this action, or to any agent of his, as it is not claimed by the appellant that J. Leslie Thompson sustained to the plaintiff the relation of an agent. If no contract relations existed between the plaintiff and defendant, no right of action could accrue to the plaintiff for fraudulent representations made to Thompson, and through which the defendant wrongfully obtained money from Thompson. Ordinarily, when an order of arrest has been granted in an action in which the cause of arrest is identical with the cause of action, it should not be vacated, if there is evidence before the court tending to sustain the allegations of the complaint which constitute a ground of arrest, and it is not made to appear, with reasonable certainty, that the plaintiff cannot recover in the action. McClure v. Levy (Sup.) 22 N. Y. Supp. 1006; Tupper v. Morin (Sup.) 12 N. Y. Supp. 310. But, under the facts stated in the plaintiff's complaint and affidavit, it does clearly appear that the plaintiff cannot recover in this action, though he should establish the facts alleged in such complaint and affidavit on the trial. These conclusions render it unnecessary to discuss the affidavits read on the hearing of the motion to vacate, on the part of the defendant, and rebutting affidavits on the part of the plaintiff. The order of the court below, vacating the order of arrest, is affirmed.

HANEY, J., took no part in the decision.

FRACTIONAL SCHOOL DIST. NO. 1, PAW PAW AND ANTWERP TPS., v. YERRINGTON.

(Supreme Court of Michigan. Feb. 26, 1896.)

SCHOOL—NONRESIDENT PUPIL—LIABILITY OF PARENT FOR TUITION.

The father of a nonresident pupil need not be notified of the recorded resolution of the school board fixing the rate of tuition for nonresident pupils, and the intention to charge tuition for his child, to render him liable therefor.

Error to circuit court, Van Buren county; George M. Buck, Judge.

Action by fractional school district No. 1, Paw Paw and Antwerp townships, against Charles E. Yerrington. There was a judgment for defendant, and plaintiff brings error. Reversed.

Titus & McNeil, for appellant. T. J. Cavanaugh, for appellee.

HOOKER, J. The plaintiff, a school district, brought an action against the father of a nonresident infant pupil, for tuition, and appeals from an adverse verdict, directed by the circuit judge, upon the ground that it had "failed to prove that the defendant had any legal or sufficient notice that such tuition would be charged." Counsel for the defendant contend that the direction to find a verdict was warranted, not only by the reason given, but by other reasons, viz.: (1) That the defendant was not shown to be a nonresident of the district; (2) that a resolution, declaring rates of tuition, had not been legally passed and recorded by the school board; (3) that the defendant had no notice of the adoption of such resolution; (4) that no agreement to pay such tuition was shown; (5) that the remedy was by expulsion of the pupil and not by action. The record shows that a resolution was passed and recorded, fixing rates of tuition for nonresident pupils. As the brief does not point out wherein this resolution or record was defective, we have no occasion to discuss it. There was testimony showing that the defendant was a nonresident of the school district. There is no evidence that notice of the existence of the resolution fixing rates of tuition was given to the defendant. The defendant's daughter attended school during the school years of 1893 and 1894, during which period she lived in the family of a Mrs. Koons. She was brought there by a Mr. Mosier, who was shown to be "county agent." A week later the defendant came, and made arrangement by which she was to live there, and attend school, he to furnish her with clothes and to pay her expenses, aside from her board, which, under arrangement made between Mosier and Mrs. Koons, she was to work for

Apparently, this is a case where a child living in one district is sent to another to "board and go to school." In Thompson v. School Dist., 25 Mich. 483, the court held that, "before any action could be maintained for tuition of the defendant's child, the district board must have fixed the rate of tuition for nonresident pupils by resolution, duly recorded." There is nothing in the case that warrants the assertion that it was there held necessary to notify the defendant of the adoption or existence of the resolution, or that tuition would be charged. There is, in this case, however, evidence that the defendant was notified twice, by mail, that tuition was due, and two or three dollars was paid upon it. This was paid to the board by Mr. Titus. It does not appear why he paid it. We think it was unnecessary that notice of the adoption of the resolution, or of an intention to charge tuition, should be given. Every citizen should know that nonresident pupils have no right to share the school privileges with resident children, except by virtue of action taken by the board under the statute; and until the board has taken such action, and fixed the rates of tuition, the nonresident pupil has no right to attend. When such pupil does

attend, the proper action having been taken by the board, there is no reason for denying compensation to the district, which the defendant impliedly promised to pay when he sent his daughter to the plaintiff's school. The adoption of the resolution and its proper record removed any disability of the district to sue which might otherwise have existed. We think there is no force in the claim that its only remedy was by expulsion of the pupil. The judgment is reversed, and a new trial ordered. The other justices concurred.

BOTSFORD v. CHASE.

(Supreme Court of Michigan. Feb. 26, 1896.)

SLANDER—EVIDENCE—MALICE.

1. In an action for slander the jury may consider the wealth and standing of defendant, to determine the influence of his statements.

2. In an action for slander the complaint alleged that, by reason of the slander, plaintiff's neighbors refused to have business dealings with him, and that he was compelled to resign his position as manager of a corporation, and to sell his stock therein. *Held*, that the gravamen of the claim for damages was the refusal of plaintiff's neighbors to have dealings with him, and the loss of his position with the corporation, and therefore evidence to show that he received, in the sale of his stock, its full value, is immaterial.

3. In an action for slander, to prove malice, plaintiff may prove other slanderous statements than the words laid in the declaration.

Error to circuit court, Kalamazoo county; George M. Buck, Judge.

Action for slander by James E. Botsford against Nehemiah Chase. There was a judgment for plaintiff, and defendant brings error. Affirmed.

H. M. Stearns and Howard & Roos, for appellant. E. M. Irish and N. H. Stewart, for appellee.

LONG, C. J. Plaintiff, with defendant and other persons, at Kalamazoo, in the year 1892, organized what is known as the Botsford Paper-Mill Company, as a corporation. The capital stock was $100,000. The plaintiff took $10,000 of the stock, and defendant also became a large shareholder therein. The plaintiff became the general manager of the company, and the defendant its president. The whole capital stock was paid in, and the mill built and equipped in April, 1893. It was then discovered that the capital stock was not large enough, and it was increased to $120,000. Thereafter it was increased to $150,000. This $50,000 was not paid in, when the plant was mortgaged for that amount. Some feeling grew up between the parties in reference to the management of the concern; and defendant contends that plaintiff, when about to organize the corporation, represented that he was a practical paper-mill man, of large experience, and that $100,000 would be ample capital to stock the plant and furnish sufficient working capital; that, relying upon this, he had taken $10,000 of the stock, and induced his friends to take the balance, aside from what the plaintiff took,—when in fact the plaintiff was not a practical mill man, and had had no experience whatever in paper making. Frequent meetings of the board of directors were held, and the plaintiff contends that at these meetings, and in the presence of other parties and at other places, the defendant made certain false, slanderous, and defamatory statements of and concerning him. This action was brought to recover damages for such defamatory words. On the trial the plaintiff had verdict and judgment for $5,000. Defendant brings error.

The defamatory statements, as laid in the declaration, are: "He has attempted to bribe me to keep still." "He has attempted to bribe me to keep still, by agreeing to give me too high a price for paper frames." "I offered to make the paper frames for twelve cents apiece, and he paid me sixteen cents." "He agreed to pay me sixteen cents, and would have paid me nineteen cents, or any other price I would have asked, in order to have me keep still." The declaration alleges that previous to the time of such conversation the plaintiff had made a certain contract for paper frames, in behalf of the paper-mill company, with defendant, for a fair and reasonable price, and that by the language aforesaid the defendant meant, and intended to have the public and the persons interested in said corporation to understand, that the plaintiff agreed to give the defendant a higher price for said paper frames than they could be bought for in the market, and so give it in fraud of the rights of the company, for the purpose of bribing the defendant to keep still and conceal some act of the plaintiff, which act defendant meant, and intended the public and other persons should infer, the plaintiff had done against the interest of the said corporation. The declaration further alleges that the defendant further stated of and concerning the plaintiff: "He is dishonest and incompetent;" also, the words: "I have looked Botsford [meaning plaintiff] up, and find his record is not good. I am informed that he has failed in business East. He does not dare own any property. Everything is in his wife's name. The Botsford Paper-Mill Company is gone to the dogs, and, unless we put Botsford out, we are gone. Botsford is dishonest. He has bribed me, by making a contract to furnish slats to the company, and I have papers in my pocket to prove it. Botsford is not fit to manage the mill. He does not understand his business. There is no head or tail to the business. Botsford is rotten." The declaration then alleges that the defendant intended by the expression, "Botsford is dishonest," that the plaintiff was dishonest and incompetent as a business man in his said trade, occupation, and business as aforesaid, and that by reason of the premises the plaintiff was com-

pelled to resign his position as manager of the company, and compelled to sell his stock in the corporation. It appears that at the request of the board of directors, after the difficulties arose, both parties resigned their positions, and the defendant purchased from the plaintiff his shares of stock, paying par value therefor. Of the errors claimed, which were argued in this court, we think but three need be discussed:

1. The court charged the jury as follows: "If the jury find that the slanderous words were spoken by defendant against the plaintiff, then, in estimating the plaintiff's damages, they may take into consideration the wealth and standing of the defendant in the community, with the view of determining the weight and influence which his false statements may have had in injuring plaintiff." It is contended that there was not a particle of evidence introduced on the trial showing, or tending to show, that the defendant was a man of wealth, and that the above charge, taken in connection with remarks of counsel on the trial, calling the defendant a "bloated paper-mill baron," prejudiced the defendant before the jury. The rule is well settled in this state that the pecuniary standing of a defendant in civil action for slander may be shown, to prove the influence his words would have in the community. Brown v. Barnes, 39 Mich. 211. That case has been cited with approval many times, and the rule there laid down has at all times since been followed in this court. We are unable to say in this case that there was not testimony which would warrant the instruction. It was shown, as appears by the record, that the defendant was a large owner in this corporation. But, aside from this, the record does not purport to contain all the evidence taken on the trial; and there may have been other evidence which warranted the court in giving the charge complained of. Just what led up to the remarks of counsel above quoted, the record does not show. It may have been in answer to remarks of counsel on the other side. It may also be said that the record does not disclose that the attention of the trial court was called to these remarks, and there does not appear to have been any exception taken thereto.

2. On the trial the plaintiff contended that he had been largely instrumental in organizing the corporation, and in securing and establishing trade and business therefor, and that by reason of the alleged slanders his relations with the corporation were broken off, and he was compelled to resign his position and sell his stock. He testified that he had had 13 years' experience in the general paper business,—buying, selling, and jobbing; that he was engaged about three months in organizing this corporation, before it became a corporation, and that the construction took nearly a year; that the company then commenced making paper, and continued about three months; that his salary was to commence at $3,000 a year, when it got to maki money; and that he was paid that sala monthly until the time of his being compell to resign his position. He also testified, su stantially, that the defendant made sta ments to the board of directors and oth that he was rotten to the core; that he h attempted to bribe him (the defendant); th he was dishonest, and incompetent to run t business; that the defendant refused to p the balance of his subscription, but made t proposition that he would do so, and furn capital stock for the company, if the plain would resign; that it was thought by t board and by himself that, unless some rec ciliation could be made, the enterprise wo go down; and that, therefore, to prevent t disaster, he offered to sell out his stock, a did sell it, to the defendant. It is clain that it was under these circumstances, a through the false, slanderous, and defamato statements of the defendant, that the comm tee of stockholders appointed by the comp requested him to resign. On the trial B Buckhout was called as a witness by the de fense, and testified that he was one of t stockholders of the concern, and had gene supervision over it after the plaintiff r signed. He was asked by counsel to st the situation of the company, and what stock was worth, in April or July, 1893, a answered: "I don't think I could state th Q. You sold some stock afterwards, did you? A. Yes, sir. Q. And you knew about the assets and liabilities of the c cern? A. Yes, sir. Q I would like to your best judgment as to the value of stock about that date." This was objec to, and the objection sustained, the court s ing: "If, on reflection, he has a judgme he can state it; but I do not think it sho be stated unless he expresses some kno edge as to its value. I think you should f show that he has knowledge of the mar value; that is, of his own opinion." T question was then asked: "You may st Mr. Buckhout, whether or not you have a knowledge of its market value. A. Wel cannot say that I have. It is a pretty diffi matter to answer a question of that kin He was then asked if he knew of any st being offered for sale in July, 1893 (this w about the time the plaintiff sold his stock the defendant), and at what price. He swered that he had known of some be bought and sold; but, under objection, court excluded the answer as to the price, the ground that it would not be compet to show what a part of the stock was bou and sold for. It is insisted that the mar value could not well be shown; that the st had no market value; but that, for the p pose of showing that the plaintiff was injured in selling his stock at par to the fendant, the defense should have been perm ted to show that other stock was bought a sold for less than par. There is no allegat in the declaration that the plaintiff was c

pelled to sell his stock at less than its par value; but the complaint is that by reason of the false, slanderous and defamatory words of the defendant, divers of his neighbors and citizens, to whom his innocence was unknown, had, on account of such grievances, refused to deal or have business transactions with him; and also, by means of the premises, "the said office and relations which the said plaintiff held to the said Botsford Paper-Mill Company are broken up and destroyed, and the said plaintiff was compelled to resign his said position, and sell his stock in the said corporation, to his great damage," etc. In other words, the gravamen of the claim is that by reason of the false, slanderous, and defamatory statements, his friends and neighbors refused to deal or to have business transactions with him, by means of which he lost his position, and was compelled to sell his stock; not that he was compelled to sell it at a sacrifice. Plaintiff had bought the stock, and paid par value for it. He sold it to the defendant for just what it cost him; and that he was compelled to sell it all, and lose his place as manager, was what he complained of. The defendant was apparently ready and willing to buy, if the plaintiff would resign his management of the corporation; and this resignation, according to the plaintiff's theory, was brought about by the defamatory statements of the defendant. The defendant himself testified that he offered to purchase the stock, and pay in the balance of his subscription if the plaintiff would get out. Under these circumstances, it is apparent that what other stock sold for about that time was wholly immaterial.

3. While the plaintiff was on the stand as a witness, he was asked to state what the defendant said about his keeping a false set of books. This was objected to, and the court admitted it solely on the ground that it bore on the question of malice. These words were not laid in the declaration, but appear to have been uttered in conversations with the plaintiff. The court was not in error in admitting this testimony. Newman v. Stein, 75 Mich. 405, 42 N. W. 956. While this testimony would not be admissible as a substantive cause of action, it was admissible to show the ill feeling which defendant had towards the plaintiff, and as tending to show malice. The jury were instructed that this testimony could be considered only as bearing upon the question of malice. There was no error in this.

Some contention is made that the slanderous words were not proved as alleged. As the record does not purport to contain all the evidence given on the trial, we are unable to determine that there was no testimony tending to prove the words laid in the declaration as having been uttered by the defendant.

Complaint is made also of the refusal of the court to charge as requested, and to the charge as given. We think the court was not in error in refusing the request, and that the substantial rights of the defendant were fully protected under the charge as given. The judgment must be affirmed. The other justices concurred.

SAGAR et al. v. HOGMIRE et al.

(Supreme Court of Michigan. Feb. 26, 1896.)

WILL—MENTAL CAPACITY—NONEXPERT WITNESS—OPINION ON HYPOTHETICAL FACTS—BURDEN OF PROOF.

A nonexpert testifying to the mental capacity of a testator cannot, on redirect examination, be asked his opinion of the mental capacity of a testator in a hypothetical case.

Error to circuit court, Branch county; George L. Yaple, Judge.

Action by Zedekiah Sagar and others against Agnes Hogmire and others to establish a will. From a judgment for plaintiffs, defendants bring error. Reversed.

The issue involved in this case is the competency of the deceased, John Sagar, to execute a will. One of the witnesses to the will was Henry Brooks. The proponents introduced him as a witness, and simply proved its execution, asking no questions as to the mental condition of the testator. The will was executed August 10, 1893. The contestants, on cross-examination, elicited from him testimony to the effect that he had known deceased from 1863 to the time of his death, had more or less conversation with him as a neighbor, talked about business matters, had been with him on a trip to buy property, noticed a change in him as he grew older; he was excitable, and at times did not know what he wanted to do; he was forgetful, and, from what he knew of him, he did not consider that he was competent at the time to make a will. On redirect examination, the following question was asked: "Mr. Brooks, supposing that a man was troubled with a stomach trouble, as you say Mr. Sager was, and about his age, and he sent for a justice of the peace, and he told him that he wanted some deeds drawn; and, when he came back, it was not drawn just exactly as he wanted it, and he pointed out to him the thing he wanted in the will, that was not there, and the man goes back and writes a new will, and then he goes back, and that man signs the will, taking those circumstances just as I have stated them, what do you say as to the mental capacity of that man to make a will?" This was objected to on the ground that the witness was not an expert or professional witness, and it was therefore incompetent to put to him hypothetical questions. The objection was overruled, and exception taken. His answer was, "If a man knew enough to do that right, there it will be all right enough." The jury sustained the will.

H. H. Barlow, for appellants. H. C. Loveridge (John B. Shipman, of counsel), for appellees.

GRANT, J. (after stating the facts). The admission of this evidence is the sole allegation of error. The proponents seek to sustain it upon the theory that it was not aimed at the testator's capacity, but at the competency of the witness to give his opinion, or, in other words, for the purpose of sustaining the witness' idea of mental competency. They also insist that the same rule of cross-examination applies to nonprofessional and nonexpert, as to professional and expert, witnesses. They cite in their brief several cases from the courts of New York, Indiana, California, and Wisconsin. In all the cases cited, the question arose upon the testimony of professional expert witnesses. No case cited involves this question. The case of Rambler v. Tryon, 7 Serg. & R. 90, cited by the contestants, is directly in point, and holds such testimony incompetent. While the question has not been directly before this court, the case of Rice v. Rice, 50 Mich. 448, 15 N. W. 545, is of some import. Similar questions were propounded to nonexpert witnesses upon the direct examinations, and were held incompetent. In the present case, while the question arose upon the redirect examination, yet, practically, it was cross-examination, and must be so regarded under the authority of Kempsey v. McGinniss, 21 Mich. 147, wherein it was held: "In this particular class of cases, and upon the question of mental soundness, or unsoundness, after a prima facie case has been established by the proponents, the case, for all purposes connected with the order of proof upon that question, stands the same as if the burden of proof throughout rested upon the contestants to show mental incapacity." The firmly-established rule in this state is that nonexperts and nonprofessionals, before they can give any opinion upon the incompetency of the testator, must state facts and circumstances as a basis for their opinions. Without giving some such facts or circumstances inconsistent with competency, such opinions are inadmissible. The reason for the rule has been frequently stated in the decisions of this court. Beaubien v. Cicotte, 12 Mich. 459; Kempsey v. McGinniss and Rice v. Rice, supra.

The question propounded to Mr. Brooks involved conditions and supposed facts of which he knew nothing. It was a hypothetical question, and we find no authority to sustain its admissibility. On the cross-examination of experts, a broad latitude is allowed, and some cases hold that it is not necessarily confined to the facts in evidence. Underh. Ev. § 188, and authorities there cited. The opinions of laymen are limited to the facts and reasons derived from actual observation. Their opinions based thereon are only admissible because the courts have recognized the difficulty in the ability of witnesses to describe to the jury all the appearances and conditions which enter into their opinions. Subscribing witnesses have generally been held competent to testify upon the mental condition of the testator, without even stating the facts upon which their opinions are based. But many early cases held that the opinions of laymen, aside from subscribing witnesses, were incompetent, and there is much force in their reasoning. Rogers, in his work on Expert Testimony (section 67), states the consensus of authority as follows: "The result has been, that many of the earlier cases have been overruled, and the principle has come to be generally recognized that nonprofessional witnesses may give their opinion as to sanity, as a result of their personal observation of the person whose mental condition is in question, after first stating the facts which they have observed." He cites a large list of authorities. The courts in New York and Massachusetts still exclude such opinions. Rog. Exp. Test. pp. 158, 159, § 157, where the decisions in those states will be found cited. We see no sound sense or reason in holding that the opinions of laymen upon mental competency, which, at the best, are not of great value, should be sustained or attacked by their further opinions upon hypothetical questions. The rule in regard to such evidence should not be enlarged. It follows that the judgment must be reversed, and a new trial ordered. The other justices concurred.

WOODS v. CHICAGO & G. T. RY. CO.

(Supreme Court of Michigan. Feb. 26, 1896.)

MASTER AND SERVANT—DEFECTIVE MACHINERY—INSPECTION—EVIDENCE—EXPERT TESTIMONY.

1. In an action by an engineer against a railroad company for injuries by an explosion of the boiler of the engine, there was evidence that there were 50 or 60 broken bolts in the boiler, the ends of which were worn smooth; that the process of wearing them smooth required considerable time; that, in the inspection of boilers by the hammer test, 90 per cent. of all broken bolts could be discovered; and that the bolts break gradually. *Held* that the evidence was not, as a matter of law, insufficient to prove that in an inspection by hammer test, made 14 days before the accident, defendant was negligent

2. A person who has been a locomotive engineer for 14 years; who has known boiler stay bolts to break, and seen them taken off; and who has been in machine shops a good deal,—may testify as to whether broken stay bolts which he had examined were recently broken or not.

Error to circuit court, Calhoun county; Clement Smith, Judge.

Action by William Woods against the Chicago & Grand Trunk Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Geer & Williams (E. W. Meddaugh, of counsel), for appellant. M. L. Howell, for appellee.

MONTGOMERY, J. The plaintiff was a locomotive engineer in the employ of the defendant. On the 13th of June, 1892, while he was engaged in running engine No. 29 in

the usual and customary way, and, as he testified, with no more pressure than usual, and with less than was allowed, the boiler exploded, and by force of the explosion the plaintiff received serious injuries. The negligence imputed to the defendant was the not having inspected its boiler properly, to ascertain whether it was in safe condition, and permitting its use when in bad repair, by the reason of a large number of stay bolts being broken, and others corroded, and permitted to remain so for so long a time, to wit, 30 days, prior to the injury. The rule relating to the duty of the defendant in supplying appliances for the use of its employés is well settled. While not an insurer, it is nevertheless its duty to use reasonable and ordinary diligence in providing safe machinery and appliances in the first instance, and, by continued inspection at such intervals as the reasonable and proper conduct of such a business requires, to ascertain whether the appliances continue in safe condition, and, if unsafe, to put them in safe condition. The master is not responsible for latent defects, not discoverable by inspection; but, to the extent that this duty of inspection goes, it is the master's duty, which he cannot escape or delegate. Anderson v. Railroad Co. (Mich.) 65 N. W. 585; Tangney v. J. B. Wilson & Co., 87 Mich. 455, 49 N. W. 666; Fuller v. Jewett, 80 N. Y. 46; Ford v. Railroad Co., 110 Mass. 259. The defendant's counsel do not contend against the rule as stated, but assert that the evidence in the present case shows conclusively that the engine was originally constructed in the proper manner; that proper inspection was made at such intervals as were usual and customary in good railroading, and that there was no direct testimony disputing the testimony of defendant's witnesses called to prove such inspection, and no evidence from which neglect in this respect could be inferred; and furthermore, though the court should be of opinion that evidence adduced by the plaintiff tended, by inference, to show the want of proper inspection, the positive testimony adduced by the defendant repelled such inference, so that at the close of the testimony it was the duty of the court to direct a verdict for the defendant.

The testimony offered by the plaintiff tended to show that the stay bolts connecting the inner and outer sheets of the boiler, and supporting and sustaining them, had become broken, to the number of about 50 or 60, and had been broken for a sufficient length of time before the explosion so that the ends had become worn smooth; that the material of which the boiler was constructed was of the first quality, and could not explode if kept in good repair; that hydrostatic and hammer tests, employed by this defendant and other companies, when properly conducted, were (either) sufficient to show the presence of broken bolts; that by the hammer test at least 90 per cent. of the broken stay bolts could be discovered. The last hammer test which defendant's witness claimed to have made was on the 1st of June,—but 14 days before the explosion. It is contended that these broken stay bolts show by their appearance that they must have been broken for a much longer period, in order that the broken ends should become worn smooth. It is difficult to account for these broken ends, yet it is a fact, established by credible testimony, that they were smooth. Various theories are advanced by plaintiff's counsel as to what caused the smooth ends of the broken parts, any of which would imply that considerable time must have elapsed after the breakage, and before the broken parts could be in the condition presented after the explosion. The two witnesses who made the hammer test on or about the 1st of June are Mr. Hunter and Mr. Kelly. Kelly testified on cross-examination that if the stay bolts were broken off, but the ends were together pretty tight, there might be very little difference in the sound of the hammer and the jar from what there would be if it were solid,—"not enough to convince me that it was broken." He further testified that if there were four stay bolts broken in a row, whether they were discovered or not might depend upon whether the sheet was sprung. There was other testimony tending to show that 90 per cent., at least, of the broken stay bolts, would be discovered by the hammer inspection. We think, in view of this testimony, and the testimony which tended to show that a large number of the stay bolts were broken a sufficient length of time before the injury so that their ends had become worn smooth, and that the process of wearing them smooth must have been very slow, according to any theory, and in view of the fact that the testimony shows that these bolts break gradually, it became a question for the jury whether the witnesses Hunter and Kelly made a proper hammer test at the time stated. If their testimony could not be disputed in the manner adopted in this case, it follows that, however incredible the surroundings may make their testimony that they performed their full duty, their testimony must be accepted as true.

Even though the proof of the plaintiff depended upon inference to establish the main fact, yet whether the inference was sufficiently rebutted was a question for the jury. Crosby v. Railroad Co., 58 Mich. 458, 25 N. W. 463; Hagan v. Railroad Co., 86 Mich. 615, 49 N. W. 509. The rule is different if the defense consists of a distinct fact, not inconsistent with the proofs offered by the plaintiff. There is other significant testimony in the case, which not only has a direct bearing on the question of whether a proper inspection was made, but tends strongly to show subsequent negligence by defendant's servants, if it does not show such negligence conclusively. James Spearman was

locomotive inspector for the defendant on the 9th day of June,—five days before the accident. He described defects which he noted in a book kept for this purpose, as follows: "Put bolt in right jaw of engine truck, and tighten up all around. Examine left side of fire box; leaks badly." He testified on the stand that he examined the left side of the fire box, and that it was leaking badly, and that it was the duty of Thomas Browning to examine it and see to its repair. This witness was called, and, on cross-examination, testified as follows: "Q. While you were there, what did you notice at the left side? A. I noticed nothing on the left side,—only the water squirting from the mouthpiece on the left side. After stopping that, there was nothing to indicate there was anything wrong. Q. The inspector who reported there was a leak there was mistaken? A. He was mistaken. Q. Either he or you were mistaken? A. I know I was not mistaken. Q. Are you sure of that? A. Yes, sir. Q. Did you make any entry besides this? A. No, sir; because I did not think there was any need of it. Q. You reported the mouthpiece corked? A. Yes, sir. Q. You did not say anything about whether there was any leak, or whether you had examined this? A. No, sir; because— Q. (interrupting). Never mind why. The way that was given here was this: 'Examined left side of fire box; leaks badly.' You was not required to do anything but examine, and you didn't think it worth while to report you had examined it, did you? A. There was nothing there leaking. Q. After you had found that there was nothing there leaking, was it your duty to put on this book that you had examined it? A. There is lots of work we don't put on that book. Q. Was it your duty to put it on that book? A. It might have been. Q. Wasn't it? A. Well, yes. Q. Why didn't you do so? Why didn't you do it? A. Because there was nothing there to enter. There was nothing there to be done. There was nothing wrong. Q. If there was any work to be done— Supposing a stay bolt had been broken, or was broken. A. Then I would report it. Q. Who found out whether there was any stay bolts broken,—you? A. I would have found out. Q. Don't you have two inspectors? A. Yes, sir. Q. Was it not your duty to report to them about this requiring an examination, instead of making it yourself? A. If I found anything wrong. Q. They were the fellows to go there and find anything wrong, were they not? A. I very often found things wrong, and reported them. Q. Who was this entry made by,—about the leaking fire box? A. By Spearman, the inspector of engines. Q. Is he over or under you? A. He is over me." In view of the peculiar nature of this testimony, it was certainly competent for the jury to infer that Spearman was right in saying that there was a leak on the left side of the fire box, and that it was not attended to, and that a careful examination at that time would have disclosed a defective
dition of this boiler, and prevented the
cident. This testimony is important to
considered in connection with defend
criticism of the instruction to the jury:
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matter of law, be a reasonable inspect
and what would constitute a reasonable t
and could not have been misunderstood
the jury.

Error is assigned upon the admission of
timony by a witness of the plaintiff, giv
his judgment as to the length of time
stay bolts had been broken. But no objec
or exception was taken to this testim
Objection was made to his testifying to
number of old breaks, but on the gro
that he did not count them. This objec
was not good, as he gave an estimate,

showed sufficient knowledge to entitle him to do so. Objection was made to the question, "What do you say as to whether the stay bolts that you speak of as old breaks were recent?" This was objected to for the reason that he had not shown himself competent, but we think he was competent to answer this question. He had been a locomotive engineer for five or six years, and had known stay bolts to break, and had seen them taken off, and had been at the Coldwater shops a great deal during that time.

The court charged the jury as follows: "It is the province of the jury to pass upon the credibility or truthfulness of witnesses. They go upon the stand here. You see them; you note their demeanor and their bearing, and the reasonableness of what they tell before you; and from all these things you pass upon their credit, as to whether they are telling the truth or not. Now, in this case there, perhaps, may be some conflict of testimony. At any rate, it has been suggested here that some of the witnesses have not testified to the facts just as they were. It is for you, taking into consideration their surroundings, the interest they may have in the case, if any, their bearing upon the stand, and reasonableness of their story, to say whether they told the truth or not. You are not obliged to believe a person because he swears to a thing, but you should be governed by those elements of common sense which aid you in determining the truth of matters in every-day life; bearing in mind, of course, that witnesses are under a solemn oath." This is excepted to, and, it is said, must have been understood by the jury as applied to Hunter's and Kelly's testimony, and that it was not proper, for the reason that they were uncontradicted; but, as we have already stated, it was a question for the jury as to whether there was not contradiction in the testimony offered by the plaintiff.

Defendant moved for a new trial on the ground of excessive damages. The verdict was for $6,500. Plaintiff was 31 when he received the injury, and was drawing $103.54 per month; and the proofs tend to show that he is now disabled from following his profession, and is able to do scarcely any work of any kind, and that he is probably permanently disabled. We do not, under these circumstances, feel warranted in interfering with the discretion of the circuit judge, who saw the plaintiff, and could better judge of his condition than we can. Judgment affirmed. The other justices concurred.

ROHDE et al. v. BIGGS.

(Supreme Court of Michigan. Feb. 26, 1896.)

NEW TRIAL—APPEAL—PLEADING—INCONSISTENT COUNTS.

1. It is not error to overrule a motion for a new trial, though the trial court has said that it might, on the evidence, have made a different finding.

2. A statement claiming to contain all the undisputed items on both sides of an account in controversy, which was not submitted to the court below on a motion for a new trial, will not be considered on appeal.

3. Sureties on the bond of a contractor were allowed to complete work left unfinished at his death. In an action on the contract they joined a count to recover, as assignees, the value of the materials and labor furnished by their principal, with one reciting that they had contracted with defendant to complete the contract for the unpaid part of the consideration named therein. *Held*, that plaintiffs were entitled in any event to recover the amount called for by the contract, and the counts, if inconsistent, were without prejudice.

Error to circuit court, Washtenaw county; Edward D. Kinne, Judge.

Suit by Louis Rohde and another against William Biggs to recover moneys alleged to be due on a building contract. From a judgment in favor of plaintiffs, defendant brings error. Affirmed.

Thomas A. Bogle (Thompson & Harriman and M. J. Cavanaugh, of counsel), for appellant. Charles R. Whitman, for appellees.

LONG, C. J. The facts in this cause and the questions involved on the trial are so fully covered by the charge of the court that we adopt it as a statement of the case, as follows: "In October, 1890, the defendant, Mr. Biggs, had a contract for the erection of certain buildings in this city, known as the 'University Hospitals.' Part of this work he sublet to other contractors, and among the number was one John Lucas, to whom he let the contract for doing the mason work on those buildings. By the terms of this subcontract, Mr. Lucas agreed to finish the buildings on or before October 1, 1891. For some reason, but what that may be does not appear on this trial, Mr. Lucas failed to carry out his contract; and in the latter part of September, 1891, he retired,—withdrew from the work. A little later on the plaintiffs in this suit, who were his bondsmen, came forward, and, in place of Mr. Lucas, proceeded to complete the contract. Mr. Lucas died some time in December, 1891. Due administration has been had of his estate, and his widow has been appointed administratrix, and whatever claim she may have had in this matter has been assigned to the plaintiffs. After the buildings were completed, differences arose between the plaintiffs and the defendant respecting these matters, and this suit is the result of their dispute and misunderstandings. It is undisputed that the original contract, between the defendant and Mr. Lucas, for this mason work, called for the sum of $30,938.84. The plaintiffs in this suit, in part as assignees of the administratrix of John Lucas, and in part in their own right, seek to recover whatever balance of said contract price remains unpaid, and also seek to recover for certain extras in the line of labor, material, etc., alleged to have been furnished by Mr. Lucas in his lifetime, and by plaintiffs after they assumed to complete this contract; and they

claim a balance of some $2,900. The defendant controverts many of these propositions or claims by the plaintiffs, and insists that nothing remains unpaid on this matter; but that, on the other hand, there is a balance due him, on a full and fair accounting between him and the plaintiffs. I think he claims a balance of some $700.

"If you shall find that the said John Lucas, in his lifetime, and the said Wagner & Rohde, between them, completed this mason work, and furnished the materials therefor, upon said hospital buildings, the plaintiffs are entitled to recover the contract price—namely, $30,938.84—therefor, less any payments which were made by the defendant thereon either to said Lucas or to plaintiffs, and also less the value of any materials or labor furnished by said Biggs towards the completion of said mason work, and also less any authorized deductions by reason of changes which were beneficial to the plaintiffs; and the plaintiffs are further entitled to recover the value of any labor or material which might be furnished, either by said Lucas or by these plaintiffs, beyond and in addition to the mason work provided in the original contract between Biggs and Lucas, towards the construction of said hospitals. In addition to whatever amount you may find due the plaintiffs under their contract with said Biggs, you should allow to these plaintiffs, as assignees, the value of any extras which were furnished by said Lucas in the construction of said hospitals, and in addition thereto the value of any extras which you may find, by the evidence, were furnished by the plaintiffs upon said hospital building.

"Something has been said upon the question, when the case was opened, by plaintiffs or defendant (or both of them, possibly), as to whether or not the defendant was damaged by the failure of Lucas to complete the contract within the time named. Whether or not the defendant was damaged is not material in this case, because there is no evidence of any specific damage, and the defendant in this case could recover none. There is no claim now, on the part of his counsel, for any specific damage that he has sustained by reason of the failure of Lucas to complete his contract; but, in that connection, I give you a request of defendant, as follows: 'It is an undisputed fact in this case that Lucas abandoned his contract with Mr. Biggs before its completion, and there is no evidence in the case that such abandonment was due to any default on the part of defendant Biggs.'

"In this contract between the university and Mr. Biggs there is this clause: 'Mr. Biggs agrees to do, or cause to be done or furnished, any additional work and material, ordered by competent authority, at the same rates or prices as shown by the schedule for the same kinds of labor or material. Mr. Biggs also agrees to allow the university for any reduction or omissions of work or material required by the contract, and not furnished at the rates shown by the schedule.' That appears in the contract between the university and Mr. Biggs. Now, I say to you, here is a very proper and a very ordinary provision in such contracts. So, if there is any increased labor or material, Mr. Biggs should have to pay therefor at the same prices, and if there are changes made that lessen the cost, that the university shall have the benefit thereof. Now, as far as applies to this case, if you find, from the evidence, that this same (or a similar) arrangement or understanding was had between Mr. Biggs and Mr. Lucas, or that they acted upon such understanding or arrangement, and regarded it as binding upon them, then, while Mr. Biggs must pay for all extra labor and material furnished by plaintiffs or Mr. Lucas, he is likewise entitled to credit for any decrease of labor or material, or reduction in the same, by reason of changes directed by the superintendent, Mr. Reeves.

"In order for the plaintiffs to recover under the contract between Lucas and the defendant, the plaintiffs must satisfy you, by a fair preponderance of the evidence, that, through the administratrix of Mr. Lucas and his bondsmen, the plaintiffs in this suit, this contract has been substantially performed; and in order to recover for said labor and materials they must satisfy you, by the same preponderance of evidence, that they are entitled to recover for them; and this, gentlemen, will constitute the claim of the plaintiffs. The defendant must establish the amount of his payments, his deductions, and his set-offs by a fair preponderance of evidence. His payments, his alleged deductions, and set-offs will constitute his defense, and his claim for a balance in his favor. The defendant is not entitled to any allowance by way of set-off for any changes in the mason work in said hospital buildings, where no arrangement, understanding, or agreement was effected for a deduction from the amount which said Lucas was to recover under his contract with said Biggs. It depends whether there is an understanding or arrangement or not.

"There has been considerable testimony and discussion with regard to the claim of the plaintiffs to a right for credit for a decrease in the cost of plastering. By the original contract between Lucas and Biggs, Lucas was to lath and plaster the buildings at the schedule price of 25 cents a yard, and I think all parties agree this was a fair price. It seems that a change was agreed upon, and, in place of common plaster, adamant was used; and while Mr. Lucas, under the contract, would have furnished the common plastering, Mr. Biggs, in fact, furnished the adamant, and he claims a credit of seven cents a yard therefor. Mr. Lucas furnished the lath and the labor in putting on the adamant, and plaintiffs claim that it required more lath and more labor; while Mr. Biggs claims there was a clear saving of 7 cents a yard. Gentlemen, this question you

must determine from all the evidence submitted to you. If it proved to be a benefit to Lucas and his bondsmen, and there was a fair understanding that Biggs was to have credit for this, and you find a credit was due, you will award him credit accordingly. On the other hand, if you find no credit was due, then none should be allowed. In determining the value of doing the plastering after the change from common to adamant and soapstone finish, the cost of the material furnished by defendant, Biggs,—the cost of the adamant,—is wholly immaterial; and if you should find that the cost of doing that work, after such change, was less than it would have been, the defendant is entitled to the gain of such diminished cost.

"Defendant also makes a claim for superintending the cost of the work after the death of Mr. Lucas. This question you must also determine from all the evidence submitted. If you find, from the evidence, that such services were rendered, and were rendered at the request of plaintiffs, with the understanding that defendant was to receive compensation therefor, or were rendered under such circumstances that he had a right to expect pay, then he can recover what those services are reasonably worth; but, if no such request was made by plaintiffs, or either of them, or if these services were rendered under such circumstances that defendant had no right or reason to expect compensation, then, of course, he has no claim for recovery in this case."

The plaintiffs recovered judgment for $2,500, and defendant brings error.

1. The contention of the defendant is that, under the undisputed testimony in the case, the plaintiffs were not entitled to recover. It appears that, after verdict, defendant made a motion for new trial, and, among other reasons for the same, alleges: (a) Because there was no evidence in said cause to support the verdict; (b) because the verdict is against the weight of evidence. This motion came on to be heard in the court below, and the court, in overruling it, said: "It is possible that, had this case been submitted to me, I might have taken a different view of the testimony than the one adopted by the jury; but, howsoever that may be, the issues were submitted to them, and I think there was evidence from which they might fairly reach the conclusion indicated by their verdict, and therefore I do not feel warranted in interfering with the judgment rendered." Exceptions were taken to these findings, and it is here insisted that the court was in error in not granting the new trial. Counsel submits a statement which is claimed to contain all the undisputed items on both sides of the account, and which shows a balance due the plaintiffs of only $912.75. We have with considerable care looked over the items of account stated in the brief, and are unable to agree with counsel that these are all conceded or undisputed items. Many of these items, both of debit and credit, seem to have been in dispute; and there appear to be items of account for which plaintiffs made claim on the trial that are not in the account as now made up and presented in brief of counsel, as well as much dispute in the testimony about the correctness of the credits which defendant now sets up. The statement of account now presented here does not appear to have been presented to the court below on the motion for a new trial. As appears by the record, the only papers submitted to the court below were those used on the trial, and the testimony there taken. A statement of account is now presented which we are asked to say is the true account between the parties. The respective claims of the parties were very fairly left to the jury to determine, and we are not able to say, from this record, that the jury were wrong in the amount found due.

2. It is contended that the court was in error in not compelling counsel to elect upon which count it would rely on the trial. We think there was no error in this. If the counts were inconsistent with one another, the case was submitted upon the right theory. The work was commenced and partly completed by Lucas. He failed to carry out his contract, when the plaintiffs, who were his bondsmen, and had guarantied the performance of it, took up the work, and carried it forward to completion. Lucas died before the completion of the work. An administratrix was appointed, who assigned all interest which the estate had in the matter to the plaintiffs. In the first count of the declaration, it is alleged that Lucas and defendant entered into a contract; that Lucas faithfully and fully performed all the duties and obligations imposed upon him by the same; that, at the decease of Lucas, the defendant was indebted to him in a large amount for labor performed and materials furnished under said contract; that this indebtedness had been assigned to plaintiffs by the administratrix of said Lucas. The fourth count alleges that Lucas abandoned the performance of the same contract; that plaintiffs assumed the part of Lucas in said contract as to the completion thereof, in consideration of which defendant undertook and promised to pay plaintiffs the part of the consideration stipulated in said contract unpaid to Lucas, and in monthly installments and in the same manner as prescribed in said contract between said Lucas and defendant; and that plaintiffs did immediately enter upon the performance thereof, etc. It is said that the plaintiffs, upon the trial, claimed that, upon this agreement, and in their own right, they were entitled to recover the indebtedness due to Lucas, and unpaid to him at his decease. Just how these allegations could in any manner injure the defendant it is difficult to see. Plaintiffs were asking to recover the contract price

only, in any view of the case. They were entitled to recover either as assignees of the claim or by reason of the agreement upon the part of the defendant to pay. Upon the trial they exhibited their assignment of the claim, and upon that theory were permitted to recover the amount due Lucas, as well as the amount due for completion after Lucas died. There was not, nor could be, any double recovery. They were entitled to recover, in any event, what there might be found due to Lucas as well as the amount due for completion of the contract, together with the cost of the extras, in conformity with the contract. If there was an abandonment of the contract by Lucas, the sureties on his bond had the right to go on to completion. This right seems to have been recognized by Mr. Biggs, and the plaintiffs proceeded with the work. No claim was made for damages in any other sense than as the right to recover what the contract called for.

The other errors assigned do not need discussion. The case was fully submitted to the jury upon the merits, and we find nothing in the record which calls for a reversal of the case. The judgment must be affirmed. The other justices concurred.

MARINETTE IRON WORKS CO. v. CODY et al.

(Supreme Court of Michigan. Feb. 26, 1896.)

PAYMENT—LIEN FOR MACHINERY—ABANDONMENT—WHAT CONSTITUTES.

1. Where purchasers of goods give an acceptance for the price, and neither party regards it other than evidence of the amount to be paid, it will not be considered as payment.

2. Plaintiff sold machinery to the lessees of a mill, and duly filed a statement of lien under Pub. Acts 1891, Act No. 179, as amended by Pub. Acts 1893, Act No. 199, giving the seller of machinery a lien thereon, in preference to any prior title or lien on the land on which it is put, etc. On default of payment of an acceptance given for the machinery, plaintiff authorized its attorneys to take a bill of sale of the machinery sold, if the right to remove it was secured. After the attorneys took the bill of sale, the lessor declared the lease forfeited, and claimed title to the machinery under a forfeiture clause in the lease. *Held*, that plaintiff might disclaim any rights under it, and enforce its lien.

Appeal from circuit court, Chippewa county, in chancery; Joseph H. Steere, Judge.

Bill by the Marinette Iron Works Company against Lorenzo J. Cody, Fred Proctor, and John F. Carver, to enforce a lien on machinery sold to defendants Cody & Proctor, and put into a mill owned by defendant Carver. From a judgment for defendants, complainant appeals. Reversed.

Clark & Pearl, for appellant. Horace M. Oren (George A. Cady, of counsel), for appellee John F. Carver.

LONG, C. J. This bill was filed to establish and enforce a lien under the provisions of Act No. 179, Pub. Acts 1891, and the amendments thereto, against certain property at what is known as "Sailors' Encampment," an island in the St. Mary's river. Defendant Carver was the owner of this property, and on December 7, 1892, he executed a lease thereof to defendant Cody. The lease was recorded in the office of the register of deeds, as being situate in the county of Chippewa, and known as the "mill property" at Sailors' Encampment, more particularly described as follows, to wit: "Including herein the real estate, with the mill and other buildings thereon, lately owned by John X. Russell, together with all the loose personal property, mill fixtures, etc., belonging to said mill." The term for which the lease was made was from December 7, 1892, until December 7, 1897, "unless such term is before then terminated, by forfeiture or otherwise." The rent reserved was the sum of $2,000 per year, and also all taxes and assessments that might be levied upon such property, which defendant Cody agreed to pay in semiannual installments. The lease contained the provision that no assignments should be made without the written assent of the lessor, and a condition that, if the rent was not paid as stipulated, the lessor might declare it at an end, and might re-enter possession, and that the second party should surrender the premises upon such forfeiture by reason of nonpayment. The lease further provided that "all improvements and additions made to said mill property by said party of the second part during the term of this lease shall be furnished by the party of the second part, and paid for at his cost; and it is expressly agreed between the parties to this lease that all such additions to the mill property, whether it be in buildings, or machinery, or tools, or anything necessary to operate the mill, shall, at the termination of this lease, whether by forfeiture or otherwise, remain in the mill, and on said premises, as the property of the party of the first part." Defendant Cody went into possession of the property after the execution of this lease, and took as a partner in the milling business defendant Proctor. The complainant in this case is a manufacturing corporation at Marinette, Wisconsin. On April 22, 1893, the complainant sold a band mill outfit and other mill machinery to Cody & Proctor for the sum of $5,782, to be put in the mill on the land in question at Sailors' Encampment. The mill was shipped to Cody & Proctor, and the complainant drew a draft, on April 22, 1893, upon Cody & Proctor, for the amount of the purchase price. This draft was accepted, by writing across the face of it the words, "Accepted May 6, 1893," and signed by Cody & Proctor. This was after the machinery had arrived at the mill. The draft was protested for nonpayment on July 24th thereafter. After Cody & Proctor had made default in payment of this draft, they made a proposition to Hurst & Sullivan, attorneys at Sault Ste. Marie, that they would make a bill of sale

of the machinery purchased from complainant for $4,000, and allow the complainant to take judgment for the balance. This proposition was submitted by Hurst & Sullivan to the complainant in a letter dated December 1, 1893. On December 8th the complainant acknowledged receipt, and stated: "If they have absolutely nothing, then we would prefer by all means to have the bill of sale stipulated for the full amount of our claim, at least that of the invoice, provided, however, the title should be absolute with us, and also that a reasonable time for the removal of the machinery could be secured." It was further stated in the letter: "If there is any property belonging to Cody & Proctor against which a judgment be applicable, then we would take judgment; if not, the bill of sale should be for the full amount of the invoice." December 11th Hurst & Sullivan wrote the complainant as follows: "We have this day, in conformity to the suggestion made in your letter of the 8th inst., obtained bill of sale of the property sold by you to Cody & Proctor for the full amount of your claim. Mr. Carver, the lessor, has a lease, so we understand, with some stringent conditions, and of which we were solicitous that he might make you some trouble; not that we think it would avail him anything. So we think better to advise you to remove the machinery at once, if you can possibly do so to any advantage. We have this day placed the bill of sale upon record." The machinery was not removed from the premises, when, on January 31, 1894, defendant Carver gave notice of the forfeiture of the lease by reason of nonpayment of the rents reserved therein; and on February 19th defendant Cody wrote a letter to him that he surrendered all claim under the lease, and Mr. Carver went into possession. Prior to that time, and on June 23, 1893, the complainant had caused to be filed in the office of the register of deeds of Chippewa county a statement and claim of lien upon the lands covered by the lease from Carver to Cody and of the property situate thereon. The certificate and statement of lien recites that "the furnishing of said materials, machinery, etc., was begun of the 5th day of May, 1893, and the last of said materials, machinery, etc., was furnished on the 5th day of May, 1893," and that the amount due the complainant, for which the lien was sought, was $5,782.

On the hearing the complainant gave testimony that it did not take the draft of Cody & Proctor as payment for the machinery, but simply as evidence that Cody & Proctor were to pay the amount thereof for the machinery in 90 days from its date. Complainant wrote Hurst & Sullivan, December 15, 1893, as follows: "You appear to have acted in this matter in disregard to our instruction, which contemplated that we should get the absolute title to the property without complication, and a reasonable time for its removal. It seems that we are still exposed to the liability of litigation with Mr. Carver, whom we take to be the owner of the property. If we get nothing by the bill of sale, we do not desire to be bound by it; but, in view of the unfortunate complications which have arisen in this matter, we will be willing to relinquish our interest in the property to Mr. Carver for not less than fifty cents on the dollar of our original claim. If that cannot be done, and the bill of sale is not sufficient to pass the title and right of possession to us, we want you to take immediate action, and reinstate the pending suit, or file a new bill, if you think that is safe to do, so that our rights may not be extinguished by lapse of time." Under this state of facts, it was claimed by the complainant, on the hearing below, (1) that the letter from the complainant to Hurst & Sullivan did not authorize them to take a bill of sale of the property, except upon certain conditions, which were not complied with; (2) that a time draft did not release their lien upon the mill machinery, as it was not intended as payment; (3) that it was entitled to have its statutory lien enforced against the property, and that the relations existing between Cody & Proctor and Carver are such that the complainant has a lien on the property for the purchase price, both against Cody & Proctor's interest, and that of Carver in the mill and machinery and land; (4) that, even if the lien could not reach Carver's interest in the land, the forfeiture of the lease to Carver would not give him the right to hold the machinery sold to Cody & Proctor, and that Carver could not prevent the complainant from removing the machinery to enforce the lien against Cody & Proctor.

The court below found that the bill of sale given by Cody & Proctor passed the title to the machinery back to the complainant; that the complainant had a lien on the property against the title of Cody & Proctor for the purchase price, and that this lien was filed by the register of deeds within the time prescribed by the statute; that the property was attached to the mill of Carver; and that, when the lease became forfeited while the property was so attached, the complainant lost all right of lien thereon, as, by the forfeiture of the lease, the title passed to Carver. The court further found that Hurst & Sullivan had authority to make the bill of sale; that the lease was terminated by the action of Carver and the consent thereon of Cody; and that Carver became repossessed of the premises, and the mill and machinery contained therein, including the machinery in question. The court stated, further: "Were it material to this issue, I should hold that the surrender made by Cody could not in any way affect the complainant's lien upon this property. As a result of these facts, the ruling of the court is that the bill of sale and proceedings in relation thereto resulted in the surrender and cancellation of the complainant's lien upon Cody & Proctor's interest in the property, and that therefore the decree

should be in favor of the defendants." The decree was rendered in favor of the defendants, from which the complainant appeals.

The defendants' contentions in this court are: (1) That the complainant has no lien against any of the property for the reasons (a) that the statute under which the proceedings were brought does not give a lien, in respect to engines and machinery sold, unless the vendor constructs, repairs, or puts up the engine, machinery, or appurtenances upon the land which is sought to be charged with the lien, and (b) that the complainant failed to file his notice of lien with the register of deeds in the county of Chippewa within the time required by the statute. (2) That, even though the complainant may have, at the outset, brought itself within the provisions of the lien law, yet it withdrew itself therefrom when, through its attorney of record, it settled its claim against Cody & Proctor, discontinued its suit on the draft taken at the time of the sale of the machinery, and received a return bill of sale of all of Cody & Proctor's interest in the machinery; that in consequence of such action on complainant's part, there was no longer a subsisting indebtedness upon which a lien suit could be predicated. (3) That in no event, under the circumstances of this case, can a lien attach upon the premises of defendant Carver, or upon the added building and machinery, which became his, when attached, conformably to the terms of the lease.

It will be seen that the result of the decree below is that complainant has lost the entire machinery sold to Cody & Proctor, and that, by the forfeiture of the lease, Mr. Carver has acquired title thereto This result is so inequitable that the decree should not stand unless the complainant has in some way estopped itself from claiming any rights therein, or Mr. Carver, under the technical rules of law, has by this forfeiture acquired title which cannot now be disturbed. It appears, conclusively, from the testimony, that the acceptance for the machinery was not taken as payment, but simply as evidence of the amount to be paid for it; and, from the conduct of the complainant and of Cody & Proctor in relation thereto, it is evident that neither party regarded the acceptance in any other light. It is elementary that neither a note nor an accepted draft would be payment unless it was intended by the parties to be so. Hotchin v. Secor, 8 Mich. 494; Brown v. Dunckel, 46 Mich. 32, 8 N. W. 537. The mill and machinery were purchased to put upon the property in question, and there to be used and operated by Cody & Proctor, the lessees. It was so placed and used. The complainant, in order to save its rights, and within the time prescribed by Act No. 179, Pub. Acts 1891, as amended by Act No. 199, Pub. Acts 1893, filed a lien in the office of the register of deeds of that county. This lien covered the property in controversy, and, as against the machinery so purchased, must be held to be a valid and subsisting lien, less the complainant, by the act of Hurs Sullivan in taking the bill of sale, rele its right to insist upon the same. The thority given to Hurst & Sullivan was to the bill of sale if the right to remove property was secured to the complain The bill of sale was taken, when it app that defendant Carver declared the lease feited, and, under the terms of the forfe clause, claimed that the title to the mill machinery had passed to him. Under t circumstances, the complainant was not b to stand by the bill of sale. It at onc rected its attorneys to make no claim u it and to enforce the lien. This it had right to do. It could not be bound by bill of sale, and be held to have surrend its rights under its lien claim. It appar was acting in the utmost good faith, willing to get out of the difficulty by re ing the machinery lack. It was not pe ted to do this, but was met with the c of Carver that, under the forfeiture of lease, the title to the mill and machinery passed to him. We think this claim ca be sustained. The lease was in force a time the mill machinery was erected, when the claim of lien was filed in the of the register of deeds. This was noti Mr. Carver of the claim which complai made. He must be held as having noti this at the time of the forfeiture of the l While, as between Cody & Proctor and ver, the forfeiture may have conveyed title of the mill and machinery to Ca yet this would not deprive complainant rights under its lien.

The statute provides for such liens, their enforcement by sale of the prop Act No. 199, Pub. Acts 1893, provides "Every person who shall in pursuance of contract, express or implied, written or written, existing between himself as tractor and the owner, part owner or l of any interest in real estate, build, alter prove, repair, erect, ornament or put in, or shall furnish any labor or materials in o building, altering, improving, repairing, ing, ornamenting or putting in any h building, machinery, wharf or structure, shall have a lien therefor upon such h building, machinery or wharf or other s ture or appurtenances, and also upon th tire interest of such owner, part owne lessee in and to the lot or piece of land." By paragraph 4 of section 9 of the act, also provided that "the liens for such or materials furnished, including those additions, repairs and betterments shal tach to the building, machinery, erec structure or improvement for which they furnished or done, in preference to any title, claim, lien, incumbrance or mortga or upon the land upon which such building chinery, erection, structure or other imp ment belongs, or is put." This section provides that, if the machinery, etc.,

furnished in the construction or erection of an independent building or other improvement, commenced since the attaching of any prior title, claim, etc., the court may, in its discretion, order such erection or improvement to be sold separately, and the purchaser may remove the same within such reasonable time as the court may fix. Mr. Carver, as lessor of the premises, had the right, under the forfeiture of his lease, to re-enter the premises; but this did not give him any interest or title to the machinery furnished by the complainant superior to the complainant's lien. That lien held good as against the property furnished by it to Cody & Proctor, notwithstanding the forfeiture of the lease; and the complainant, under its bill to enforce the lien, had a right to a decree against all the defendants, and, under the statute, a right to have this property sold separately from the land which Carver owns. The decree of the court below will be reversed, and a decree entered here in accordance with these views, and the proceedings transferred to the court below to carry out its provisions. Complainant will recover costs of both courts. The other justices concurred.

HUGHES et al. v. JONES et al.

(Supreme Court of Michigan. Feb. 26, 1896.)

APPEAL—CONFLICTING EVIDENCE—REVIEW.

A finding on conflicting evidence will not be disturbed on appeal.

Appeal from circuit court, Cass county, in chancery; Orville W. Coolidge, Judge.

Bill by George A. Hughes, executor, and others, against Minor T. Jones and others, to avoid a conveyance and a contract to dismiss an appeal. From a decree for plaintiffs, defendant Minor T. Jones appeals. Affirmed.

Spafford Tryon (Harsen D. Smith and George M. Stevens, of counsel), for appellant. Charles E. Sweet, for defendant appellee Mary A. Jones. J. R. Carr, for complainants and appellees.

GRANT, J. One Minor T. Jones died testate December 24, 1892, without issue. Complainant Fred Jones had lived with the deceased from his infancy, and had married the daughter of defendant Mary A. Jones by her former marriage. He had practically adopted Fred as his son. His property inventoried nearly $13,000. He made bequests to certain relatives, devised a mortgage of about $3,300 to his wife, defendant Mary A. Jones and made Fred the residuary legatee. The principal portion of the estate thus coming to Fred was a farm worth between $4,000 and $5,000. The will was admitted to probate in the probate court. Defendant Minor T. Jones was a nephew of the deceased, contested the will, and appealed from the decision of the probate court to the circuit court, where the case was pending when the transactions now complained of took place. Defendant Mary A. Jones was suspected by defendant Minor T. Jones to have administered poison to her husband, and to have burned two of his barns. Complainants and the defendant Minor T. Jones lived in Cass county; defendant M. T. Jones, Foster, and Anderson, in Chicago. Anderson had formerly been in the employ of the deceased. Defendant Mary A. Jones went to Chicago the latter part of January, 1894, where she was met at the depot by defendant Anderson, and taken to an hotel where he had engaged a room for her. She wrote a letter to the complainant Fred Jones, requesting him and his wife to come to Chicago at once, saying that she was in trouble. This letter was taken by Anderson to complainant Fred Jones, and delivered, between 9 and 10 o'clock in the evening. They went by the first train to Chicago, Anderson returning with them. He took them to a cheap hotel, where they found Mrs. Jones. Soon after their arrival the defendant Foster was introduced as the attorney of Mrs. Jones. Anderson pretended to be her friend, and was her advisor, in whom, for some reason, she placed great confidence. The next day after their arrival in Chicago the defendant Mrs. Jones executed an assignment of the above-mentioned mortgage to defendant Minor T. Jones, and complainants Fred and his wife made an absolute deed to him of the real estate devised to Fred. At the same time the four executed a contract reciting the will, the bequests, the contest then pending, and agreeing that, in consideration of the assignment and deed by Fred and his wife, defendant Minor T. Jones would pay Fred $1,000,—$100 to be paid in cash, and the other $900 as soon as the estate of the deceased was finally settled,—and would discontinue his appeal. All this was done in the room of Mrs. Jones in the hotel, in the presence of Minor T. Jones and his attorney, who drew the papers, and defendants Anderson and Foster. Complainants, upon their return home the following day, went to an attorney, and stated to him the above transactions. They thereupon at once filed this bill to set these conveyances and contract aside upon the ground that they were obtained by fraud, and threats of criminal prosecution against Mrs. Jones. Proofs were taken in open court, and a decree entered setting them aside and restoring the appeal from the probate of the will, and placing the parties in statu quo. The learned circuit judge filed a written opinion, reviewing the testimony and giving the reasons for his conclusion. The question is one entirely of fact. The material testimony is in direct conflict. This is one of those cases where much depends upon the credit to be given to the witnesses, and their appearance and character in open court are important factors in reaching a conclusion. Anderson was one of the

chief witnesses for the defense, and the court finds that he is utterly unworthy of belief, and in this conclusion we fully concur. It would profit neither the profession nor the parties to enter into a detailed statement of the evidence. Any one desiring it can obtain a copy of the able opinion of the circuit judge. After seeing the witnesses and hearing their testimony, he finds the facts to be with the complainants, and in his findings and conclusion we concur. The decree is affirmed, with costs. The other justices concurred.

SHELDEN v. BARLOW et al.

(Supreme Court of Michigan. Feb. 26, 1896.)

EXECUTION—LIMITATIONS—DEFICIENCY JUDGMENT—INTEREST—DIFFERENT RATES IN MORTGAGE.

1. Under 2 How. Ann. St. § 8721, providing that the time of the absence of the debtor from the state shall not be included in computing limitations, and section 8736, making limitation on a judgment or decree 10 years, execution may issue on a deficiency judgment in a mortgage foreclosure action at any time within 10 years, excluding any time the judgment defendant may have been absent from the state.

2. Where a mortgage note provided 7 per cent. interest for the first two years and 10 per cent. thereafter, and the mortgagee, on default in interest within the first two years, elected, under the mortgage, to declare the whole amount due, and sue therefor, the decree should allow interest at 7 per cent.

Appeal from circuit court, Clinton county, in chancery; Sherman B. Daboll, Judge.

Action by Allan Shelden against Edwin Barlow and William E. Warner to foreclose a mortgage. There was a judgment for plaintiff, and from an order awarding execution on a deficiency judgment defendant Barlow appeals. Modified.

Walter Barlow, for appellant. Spaulding & Cranson, for appellee.

MONTGOMERY, J. Defendant Barlow appeals from an order of the circuit court for Clinton county, in chancery, awarding an execution for a deficiency reported after sale in a foreclosure case. The decree for foreclosure was entered November 19, 1877, authorizing a sale on or after May 1, 1878. Sale was made on June 15, 1878, and on the same day a deficiency was reported by the commissioner. The present proceeding was instituted on the 14th of August, 1895.

Defendant contends that complainant had lost his right to proceed by laches. It appears, from the record, that from October 24, 1885, until July 30, 1895, defendant Barlow was a resident of the state of Kansas, and was absent from this state. In Wallace v. Field, 56 Mich. 3, 22 N. W. 91, it was held that the complainant has 10 years from the date of decree to make his claim by execution. While the reason for this holding was not given, it is evident that the limitation was adopted in analogy to that fixed by the statute of limitations. 2 How. Ann. St. § 8736. And we see no reason why the saving clause of section 8721, that "the time of the absence of the debtor from the state shall not be taken as any part of the time limited for the commencement of the action," should not apply. It is suggested that a substituted service might have been ordered, on the authority of Ransom v. Sutherland, 46 Mich. 490, 9 N. W. 530. But, as the proceeding to compel payment of a deficiency is essentially a new proceeding (Johnson v. Shepard, 35 Mich. 123), such substituted service could not be given extraterritorial effect; and we think it should not be held that the neglect to resort to such uncertain and incomplete remedy constitutes such laches as bar a proceeding taken on a personal service.

A question is raised as to whether this decree for deficiency should bear interest at 7 per cent. or 10 per cent. The note read as follows: "$4,500. Detroit, November 18th, 1875. Two years after date, we jointly and severally promise to pay to Allan Shelden, or bearer, the sum of forty-five hundred dollars, at his office in Detroit, with semiannual interest at the rate of seven per cent. per annum for the first two years from date hereof, and after two years from date hereof interest at the rate of ten per cent. per annum, payable semiannually. T. M. Cody. Edwin Barlow." Before the two years had expired, complainant had elected to treat the entire amount of the note as due, under a clause in the mortgage giving him the right to do so in case of default in payment of interest. The note was a 7 per cent. note when the decree was entered, and never became a 10 per cent. note. We think the decree should bear interest at the rate of 7 per cent. It does not appear that this point was specifically made in the court below. The order will be modified by fixing the rate at which interest is to be computed at 7 per cent., and, as modified, will be affirmed, without costs to either party in this court. The other justices concurred.

EAMES v. MILLER et al.

(Supreme Court of Michigan. Feb. 26, 1896.)

PARTNERSHIP—ACCOUNTING—DECREE—REVIEW ON APPEAL.

A decree in a partnership accounting will not be disturbed on appeal where it appears that the settlement was just, and was made on a consideration of all the partnership affairs.

Appeal from circuit court, Kalamazoo county, in chancery; George M. Buck, Judge.

Bill by Charles B. Eames against George W. Miller and others for partnership accounting. From a decree declaring complainant to be indebted to some of the defendants, complainant appeals. Affirmed.

Edwards & Stewart, for appellant. Boudeman & Adams, for appellees.

LONG, C. J. This bill is filed for the dissolution of a partnership called the Eames

Pulley Company, and for an accounting between the partners. In October, 1889, the complainant, who resides at St. Louis, Mo., and his brother, defendant Gardner T. Eames, residing at Kalamazoo, this state, were interested in certain letters patent for the making of wood split pulleys. They had theretofore been engaged in making pulleys under said patents at Racine, Wis., and had a half interest in that business, which was carried on by Stecker, Webber & Huetton. That business, apparently, had failed, and all there was left of it was certain machinery, engines, boiler, and other fixtures. Complainant and his brother also had certain other property at Kalamazoo, but which was largely incumbered. Defendant Foster resided at St. Louis, Mo. Through him, defendants Miller and Haines, who resided at Kalamazoo, became acquainted with the complainant and his brother, Gardner T. Eames, and an arrangement was made by which it was agreed to form partnership called the Eames Pulley Company. Articles of copartnership were drawn and signed by the parties, complainant and his brother, Miller, Haines, and Foster, each owning two-ninths interest, except the complainant, who owned one-ninth. By the copartnership agreement, complainant and his brother were to assign to the copartnership all their title and interest in the patents upon the pulleys, and to transfer to Miller, Haines, and Foster their interest in the property at Racine, Wis., and at Kalamazoo, and Miller, Haines, and Foster were to furnish the moneys to purchase from Stecker, Webber & Huetton their interest in the Racine property at the sum of $2,200, and to pay the debts of Eames Bros., contracted in the Kalamazoo factory, and for the property and machinery placed therein the sum of $4,300. Foster was to be president of the company, Miller vice president and general manager, Haines secretary and treasurer, and Gardner T. Eames superintendent of the works. It was further agreed, in the articles, that Gardner T. Eames, as superintendent, was to give his entire time to the business, under the direction of the general manager, and for his services was to receive $1,200 per year, payable weekly; but it was further provided that, if his services were not satisfactory to the majority of the copartnership, he was, at their request, to resign his position. Eames Bros. were to pay nothing into the business, except as before stated. These articles of copartnership were dated October 11, 1889, and the copartnership commenced and dated from November 11, 1889. The machinery was brought from Racine, and Gardner T. Eames, as superintendent, commenced work in placing the machinery in position, getting ready for business, etc. Miller and Haines becoming dissatisfied with his management after the lapse of a few months,—Foster joining with them,—requested Gardner T. Eames to resign his position, which he did; and Miller then took charge, and carried on the business a few months longer, when it was closed down. In the meantime Miller and Haines had advanced moneys, over and above the amount stipulated to be paid above, to carry on the business. The debts of the concern had, in the meantime, run up to about $5,000, and to secure these Miller and Haines had given security upon the company property to the defendant the First National Bank of Kalamazoo.

Upon the filing of this bill, defendants answered; and Miller and Haines claim, by their answer,—and they gave testimony on the hearing tending to substantiate the claim,—that they were induced to enter into the copartnership by Eames Bros. upon the representation that Gardner T. Eames was a good mechanic, and would make a first-class superintendent of the shop; that the pulleys had proved satisfactory, and large numbers had been sold at Racine, which had given good satisfaction; that they had also sold a great many pulleys in the East, and that 33 per cent. profit could be made; also, that the shop would have a capacity of 75 pulleys per day after it got to running, and that Gardner T. Eames would have the shop running in six or seven days after the machinery was received from Racine. They gave testimony, upon the hearing, showing, further, that but few pulleys had been sold at Racine; that of the car load shipped east only $78 had been paid thereon, and the balance refused; that they had not given satisfaction; and that they were too expensive to make to meet the demands of the trade with any profit. They further showed that, within 10 weeks after the company organized, it became, under Gardner T. Eames' management, largely indebted, and that no product in consequence was turned out. After the filing of the bill, a receiver was appointed, who took possession of the property, and, under the direction of the court, sold the same at public auction. The moneys arising from the sale were paid, by order of the court, over to the First National Bank of Kalamazoo, to pay the indebtedness of the company. No appeal was taken from that order. Upon the final hearing, after the proofs were taken, the court made a decree dissolving the copartnership, in accordance with the prayer of the bill, and the court found that there was due from the complainant to Miller and Haines the sum of $356.51, and that there was due from defendant Gardner T. Eames to Miller and Haines the sum of $713.02. The costs of the proceedings were awarded to Miller and Haines against the complainant. Defendant Foster's interest in the matter had been settled amicably between himself and Miller and Foster before the entry of the decree. Complainant appeals from the decree.

We have examined the testimony with care, and are satisfied that the decree was correct. The accounting made by the court was full and fair as between the parties, and it would not profit anyone to set out in detail further

of the facts. It was purely a question of fact, and we think the decree abundantly supported by the evidence. The decree will be affirmed, with costs, to be taxed in favor of defendants Miller and Haines. The other justices concurred.

JOHN HUTCHISON MANUF'G CO. v. PINCH.

(Supreme Court of Michigan. Feb. 26, 1896.)

REVIEW ON APPEAL — OBJECTIONS TO EVIDENCE.

Where evidence is admissible for any purpose, a general objection that it is irrelevant, incompetent, and immaterial, without stating the precise ground of exception relied upon, is not sufficient.

On rehearing. Judgment affirmed.

For former report, see 64 N. W. 729.

John M. Corbin, for appellant. Garry C. Fox (James M. Powers, of counsel), for appellee.

MONTGOMERY, J. An opinion was handed down at the last term of court reversing the judgment below, and directing a new trial. 64 N. W. 729. On application, we granted a rehearing, for the reason that the fact that no exception was taken to the ruling admitting the testimony, which we held to be incompetent, escaped the attention of the court. Plaintiff's counsel contends, however, that other evidence was received, subject to objections and exceptions, which raised the same question. This evidence was of this character: Defendant offered proof to show that the mill required more power than it did before the repairs were made. Upon a careful scrutiny of the record and of the objections urged, we are impressed with the view that the question discussed in the former opinion was not presented by the objections referred to. It is clear that the question was not considered by the circuit judge, and that the objections were not sufficiently specific to inform him that the defendant sought to make the contention that the written contract between the parties embraced the other agreement in such sense that the testimony referred to in the former opinion or the testimony as to the requirement of increased power should not be admitted for that reason. This view is strengthened by the consideration that the testimony showing that the increased power was made necessary by the changes in the mill would have some bearing on the question of whether the work answered to the warranty that the mill should give good results. As this testimony was objected to generally as irrelevant, incompetent, and immaterial, we think the defendant was not apprised of the precise nature of the plaintiff's objection, if, indeed, the counsel who then tried the case had in mind the point subsequently pressed; nor do we think the point one on which the objection made to this testimony would be likely to suggest itself to the court. The point was not suggested by any request to charge, but the defendant's first request, relating to the claim of damages because of the mill requiring increased power, is based upon another distinct claim, namely, that defendant had accepted performance of plaintiff's contract, so as to preclude him from raising the question. Counsel for the plaintiff has discussed other questions, and those presented by his original brief have been considered. We think the amendment of the notice under the general issue was warranted, and that the proofs as to the increased amount of power being made necessary by the repairs were not objectionable upon any ground urged before the circuit judge, and that the case was fairly submitted upon the issue as the plaintiff sought to put it before the jury. The judgment will be affirmed.

HOOKER, J., did not sit. The other justices concurred.

STARLING v. SUPREME COUNCIL ROYAL TEMPLARS OF TEMPERANCE.

(Supreme Court of Michigan. Feb. 26, 1896.)

INSURANCE—MUTUAL BENEFIT SOCIETY—CHANGE OF CERTIFICATE — CONSENT — TRANSFER OF MEMBERSHIP—DISABILITY—EVIDENCE.

1. A mutual benefit society which issues to a member a certificate of insurance, conditioned, among other things, on "paralysis so extensive as to produce absolute disability," cannot modify the certificate, by excluding this cause of disability, without the express consent of the member.

2. A member of an order which is social as well as beneficiary, whose lodge is disbanded for lack of members, and whose transfer card is refused by the other local lodge, is not bound to transfer his membership to a foreign lodge, but may send his assessments to the supreme council.

3. Whether a person is totally disabled from following any avocation, within a benefit insurance certificate, is for the jury.

Error to circuit court, Wayne county; George S. Hosmer, Judge.

Action by John G. Starling, administrator of Adolphus F. Starling, deceased, against the Supreme Council Royal Templars of Temperance to recover under a certificate of insurance. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

J. H. Tatem, for appellant. Powell & Johnson, for appellee.

MOORE, J. The defendant is a fraternal and mutual benefit association, composed of social and beneficiary members, with a membership of 13,000. Its beneficiary fund is derived from monthly assessments paid by its members. The certificate of insurance issued to the plaintiff provides, among other things, that the beneficiary, at the death of the assured, shall be entitled to the sum of $1 from each and every active member in good standing, not to exceed 2,000 members, or if the insured shall become totally dis-

abled for life, so as to prevent his following his own or any other avocation, he shall, upon satisfactory proof of such total disability, be entitled to one-half of the above-mentioned amount, the remaining one-half to be paid at the time of his decease, provided he shall comply with all the laws, rules, and regulations of the order. On the back of the certificate was indorsed the following: "Total disability shall consist of the following conditions: First. An injury which shall produce complete, total, and permanent disability from following any avocation. Second. Paralysis so extensive as to produce absolute disability to follow any avocation, and which is conclusively permanent. Third. Rheumatic or gouty arphritus followed by permanent anchylosis so extensive as to produce total disability. Fourth. Entire and hopeless loss of useful vision. Fifth. Hopeless and irremediable insanity." In July, 1890, the plaintiff was stricken with paralysis, which, he claims, totally disabled him for work, and entitled him to the sum of $1,000, according to the terms of his certificate, and, inasmuch as his claim was not paid, he brought this suit in 1893.

It is claimed, by way of defense, that in 1890, and before this suit was brought, the causes of total disability were reduced to three: (1) Entire and incurable loss of vision; (2) entire loss of both arms, or both legs; (3) hopeless and incurable insanity, —and that, inasmuch as the plaintiff had agreed to observe the rules and regulations of the order, this change of causes of total disability would prevent his recovery for the total disability growing out of the paralysis. It has been held that, where a mutual benefit society issued to a member a certificate of insurance, the subsequent adoption of a by-law by the society could not modify or change the contract of insurance without the express consent of the member. Grand Lodge v. Sater, 44 Mo. App. 445; Insurance Co. v. Connor, 17 Pa. St. 136; Becker v. Society, 144 Pa. St. 232, 22 Atl. 699; Morrison v. Insurance Co., 59 Wis. 162, 18 N. W. 13. To the same effect is Becker v. Insurance Co., 48 Mich. 610, 12 N. W. 874.

It is also claimed that plaintiff is not entitled to recover for the reason that, at the time of the commencement of this suit, he was not a member of the order. It seems to be established by the record that plaintiff, who was a resident of Detroit, was a member of Enterprise Council, of Detroit, until it broke up for want of members. He then obtained a transfer card from the supreme council at Buffalo, and deposited it with the North Star Council at Detroit. It was refused by that council. It is claimed by the defendant that, if the Detroit councils refused to receive him, he was under obligations to unite with a council in Grand Rapids or Buffalo. As this was a social as well as a beneficiary order, such a construction is unreasonable. The plaintiff sent payments of all assessments of which he had notice, to the supreme council, at Buffalo, which received them for more than two years after he claims to have become totally disabled. The plaintiff had done all he could, and all he was bound to do, to retain his membership, and was not in fault.

Complaint is made of the charge of the trial judge. The record shows that the avocation of plaintiff was cutting leather in a shoe factory, which required a steady hand; that, after 1890, his condition was such that he could not longer follow it. There was some testimony that, for a short time in 1892, he had acted as an inspector of sidewalks. After the trial judge had charged the jury properly as to the law, this occurred: "Mr. Powell: May it please the court, your honor has not defined what 'following an avocation' would be. I don't know whether you see fit to do that or not. The Court: I have not been requested to, in that respect. I will say, on that subject, that following an avocation, perhaps— Mr. Tatem: It is not a question of law, your honor. The Court: I think that is so, largely. But I will say this, with reference to that: The fact that a man may carry a bucket of coal, or may carry a stick of wood, or perhaps may run a lawn mower over a lawn, will not, in itself, necessarily show that he is competent to follow an avocation. The fact that a man may work for a few moments, even though, perhaps, he may work for a few months, will not, necessarily,—it is not conclusive evidence that he can follow some avocation. But, if you find that he can perform some kind of employment,—if you find, as suggested by the counsel in this case, that he could keep a newspaper stand, or a peanut stand, or could do any work, or follow any line of employment,—why, then, gentlemen of the jury, under those circumstances, he would not be entitled to recover. But you must remember it is not for me to say what inference shall be drawn from the evidence in this case. You have heard the evidence. It is for you to draw the inference of fact, and not for the court." The court had fully charged the jury that, to entitle the plaintiff to recover, he must be totally disabled from following any avocation, and he again repeated that charge, and left it entirely for the jury to draw the inference of fact. The judgment of the court below is affirmed, with costs. The other justices concurred.

In re CLANCY.

(Supreme Court of Michigan. Feb. 26, 1896.)

GUARDIAN AND WARD—CUSTODY OF WARD—WHEN DENIED.

Where a mother with a minor son and daughter, after being denied the custody of her daughter in one county, because she was unfit to rear her, went to reside in another county, and there procured the appointment of a resident of

the town of her own residence as guardian of both children, the guardian was properly denied the custody of the daughter, where it did not satisfactorily appear that his petition was made in good faith, to secure exclusive care of her, and it did appear that he left the boy in possession of his mother.

Petition on relation of William Clancy, Jr., guardian, against Arnold Sinon and wife, for writ of habeas corpus to obtain the custody of his ward. Denied.

Hawes & Luby, for petitioner. Osborn, Mills & Master, for respondents.

PER CURIAM. This is a proceeding by the writ of habeas corpus to obtain possession of the person of Marguerite M. Clancy, a child between five and six years of age. The father is dead. The mother petitioned for the writ of habeas corpus before Judge Buck, of Kalamazoo county. Testimony was taken before him, and he determined that the mother was an unfit person to have the education, care, and custody of the child, and ordered the child to remain in the custody of Mr. and Mrs. Sinon. The mother then went to Washtenaw county, where she claims to have meanwhile obtained a residence, and filed a petition in the probate court to have William Clancy, Jr., the relator here, appointed guardian of her two children, and he was so appointed. He thereupon instituted this proceeding.

This court made a reference to take proofs as to the good faith of the application, and whether Mr. Clancy was a suitable person to have the custody, education, and care of the children. In July last the child was virtually abandoned by its mother, and left with one Mrs. Mosher. The father soon afterwards applied to Mr. Merrill, the county agent, to find a suitable home for the girl. A temporary arrangement was made with Mrs. Mosher, who kept her four weeks. She then notified Mr. Merrill that she did not desire to keep her longer. He thereupon made arrangements with Mr. and Mrs. Sinon to take the child. The mother would be the proper custodian of the child if she were a proper person. The circuit court of Kalamazoo county judicially determined that she is not, and in this conclusion we concur. We are not satisfied that this petition is made in good faith on the part of Mr. Clancy, and that he desires possession for the purpose of taking exclusive care, control, and education of the child. Her mother is living in Ann Arbor, where Mr. Clancy lives; and although he is entitled, under his letters of guardianship, to the same right of possession of the boy as of the girl, yet he has not taken it, and leaves him to the exclusive possession of his mother. That this child should be placed under the proper influence is of the first consideration, and we see no legal obstacle to leaving her under the care of Mr. and Mrs. Sinon, rather than place her where she may be subjected to the influence of her mother, whom the court has found to be an unfit person. The writ will therefore be denied, and the child remanded to the possession of respondents.

STEERE v. TREBILCOCK et al.

(Supreme Court of Michigan. Feb. 26, 1896.)

NONNEGOTIABLE NOTE — ASSIGNMENT — DELIVERY ON SUNDAY—GUARANTY—RIGHT TO COLLATERAL.

1. An indorsement on a nonnegotiable note, upon the back of it, by the payee, and its delivery, was a sufficient assignment of the instrument to pass title

2. The fact that a note was handed to plaintiff in satisfaction of a guaranty on Sunday, it not appearing that the contract was made on Sunday, would not invalidate the delivery.

3. An attorney, being employed to pass upon the validity of certain bonds, refused to return them until his fee was paid. Defendants made their note, and delivered it to the cashier of a bank, agreeing to pay the cashier whatever he might be compelled to pay in order to obtain the papers. Defendants delivered to the attorney a letter from the cashier, agreeing to remit the amount of his bill if he would deliver the papers to defendants, which he did. When the attorney called on the cashier for payment, defendants refused to pay their note, and the cashier delivered it to the attorney. *Held*, that the note was given to the cashier as an indemnity to him on his debt to the attorney, and, being properly assigned and delivered to the attorney, the latter could maintain an action thereon.

Error to circuit court, Gogebic county; Norman W. Haire, Judge.

Action by George S. Steere against William Trebilcock and John A. McLeod. Judgment for defendants, and plaintiff brings error. Reversed.

Ball & Ball, for appellant. Charles E. Miller, for appellees.

LONG, C. J. Prior to October 14, 1893, the city of Ironwood had voted certain bonds for public improvements, and were seeking to negotiate them. Mr. O. E. Karste had bargained with the city for the bonds, and had employed a firm of brokers in Chicago to negotiate them. The plaintiff had been employed by these brokers to procure and prepare a statement of the bonds, and the proceedings authorizing their issue, and give his opinion, as an attorney, upon the question of their validity. These brokers failed to place the bonds, and the city of Ironwood negotiated with brokers in New York City to take them on the recommendation and favorable opinion of the plaintiff. The defendants were commissioned by the common council of the city—Mr. Trebilcock being the mayor—to obtain the bonds, and deliver them over to the New York brokers, and obtain a first payment of $25,000 upon them. For the purpose of completing such sale, the defendants were desirous of obtaining from the plaintiff the papers and documents which had been prepared on the subject of the bonds, and also his opinion

on the question of their validity, in accordance with the arrangement with the New York brokers. When the bonds were first turned over to Karste, he had arranged with the plaintiff for this examination, and had agreed with him upon a settlement of his services at the sum of $1,130. When defendants called upon Karste for the bonds and plaintiff's opinion, Karste informed them that plaintiff's charge was $1,130, and that he could get the papers and the opinion upon the payment of such sum; but he undertook, at defendant's request, to obtain the bonds and the opinion at a lesser figure. The defendants then agreed that, if Karste could procure the delivery of the papers and plaintiff's opinion, they would pay whatever sum Karste had to pay therefor, as it was not known at the time whether any reduction could be had or not. Karste demanded that the defendants give him their note for $1,130, saying that he did not think he could get any reduction. The defendants gave the note in question, with the understanding that, if Karste did not have to pay the total amount, they were to pay only such amount as he had to pay. This note is as follows: "Ironwood, Mich., Oct. 14, 1893. $1,130. On demand, after date, for value received, we promise to pay to the order of the Bank of Ironwood eleven hundred thirty dollars, at the People's Savings Bank of Ironwood, with interest at —— per cent. per annum after ——, until paid. Due ——. Wm. Trebilcock. John A. McLeod. This note is to be paid when Coffin and Stanton make first payment on bonds." Karste, upon obtaining the note, gave to the defendants a letter to present to the plaintiff, as follows: "Ironwood, October 14, 1893. George S. Steere, Esq., Chicago, Ill.—Dear Sir: On the delivery to Mr. Trebilcock of the papers now in your possession pertaining to the $150,000 Ironwood public improvement bonds, and a favorable report on same to Coffin & Stanton of New York, and on the payment of $25,000 or less by them, we will remit you the amount of your bill due for services to the city, to wit, eleven hundred and thirty dollars ($1,130). Yours, truly, O. E. Karste, Cashier." Defendant Trebilcock went with this letter to Chicago, for the purpose of obtaining from the plaintiff the papers referred to. Karste at once communicated with the plaintiff by telegraph, seeking to get a reduction of the amount, but received an answer refusing to make any reduction. The court found the foregoing facts, substantially. We now quote from the court's further finding, as follows: "Said letter of Karste was taken by said defendant Trebilcock to Chicago, and on or about the 15th day of October, 1893, was delivered to the plaintiff, who on the following day delivered to said Trebilcock the papers demanded, together with his written opinion, as requested. The defendant Trebilcock took the papers from the plaintiff, went East, and succeeded in negotiating the bonds for the city, and obtaining from Coffin & Stanton, for the city, a payment of $25,000, which payment was made before the commencement of this suit." The further facts found by the court are, substantially, that the plaintiff thereafter called upon Karste to pay the amount of his bill, and Karste requested the defendants to pay their note, so that he could pay the same in accordance with his letter which Trebilcock had delivered to the plaintiff, and said to them that he either should sue them for it, or send it to Mr. Steere. Defendants refused to pay the note, whereupon Karste indorsed the note as follows: "Pay George S. Steere, or order, without recourse. Bank of Ironwood, O. E. Karste, Cashier." The court found further that Mr. Karste handed this note to the plaintiff, with the indorsement upon it, in the city of Chicago, on Sunday, and that the note was never assigned to the plaintiff by Mr. Karste, otherwise than as "heretofore stated"; that plaintiff received it in satisfaction of his guaranty; and that Mr. Karste did not pay any money for the purpose of procuring the papers in question. The court then found further that: "The plaintiff did not deliver the papers in question to defendant Trebilcock in reliance upon any guaranty or promise made by said Karste. But I find that Trebilcock told the plaintiff, at their first interview, that he and McLeod had left the note in suit with the Bank of Ironwood, to secure Mr. Karste, and that Mr. Karste must make an arrangement with the plaintiff to get the papers for them, which Mr. Karste had agreed to do, and that Trebilcock and McLeod had secured Mr. Karste for the money, and plaintiff delivered said papers and his opinion in reliance upon that statement; that there never was any personal negotiation between Steere, the plaintiff, and the defendants, Trebilcock and McLeod, jointly; that the plaintiff never did any work or perform any service for the defendants jointly; that defendant McLeod was no party to any arrangement or bargain between the plaintiff, Steere, and the defendant Trebilcock; that the defendants Trebilcock and McLeod were not copartners, nor jointly interested in any transaction with the plaintiff, Steere; that defendant Trebilcock had no permission or authority to make any contract in Chicago which should bind defendant McLeod in any manner; that after the talk between Trebilcock and Steere in Chicago, and after the papers were delivered to Trebilcock by Steere, that Steere, by request of Karste, presented a bill to the city of Ironwood, accompanied by a sworn affidavit that the city was indebted to him in that amount." The court found, as matter of law: "First. That the instrument sued on in this cause is not a promissory note negotiable under the law merchant; that the title to said instrument cannot pass by indorsement, but only by assignment,—the bare indorsement being insufficient, indorsed on the back of a contract, to transfer title, or operate as an assignment of the contract. And, in case such in-

strument was assigned or transferred to a third person, such third person would take it subject to all such equities and defenses as existed between the original parties. Second. There being no proof in this case of any assignment of the paper in question to the plaintiff, there can be no recovery by the plaintiff in this cause. Third. The mere handing of the instrument in question by Karste to the plaintiff, in the city of Chicago, on Sunday, is not such an assignment and transfer of title to the plaintiff as will authorize him to bring suit upon it. Fourth. Under the evidence in this case, there can be no recovery by the plaintiff, or judgment against the defendants, under the count in plaintiff's declaration for labor or services. Fifth. There can be no recovery against the defendants in this case on account of any contract or conversation had between the plaintiff and defendant Trebilcock, in Chicago, to which the defendant McLeod was not a party. Sixth. I find, as matter of law, from the undisputed evidence in this case, that the plaintiff is not entitled to recover in this cause, and the judgment must be for the defendants." Judgment was rendered by the court below in favor of the defendants.

The contentions of defendants' counsel are: (1) That the defendants are not in the position of principal debtors, who are indemnifying a surety for securing their indebtedness, nor can they be said to have agreed to pay Karste's indebtedness to the plaintiff for services which had already been performed, but that the contract was special, and, in order for the defendants ever to be called upon to pay the amount of the contract, it was necessary that Karste should perform the conditions precedent, namely, to procure the surrender of the papers in question, and to pay what was necessary to pay for their surrender, and, the court having found that Karste has not executed his part of the contract, that there is a failure of consideration, which may be set up by the defense in any suit brought upon the so-called note. (2) That if it can be said that Karste was a surety for the defendants, and that their contract with him was to indemnify him for whatever he might be called upon to pay out as such surety, and the note was given to such contract for indemnity, then the plaintiff could not recover; for where a note given by a principal to the surety for his indemnity, as in the case of a collateral surety only, the surety on such note may recover only whatever sum is actually paid out up to the time of the trial, and no more. (3) That the contract in question is not a promissory note, negotiable under the law merchant. Therefore the indorsement upon the back thereof was insufficient to transfer title to the plaintiff. Counsel stated, however, that he does not contend but that an indorsement of the paper in question, accompanied by a valid delivery, would be a sufficient assignment, but that there must be both a valid indorsement and a valid delivery, in order to make an assignment, and that the burden was upon the plaintiff to show such assignment and delivery; and, under the findings of the court in this case, it cannot be said that the plaintiff has proved his case. (4) That the court having found that this was not a valid assignment of the instrument in question, and there being nothing before this court to show what the testimony was on which the court made such finding, this court will conclusively presume that there was sufficient evidence to justify the court below in finding as it did; that this court will not assume that there was any lack of testimony necessary to support the findings; and, therefore, that if there was no other question in the case, the court below having found that the plaintiff was not an assignee of the instrument in question, and it appearing conclusively that the instrument could be transferred only by assignment, the court was right in rendering judgment for the defendants.

We are of the opinion that, under the findings of fact made by the court below, this judgment cannot stand; that the judgment should have been rendered in favor of the plaintiff. The suit is brought upon the note, and the declaration alleges the facts and circumstances under which the plaintiff became possessed of it. While the note is not negotiable, the indorsement upon the back of it by the payee, and its delivery over to the plaintiff, were a sufficient assignment of the instrument to pass the title. Bank v. Gregg (Mich.) 64 N. W. 1052. The mere fact that the note was handed to the plaintiff, in Chicago, on Sunday, would not invalidate the delivery. It appears from the findings that the note was delivered to the plaintiff, and received by him, in satisfaction of the guaranty. When the indorsement was actually made upon the note, and when the agreement was made by which the plaintiff was to receive it in satisfaction of his warranty, does not appear. At least, it does not appear that such an arrangement was made on Sunday. The instrument sued upon was not a Sunday contract, but a promise to pay, lawfully made, and transferred to the plaintiff upon a valuable consideration; and the mere fact that it was handed to him on Sunday would not defeat its operation as a valid delivery. Even if this were not so, there is no showing upon this record but that such a delivery would be valid, in the state of Illinois, though made on Sunday. At the common law, this delivery would be good. Adams v. Hamell, 2 Dug. 74; O'Rourke v. O'Rourke, 43 Mich. 58, 4 N. W. 531. The note was given to Mr. Karste by the defendants for the purpose of enabling him to obtain from the plaintiff the papers which he had in his possession, and also his opinion as to the validity of the bonds. Mr. Karste had procured these services to be rendered through his brokers in the city of Chicago. The defendants were desirous of obtaining the benefit of these services, and induced Mr. Karste

to procure the documents so that they might be enabled to sell the bonds in New York, as the New York brokers agreed to take them upon the favorable opinion of the plaintiff as to their validity. Mr. Karste could not get these papers without the payment of the amount of $1,130. The defendants undertook and agreed to pay whatever Mr. Karste might be compelled to pay for the papers. The note was given for this purpose; and, to induce the plaintiff to surrender them, the letter set forth was written. We think the contract cannot be construed as contended for by counsel for defendants. It was not an arrangement, as claimed by counsel, that the defendants could be liable only for such an amount as Karste would actually have to pay the plaintiff; for the court found that the defendants executed the note and left it with Karste to indemnify him, and that it was not known at the time whether any reduction could be had, and that defendants gave their note with the understanding, if any reduction could be had, and Karste did not have to pay the total amount, they were to pay only such amount as he would have to pay. In other words, the court seems to have construed the arrangement as one in which the note was given to Karste as an indemnity; and it appears by the findings, further, that, in order to get the papers, Karste had to obligate himself to pay the whole amount of $1,130. The note being in Karste's hands as an indemnity, the plaintiff had a right to rely upon it; and, if Karste had refused to appropriate it for the purpose of paying plaintiff's claim, there can be no doubt the plaintiff could have compelled it. The mere fact that the court found that the plaintiff did not deliver the papers in question to the defendant Trebilcock upon any guaranty or promise made by Karste could not affect the plaintiff's rights in the premises. The rule is stated in Curtis v. Tyler, 9 Paige, 432, as follows: "It is well settled that where a surety, or person standing in the situation of a surety, for the payment of a debt, receives a security for his indemnity, and to discharge such indebtedness, the principal creditor is, in equity, entitled to the full benefit of that security; and it makes no difference that such principal creditor did not act upon the credit of such security in the first instance, or even know of its existence." See, also, Colebrooke, Collat. Sec. § 218; Bank v. Lee, 11 Conn. 112; Moses v. Murgatroyd, 1 Johns. Ch. 119; Constant v. Matteson, 22 Ill. 546; Phillips v. Thompson, 2 Johns. Ch. 418; Belcher v. Bank, 15 Conn. 381.

Mr. Karste having assigned the note to the plaintiff, as he would have been compelled to do, had proceedings been taken for that purpose, and there having been a valid assignment and delivery, the plaintiff had the right to insist upon the payment of the debt for which the note was given as collateral security to the undertaking of Karste. It could not be questioned that, if Karste had paid the full amount of the note in the first instance, he would have the right to recover from the defendants the amount so paid by him, and his right of action would have been upon the note.

The finding of the court below that this was not a joint undertaking of the defendants, we think, has no force, when we take into consideration what Trebilcock and McLeod did. They were jointly liable on the note to Karste, and that note was given as an indemnity to him upon his debt to the plaintiff; and, being properly assigned and delivered to the plaintiff, we think the plaintiff's action can be maintained against them both. The judgment of the court below must be reversed, and a judgment entered here, upon the finding, in favor of the plaintiff, for $1,130, with interest at 6 per cent. from the time of the commencement of this suit,—April 7, 1894. The plaintiff will recover costs of both courts. The other justices concurred.

LAUZON v. BELLEHEUMER.

(Supreme Court of Michigan. Feb. 26, 1896.)

ACCORD AND SATISFACTION—CONCLUSIVENESS.

A contract stating that it is in full settlement of all actions and causes of action on account of all matters of any kind between the parties is conclusive as to any controversy existing, where there was no evidence of fraud or mutual mistake.

Error to circuit court, Gogebic county; Norman W. Haire, Judge.

Action by Bruno Lauzon against Paul Belleheumer. Judgment for defendant, and plaintiff brings error. Affirmed.

The defendant was indebted to the plaintiff for board and office rent in the sum of $260.60, unless he is precluded from recovering by the following agreement of settlement:

"Whereas, differences have arisen between Bruno Louzon and A. Louzon and P. E. Belleheumer, touching certain alleged misconduct on the part of the said Belleheumer towards the said A. Louzon, in consideration of the premises, and on condition that the said Louzon shall release and acknowledge full satisfaction for and on account of all actions and causes of action which they, or either of them, may have on account of the matter aforesaid, or for and on account of other matter or thing of any kind or nature, the said Belleheumer agrees to pay to the said Louzon the sum of $500, the same to be applied on a certain mortgage executed by the said Louzon to the said Belleheumer, upon certain real estate, situate in the city of Ironwood, aforesaid; and, upon the execution of this agreement by said Louzon and his said wife, the said Belleheumer shall deliver to them his receipt for said sum of $500, to be applied as above set forth; and the said Bruno Louzon and A. Louzon, his wife, hereby agree to accept and receive the

same in full satisfaction of all claims of every nature as aforesaid. In witness whereof, we have hereunto set our hands, the day and year first above written. Bruno Louzon. Angelina Louzon.

"Signed and executed in my presence: Frank F. Kutts."

At the conclusion of the plaintiff's proofs, the court directed a verdict for the defendant.

Thomas Kissane and M. M. Riley, for appellant. Charles E. Miller, for appellee.

GRANT, J. (after stating the facts). The contract, in its express terms, covers the account for which this suit is brought. It is, however, insisted on behalf of the plaintiff that the account for board and rent was not intended to be settled by this agreement, but only the insult which it is claimed was offered by the defendant to plaintiff's wife. Plaintiff testified that, in the negotiation pending this agreement, nothing was said about this account, and it is urged that he had the right to submit to the jury the question of fraud in its execution. Plaintiff testified to no false representations. He admits that the agreement was read to him, and does not claim that any portion of it was suppressed or erroneously read to him. Settlements cannot be set aside upon the ground that one of the parties did not understand them. The agreement upon its face was a clear settlement of all the accounts between the parties up to its date. There was no ambiguity in it, and nothing to be misunderstood. The evidence fails to make out a case of fraud or mutual mistake. The rule governing this case is fully stated in Pratt v. Castle, 91 Mich. 484, 487, 52 N. W. 52. Judgment affirmed. The other justices concurred.

CATHRO v. GRAY et al.

(Supreme Court of Michigan. Feb. 26, 1896.)

SPECIFIC PERFORMANCE.

Where the vendor in a contract for the sale of land fails to make the payments required by his contract, and takes no steps to enforce it after notice from the vendor that he had forfeited it, and permits a subsequent grantee to take possession of the land and make valuable improvements thereon, specific performance will not be enforced at the instance of the vendee.

Appeal from circuit court, Alpena county, in chancery; William H. Simpson, Judge.

Suit by John J. Cathro against Edgar L. Gray and another. There was a decree for defendants, and complainant appeals. Affirmed.

W. E. Depew, for appellant. Edgar L. Gray, for appellees.

LONG, C. J. In June, 1878, defendant Gray entered into a written contract with the complainant and George Cathro, to sell and convey to them 120 acres of land in Alpena county, for the sum of $420, to be paid in annual payments of $105 each, the last payment to be August 31, 1882. The contract provided that the vendees should pay all taxes and assessments and all back taxes since and including the year 1873, and, upon full payment being made, the vendor should convey the premises by warranty deed, but, if the payments were not made in full, the payments theretofore made should be forfeited, and the premises, with the improvements thereon, should revert, and the vendor might thereupon re-enter and take possession, or that, at his option, the vendor might enforce the payment of the money due on the contract, but no pine timber was to be taken off without the written assent of the vendor. George Cathro thereafter assigned his interest in the contract to the complainant. Defendant Gray, claiming that complainant, Cathro, had not kept up his payments in accordance with the terms of the contract, treated it as void, and on October 3, 1887, entered into a written contract with defendant John J. Murphy for the sale of the lands to him for the sum of $600, the last payment of which was to be made October 25, 1891. After this contract was made, Mr. Murphy entered into possession of the premises, paid the taxes thereon, and has made more or less improvements upon the premises. Complainant now files this bill to enforce specific performance of the contract made with him, and an accounting to ascertain the amount due from him to defendant Gray, and claims to have made certain payments under the contract. The testimony was taken before a commissioner, reported to the court below, and upon such proofs that court dismissed the complainant's bill. The complainant appeals to this court.

It appears that, after Cathro obtained his contract, he cut and removed from the premises quite a quantity of timber; that he did not keep up his payments, when, in the summer of 1883, Mr. Gray notified him that his contract was forfeited. After this notice was given, the complainant wrote his brother George in reference thereto, and stated in the letter: "If you want to keep your interest, you will have to send me a power of attorney to settle for you. I do not know how you will look on it. As for myself, shall let it go, only it would leave me liable for what he might choose to charge me for the hardwood he claims pay for, or defend it by a lawsuit, which I may as well enter first as last." The claim by defendant Gray is that Cathro thereafter did nothing in reference to the lands, made no further payments under his contract, and that the whole matter was ended so far as Cathro was concerned, when, in 1887, he (the defendant) made a contract of sale of the lands to defendant Murphy; that, before Murphy purchased, he had a talk with Cathro in reference to these lands. At first Cathro claimed some interest in them, and

produced a contract; but Mr. Murphy testified that, upon examining it, he found that it described other lands than those in controversy here, and that Cathro then said to him that, if he wanted to go on and make a farm of it, he would never bother him; that he would likely see Mr. Gray, and settle the difficulty with him. Mr. Murphy claims that, with this understanding, he went into possession of the premises, made valuable improvements thereon, paid the contract price, and paid the taxes for the years 1887–89; these premises were adjoining those occupied by Mr. Cathro; and that Cathro saw him year by year making improvements, and made no objection thereto until about the time of the filing of this bill. We are satisfied from an examination of the testimony that Mr. Cathro failed in making his payments in accordance with the terms of his contract, and that Mr. Gray had the right in 1883 to terminate it; that Cathro did not seek thereafter to enforce the terms of his contract, and that Mr. Murphy, in 1887, in making the purchase, acted in good faith; that Cathro knew of Mr. Murphy's purchase; and that, while he claims that from year to year he made no objections to Murphy's possession, he took no steps to enforce his claimed rights, but permitted Murphy to expend money in improvements. The decree of the court below must be affirmed, with costs. The other justices concurred.

GILL v. BACKUS et al.

(Supreme Court of Michigan. Feb. 26, 1896.)

JUDGMENT — COLLATERAL ATTACK — ATTACHMENT — BOND OF INTERVENER.

Erroneous action of the circuit court in an attachment suit in allowing costs to the plaintiff, the amount recovered being less than $100, cannot be collaterally attacked in an action on the bond of an intervener, conditioned on the payment of the judgment recovered, which should be adjudged a lien on the property.

Error to circuit court, Alcona county; William H. Simpson, Judge.

Action by George A. Gill against Absalom Backus, Jr., and others. There was a judgment for plaintiff, and defendants bring error. Affirmed.

O. H. Smith, for appellants. J. H. Killmaster and M. J. Connine, for appellee.

HOOKER, J. Gill brought an action in circuit court by attachment, under the log lien law, against Morrill & Morrill, copartners, claiming a lien for $135 upon certain lumber. Backus intervened as owner of the lumber, and gave a bond for the release thereof. The trial resulted in a verdict in favor of Gill for $105.64 damages, $52.50 thereof being found to be a lien upon the lumber. Judgment was rendered upon the verdict, for the damages aforesaid, and concluded as follows: "And it is further considered, ordered, and adjudged that the said plaintiff do have a lien upon the property described in his declaration in this cause to the amount of fifty-two dollars and fifty cents, with his costs, disbursements, charges, and expenses of suit to be taxed, and that the plaintiff have execution thereof." Costs were taxed at $45.56. In an action upon the bond, the plaintiff recovered $101.98, made up as follows: The damages to amount of lien, $52.50; costs taxed, $45.56; interest, $3.92.

The only question raised in the case is the validity of the judgment for costs in the original attachment case, it being contended that the defendant, and not the plaintiff, should be entitled to costs where the amount recovered in circuit court is less than $100. The defendant Backus took no steps to review the judgment in the attachment case, and, as the bond undertakes to pay the judgment, neither Backus nor the sureties can question the judgment, unless it is void in whole or in part upon its face. Clinton v. Laning, 73 Mich. 284, 41 N. W. 424; Clinton v. Rice, 79 Mich. 359, 44 N. W. 790. The circuit court had jurisdiction of the case, inasmuch as the amount of lien claimed in the affidavit exceeded $100 over and above all legal set-offs. 3 How. Ann. St. § 8427*g*. No claim is made that it had not jurisdiction of the parties. Section 8427*l* permits a recovery of costs, and their collection by sale of the property attached. The most that can be claimed by the appellant is that, under 2 How. Ann. St. § 8967, the court should not have awarded costs to the plaintiff, and should have given the defendant costs, inasmuch as the jury found that the lien was less than $100. But this was at most an irregularity, which could only be corrected by proceedings in that cause. The judgment cannot be collaterally impeached. It therefore becomes unnecessary to discuss the other questions in the case. The judgment is affirmed. The other justices concurred.

TOWL v. BRADLEY.

(Supreme Court of Michigan. Feb. 26, 1896.)

CHALLENGE TO JUROR—LIMITATIONS.

Defendant has a right to question jurors upon the subject of their prejudices against the defense of limitations, as a means to determine whether or not to exercise the right of peremptory challenge.

Error to circuit court, Muskegon county; Fred J. Russell, Judge.

Action by Albert Towl against James M. Bradley. There was a judgment for plaintiff, and defendant brings error. Reversed.

F. W. Cook, for appellant. Bunker & Carpenter, for appellee.

HOOKER, J. This case is within the rule laid down in Monaghan v. Insurance Co., 53 Mich. 245, 18 N. W. 797. The defendant had

a right to question the jurors upon the subject of their prejudices against the defense of the statute of limitations, as a means of determining whether or not to exercise the right of peremptory challenge. As the other assignments of error are not discussed in the brief, we do not pass upon them. The judgment is reversed, and a new trial ordered. The other justices concurred.

STERNER v. HAAS et al.

(Supreme Court of Michigan. Feb. 26, 1896.)

MECHANICS' LIENS — NOTICE TO GIVE RIGHT OF ACTION—WAIVER—WHO IS A CONTRACTOR.

1. The requirements of Pub. Acts 1891, No. 179, § 4, providing that a contractor shall furnish the owner a statement of laborers and material men under his contract, with the amounts due each, before he shall have a right of action to enforce a mechanic's lien therefor, cannot be considered waived in favor of a contractor unless under circumstances amounting to an estoppel.

2. One whose lien statement shows the furnishing of a large number of articles and materials entering into the construction of parts of a building, and the construction of such parts by his skilled workmen, is a contractor.

Appeal from circuit court, Genesee county, in chancery; Charles H. Wisner, Judge.

Action by Edwin Sterner against Catharine Haas and others. Decree for defendants, and plaintiff appeals. Affirmed.

Durand & Carton, for appellant. Ed. S. Lee and Kohler & Bentley, for appellees.

HOOKER, J. The complainant was engaged in the business of plumbing and gas fitting, and did the work of steam heating, plumbing roofing, electric wiring, etc., upon the residence of the defendants. Subsequently he filed his statement of lien, for a balance of several hundred dollars, and the bill in this cause was filed to enforce it. The trial court determined that he was a contractor, and as such obliged to give to the owner a statement under oath containing the names of all laborers who performed work upon the premises, and material men who furnished materials therefor, with the amounts due them, respectively, if anything, under section 4 of Act No. 179, Pub. Acts 1891. The lien law is in derogation of the common law, and all rights under it are statutory, and cannot be extended beyond the provisions of the statute. Wagar v. Briscoe, 38 Mich. 587; Electric Co. v. Norris, 100 Mich. 502, 59 N. W. 151. Section 4 expressly provides that the contractor shall have no right of action until such statement is furnished. In the face of this express provision, we are unable to say that the proceeding can be sustained without compliance with it, when the lienor is a contractor. It is contended that the failure to furnish this statement should not be held fatal in this case, inasmuch as all material and labor is shown to have been paid for, and the defendants have never requested such statement; but if a waiver can ever aid a complainant, against the express condition upon which this section permits a suit to be brought to enforce the lien (which we do not determine), it can only be under circumstances amounting to an estoppel. It then becomes necessary to ascertain whether the complainant was a contractor, or merely a material man, and therefore not required to serve the statement mentioned in section 4. See Avery v. Board, 71 Mich. 538, 39 N. W. 742; Staffon v. Lyon (Mich.) 62 N. W. 354.

Counsel for the complainant contend that their client was a material man, and not a contractor. They say that the testimony shows that he did not make a contract to do this work, but that the articles furnished were purchased by the defendants as wanted, and at the time of such purchases it was arranged with the complainant to place the same in the building. An examination of the testimony shows that the statement of the lien filed says that the lienor "furnished certain labor and materials in and for the building, etc., and dwelling house, in pursuance of a contract." The itemized statement accompanying the claim of lien contains innumerable items of material and labor, interspersed, at various dates, including tin, lead, pipes, and the various fittings used therewith, and the labor of cartmen, tinners, plumbers, gas fitters, steam fitters, helpers, etc. The inference that there was an understanding that the complainant should do the necessary work, of the various kinds, seems unavoidable, and the fact that the parties did not agree upon an aggregate price does not preclude contract relations within the terms of this statute. It was not a case where the complainant merely sold a marketable commodity, which he kept on sale, or manufactured to order to be used by others; but it involved the furnishing of the necessary materials, and combining them in a structure like a roof, a steam-heating apparatus, a water system,—in short, a dwelling house,—all requiring skilled workmen, which the complainant provided and furnished upon his own responsibility and credit. See People v. Powers (decided at this term) 66 N. W. 215. As this makes the complainant a contractor, within the statute, we have no alternative but to affirm the decree of the circuit judge, with costs. Ordered accordingly. The other justices concurred.

GRAHAM v. CASS CIRCUIT JUDGE.

(Supreme Court of Michigan. Feb. 26, 1896.)

LIBEL AND SLANDER — PRIVILEGED COMMUNICATIONS — COMPLAINT FOR LARCENY — AFFIDAVIT TO HOLD TO BAIL — DISMISSAL OF ACTION FOR INSUFFICIENCY.

1. A complaint for larceny, made before a justice of the peace, is privileged, and cannot be made the basis of an action for libel.

2. An affidavit to hold to bail in an action of slander, charging the defendant with repeating the slander, without averring personal knowledge of the utterances by plaintiff, is insufficient.

3. In an action for libel, where defendant, though the affidavit to hold to bail was insufficient, gave special bail and entered a general appearance, a motion to quash and dismiss the proceedings because the affidavit conferred no jurisdiction to issue the writ or to order bail is properly denied.

Application on relation of William Graham against the circuit judge of Cass county for writ of mandamus to compel defendant to quash and dismiss libel proceedings. Writ denied.

One Nelson J. Crosby made an affidavit for a capias ad respondendum, charging the relator with libel. An order for bail was indorsed upon the affidavit. The relator was arrested, and gave a bond conditioned that he would appear in the action by putting in special bail. The relator furnished a special bail bond, and caused his appearance to be entered by his attorneys. The plaintiff filed exceptions to the special bail bond. Afterwards the relator, through his attorneys, moved to quash and dismiss the proceedings upon the ground that the affidavit conferred no jurisdiction upon the court to issue the writ, or make an order to hold to bail. The motion was denied, and the object of this writ is to compel the circuit judge to grant the order.

Howell & Carr, for relator. Spafford Tryon, for respondent.

GRANT, J. 1. The libel complained of consists of a complaint made by the defendant before a justice of the peace, charging Mr. Crosby with larceny of property of the value of $30. The complaint was privileged, and cannot be made the basis of an action of libel. Hart v. Baxter, 47 Mich. 198, 10 N. W. 198, and authorities there cited. It is, however, insisted that the affidavit is good because the defendant is therein charged "to have repeated the same slanderous words and charges in divers places in said village of Cassopolis, and to divers people." It is evident that the gravamen of the charge is the complaint made before the justice. If the residue of the language of the affidavit is intended to cover an action for slander, it is not sufficient, under the decisions of this court, to justify an order to hold to bail or to imprison. It is too indefinite, and does not purport to be based upon a personal knowledge of the utterances charged upon the defendant. Johnson v. Morton, 94 Mich. 1, 53 N. W. 816; People v. McAllister, 19 Mich. 215; Hackett v. Circuit Judge, 36 Mich. 334; Sheridan v. Briggs, 53 Mich. 569, 19 N. W. 189.

2. The court had jurisdiction of the subject-matter, and it is a universal rule that a general appearance waives defects, and gives jurisdiction over the person. Stephenson's Case, 32 Mich. 60, does not apply. He was imprisoned after the writ, and applied for his release by habeas corpus. The question was one of jurisdiction to imprison, and not one of jurisdiction of the subject-matter. The imprisonment might be unlawful, and still the suit for damages be sustained. If this were a motion to discharge the bail bond, that case would apply. The general appearance waives all defects as to the right to maintain the suit for damages. Whatever defects may be found in subsequent proceedings must be taken advantage of upon the pleadings. 2 Enc. Pl. & Prac. 639, and authorities there cited; Wright v. Jeffrey, 5 Cow. 15; Pixley v. Winchell, 7 Cow. 366; Stewart v. Hill, 1 Mich. 265; Wiest v. Luyendyk, 73 Mich. 661, 41 N. W. 839. The writ must be denied. The other justices concurred.

BROWN et al. v. NEIDHOLD et al.

(Supreme Court of Michigan. Feb. 26, 1896.)

NOVATION—EVIDENCE.

Defendants were mortgagees of chattels, which were sold by the mortgagor to another with defendants' consent, and a bill of sale was executed to defendants by the mortgagor in an amount exceeding the sum due on the mortgage, and the purchaser was to pay for the same in monthly installments to defendants. There was evidence of an arrangement between defendants, the mortgagor, and plaintiffs, creditors of the mortgagor, whereby defendants were to assume the debt due from the mortgagor to plaintiffs, and that plaintiffs looked to defendants for payment. After making two payments, the purchaser surrendered the property to defendants. *Held*, that it was proper to submit to the jury the question as to whether the arrangement between the parties amounted to a novation.

Error to circuit court, Gogebic county; Norman W. Haire, Judge.

Action by Archibald Brown and another against Charles Neidhold and another. From the judgment rendered, defendants bring error. Affirmed.

Charles E. Miller, for appellants. S. S. Cooper, for appellees.

LONG, C. J. In the year 1893 one George Leanna was the owner of a livery outfit. There was a mortgage upon it to the defendants for $950. During that year one Thomas Desonia desired to purchase the livery stock from Leanna. He and Leanna and the defendants finally arranged that Desonia might purchase from Leanna, but that Leanna should give a bill of sale of the property to the defendants, and that Desonia should pay the defendants for it in certain monthly payments; and, when he had paid the amount of Leanna's indebtedness to the defendants, he was then to have absolute title. The bill of sale was made for the sum of $1,400. The plaintiffs claim that Desonia was to pay $200 in cash, with which Leanna was to pay his outside bills, and Desonia was to give the defendant a mortgage or bill of sale for $1,200 to secure their claims against Leanna; that it was then arranged that defendants should deduct from the $1,400 their own bill of $950, and, instead of paying the balance, that they (the defendants) would

assume the payment of the bills which Leanna was owing at the time, including the bills of Joseph Vogtlin and John Wilson. Before this suit was brought, Vogtlin and Wilson assigned their claims to the plaintiffs. The amount due the plaintiffs from Leanna was $92.65; and due to Vogtlin, $42.20. The matter of Wilson is unimportant, as the court below directed the jury that no verdict could be rendered on that in favor of the plaintiffs. On the trial it was contended that the arrangements between the parties amounted to a novation. The plaintiffs had judgment, and defendants bring error.

It is conceded by counsel in this court that the plaintiffs had a right to recover the $42.20 upon the claim assigned by Vogtlin, as there was a novation in reference to that; but defendants' contention is that the evidence on the trial does not support the claim of plaintiffs that there was an arrangement which amounted to a novation in reference to their claim. It appears that the arrangement was between the plaintiffs and defendants and Leanna that Desonia should first pay and reduce the defendants' claim to $700, and that the payments thereafter made by Desonia should apply upon the plaintiffs' claim until that was paid. It was understood that, as Desonia was paying only $50 per month, it might take five months before anything would be paid upon the plaintiffs' claim; but Leanna testified that Edward Neidhold said they would take care of them (speaking of the claims of plaintiffs) and the Vogtlin claim; and plaintiff Otto testified: "Leanna asked me if I and him was square in that bill, and Mr. Neidhold accepted the bill and promised to pay it; and I understood it would release Mr. Leanna, and since that time I have not looked to Leanna for the bill. I have looked wholly to Neidhold Bros." Desonia paid something over $100 on defendants' claim, and then surrendered the whole property to them. We think the court was right in submitting the question to the jury as to whether the arrangement between the parties amounted to a novation. While the defendants did not receive from Desonia the amount he was to pay in cash, yet they did receive all of the property to which all of the parties looked for the payment of their respective claims. The judgment must be affirmed. The other justices concurred.

CARMICHAEL v. LATHROP et al.

(Supreme Court of Michigan. Feb. 26, 1896.)

WILLS—ADEMPTION OF BEQUEST BY CONVEYANCE OF REALTY.

1. A general bequest to a child, of a share of testator's personalty, may be satisfied pro tanto by a conveyance of real estate during the life of the testator, where such is the clear intention; such conveyance not operating as a revocation of the bequest, but as a satisfaction.

2. By a will the three daughters of a testator were made equal residuary devisees and legatees of all his property at the death of his wife. He afterwards conveyed real estate to each of two daughters, and intended to do equally well by the third, but had made no conveyance to her at the time of his death. *Held*, the share of the personalty receivable by each of the two daughters under the will being greater than the value of the realty conveyed to her, that the bequests to them should be considered adeemed to that extent.

Appeal from circuit court, Wayne county, in chancery; Joseph W. Donovan, Judge.

Action by Marilla B. Carmichael against Ada M. Lathrop and Emily B. Lloyd. Decree for defendants, and plaintiff appeals. Reversed

Fraser & Gates, for appellant. Charles A. Kent, for appellees.

HOOKER, J. The will of Henry P. Pulling was executed in June, 1872. After giving his wife the use and enjoyment of all of his property during life, in lieu of dower, it provided that: "Second. All the remainder of the estate of, in, and to my said property, both real and personal, subject to the said life estate of my said wife, I give, devise, and bequeath to my three daughters, Ada M. Lathrop, of Detroit, Michigan, Emily Lloyd, of Albany, New York, and Marilla B. Carmichael, of Amsterdam, New York, and to their heirs forever, share and share alike. * * * Third. I hereby authorize and empower my hereinafter named executors to sell and convey in fee simple absolute, in their discretion, any portion or all of my real estate, with a view of otherwise investing the proceeds thereof, or to change my present securities into real investments. But such change is to be done with the consent of my wife, and the approval of the probate court or a court of chancery. And this power and authority of so selling and conveying in fee simple absolute my real estate is hereby made notwithstanding the bequests which are given to my daughters, which bequests are hereby made subservient to said power. And I do hereby direct my executors to invest all my moneys and property, and the avails of all real estate so sold, in first-class, unincumbered real-estate mortgages, or in United States bonds or Michigan state bonds, said securities to be held and retained by them, and the income thereof paid quarter yearly, or, at the furthest, every half year, by them, to my said wife, until her decease, and on such death my estate is to be closed up and distributed as provided for in the second clause of this my will. And lastly I do hereby appoint my brother Abraham C. Pulling, of New York City, my brother-in-law William P. Bridgman, of Detroit, and my son-in-law Joseph Lathrop, of Detroit, to be the executors of this my last will and testament, hereby revoking all former wills by me made." Mr. Pulling died in July, 1890, and the will was probated August 19, 1890.

Joseph Lathrop qualified as executor. The probate records show that at the time of the testator's death he was seised in fee of real estate to the value of $65,000, that there was due to him upon land contracts $45,000, that he owned other personal property to the amount of $30,000, and that there were no debts or claims against the estate. Previous to the death of the testator, he conveyed to each of the defendants a parcel of real estate; that conveyed to Mrs. Lloyd being alleged to be worth $14,000, and that received by Mrs. Lathrop said to be worth $10.000. There is evidence tending to show that he intended to repair the house upon Mrs. Lathrop's property, thereby making the gift to her equal to that of Mrs. Lloyd, and that he intended to do as well by his other daughter, the complainant; but her husband became embarrassed, and finally went to state's prison, and she never received a home, as the others had. Her father, however, gave to her money from time to time, for her support, which aggregated $1,100. Soon after the probate of the will, litigation arose between the widow and children, which was finally adjusted, and the property was divided, the parties executing the necessary deeds and other instruments to carry it into effect. The accounts of Lathrop, the executor, were settled, and he was discharged. There is now some land held in common by the three sisters.

The complainant files the bill in this cause, alleging that the lands conveyed by the testator to her two sisters should be treated as ademptions of their respective legacies, and that they should be required to account to her for her share thereof. She alleges that her father so intended, and that they recognized the justice thereof, and promised to see that she received the same, and, relying upon such promises, she consented to the settlement of the estate, expecting that her sisters would pay her an amount equal to her share of said parcels so received by them. It seems tacitly agreed that this record involves only the question whether the property conveyed to Mrs. Lloyd and Mrs. Lathrop before the testator's death should be applied upon their respective interests under the will, or, in other words, as the counsel for the complainant state it, whether it can be treated as ademption or a satisfaction pro tanto of their bequests. We are perhaps at liberty to assume from the pleadings and admitted facts that the defendants received sufficient personal property under the will to more than cover the claim of the complainant; in other words, that they have received bequests to such amount in addition to any lands that they may have received. As to such personal property, the will made the sisters legatees, although they may have been also devisees as to the real estate, if the contention of the defendants' counsel is correct. In other words, they are none the less legatees, taking bequests of personal property, because one and the same provision of the will gave them both personal and real property. Hence we need spend no time upon the question whether the terms of the will made them devisees, as there are legacies sufficient to support the ademption contended for. We can therefore eliminate some of the questions which arise where an attempt is made to apply the doctrine of satisfaction to a devise of real property by reason of the conveyance to the devisee of other property. The case is one where it is claimed that a gift of personal property by will may be satisfied by a conveyance of land, when such is the clear intention of the testator. If a person should bequeath to another a sum of money, and, previous to his (the testator's) death, should pay to such person the same amount, upon the express understanding that it was to discharge the bequest, the legacy would be thereby adeemed. But, in the absence of an apparent or expressed intention, that would not ordinarily be the effect of the payment of a sum of money to a legatee under an existing will. Generally, such payment would not affect the legacy. To this rule there is an exception, where the testator is a parent of or stands to the legatee in loco parentis. In such case the payment would be presumed to be an ademption of the legacy. At first blush this impresses one as an unreasonable rule, as it puts the stranger legatee upon a better footing than the testator's own son, and judges and law-writers have severely condemned the rule. See Story, Eq. Jur. §§ 1110–1113. It has been said that "this rule has excited the regret and censure of more than one eminent modern judge, although it has met with approbation from other high authorities." Williams, Ex'rs, 1332. Story's condemnation of it is strong, but he adds, "We must be content to declare ita lex scripta est. It is established, though it may not be entirely approved." And Worden, J., in Weston v. Johnson, 48 Ind. 5, says, "Whatever may be thought of the doctrine, it is thoroughly established in English and American jurisprudence." Shudal v. Jekyll, 2 Atk. 518; 2 White & T. Lead. Cas. Eq. (4th Ed.) 741; Van Houten v. Post, 33 N. J. Eq. 344; Ex parte Pye, 18 Ves. 140. With a refinement of logic, characteristic, the early English judges held that the intention to adeem a legacy is to be presumed from the advancement of a part of the legacy, on the theory that it was the testator's right to do so, and that he must be presumed to be the best judge of the propriety of a revocation; but the rigor of this rule has been relaxed, and cannot now be said to be the law. Ex parte Pye, 18 Ves. 140; Pym v. Lockyer, 5 Mylné & C. 29, 55; Montague v. Montague, 15 Beav. 565; Williams, Ex'rs, 1333; Hopwood v. Hopwood, 7 H. L. Cas. 728; Wallace v. Du Bois, 65 Md. 153, 159, 4 Atl. 402. See cases cited 1 Pom. Eq. Jur. § 555, note 3. There are cogent rea-

sons in support of the rule stated,—i. e. that payment to a son adeems the legacy,—which is based on the theory that such legacy is to be considered as a portion, and that the father's natural inclination to treat his children alike renders it more probable that his payment was in the nature of an advancement than a discrimination in favor of one, oftentimes the least worthy. Double portions were considered inequitable, and upon this the doctrine rests. Suisse v. Lowther, 2 Hare, 427. While the authorities are a unit that a legacy by one in loco parentis will be adeemed by payment, in the absence of an apparent or expressed intent to the contrary, the doctrine was early restricted. Among other limitations was the rule that the presumption could not be applied to a residuary bequest, because the court would not presume that a legacy of a residue, or other indefinite amount, had been satisfied by an advancement, as the testator might be ignorant whether the benefit that he was conferring equaled that which he had already willed. Freemantle v. Bankes, 5 Ves. 85; Clendening v. Clymer, 17 Ind. 155; Story, Eq. Jur. § 1115. This exception fell with the discarding of the rule that satisfaction must be in full. Pym v. Lockyer, 5 Mylne & C. 29; Montefiore v. Guedella, 1 De Gex, F. & J. 93. Again, it was held that it could not be applied unless the advancement was ejusdem generis with the legacy. See 2 Story, Eq. Jur. § 1109. Counsel for the defendant contend that "the conveyance of real estate after the making of a will is held not a satisfaction of any legacy, in whole or in part, even though that was the clear intent of the testator," and he cites several authorities to sustain the proposition. In Arthur v. Arthur, 10 Barb. 9, it was held that "a conveyance made subsequent to a devise of land is not a revocation or satisfaction of a devise of other lands to the grantee. But, if the conveyance be of a portion of the same land, that is a revocation pro tanto." This was a case where the court found that the grantor intended and the grantee expected the land conveyed would be in lieu of the grantee's share under the will. It was said that to hold that the conveyance was a satisfaction was to hold that the will might be revoked by implication, which could not be tolerated under the statute of frauds. This case contains an elaborate discussion of the subject, and cites many of the earlier authorities bearing upon it. The court of appeals considered the subject in Burnham v. Comfort, 108 N. Y. 535, 15 N. E. 710. In this case it was claimed that a devise of real property was satisfied by the payment of money, on the express understanding, evidenced by the receipt of the devisee, that it was received as a part of her father's estate. The court said that to sustain such claim they must hold that it operated as a revocation of the will, which would contravene "the spirit, if not the letter" of the statute of frauds, and that the proposition "lacked support in principle as well as authority." The opinion then asserts that "the rule of ademption is predicable of legacies of personal estate, and not applicable to devises of realty." After discussing the question of intention, and intimating that, while a presumption of intention that the gift should be in satisfaction would exist if the case were one involving a legacy, it would not in case of a devise, it proceeds to show that the statute of frauds, which extends to wills, was an unsurmountable barrier to the application of the rule contended for, as to devises. Two members of the court dissented. The supreme court of South Carolina, in the case of Allen v. Allen, 13 S. C. 512, had occasion to consider a case where the legatees were also devisees, as in the present case. It was held that payments of money were to be considered as made in satisfaction of the legacies, but not the devises. The court said: "It would seem that, upon the same principles, devises of real estate ought likewise to be adeemed (if such a term can, with any propriety, be applied to devises) by subsequent payments to the devisees with the intention of producing that result; but it is conceded that the doctrine of ademption has never been applied to devises of real estate, and, in the absence of any authority, we do not feel justified in disregarding the well-established line which has for ages been drawn between real and personal estate, even though we may be thereby compelled to thwart the obvious intention of the testator, and disturb the distribution of his property which he thought was proper and just to his descendants. For, while the intention of the testator is the cardinal rule of construction of a will, yet such intention cannot be given where it is in conflict with the rules of law. A devise of real estate cannot, like a pecuniary legacy, be affected by any subsequent transactions between the testator and the devisee, but must stand until it is revoked or altered in the manner prescribed by law." Attention is also called to the case of Swails v. Swails, 98 Ind. 511. In this case land was devised as follows: 88 acres to J.; 36 acres to N. Subsequently the testator conveyed portions of the same land as follows, viz.: 60 acres to J., the son; and 40 acres to N., a grandson. It was held that the deeds did not revoke the devise of the 24 acres to N., and that the doctrine of ademption does not apply to specific devises of real estate, nor where the devisor does not stand in loco parentis. The case followed Weston v. Johnson, 48 Ind. 1, where it was held that the doctrine of ademption of legacies by advancement to the legatee by the testator in his lifetime has no application to devises of real estate. Again, in Campbell v. Martin, 87 Ind. 577, it is said, "But we know of no reason whatever for the extension of

the doctrine, and making it applicable to devises of real estate." In Marshall v. Rench, 3 Del. Ch. 239, the court admits that in some cases a conveyance to a devisee after the making of the will would operate in like manner as the ademption of a legacy,—e. g. where the conveyance to the devisee is of the same land,—because "by such a conveyance the testator executes his devise, precisely as the settlement of a portion on a legatee is an ademption of the legacy." The court adds that "the conveyance to a devisee of lands other than those devised, or of an interest in lands different from that devised, has never been held an implied revocation of the devise." The authorities cited in support of this are all ancient, except Arthur v. Arthur, hereinbefore discussed. We mention at this point the fact that all of these were cases where the attack was made upon a devise, merely, except the South Carolina case, and in that case the claim of ademption was sustained as to the legacies. 2 Woerner, Adm'n, p. 978, is cited in support of defendants' contention. This author dismisses the subject with the statement that "specific legacies are said not to be affected by the subsequent advancement of a portion, because the gift of specific articles of personal property by a father to his child is not presumed to be intended as a portion. And, for the same reason, real estate devised is held not to come within the rule; but this exception is repudiated in Virginia, and unfavorably commented on elsewhere." See Hansbrough v. Hooe, 12 Leigh, 316.

The authorities cited have been commented on at length for the purpose of showing that they differ from the case before us, inasmuch as they were cases where it was sought to treat conveyances as satisfactions of devises. This is not a case where an attempt is made to deprive a devisee of title to land willed to him, but it is claimed that the presumption that a bequest to a son is satisfied pro tanto by a gift is not to be applied where the gift is of land instead of money, or other personal property ejusdem generis. In Richards v. Humphreys, 15 Pick. 140, will be found the following dictum of Shaw, C. J.: "We have seen that ademption depends solely upon the will of the testator, and not at all upon the ability of the party receiving to give a valid discharge. Had money been paid to trustees or others for her benefit, without any act or consent of hers, if given expressly in lieu or in satisfaction of such legacy to her, it would have operated as an ademption. Had he purchased a house or other property in her name, and for her benefit, with the like intent and purpose expressed, it would have had the same effect." It is apparent that the law looks upon a legacy to a son as a setting off of his portion. Also, it is plain that a subsequent gift, unless it be of real estate, is presumed to be in satisfaction pro tanto of the legacy. It is also settled that whether the gift is to be considered an ademption of a legacy must depend upon the intent of the testator alone. A gift of personal property to a son may be shown not to have been so intended, but the burden is upon the legatee. Ford v. Tynte, 2 Hem. & M. 324. A gift to a stranger may be shown to have been intended as an ademption, but here the presumption is the other way, the burden being upon the administrator to show such intent. There can be no doubt that a testator's conveyance of real property may constitute an ademption, if he so intends it, e. g. where he expresses the intent in the conveyance, and possibly in other ways. If so, the only significance of the doctrine ejusdem generis is its effect upon the presumption. The doctrine that the property conveyed must be ejusdem generis appears to be the only ground upon which it can be said that the conveyance in this case should not be treated as satisfaction pro tanto. It has been said in early cases that "when the gift by will and the portion are not ejusdem generis, the presumption will be repelled. Thus, land will not be presumed to be intended as a satisfaction for money, nor money for land." Bellasis v. Uthwatt, 1 Atk. 428; Goodfellow v. Burchett, 2 Vern. 298; Ray v. Stanhope, 2 Ch. R. 159; Saville v. Saville, 2 Atk. 458; Grave v. Earl of Salisbury, 1 Brown, Ch. 425. But see Bengough v. Walker, 15 Ves. 507. The courts have not accepted without protest the proposition that the application of the presumption arising from the relation of parent and child should depend upon the similarity of the property willed and donated, and it has been asked "why, if a gift of a thousand dollars will satisfy a legacy of that amount, it should not equally be satisfied by a donation of lands of equal value." And see Pym v. Lockyer, 5 Mylne & C. 44. But all agree that ademption is a matter of intent. In Jones v. Mason, 5 Rand. (Va.) 577, the court said, "This whole class of cases depends upon the intention." In Hoskins v. Hoskins, Prec. Ch. 263, it is said, "I answer, it still shows that intention is everything; ejusdem generis nothing." In Chapman v. Salt, 2 Vern. 646, it was said, "Showing that intention is everything." Again, "It is laid down generally that a residuary legacy will not adeem a portion due under a settlement, because it is entirely uncertain what that legacy may be. But this rule, like the rest, yields to intention." Rickman v. Morgan, 1 Brown, Ch. 63, 2 Brown, Ch. 394. In Bengough v. Walker, 15 Ves. 507, it was held that a bequest of a share in powder works, charged with an annuity, was a satisfaction of a portion of $2,000, when it was so intended. See, also, Gill's Estate, Pars. Eq. Cas. 139. It is forcefully argued that these cases make obsolete the doctrine of ejusdem generis. Whether they do or not, they certainly show that it must yield to the testator's intent. We cannot, therefore, accede to the proposition of counsel for the defendants "that the conveyance of real estate will not

be held a satisfaction of any legacy in whole or in part, even though the intent of the testator is clear." We think the testimony shows the testator's intent. There may be testimony in the record that was incompetent to prove it, but there is sufficient that was competent. The widow was conversant with the entire transaction, and the defendants' statements are admissions of their knowledge of such intentions.

It is contended that "the allowance of a conveyance of property as a satisfaction of a devise or legacy would be equivalent to a revocation of the will in part, and it would have to be proven in the manner provided by our statute for the revocation of wills, e. g. by the destruction of the will, or the making of a new will." How. Ann. St. § 5793; Lansing v. Haynes, 95 Mich. 16, 54 N. W. 699. We think it should not be called a revocation of the will. The defendants' bequests are permitted to stand unquestioned, and matter in discharge of the obligation (i. e. payment) is shown. The will is not overturned or revoked. It is satisfied. We think the prayer of the bill should be granted, and the record should be remanded to the circuit court for the county of Wayne, in chancery, for further proceedings. Decreed accordingly. The other justices concurred.

WAGG-ANDERSEN WOOLEN CO. v. DUNN, Sheriff.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

BILL OF SALE AS SECURITY—FILING.

Under Sanb. & B. Ann. St. § 2313, making the filing of a chattel mortgage essential to its validity against third persons, unless accompanied by delivery and continued possession of the property, the holder of a bill of sale, taken as security, and not filed for two months thereafter, cannot recover the property from the sheriff, who, in the meantime, seized it from the debtor on an execution against him, and is in possession; nor can such plaintiff be aided by the invalidity of the defendant's seizure.

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by the Wagg-Andersen Woolen Company against Michael Dunn, sheriff. Judgment for defendant, and plaintiff appeals. Affirmed.

Henry W. Dunlop, for appellant. Turner, Bloodgood & Kemper and J. H. Turner, for respondent.

CASSODAY, C. J. It appears from the record that, January 30, 1894, one Finkelstein was indebted to the plaintiff on account of goods theretofore sold and delivered, and on that day executed and delivered to the plaintiff, on account of such indebtedness, his judgment note for $325; that judgment was thereupon immediately entered, and execution issued, and Finkelstein's stock of goods levied upon, and taken into the possession of the sheriff; that Finkelstein thereupon protested, and the result was that, January 31, 1894, Finkelstein gave to the plaintiff a bill of sale of his said stock of goods, reciting a consideration of $1, with the parol agreement that it should be security for the plaintiff's debt, which Finkelstein then agreed to pay at the rate of $50 per month, but which bill of sale was not filed until April 20, 1894; that, February 2, 1894, Finkelstein, being indebted to Fornes & Co. in the sum of $470, executed and delivered to them his judgment note for that amount, upon which judgment was entered on that day for that amount and costs, to wit, $500.50; that execution was issued thereon, and the stock of goods levied upon, and taken by the defendant herein, as sheriff, on that day; that, February 19, 1894, Finkelstein made a voluntary assignment for the benefit of his creditors to one Smythe, who immediately qualified and entered upon the discharge of his duties as such assignee; that, February 22, 1894, the plaintiff demanded the goods so held by the defendant, but he refused to give them up; that, April 20, 1894, the plaintiff filed the bill of sale with the clerk, and on the same day commenced this action of replevin, to recover the goods in question, under and by virtue of the bill of sale. The defendant answered, and justified, as such sheriff, under the execution and judgment in favor of Fornes & Co. At the close of the trial, the jury returned a verdict to the effect that they found for the defendant, and that he was entitled to a return of the property described in the complaint herein; that he, as sheriff, was, at the time of the commencement of this action, lawfully entitled to the possession of such property by virtue of the execution mentioned; that the amount of the special property of the defendant under said execution was the judgment of $500.50, and the interest thereon, being $27.50; that the value of the property taken from the defendant was, at the time it was so taken, $700; that they assessed the defendant's damages at 6 cents. From the judgment entered thereon, accordingly, the plaintiff brings this appeal.

The plaintiff must recover, if at all, upon the strength of its own title, and not upon the weakness of the defendant's title and right to the possession. The plaintiff's claim of title and right to possession rests entirely upon the bill of sale, which, confessedly, was taken as mere security for the payment of a debt. Being a mere security, and not having been filed as required by the statute, it was invalid, as against any other person than the parties thereto. Sanb. & B. Ann. St. § 2313, and cases cited in the notes. See, also, Parroski v. Goldberg, 80 Wis. 339, 50 N. W. 191; Drug Co. v. Hvambsahl, 89 Wis. 61, 61 N. W. 299. Counsel for the plaintiff contends that, because the execution under which the defendant justifies was issued upon the judgment entered upon the judgment note within 60 days prior to making the assignment, the same was, by virtue of the statute, rendered

void and of no effect. Sanb. & B. Ann. St. § 1693a. But the same argument, under the same statute, applies equally to the bill of sale. Neither question, however, is here involved, since the defendant, as sheriff, is in possession, and the plaintiff has shown no superior title or right to the possession. The judgment of the superior court for Milwaukee county is affirmed.

YOUNG v. KRUEGER et al.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

SUMMONS—SERVICE ON FIRM—RETURN.

1. A return on a summons in an action against a firm, reciting a service on both partners by reading the summons to one of them, and by leaving with him a copy thereof for "each" of them, shows a valid service on the partner to whom the summons was read, and therefore authorizes, under Rev. St. § 3663, on default, a judgment against both.

2. A summons returnable August 17th, served on August 11th, is served six days before return day.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Action by A. G. Young against Julius Krueger and another. From a judgment on certiorari to the circuit court, reversing a judgment of the justice court for plaintiff, he appeals. Reversed.

This was an action commenced in a justice's court, by the appellant against the respondents, as copartners. A summons was issued by the justice on August 6, 1894, returnable August 17, 1894. It was returned, bearing the following indorsement of service: "I certify that, on the 11th day of August, 1894, at the city and county of Milwaukee, I served the within summons on the defendants Julius Krueger and Henry Krueger, by reading the same to Julius Krueger, and delivering to and leaving with him a true copy thereof for each of them, at their usual place of abode. The defendant Henry Krueger I could not find." On the return day of the summons the defendants failed to appear. The plaintiff proved his case and took judgment against both defendants. The case was taken by common-law certiorari to the circuit court, which court reversed the justice's judgment. From this judgment of the circuit court this appeal is taken.

H. W. Sawyer and E. W. Sawyer, for appellant. I. T. Ford, for respondents.

NEWMAN, J. (after stating the facts). The respondents claim that the constable's return fails to show a good service upon either, both because what was done did not amount to a good service, and because it was not made six full days before the date at which it was returnable. The summons was read to Julius Krueger. That lacks nothing of perfect service on him, unless it should appear that he demanded a copy, and his demand was not complied with. Section 3600, Rev. St. But it appears that the officer did deliver to and leave with him a true copy "for each of them." It is not quite plain what the return lacks of showing a good service upon Henry Krueger, also. It shows that he was not found by the officer, and that a copy was left for him, at the usual place of abode of both of them, with his codefendant and copartner, to whom he read the original summons. It is not quite obvious what that lacks, in substance, of "leaving a true copy thereof at his usual place of abode, in the presence of some one of the family, of suitable age and discretion, who shall be informed of its contents." But it was not necessary to the jurisdiction of the court that the summons should be served upon Henry Krueger, for the judgment which was rendered was authorized by service of the summons upon one only. Rev. St. § 3663.

Was the summons served six days before its return day? Is the 11th day of the month six days before the 17th day? In the computation of the time, the day of the service should be excluded, and the day of the return should be included. Sanb. & B. Ann. St. § 4971, subd. 24; 22 Am. & Eng. Enc. Law, 113, and cases cited in notes; 26 Am. & Eng. Enc. Law, 3. Parts of days are to be disregarded. 5 Am. & Eng. Enc. Law, 89. The service was six days before the return day. The justice's judgment should have been affirmed. The judgment of the circuit court is reversed, and the cause is remanded, with direction to affirm the justice's judgment.

HEROLD v. PFISTER.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

INJURY TO MINOR EMPLOYÉ—ASSUMPTION OF RISK — WHEN A QUESTION OF LAW.

1. A servant girl, 16 years of age, of reasonable intelligence, cannot recover for an injury ceased by tripping over steam pipes laid on the floor of her employer's kitchen, and covered with boards in the form of an inverted V, rising two inches above the floor, where she knew of the obstructions, and had passed over them for several months prior to the accident.

2. The fact that an employé, injured by the alleged negligence of his employer, is a minor, does not require the question of his assumption of risk to be submitted to the jury, where it plainly appears from undisputed evidence. Casey v. Railway Co., 62 N. W. 624, 90 Wis. 113, followed; Luebke v. Machine Works, 60 N. W. 711, 88 Wis. 442, distinguished.

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by Julia Herold, by guardian, against Charles F. Pfister to recover for injuries caused by a defective floor. From an order setting aside a verdict for defendant, directed by the court, and awarding a new trial, defendant appeals. Reversed.

This was an action brought by the plaintiff, a minor of the age of about 16 years, to recover damages against the defendant for an injury sustained while in his employ, by

reason of his alleged negligence and breach of duty, in that the floor of the kitchen in which she was employed as second vegetable cook, in the Hotel Pfister, was unsafe and dangerous, as the steam pipes running along and over the floor were covered with pieces of boards, in the form of an inverted V, and extending about five inches above the floor, and that the defendant, by his superintendent, required her to do, alone, the work which required two persons to do it in a safe and proper manner, and directed her to hurry, and do her work quicker, so that she became excited and confused, and her attention was thus diverted from the dangerous condition of the floor, whereby she fell over said steam pipes and covering, and received, in consequence, a severe cut on the right arm near the wrist, and other injuries, from which she became ill, and was unable to work, etc., to her great damage. The defendant insisted, in his answer, that the floor was not unsafe, and that he had not been guilty of any negligence or breach of duty, and that the injuries of the plaintiff were caused solely by her negligence and lack of ordinary care. Upon a trial before a jury, the plaintiff testified, as to the manner of her injury, in substance, that, at the time, she was employed in the kitchen as second vegetable cook; that it was her duty to cook the vegetables, and dish them out on the steam table, about 30 feet from where they were prepared, for the waiters who attended in the dining room; that, in coming from the vegetable pantry to the steam table, she had to cross over two steam pipes, one near the table, and the other before it, and they were on the floor, and covered with boards in the form of an inverted V, the top of the covering being about five inches above the floor; that she had no assistants, but had had one before, and in carrying a jar of mashed potatoes to the steam table, she was hurrying, and, as she was crossing over one of the steam pipes, she fell and cut herself with the jar; that she caught with her heel in stepping over it, and fell. As she expressed it, her heel "caught on the slant of the boards and I fell, and that was all there was of it." She further testified that there was plenty of help; that the room was well supplied with windows; that she was coming towards the light, which fell directly on the floor; and that the condition of the floor was in plain sight of everybody. She was in the sixteenth year of her age, and nearly full grown, and had worked there about five or six months. She had never measured the height of the covering of the steam pipes, but it was of hard wood, with a tight joint at the top, and the floor was of stone. A fellow servant described the situation in substantially the same manner, and stated that the boards were about as wide as the length of a volume of Reports; that the first vegetable cook was absent that day, and the plaintiff had to do the work alone. The uncontradicted evidence showed that the pipes, etc., were in the same condition at the time of the trial as at the time when the injury occurred, and, by actual measurement, the height, at the highest point, from the floor to the covering of the steam pipes, was two inches, and it was thirteen inches wide. The jury was permitted to view the floor and the covering of the steam pipes in question. One Matthews, who had had experience in the construction of buildings and laying out of pipes therein, testified that he knew how the floor in question was constructed, and that it would be practicable to run the pipes under it, and such would be the proper method; that it would be better construction to place them under the floor, or up, over the floor, near the ceiling, than over the surface of the floor. It was admitted that the defendant had knowledge that another person had been injured upon the covering of the pipes in question prior to the accident to the plaintiff. At the close of the evidence the defendant's counsel moved the court to direct a verdict for the defendant, and such request was granted, and a verdict for the defendant was entered accordingly. Subsequently, the plaintiff moved to set aside the verdict, and for a new trial, on the ground that the court erred in directing a verdict for the defendant, which motion was granted, and the court made an order accordingly, from which the defendant appealed.

Quarles, Spence & Quarles, for appellant. Runkel & Runkel and Austin & Fehr, for respondent.

PINNEY J. (after stating the facts). We think it is entirely plain that the court properly directed a verdict for the defendant. The plaintiff appears to have been a person of reasonable intelligence and judgment for one of her years, and she had had experience in the kind of work in which she was employed, and had worked in it, upon and over the floor, which, it was alleged, was of improper and unsafe construction, for five or six months. Beyond question, she was entirely familiar with the situation, and the alleged element of danger to her safety while thus engaged in her service. She had arrived at years of discretion, and was nearly or quite full grown. It does not appear that she had ever made any complaint of the alleged defect, although it was plainly visible, and well known to her. The evidence shows that she was, beyond question, of sufficient intelligence and judgment to appreciate and understand whatever of danger there was to which she was exposed in passing over the covering of the pipes, as much so as an adult. There was nothing obscure or complex in the situation, and nothing requiring special intelligence or experience, as in the case of Chopin v. Paper Co., 83 Wis. 192, 53 N. W. 452, in respect to the operation, speed, and consequent peril from machinery in motion. As

the situation was entirely plain to the humblest understanding, and there was nothing in the case tending to show that she could not and did not fully understand and appreciate the risk or danger of passing and repassing over the covered pipes, while about her work, she must be held to have assumed the risk of continuing in her employment, under the circumstances disclosed. It does not appear that anything occurred at the time to disturb or attract her attention. No one was then urging her to make haste in her work. The fact that she had been directed to hurry up her work, two hours before, was not likely to affect her powers of observation and judgment at the time the accident occurred. The evidence was undisputed, and the inferences from it were plain and certain; and, although the plaintiff was a minor, the case presented no question for the consideration of the jury, but one of law, for the court. In the case of Luebke v. Machine Works, 88 Wis. 442, 60 N. W. 711, the facts and proper inferences from them were in doubt, and what was there said was in discussing or declaring the rule by which the jury was to be guided, in view of the fact that the case was a proper one for their consideration, and that, therefore, the motion for a nonsuit, and the defendant's request that the jury should be directed to find for the defendant, were properly denied. The opinion in Luebke v. Machine Works, supra, taken in connection with the case before the court, does not hold that, in an action brought by a minor for personal injury, the question of his or her contributory negligence or assumption of risk, though it plainly appears from the uncontradicted evidence, must be submitted to the jury for its decision. The rule is clearly stated in Casey v. Railway Co., 90 Wis. 113, 62 N. W 624. The order appealed from is reversed, and the cause is remanded for a new trial.

PEARSON v. NEEVES et al.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

FORECLOSURE — PLEADING — DENIAL ON INFORMATION AND BELIEF—VERIFIED ANSWER—MOTION TO STRIKE.

1. Where a complaint in foreclosure alleges a failure of the mortgagor to pay taxes and insurance as covenanted, and a payment of the same by plaintiff, an answer by parties made defendants as subsequent purchasers or incumbrancers, denying all knowledge, or information sufficient to form a belief, in respect to such allegations, raises a material issue.

2. It is error to strike out as sham a properly verified answer which puts in issue a material allegation of the complaint. Pfister v. Wells (Wis.) 65 N. W. 1041, followed.

Appeal from circuit court, Milwaukee county: D. H. Johnson, Judge.

Action of foreclosure by John T. Pearson against William B. Neeves and others. From an order striking out as sham the answer of defendants William B. Neeves and his wife, Ellen C., said defendants appeal. Reversed.

This action was for the foreclosure of a mortgage by which it was covenanted, among other things, in substance, that the mortgagor, Kirchhoff, should pay annually all taxes assessed on the mortgaged premises 10 days before the annual tax sale, and should keep the buildings thereon insured against loss or damage by fire, in the sum of $5,000, in some solvent, incorporated insurance company. For his failure to keep these covenants, and upon proper allegations in that behalf, a claim was made that the sum of $22.50 for insurance, and $239.36 for taxes paid by the plaintiff, should be included in the judgment, in addition to the amount of the mortgage debt. The defendant William B. Neeves, and Ellen C., his wife, were made defendants under an allegation that they had, or claimed to have, some interest or lien upon the mortgaged premises, which had accrued subsequent to the lien of the mortgage; and they answered, admitting this allegation, and alleging that, as to the truth of the other allegations of the complaint, they had no knowledge, or information thereof sufficient to form a belief, and that they therefore denied the same. This answer was duly verified, and, upon affidavits supporting the allegations of the complaint, the plaintiff moved the court to strike out such answer as sham; and the court made an order granting the motion, from which the defendants Neeves and wife appealed.

Lindley Collins, for appellants. Quarles, Spence & Quarles and Hoyt & Ogden, for respondent.

PINNEY, J (after stating the facts). The allegations upon which the claim for the moneys paid by the plaintiff for taxes and insurance was founded were not presumptively within the knowledge of the defendants, as subsequent purchasers or incumbrancers; and they might properly deny all knowledge or information in respect thereto sufficient to form a belief. Such a denial, under these circumstances, formed a material issue for trial. Davis v. Louk, 30 Wis. 308. And, as the answer was properly verified, it could not be stricken out as sham. The case of Pfister v. Wells (Wis.) 65 N. W. 1041, upon this point, is conclusive. The order appealed from is reversed, and the cause is remanded for further proceedings according to law.

FOX et al. v. WILLIAMS.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

QUIETING TITLE—WHAT CONSTITUTES CLOUD—TENDER INTO COURT.

1. Rev. St. § 3186 (Laws 1893, c. 88), authorizing an action, by the person having the legal title and possession of land, against "any one setting up a claim" to the land, to quiet title, authorizes such action against a person claiming an interest in land under a contract of sale,

though the contract on its face shows that the claim is invalid.

2. In an action for rescission of a contract for sale of land, and removal of a cloud on title created thereby, a tender and payment into court is, for the tenderee, a conclusive admission of his right to the money tendered, and he is entitled thereto, though such tender was not necessary to the plaintiff's right to relief.

Appeal from superior court, Milwaukee county; J. C. Ludwig, Judge.

Action by William Fox and others against William M. Williams. There was a judgment for plaintiffs, and defendant appeals. Modified.

This action is in the nature of an action quia timet against a party setting up a claim to the title of land. The complaint shows: That on December 3, 1892, the plaintiffs gave the defendant a writing, of which the following is a copy: "Received of William M. Williams one hundred dollars ($100), to close bargain on twenty-five (25) acres of Bedessen farm, at ten thousand dollars ($10,000). C. H. Lewis, per Mrs. C. H. Lewis." That the plaintiffs are the owners of the legal title, and in possession of the lands mentioned in the writing. That they have tendered to the defendant a conveyance of the premises intended, and also the sum of $100 which was deposited with the clerk, and demanded performance by the defendant upon his part. That the defendant refuses to perform on his part, but still claims and gives out that he has a good and valid claim, by virtue of the writing, to the lands mentioned in it. Said complaint asks for judgment declaring the writing to be null and void, and that it be delivered up and canceled. A demurrer to the complaint, ore tenus, was overruled. There was a trial on the merits, which resulted in a judgment for the plaintiffs, and the plaintiffs were allowed to withdraw their tender. From this judgment the appeal is taken.

J. M. Clarke, for appellant. Winkler, Flanders, Smith, Bottum & Vilas, for respondents.

NEWMAN, J. (after stating the facts). It seems to be conceded, as seems evidently the fact, that the writing set out in the complaint is void, and does not amount to a contract, and so is not, even apparently, a cloud upon the plaintiffs' title. So, independently of the statute (Rev. St § 3186; Laws 1893, c. 88), the complaint fails to state a cause of action entitling the plaintiffs to relief of the character asked; for there are many cases in this court which hold that equity will not interfere to set aside, as a cloud upon title, an instrument which upon its face appears to be void. Moore v. Cord, 14 Wis. 213; Pier v. City of Fond du Lac, 38 Wis. 470; Cornish v. Frees, 74 Wis. 490, 43 N. W. 507; S. L. Sheldon Co. v. Mayers, 81 Wis. 627, 51 N. W. 1082; Brown v. Cohn, 88 Wis. 627, 60 N. W. 826. These cases seem to have been decided with reference to the rules governing the general jurisdiction of courts of equity in actions quia timet, and with little reference to enlargement of that jurisdiction which has been effected by the statute. But the co has in other cases recognized the effect the statute in enlarging that jurisdiction, though it has in no case defined the lim of the statutory action. In Clark v. Dra 3 Pin. 228, the court say, of the statute: was intended to give a person in possess of land the power to institute a suit in equ in a case proper for the consideration of su a court, against any person setting up a cla to the land, to settle the question of title, though no attempt should be made to turb his possession." In Hart v. Smith, Wis. 213, on page 220, the court say: "T section enlarges the power of the court grant relief in cases of claim to real est which, by the settled rules of a court equity, do not constitute a cloud upon title." In Pier v. City of Fond du Lac, Wis. 470, on page 480, the court say that legislature "intended to provide an easy re edy in a class of cases which are not wit the general equity jurisdiction of the co The statute, in terms, gives the action t person who has the possession and legal t to land, against any other person setting u claim thereto. We have already seen t those conditions alone are not sufficient maintain an action quia timet independentl the statute, but that there must exist an parent incumbrance upon the land." In Ma v. Ayers, 28 Wis. 612, a certificate of sale the plaintiff's land, under a judgment execution against another party, altho not, apparently, a valid claim against land, was held to be such a "setting up claim thereto" as would sustain an acti under the statute. The court say (page 6 "While that certificate of sale exists, it essarily tends to throw some doubt upon plaintiff's title. Besides, the mere fact t a deed may be issued upon this certific which is capable of being used as a me of vexatious litigation, will prevent the s of the property for its full value; and in t way the plaintiff may be most seriously p udiced while it remains in an uncance state. Moreover, the conduct of the defe ant is utterly inexplicable if he does claim some right under it to the plainti land. Why has he taken that certific and why does he continue to hold it, unl he supposes that it gives him some in est in the property, or unless he inte to use it for some vexatious and impr er purpose?" The remarks of the co in that case, are pertinent and appropri in this case. Why does the defendant, wi refusing to perform on his part, conti to hold the writing, and to claim an terest by reason of it? The case is har distinguishable from Maxon v. Ayers, eit in legal principle or the apparent character the unlawful purpose. So, it is seen that t court has frequently recognized, if it has always observed, the extension, by the s

ute, of the power of a court of equity to the cancellation, in a proper case, of instruments which were not, even apparently, a cloud upon the title, but which were capable of being used to affect the title injuriously; and, while the scope of the statutory remedy has never been fully defined, it is evident that the statute is of the class denominated "remedial," and is to be construed liberally, so as to include all cases which are fairly within the meaning of its words. No doubt the claim which the defendant sets up, while not, in a technical sense, a cloud upon the title, is nevertheless capable of being used to throw a very real cloud, in the popular sense, upon the title of the owner. This is what was intended by the following passage in Maxon v. Ayers, supra: "Doubtless the words, 'setting up a claim,' refer to some assertion of rights or interest in real estate the effect of which is necessarily to throw a cloud over the title, and which claim is liable to be used by the party asserting it for an improper purpose to the injury of the real-estate owner." So, it seems plain that the statutory remedy is not limited to cases where the claim set up is valid on its face, but is extended to every setting up of a claim such as is liable to be used by the party asserting it for an improper purpose, to the injury of the owner of the land.

The defendant paid $100 on the alleged contract. The plaintiffs tendered that sum, with interest, for rescission of the contract, and kept their tender good by paying the money into court. By the judgment, this money is given to the plaintiffs. This is error, for the tender and payment into court, for the tenderee, of the money tendered, is a conclusive admission that the amount so paid in is due to the tenderee; and, hence, that money belongs absolutely to him, whatever may be the fate of the action. Schnur v. Hickcox, 45 Wis. 200; 25 Am. & Eng. Enc. Law, 943, and cases cited in note 1. The fact that the tender was not essential to the plaintiff's right to relief does not make the case an exception from the rule. The judgment of the superior court of Milwaukee county is affirmed, except as to that part which disposes of the tender, and as to that it is reversed. The cause is remanded, with directions to modify the judgment in accordance with this opinion. Neither party is to have costs, but the respondents are to pay the clerk's costs.

KINNE v. MICHIGAN MUT. LIFE INS. CO.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

INSURANCE—LIFE POLICY—SURRENDER VALUE.

A life policy provided that, after the expiration of the third or any subsequent year "for which premium has been paid," the company would pay the cash value therein specified; that, if the first or any subsequent premium shall be "settled wholly or in part by note, * * * such settlement shall not be deemed a payment," but only an extension of time of payment; and that, if the premiums were not paid as provided, the company should not be liable, and the policy should cease, excepting only that, after three or more annual premiums "have been paid," the policy might be surrendered for its cash value. The application provided that neglect to pay the premium when due "shall vitiate the policy, and forfeit the payment made thereon, except as provided in the policy." The insured paid the first two years' premiums; and, on the day the premium for the third year was due, he gave a premium note, which was not paid when due, and the company gave him a renewal receipt, to the effect that the annual premium had been received on the policy, "continuing the same in force" until a year from that date, "provided that, if any note or other obligation has been given for such premium, * * * then, for any loss occurring during such nonpayment, the company shall not be liable." The policy contained a similar provision. *Held*, that the insured could not recover the surrender value of such policy at the end of the third year. Insurance Co. v. Bowes, 51 N. W. 962, 42 Mich. 19, and Tabor v. Insurance Co., 6 N. W. 830, 44 Mich. 324, distinguished.

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by Herbert Kinne against the Michigan Mutual Life Insurance Company to recover the surrender value of a policy issued on plaintiff's life on the endowment plan. From a judgment for plaintiff, defendant appeals. Reversed.

This was an action upon a policy of insurance for $2,500, issued by the defendant to the plaintiff upon his life, upon the endowment plan, by which it was provided, in substance, among other things, that on the surrender of the policy duly receipted by the insured and beneficiaries, within three months "after the expiration of the third or any subsequent year for which premium has been paid," the company would pay the cash value therein specified, which in the present case, at the end of the third year, was $194.40. The annual premium for the first and second years, it is admitted, was paid, and the plaintiff claims that on the 30th of March, 1893, he paid the premium due that day for the third year, up to March 30, 1894, and received a renewal receipt. This alleged payment was by the note of the insured for the amount of the premium, $115.22, dated March 30, 1893, payable 60 days after date; and, not having been paid at maturity, it was renewed, but remained in the hands of the company unpaid, and was tendered to the plaintiff at the trial. It was alleged, and evidence was given to show, that, after the end of the third year, the plaintiff offered to surrender the policy duly receipted, and demanded payment of the cash surrender value, which was refused. It was denied that the third annual premium had ever been paid, and this was the real question in issue. The renewal receipt for the third premium was to the effect that the annual premium due March 30, 1893, had been received on the policy, "continuing the same in force until 12 o'clock noon of the 30th day of March, 1894, * * * provided that, if any note or other obligation has been given for

such premium or any part thereof shall not be fully paid when due, then for any loss occurring during such nonpayment the company shall not be liable, but the whole amount of the premium included in such note or other obligation shall be considered as earned, and the company may collect the same." The policy contained a provision to the same effect, and that "if the first or any subsequent premium on the policy shall be settled wholly or in part by note or other obligation, whether of the beneficiary, the insured, or any third party, such settlement shall not be deemed a payment, but only an extension of the time for such payment of premiums"; and, further, that, "if the premiums are not paid as provided herein, then, in every such case, the company shall not be liable for the payment of the sum insured, and the policy shall cease and determine, excepting, only, that, after three or more annual premiums have been paid upon this policy, it may be surrendered for its cash value, in accordance with the agreement expressed and indorsed hereon, or it will be valid as a paid-up, nonparticipating policy, payable as herein provided, for as many twentieth parts of the whole amount payable at the end of the period for which the policy is issued as there have been complete annual premiums paid," which in the present case would have been $375, payable March 30, 1911, had the plaintiff actually paid three complete annual premiums. The insured stipulated in his application that "neglect to pay the premium on or before the day it becomes due shall violate the policy, and forfeit the payment made thereon, except as provided in the policy." The court was requested to direct a verdict for the defendant, but the request was refused; and a motion to set aside the verdict for the amount claimed and interest, and for a new trial, on the ground that the verdict was contrary to the law and evidence, was denied. From a judgment against the defendant on the verdict, it appealed.

Van Valkenburgh & Kershaw, for appellant. N. K. Curtis, for respondent.

PINNEY, J. (after stating the facts). The note given by the plaintiff for the third annual premium would not operate as payment in the absence of an express agreement to that effect. Paine v. Voorhees, 26 Wis. 522; Aultman & Taylor Co. v. Jett, 42 Wis. 488. By the express terms of the policy, the payment of the third annual premium was a condition precedent to the plaintiff's right to recover the surrender value of the policy at the end of the third year. There is no claim that this condition was ever performed, unless the giving of the plaintiff's note for the third premium, and its subsequent renewal by a second note, operated as payment. The renewal note was past due and unpaid in the hands of the defendant when the plaintiff tendered the surrender of his policy, and demanded payment of its surrender value, and this note has never been paid. The provisions of the policy on this subject are too clear and explicit to admit of any doubt as to their effect, and are conclusive against the plaintiff's contention of payment of the third annual premium by his note. They were evidently framed to exclude any possible inference of payment from the mere giving of a note of the insured in settlement of the annual premiums. In the language of the policy, the premium was "settled by note"; but "such settlement shall not be deemed a payment, but only an extension of the time of such payment"; and it is stipulated in the plaintiff's application for a policy that "neglect to pay the premium on or before the day it becomes due shall violate the policy." While the renewal receipt continued the policy until March 30, 1894, this renewal was subject to the conditions expressed therein, and in the policy itself, that, if the note given for it was not paid when due, "then for any loss occurring during such nonpayment" the company shall not be liable, and that, "if the premiums are not paid as provided herein, then, in every such case, * * * this policy shall cease and determine, excepting only that, after three or more annual premiums have been paid upon the policy," it may be surrendered for its cash value, as stipulated. The condition precedent to a lawful demand for the surrender value of the policy had not been performed, and the plaintiff was in no condition to claim or recover the surrender value. He had no cause of action. We were referred to the cases of Insurance Co. v. Bowes, 42 Mich. 19, 51 N. W. 962, and Tabor v. Insurance Co., 44 Mich. 324, 6 N. W. 880, as sustaining the plaintiff's contention that, by giving his note for the third annual premium, he had paid it, and was entitled to recover. It is sufficient to say of these cases that it does not appear that the policies there under consideration contained a condition precedent, such as or similar to the one before us; nor do they declare, as this one does, in substance, that a settlement by note "shall not be deemed payment, but only an extension of the time for such payment of premium." The court erred in refusing to direct a verdict for the defendant. The judgment of the superior court is reversed, and the cause is remanded for a new trial.

MILWAUKEE THEATER CO. v. FIDELITY & CASUALTY CO. et al.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

INDEMNITY—EMPLOYE'S FIDELITY BOND—LIABILITY OF SURETY.

A surety on a fidelity bond, indemnifying a corporation against loss of money intrusted to its treasurer, through the "embezzlement or larceny" thereof by him, is not liable for money intrusted to him, and for which he failed to account, on which, while in his hands, the corporation charged him interest.

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by the Milwaukee Theater Company against George J. Obermann, and the Fidelity & Casualty Company as surety, on a fidelity bond. From a judgment for defendants, plaintiff appeals. Affirmed.

Action upon a bond. The defendant Obermann was treasurer of the plaintiff company from August 19, 1890, until July 1, 1893. On the 31st of December, 1892, the defendant Obermann, and the defendant corporation as surety for Obermann, executed and delivered to the plaintiff a bond, of which the material agreements are as follows: "Now, in consideration of the sum of forty-five dollars, as a premium for the term ending on the eighteenth day of December, eighteen hundred and ninety-three, at 12 o'clock noon, it is hereby declared and agreed that, during such term, or any subsequent renewal of such term, and subject to the conditions and provisions herein contained, the company shall, at the expiration of three months next after proof satisfactory to its officers of a loss as hereinafter mentioned, make good and reimburse to the employer, to the extent of the sum of six thousand dollars, and no further, such pecuniary loss, if any, as may be sustained by the employer by reason of fraud or dishonesty of the employed in connection with the duties referred to, amounting to embezzlement or larceny, which has been committed and discovered during the continuance of said term, or any renewal thereof, and within three months from the death, dismissal, or retirement of the employed." It appeared, upon the trial, that the defendant Obermann, while treasurer, generally had in his possession several thousand dollars, received either from the manager of the theater or from payment of subscriptions to stock. At a meeting of the directors of the plaintiff corporation held February 10, 1891, the defendant Obermann was present, and reported in his hands at that time $4,625; whereupon the following resolution was passed: "Moved and carried that the manager transfer to the treasurer $2,000 of the company's funds. The treasurer shall be required to pay to the company 6 per cent. per annum on $6,500 now in his possession." The amount of $2,000 was transferred to Treasurer Obermann by Manager Brown in the presence of these directors. At a meeting of the directors, held October 19, 1891, the following proceedings were had: "A statement showing the interest due the Milwaukee Theater Company from moneys deposited in the hands of Treasurer George Obermann from January 16, 1891, to October 13, 1891, amounting, in aggregate, to $252.68, was read. It was moved and carried that, in accordance with conditions made at the first meeting of the board of directors, this statement be mailed to Treasurer Obermann by the secretary, requesting him to deposit this sum to the credit of the Milwaukee Theater Company." At a meeting of the directors, held December 13, 1892, the following resolution was passed: "It was moved and carried that, on delivery to the president of a satisfactory bond of $6,000, the manager shall transfer to the treasurer additional funds, to make the balance in the treasurer's hands $6,000, he to pay interest on moneys in his possession at the rate of 6 per cent. per annum, payable semiannually." On the 1st of July, 1893, when Mr. Obermann ceased to be treasurer of the plaintiff corporation, the $6,000 mentioned in the last resolution was still in his hands, and, not being paid over to his successor on demand, this action was brought against Obermann and the Fidelity & Casualty Company, upon the bond, to recover such sum. Upon the close of the plaintiff's evidence, the court nonsuited the plaintiff, and from judgment thereon this appeal was taken.

Turner, Bloodgood & Kemper, for appellant. Winkley, Flanders, Smith, Bottum & Vilas and D. S. Rose, for respondents.

WINSLOW, J. (after stating the facts). The defendant corporation did not contract to pay any mere debts which Obermann might owe to the theater company, but only to reimburse it for pecuniary loss resulting from embezzlement or larceny. The question, therefore, is whether the evidence shows that Obermann has been guilty of embezzlement of the $6,000. So far as necessary to define embezzlement for the purposes of this case, it may be defined as the fraudulent conversion of the money or personal property of another, which is in the possession of a trustee, servant, agent, or bailee in a trust capacity. There can be no embezzlement unless the property charged to have been embezzled was, at the time of the conversion, held in trust. A mere debtor does not embezzle the money of his creditor by failing to pay the debt when due. Did Obermann hold the money in question in a trust capacity, or was he simply the debtor of the plaintiff to that amount? The trial court evidently thought that he had become a mere debtor, and with that conclusion we agree. Interest is compensation for the use of money. When the theater company resolved that Obermann should pay them interest on moneys in his hands, and charged him with such interest, and Obermann assented, the necessary implication resulting from the arrangement was that he was to have the use of the money. He was to pay for the use of it. Why should he not have what he paid for? We could not sustain a conviction for embezzlement on these facts, nor have we been referred to any case where such a conviction on similar facts has been sustained. There are, however, authorities sustaining, in principle, the view which we have taken. Kribs v. People, 82 Ill. 425; Miller v. State (Neb.) 20 N. W. 253. Judgment affirmed.

OLWELL v. MILWAUKEE ST. RY. CO.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

APPEAL—ASSIGNMENT OF ERROR—ORDINARY CARE — DEFINITION — TRIAL — VERDICT — SEPARATION OF JURY.

1. In an action for the death of a child, caused by defendant's negligence, error, if any, in excluding the record of a coroner's inquest held on the body of the child, is not made to appear, where, in the bill of exceptions, there is no suggestion of the contents of such record, nor any statement as to what material fact was found by it.

2. It is not error, in an instruction, to define "ordinary care" as "such care as the great majority of men would use under like or similar circumstances."

3. In an action submitted to the jury on a special verdict, the jury were directed that, if they found a verdict, they might seal it, and return into court with it the following morning. It appeared that the jury thought that, after answering the first and second questions in the affirmative, it was unnecessary to answer the other three, and they sealed their verdict, which contained answers only to the first and second questions, and returned it into court the following morning. *Held*, that it was not error to send the jury back to complete their verdict by answering the remaining questions, in the absence of any claim or proof of improper conduct during their separation.

Appeal from superior court, Milwaukee county; J. C. Ludwig, Judge.

Action by Lawrence A. Olwell, as administrator, etc., against the Milwaukee Street-Railway Company, to recover for the death of plaintiff's intestate, caused by defendant's negligence. From a judgment for plaintiff, defendant appeals. Affirmed.

The defendant's intestate, a boy two years and seven months of age, was on the 4th day of May, 1894, run over and killed by one of the defendant's electric street cars, on one of the public streets of the city of Milwaukee; and this action is brought, under the statute, for the benefit of the parents of the deceased, claiming that such death was caused by the negligence of defendant's employés. The defendant denies negligence on its part, and alleges contributory negligence on the part of the boy and of his father and mother. The case was submitted to the jury upon a special verdict, and, as the jury were charged just before adjournment, they were told that, if they found a verdict during the night, they might seal the same, and bring it into court at 10 o'clock a. m. on the following day. It appears by the record that at 9 o'clock in the evening the jury arrived at a verdict, as they supposed, and sealed it, separated, and came into court on the following morning, and presented it to the court in the following form: "(1) Did Ralph Rice come to his death by one of the defendant's cars running over him on Clinton street, in this city, on May 4, 1894? Ans. (by court). Yes. (2) Was the motorman of defendant's car guilty of a want of ordinary care, which proximately caused the injury? Ans. Yes. (3) Was Joseph Rice the custodian of the child at time of the accident? Ans. ———. (4) If you answer the third question in the affirmative, was said Joseph Rice guilty of a want of ordinary care, which contributed proximately to the injury? Ans. ———. (5) Was the mother of Ralph Rice guilty of a want of ordinary care, which contributed to the injury? Ans. ———. (6) If the court is of the opinion that plaintiff should recover, at what sum do you assess his damages? Ans. $1,500." At this time the plaintiff was present in court, with his attorney; but the defendant's attorneys were not present, although an attorney employed as clerk in their office was present to hear the verdict, but without authority to represent his firm in the matter. Upon looking at the verdict the presiding judge returned it to the jury, and directed them to retire and answer the remaining questions, which they had left unanswered. Thereupon they retired again, and soon returned with a complete verdict; having answered the third question "Yes," and the fourth and fifth questions "No." This verdict was received, and entered in the usual manner. A motion for a new trial was made, based in part upon the ground that the answers to the third, fourth, and fifth questions were void on account of the separation of the jury. The motion was overruled, and judgment for the plaintiff rendered on the verdict, from which defendant appealed.

Miller, Noyes & Miller, for appellant. Frank M. Hoyt and L. A. Olwell, for respondent.

WINSLOW, J. (after stating the facts). Three questions are raised by the appellant:

1. The record of a coroner's inquest, which was held on the body of the child three days after the accident, was offered in evidence by the defendant, and excluded by the court. This ruling is claimed to have been erroneous. Upon what principle it can be claimed that this record can affect in any way the rights of private parties, who were not parties to the proceeding, is not quite clear, although it must be admitted that there are authorities to that effect. Insurance Co. v. Vocke, 129 Ill. 557, 22 N. E. 467, and cases there cited. We find it unnecessary to decide the question here, however. If admissible at all, it must appear affirmatively that it would have had some bearing on the controversy, in order to justify the reversal of the judgment on account of its rejection. Error must be affirmatively shown. There is no suggestion of its contents preserved in the bill of exceptions, nor is there any offer or statement as to what fact was found by it which would have any bearing on the present controversy. It may be that the inquest resulted simply in a finding that the child came to its death by being run over by the car. If such was the fact, its rejection could not be erroneous, because that fact was admitted. Under these circumstances it cannot be said that error is shown.

2. In charging the jury the trial judge defined "ordinary care" as "such care as the

great majority of men would use under like or similar circumstances." This expression is criticised as inaccurate, and it is said that ordinary care is "such caution and prudence as the great majority of mankind observe in their own business and concerns, or, rather, such care as a person of ordinary prudence would exercise in the same relation, and under similar circumstances and conditions." This seems like carrying criticism to extreme lengths, especially in view of the fact that no instruction on the subject was requested by the appellant. The definition given by the court is substantially in accord with the decisions of this court. Dreher v. Town of Fitchburg, 22 Wis. 675; Duthie v. Town of Washburn, 87 Wis. 231, 38 N. W. 380.

3. It is claimed that the jury could not be sent back to perfect their verdict after their separation. It seems that the jury thought that, after answering the first and second questions in the affirmative, it became unnecessary for them to answer the third, fourth, and fifth questions, and so they sealed their verdict and separated. It is not claimed that their action was dishonest, or that there was any ulterior purpose in it, nor is it claimed that any of the jury were subject to any improper influence during their separation, nor is it shown that there was any chance or opportunity for such influence to be exercised. Under these circumstances, we think it was competent for the court, in its discretion, to send them out to perfect their verdict. High v. Johnson, 28 Wis. 72; Douglas v. Tousey, 2 Wend. 352; Warner v. Railroad Co., 52 N. Y. 437; Maclin v. Bloom, 54 Miss. 365; Loudy v. Clarke (Minn.) 48 N. W. 25; Coal Co. v. Maehl (Ill. Sup.) 22 N. E. 715. If it were shown in such a case that there had been any improper conduct on the part of any of the jury during their separation, or should facts be shown which would raise a well-founded suspicion thereof, it would doubtless be the duty of the court to set aside the verdict and grant a new trial; but, as before remarked, no such showing is made in the present case. Judgment affirmed.

O'BRIEN v. CHICAGO & N. W. RY. CO.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

TRIAL—DIRECTING VERDICT—PROVINCE OF JURY.

Where plaintiff's testimony, if believed, was sufficient to support a verdict in his favor, it was error to direct a verdict for defendant, though plaintiff's evidence was uncorroborated in any, and contradicted in many, material points, and he was shown to have made statements, purposely false, out of court, contradicting his testimony.

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by William J. O'Brien, by his guardian ad litem, against the Chicago & Northwestern Railway Company for personal injuries. From a judgment for defendant, plaintiff appeals. Reversed.

The plaintiff was a brakeman in the employ of the defendant. His particular work, at the time of the accident, was in the defendant's yard, in Milwaukee, switching cars. The particular ground of defendant's liability, as alleged in the complaint, is the failure of fellow switchmen to obey the plaintiff's signals. The plaintiff went between two freight cars for the purpose of coupling them together. He claims that he gave the proper signal at the proper time for the train to stop, which was disregarded, and the train backed down upon him, while he was trying to disengage a pin, which had become fast, and to make the coupling, and crushed his arm between the cars, and disabled it. His testimony was sufficient, if believed, to support a verdict in his favor. But he was not corroborated in any material point. He was shown to have made statements of material facts directly contrary to his testimony, and acknowledged that some of those statements were intentionally false. Moreover, he was contradicted, on material points, by the testimony of his fellow workmen. After the testimony of both sides was in, the trial court directed a verdict for the defendant, stating its reasons as follows: "The motion to direct a verdict in favor of the defendant is granted—First, upon the ground that the burden of proof is upon the plaintiff to satisfy the court, by a fair preponderance of the evidence, that he is entitled to recover upon his cause of action; second, upon the ground that there is such a want of preponderance of evidence as would justify the court, in the exercise of its sound discretion, to grant a new trial, if a verdict were rendered for the plaintiff, on the ground that the verdict would be against the weight of evidence, in accordance with the decision made in the case of McCoy v. Railway Co., 82 Wis. 215, 52 N. W. 93, it appearing to the court that the only testimony on the part of the plaintiff is that of the plaintiff himself, and it is not corroborated by any other witness, and that he has, at various times, made statements directly contrary to his statements made under oath on the trial, and that he himself admitted, on the trial, that some of the material statements so made by him were false, and that he made such false statements intentionally. This being the case the court ought, following the decisions of other courts, to direct a verdict in favor of the defendant, because, if a verdict were rendered against the evidence, it would be contrary to the weight of evidence, and the court would grant a new trial." From a judgment on this verdict, this appeal is taken.

Timlin & Glicksman and E. A. Conway, for appellant. Winkler, Flanders, Smith, Bottum & Vilas, for respondent.

NEWMAN, J. (after stating the facts). The question of the credibility of witnesses and testimony is always for the jury. So,

if it was competent, as matter of law, for the jury to believe the plaintiff's testimony, then the case should have gone to the jury. There is no such rule of law as that one who has previously made a statement, even purposely false, but out of court, of the matter in controversy, shall not be believed when he testifies, under oath and in court, to a different version of the same matter. It is considered that some element of credibility is imparted to the statement of the witness by the confirmation of his oath. There is no rule of law which declares that the sworn testimony is neutralized by the former unsworn statement, although, practically, its value is said to be impaired, and may be entirely destroyed; but whether it is so impaired or destroyed is a question for the jury, and not for the court. It relates to the question of the weight or credit to which the testimony is entitled, which is always a question for the jury; for the law recognizes that even a person of doubtful veracity may have testified the truth in the particular case. And the question on which side the testimony preponderates is also always for the jury. No witness is, as matter of law, altogether discredited because several witnesses have testified to a version of the affair which is inconsistent with his testimony. The preponderance of the proof may be with the one witness. Preponderance may not go with numbers. This has often been held. True, it is not required that a contention which is supported only by a mere scintilla of evidence, or which is unsupported by testimony which, if believed, would justify a verdict in its favor, should be submitted to the jury. But no case is known which holds that the affirmative testimony of one witness, and he a party and contradicted, which covers all the material points of the party's sufficient pleading, is a mere scintilla of evidence, or, as matter of law, incapable, if believed by the jury, to support a verdict. Nor is it important, at this point in the trial, whether the trial judge credits the testimony of the witness. If all the material allegations of a sufficient pleading are supported by the affirmative testimony of one witness, there is a question for the jury. But if a verdict be returned which the court deems to be insufficiently supported by credible evidence, it should then, in the exercise of a fair judicial discretion, set aside the verdict and grant a new trial. The trial court, at this point, has a large supervisory power over the verdicts of juries, and should exercise it fully, for the promotion of justice.

This is believed to be the doctrine and result of our cases. In Jones v. Railway Co., 49 Wis. 352, 5 N. W. 854, the court say: "If the plaintiff gives any evidence to support his claim, the case must be submitted to the jury, although, in the opinion of the trial judge, it may be insufficient to sustain a verdict, or the decided weight of evidence is for the defendant. In such case this court has repeatedly said that it is the duty of the court to submit the questions of fact to the jury, under proper instructions, and take their verdict thereon." The cases to that effect are there cited. In Bouck v. Enos, 61 Wis. 661, 21 N. W. 825, the court say: "It is the province of the jury to determine, not only the credibility of witnesses and all disputed facts, but all conflicting inferences reasonably drawn from undisputed or admitted facts." In Kruse v. Railway Co., 82 Wis. 568, 52 N. W. 755, the court say: "The long-established rule of this court is that a verdict for defendant should only be directed when the plaintiff's evidence, under the most favorable construction it will reasonably bear, including all reasonable inferences from it, is sufficient to justify a verdict in his favor." In Larson v. City of Eau Claire (Wis.) 65 N. W. 731, the court say: "The remedy against a verdict, on the ground that it is against the preponderance of evidence, is by motion for a new trial, which is addressed to the discretion of the court, with the exercise of which this court will not interfere, except in cases where it is quite clear that such discretion has been abused." It is evident, from the reasons stated by the trial judge, that he directed the verdict for the defendant on the ground that the plaintiff's contention was not supported by a preponderance of the evidence. It is clear, upon the cases cited, that that question was for the jury, and not proper to be considered by the court until after verdict, and on a motion for a new trial. It might well be trusted that the jury would, with proper instructions, find a verdict which should be in accord with the preponderance of the evidence. The judgment of the superior court of Milwaukee county is reversed, and the cause remanded for a new trial.

QUIGLEY et al. v. ST. PAUL TITLE INSURANCE & TRUST CO.

(Supreme Court of Minnesota. Feb. 7, 1896.)

TITLE INSURANCE — CONSTRUCTION OF POLICY — DEFENSE OF SUITS—NOTICE OF ABANDONMENT.

1. Certain propositions of law contended for by appellant *held* not warranted by the evidence.

2. Action by the insured against the insurer on a title insurance policy. *Held*, under the terms of the policy, when the insurer corporation undertook to defend the title or interest of the insured, it was bound to protect him through all stages of the proceeding against him (as well after the foreclosure sale as before the judgment in the proceeding), or else notify him that it would not, and furnish him all necessary information of the status of the proceeding in time to enable him to protect himself.

3. When, after the giving of such a notice, the insurer defended the insured in the proceeding, *held*, the notice was thereby withdrawn.

4. *Held*, further, the evidence is not sufficient to show that, after it abandoned any further attempt to protect him, it again gave him such a notice.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Hascal R. Brill, Judge.

Action by Lucien G. Quigley and others against the St. Paul Title Insurance & Trust Company. Verdict for plaintiffs. From an order denying a new trial, defendant appeals. Affirmed.

Stevens, O'Brien, Cole & Albrecht, for appellant. Stiles W. Burr, for respondents.

CANTY, J. Most of the facts necessary to the understanding of this case are recited in the opinion on the former appeal, in which a new trial was granted. See 62 N. W. 287. The case has since been tried a second time, resulting in a verdict for plaintiff for the sum of $2,650, and from an order denying a new trial defendant takes this appeal, which presents some questions not presented by the former appeal. On the last trial, two officers of the defendant company testified in its behalf that they notified the loan agent, Lee, after the mechanic's lien foreclosure suit was commenced, and before the foreclosure sale in that suit, and again after the sale, and before the year to redeem expired, that the defendant would look to him to take care of that lien. There is also evidence tending to prove that, for the purpose of receiving such a notice, Lee was the agent of the mortgagee, Quigley, up to the time of his death. The evidence tends to prove that Lee, as agent for Quigley, had authority to look after and protect Quigley's rights as mortgagee in a number of mortgages held by him on St. Paul property, and that the receiving of such a notice was within the scope of Lee's authority. The amount of the mechanic's lien claim was but $95, the amount of the judgment in the foreclosure suit to enforce the same was but $139.48, and the mortgaged premises sold on the foreclosure sale for $157.56. By neglecting to redeem from this sale, the premises (found by the jury to be worth $2,650) were lost when the year to redeem expired.

It is contended by appellant that Quigley, through his agent, Lee, received notice from defendant that he must take care of this lien and redeem from the foreclosure sale, himself; that he was bound to do so; and that, by failing to do so, he could not increase the liability of defendant, whose contract with him was merely to indemnify and save him harmless, and insure his interest in the premises as mortgagee. It is contended that, under these circumstances, appellant is liable only for the amount of the incumbrance, which, at most, was only the amount necessary to redeem from the foreclosure sale, which was very much less than the value of the property. The court below did not accept these propositions as law applicable to this case, but charged the jury that plaintiff is entitled, in any event, to recover $2,200, the amount of the insurance policy, if the mortgaged premises were worth that much; and if they were not worth that much, he was entitled to recover the amount of their value. This is assigned as error. Let us examine the evidence on which appellant claims that this rule of law should have been laid down. It was admitted on the trial, by defendant, that neither Quigley, nor his heirs or executors, had any knowledge of the mechanic's lien claim in question, or of the proceedings to foreclose the same, until after the year to redeem had expired, and that Quigley never had any notice of any of these things, except such as could be imputed to him through the knowledge of Lee and the notices to him. Auerbach, the president of the defendant company, testified that, after the lien suit was commenced, and before the foreclosure sale under the same, he notified Lee that he (Lee) must pay the lien. For all that appears, this notice may have been given before defendant elected to take upon itself the defense of that suit, and for the purposes of this case we must assume that it was given before. If, after the giving of this notice, the defendant proceeded to contest the lien claim, it amounted to a withdrawal of its notice; and until it abandoned that contest, and again notified Quigley or his agent thereof, he would hardly be justified in paying the lien claim and the costs which defendant was incurring in defending the same, and in attempting to hold defendant liable to reimburse him for all he so paid. After defendant had abandoned any further defense of the lien suit, or any further efforts to protect Quigley from that claim, he was entitled to a new notice giving him the status of that claim at that time. The witness, Auerbach, testified that he again notified Lee, after the foreclosure sale, and during the year of redemption, that he (Lee) must redeem from the sale. It nowhere appears at what time during the year of redemption this notice was given. The year to redeem expired on August 17, 1892, and Quigley died on the 10th of March prior. The death of Quigley terminated Lee's agency, and, for all that appears, the notice may have been given to Lee after Lee's agency was thus terminated. The evidence of the other officer of defendant is still more indefinite as to when, during all the period from the time the suit was commenced until the time to redeem expired, he notified Lee that he (Lee) must pay the claim. Then we are of the opinion that the evidence is not sufficient to show that any such notice was given Lee, after defendant had abandoned the further defense of the lien suit, and before the death of Quigley.

Lee retained in his hands the proceeds of the mortgage loan, on of which he paid a large number of other liens similar to this. The evidence tends strongly to show that he held this money, not as the agent of Quigley, but as the trustee of the mortgagor, Mrs. Kingsley, and of this defendant, for the purpose of satisfying all such liens

out of it, and thereby protecting defendant on this insurance policy; that this arrangement was made in lieu of a bond from the mortgagor to protect the defendant from these liens, and that the demands made on Lee by these witnesses were that he satisfy this lien out of this fund. But we do not place our decision on this ground, or consider what force should be given to this evidence in disposing of the case.

As we held on the former appeal, when, under the terms of this policy, the insurer undertook to defend the insured, it was bound to protect him through all stages of the proceeding, or else notify him that it would not in time to enable him to protect himself. It was also bound to furnish him at such time all reasonable information of the status of the adverse claim, so as to enable him to take all proper precautions for his protection. The defendant failed to protect the insured, and has failed to prove that it gave him any such notice in time to enable him to protect himself; therefore, as a question of law, the plaintiff was entitled to recover full compensatory damages. This disposes of all the questions raised worthy of consideration and not disposed of by the former appeal. The order appealed from is affirmed.

HEMSTAD v. HALL.

(Supreme Court of Minnesota. Feb. 7, 1896.)

APPEAL—SETTLED CASE—CONCLUSIVENESS—JUDGMENT NON OBSTANTE VEREDICTO.

1. In a motion for judgment notwithstanding the verdict, it was stated, in an affidavit, and in the judge's order granting the motion, that certain proceedings took place on the trial. A settled case was subsequently made and filed, which certified that it contained all the evidence introduced, and all the proceedings had, but which failed to disclose that any such proceedings were had as above stated. *Held*, the settled case must control, and cannot be contradicted or impeached by the statements in the order and affidavit.

2. It is error to grant a motion, made under chapter 320, Laws 1895, for judgment notwithstanding the verdict, unless the moving party made a motion to direct a verdict in his favor at the close of the testimony.

3. Immediately on recording the verdict in plaintiff's favor, the trial court set it aside on its own motion, and neither party objected thereto. Thereafter defendant moved for judgment notwithstanding the verdict, under said chapter 320. The motion was granted, and, in the order granting the same, the court of its own motion set aside said order setting aside the verdict. *Held*, when defendant made his motion, the verdict had been set aside, and the case stood for trial as though no trial had ever been had. There was then no trial, with its evidence or proceedings, on which he could move for the statutory verdict to be entered by the court's order, under said chapter 320, and the order of the court, of its own motion, restoring and reinstating the evidence and proceedings, did not cure the defective character of defendant's motion, and it was error to grant the same.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; S. H. Moer, Judge.

Action by Mathias O. Hemstad against Martin Olson Hall. Judgment for defendant, and plaintiff appeals. Reversed.

John Rustgard, for appellant. Smith, McMahon & Mitchell, for respondent.

CANTY, J. In this action the jury returned a verdict for plaintiff for one cent. Immediately after the verdict was recorded, it was set aside by the court of its own motion, and neither party objected thereto. Thereafter defendant moved for judgment notwithstanding the verdict, which motion was made on "the files, records, proceedings, and testimony herein," and upon the affidavits of plaintiff's attorney, in one of which he stated "that, at the close of the testimony, defendant moved the court for a direction of a verdict as to the cause of action set out in the complaint." The court below granted the motion, and the order granting the same, so far as here material, reads as follows: "The court being duly advised in the premises, and said court being satisfied that the motion, made by defendant herein at the close of the testimony, for direction of verdict as to the cause of action set out in the complaint, should have been granted, the ruling of the court thereon having been duly excepted to, now, therefore, it is hereby ordered that the defendant herein have judgment against the plaintiff for his costs and disbursements notwithstanding the verdict herein. It further appearing, from the records herein, that the verdict was set aside by the court of its own motion, without the consent of either plaintiff or defendant, and the defendant not having consented thereto, now, therefore, for the purpose of correcting the records herein, it is further ordered that the order so made setting aside said verdict be vacated, and the judgment given for defendant as above ordered." No motion was ever made by either party to reinstate the verdict, but the court, of its own motion, reinstated it in the order above recited. Thereupon plaintiff served a proposed case, and, pursuant thereto, a case and exceptions were subsequently settled and filed, the judge's certificate to which certifies that it contains all the evidence introduced, and all the proceedings had on the trial. Thereafter judgment was entered for defendant pursuant to the above-recited order, and plaintiff appeals.

1. It will be observed that the above-recited order of the court and the affidavit of defendant's attorney both state that, at the close of the evidence, defendant moved for direction of a verdict in his favor as to the cause of action set out in the complaint. The settled case discloses no such motion. We are clearly of the opinion that the settled case must control, and cannot be contradicted or impeached by the statements in the order and affidavit. This is a well-settled principle. Then, for the purposes of this appeal, it must be held that no such motion was made on the trial.

2. This is certainly not a case in which, on common-law principles, the defendant was entitled to judgment notwithstanding the verdict, and defendant's motion was evidently made on chapter 320, Laws 1895. That statute provides: "In all cases where at the close of the testimony in a case tried, a motion is made by either party to the suit requesting the trial court to direct a verdict in favor of the party making such motion, which motion is denied, the trial court on motion made that judgment be entered notwithstanding the verdict or on motion for a new trial, shall order judgment to be entered in favor of the party who was entitled to have a verdict directed in his or its favor." It also provides that the supreme court may do likewise on appeal. It is very plain, from the reading of this statute, that a motion to direct a verdict must be made at the close of the testimony, in order to give the party making it a right subsequently to move, under the statute, for judgment notwithstanding the verdict. The motion to direct a verdict is a condition precedent to the right to judgment notwithstanding the verdict. As before stated, it must be held that, in this case, no such motion to direct a verdict was made, and, therefore, the order granting judgment notwithstanding the verdict was erroneous, and the judgment therein must be reversed.

3. But there is still another reason why the judgment should be reversed. When the motion for judgment notwithstanding the verdict was made, the verdict had been set aside, without objection or exception by either party, and the case stood for trial as though no trial had ever been had. The trial had been annulled, the order annulling it had not been set aside, and defendant had never moved to have it set aside. Then there was no trial, with its evidence or proceedings, on which the defendant could move for the statutory verdict to be entered by the court, by its order, as provided in said chapter 320; and defendant had not asked, in his motion, to have the evidence and proceedings reinstated or restored. The order of the court, of its own motion, reinstating and restoring the evidence and proceedings, did not cure the defective character of defendant's motion; and, if it did anything, it was only to add, for the purposes of this appeal, additional error to the record. The judgment appealed from should be reversed, and the case ordered to stand for trial on the original order setting aside the verdict. So ordered.

McCARVEL v. PHENIX INS. CO. OF BROOKLYN.

(Supreme Court of Minnesota. Feb. 7, 1896.)

INSURANCE — PROOF OF LOSS — WAIVER — ISSUES — INSTRUCTIONS.

1. A fire insurance policy provided that, within 60 days after a loss, the insured should furnish to the insurer proof of loss, containing certain matters and particulars of and concerning the loss and the origin of the fire, and, if required, should furnish the insurer certain other matters, and a certain official certificate of and concerning the same. The insured furnished an insufficient proof of loss, which was retained by the insurer, who (when the insured would have but 2 or 3 days left in which to furnish a sufficient one) objected to the proof so furnished, and demanded, as necessary to obviate the objections, that the insured furnish the particulars which, by the policy, he was unconditionally required to furnish, and also said matters and certificate which he was not required to furnish unless demanded, and which were then for the first time demanded. *Held*, by mixing up, indiscriminately, in its objection and demand, the things which he was unconditionally required to furnish, and those which he was not required to furnish unless demanded, and by failing to warn him that he had less time in which to furnish the former than the latter, or that a failure to furnish the former within the 60 days would result in a forfeiture, the insurer waived the 60-day limit, and extended the time to furnish the former to a reasonable time in which to comply with all the demands together.

2. The policy contained a large number of conditions. In an action by the insured against the insurer to recover the loss, the plaintiff claimed that he had fully complied with all of these conditions except one, and, as to that one, that defendant had, by a certain act, waived full compliance with it. The issue thus raised was the only one submitted to the jury, who found for plaintiff. It was an immaterial issue, for the reason that it conclusively appeared that, by another act, defendant had waived compliance with this condition within the time limited in the policy. There was another material issue which might have been submitted to the jury. *Held*, by failing to call the trial court's attention to such issue, the defendant waived it, and if there is sufficient evidence to sustain the verdict, it will not be disturbed; that the charge of the court on the issue submitted must be viewed in the light of this waiver; and that the error committed by the court, in making the rights of the parties depend on an immaterial issue, was induced by the defendant itself.

3. *Held*, the verdict is sustained by the evidence.

(Syllabus by the Court.)

Appeal from district court, Murray county; P. E. Brown, Judge.

Action by Thomas J. McCarvel against the Phenix Insurance Company of Brooklyn. There was a verdict for plaintiff, and from an order denying a new trial defendant appeals. Affirmed.

Kitchel, Cohen & Shaw, for appellant. L. F. Lammers and Wilson Borst, for respondent.

CANTY, J. The defendant insurance company issued a policy of fire insurance to plaintiff, insuring him against loss by fire on his stock of merchandise, contained in his store building, situated at Lime Creek, Minn. Defendant also issued to him another policy on his store building, which policy is not here involved. But this action was tried with another action on the latter policy. On October 2, 1894, while these policies were in force, a loss occurred, and plaintiff on that day sent the following notice of the loss to defendant at Chicago, duly dated, addressed, and signed by him: "I have been burned

out,—a total loss of stock and building. Please send adjuster as soon as possible." On October 4th defendant answered, from Chicago: "We accept notice of loss under policies 1,061 and 1,058 of our Fulda, Minn., agency, communicated by your letter of the 2d. The adjustment has been referred to Mr. O. E. Greely, of Minneapolis." By the terms of the policy plaintiff was required to furnish proof of loss within 60 days after the fire. On November 20th he sent to defendant, at Chicago, as proof of loss, the following, duly verified as of that date:

"Loss under Policy 1,061 and Policy 1,058, Lime Creek, Murray Co., Minnesota. To the Phenix Insurance Company of Brooklyn, Chicago, Ill.: The following is an inventory of the stock destroyed, together with the store, by fire, at Lime Creek, on October 2d of this year, to the best of my knowledge, viz.:

Complete line of groceries	$ 500 60
Total of boots, shoes	580 90
Hats	75 00
Caps	40 00
Gloves and mittens	75 60
Medicines	25 00
Hardware and tinware	50 00
Dry goods and notions	1,287 00
Value of building	900 00
Value of fixtures	100 00
Total	$3,632 90

"The half of stock insured in the Continental Insurance Co. The fire was discovered at or near 12 o'clock on the night of above date. Can form no opinion as to its origin.

"Thos. J. McCarvel."

This proof of loss was received by defendant at Chicago on Friday, November 23d, and was sent by it to its adjuster, Greely, at Minneapolis, who received it the next day, Saturday, November 24th. On the following Monday, Greely wrote plaintiff the letter hereinafter referred to objecting to this proof of loss, which letter was not received by plaintiff at Lime Creek until November 28th or 29th, leaving only 2 or 3 days before the 60 days specified in the policy for furnishing proof of loss would expire. But the proof of loss so sent to defendant was retained by it and never returned to plaintiff. On December 17th plaintiff made and sent to defendant a new proof of loss, which was returned to plaintiff. The defendant offered no evidence on the trial except such as it elicited on cross-examination, but relied for its defense on the defective condition of the first proof of loss, and the failure of plaintiff to furnish any sufficient proof of loss within such 60 days. The court below left it to the jury to determine, from the evidence, whether or not the defendant had retained the proof of loss, sent it on November 20th, an unreasonable length of time, without objecting to it, and charged them that, if defendant had done so, it waived the objection that the proof of loss was not sufficient, and also charged them that what was a reasonable time, under all the circumstances, was for the jury to determine. Defendant excepted to those portions of the charge, and assigns the same as error.

It is contended by appellant that it must be held, as a question of law, that it did not retain this proof of loss an unreasonable length of time before objecting to it, and that, therefore, a new trial should be granted. We are of the opinion that, for reasons hereinafter stated, the question thus submitted to the jury was an immaterial one, that it conclusively appears by the evidence that, by another and different act, defendant waived the 60-day limit, and extended the time for furnishing a sufficient proof of loss to the reasonable time hereinafter stated. The policy of insurance contains the following provisions, which, for convenience, we have divided into three parts: "(1) If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article, and the amount claimed thereon; (2) and within 60 days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and all others in the property; the cash value of each item thereof, and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property, and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposure of said property since the issuing of this policy; by whom and for what purpose any building herein described, and the several parts thereof, were occupied at the time of fire; (3) and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged, and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim, as a creditor or otherwise, nor related to the insured), living nearest the place of fire, stating that he has examined the circumstances, and believes that the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify." It will be noticed that the second division of this part of the policy specifies what is unconditionally required to be furnished in the proof of loss. The third division specifies some additional things, which the defendant may require if it sees fit, but which plaintiff was not obliged to furnish unless so required.

Now, said letter of November 26th, written by the adjuster, Greely, to plaintiff, demands, equally and without distinction, the things provided for in the second division and those

provided for in the third division aforesaid. All of the letter here material is as follows: "We beg to advise you that, in case you intend to make a claim against the Phenix Insurance Company, we must have the fullest information that we are entitled to receive under the contract, and nothing else will be satisfactory to us. The paper which you send us does not state whether or not you were insured by the Phenix Insurance Company, nor for what amount; nor whether or not, if you hold policies of this company, the insurance was in force at the time you claim the property was destroyed; nor does it state whether or not the property was unincumbered; nor does it give a copy of the descriptions and schedules of policies of any other company held by you; nor whether there has been any change of title, use, occupation, location, possession, or exposures of said property, since the issuing of the policies of insurance of the Phenix Insurance Company; nor by whom nor for what purpose the buildings were occupied at the time of the fire; [nor is there furnished a certificate of a magistrate or notary public, not interested in the claim as a creditor or otherwise, not related to you, living nearest the place of the fire, stating that he has examined the circumstances, and believes you have honestly sustained loss to the amount that said magistrate or notary public shall certify.] In fact, the paper referred to is at best but a memorized inventory, entirely lacking of detail or substantiation, and is in no sense, nor can we accept it as such, a statement of facts which are essential and necessary, and upon which we must insist, in case you purpose to make a claim against the Phenix Insurance Company. Taking this paper for all it purports to be, viz. an inventory, and these aggregate sums—$500, for instance, for a line of groceries, $580 for boots and shoes, $75 for hats, $1,287 for dry goods and notions, $900 for value of building, and other items of the inventory—are not specific accounts, and we must insist upon more particular or detailed information. We presume you kept books of account, and made an annual inventory of your stock; that you kept books of purchase, cash books, sales book; and that they were kept in a fireproof safe. On this presumption we apprehend you ought to have no difficulty in arriving at a cash value of the stock at the time it was burned. [We presume, also, that this building was built by you, and that you have in your possession the detailed information as to the cost of material, the different kinds used, and all the cost of labor, from which reliable information ought to be had as to the value of the building at the time of the fire. We insist upon a certificate of a magistrate or notary public as above indicated, and a full compliance with all the conditions of the policies of the Phenix Insurance Company, which you hold, before we will consider any claim on your part.] Yours, very truly, Phenix Ins. Co of Brooklyn, by Otto E. Greely, Adjuster."

We have included in brackets the portions of this letter which demand things not specified in said second subdivision of the portion of the policy above quoted. On November 26th, these things were demanded for the first time. The defendant put in the same category matters as to which plaintiff was unconditionally required to furnish proofs within a very limited time, and matters as to which he was not required to furnish any proofs or certificates unless demanded, and then only within a reasonable time after such demand. Defendant, at that late hour, presented all of these matters as objections to the proofs of loss already furnished, without in any manner intimating to plaintiff that he had less time to furnish a portion of the things so demanded than he did to furnish the other portions. Undoubtedly, the proof of loss already furnished was defective; and conceding, without deciding, that, as charged by the trial court, defendant had a right to retain this defective proof, object to the particular defects in it, and demand that they be remedied, without thereby waiving those defects, it was bound to do so in an explicit manner, in a manner not calculated to mislead or confuse the plaintiff. Instead of doing this, it mixed up all of these demands. Yet it nowhere warned plaintiff that a portion of the things demanded must be furnished within the 60 days, and that the rest need not be then furnished, or that it intended to stand on its strict legal rights by forfeiting the policy unless the things so required to be furnished within the 60 days were so furnished. All such transactions must be strictly construed against the party invoking the right of forfeiture; and, applying this rule, we are of the opinion that it was implied in defendant's demand that all of such demand could be complied with at once,—that plaintiff could defer complying with such former part of the demand until a reasonable time had elapsed for complying with the latter part of the same. As said in Davis Shoe Co. v. Kittanning Ins. Co., 138 Pa. St. 90, 20 Atl. 838: "The great mass of persons who insure their property are, in the main, ignorant of insurance law, and their business is often solicited by the agents of such companies. They are not accustomed to making out such papers as proofs of loss, and when they are defective the assured should be dealt with fairly, and no advantage taken of their ignorance." Then we are of the opinion that, by the form in which the defendant made its objections to the proof of loss, it waived compliance with its demands within the 60-day limit, and extended the time for compliance to a reasonable time in which to comply with all of its demands together. All of these demands were complied with on December 17th, and whether or not that was a reasonable time in which to comply with them was, on the

evidence, a question for the jury. Then, there was sufficient evidence to sustain a verdict for the plaintiff.

The next question to be considered is whether the appellant is in position to take advantage of the court's error in submitting the case to the jury on an immaterial issue, and not on the real issue in the case. The court charged the jury as follows: "Of course, gentlemen, if you find that the company, within a reasonable time, called on the plaintiff to furnish additional proofs, then the plaintiff cannot recover in this case. If you find that that was not done within a reasonable time, then the plaintiff is entitled to a verdict in this case for the amount of his claim, namely, $750 in one case, and $500 in the other, with interest thereon from December 20, 1894, at the rate of 7 per cent. per annum." The appellant excepted to all of this portion of the charge by a single exception, and whether the exception is sufficient, or it is not well taken, for the reason that it covers portions of the charge of which the appellant cannot complain, we will not consider. We are of the opinion that defendant itself induced the error committed against it by one of the propositions contained in the portion of the charge quoted above. The issue made on the trial was largely of the defendant's own choosing. The plaintiff pleaded and proved the policy, with all of its conditions, and claimed that he had complied with all of these conditions but one, and as to that one that the defendant had waived it. Plaintiff pleaded and proved all the facts, and claimed that they made for him a cause of action which should be submitted to the jury. The defendant resisted this claim on the sole ground that it had not waived his failure to furnish to it a sufficient proof of loss within the 60 days. This was presented to the court as the sole controversy in the case. If the defendant claimed that there were other reasons why plaintiff should not recover, it should have called the court's attention to them by requests to charge, or in some other proper manner. Instead of doing this, it permitted the case to go to the jury on the single question of waiver of the 60-day limit by reason of a certain act, and by its conduct led the court to believe that this was the real question, and the only question, in the case. But, as before stated, we are of the opinion that it conclusively appears that the 60-day limit was waived by another certain act. There are a score or two of conditions in the policy, on any one of which, in such a case as this, the defendant might raise a question as to its liability. But in this case it has not done so. We need not consider what the effect may be of the defendant's failure to raise such a question on the trial, when the evidence shows conclusively that the point thus raised would be fatal, and that, by reason thereof, the plaintiff is not entitled to recover. This is not such a case. The point which could be here raised would simply have made a question for the jury. If the verdict is sustained by the evidence, an appellate court will not set it aside merely because the trial court wholly omitted to charge the jury on a point to which its attention had never in any manner been called. By failure to raise the point it is waived, and the error in the charge must be viewed in the light of this waiver. For this reason, this case stands as though the defendant had no defense whatever, but predicated a defense on an immaterial issue. This disposes of the case, and the order appealed from is affirmed.

RYAN v. WAYSON.

(Supreme Court of Michigan. March 3, 1896.)

SALE—DEFAULT IN PAYMENT—RIGHT OF POSSESSION—RIGHTS OF PURCHASER.

1. Under a contract of sale providing that title to the goods should remain in the seller till all the purchase price was paid as provided by the contract, and that the purchaser should have the right of possession of the goods, and might sell the same at retail, provided that they should not at any time be reduced below a certain amount, the seller is entitled to possession on default in payment.

2. Under a contract of sale by which title remained in the seller till payment of all the purchase price, and he had right of possession on default in payment, it is error, in a replevin suit by the seller, on default in payment, to hold that the purchaser has a special interest in the goods to the amount that their value exceeds the unpaid price, and to give him judgment against the seller therefor, as, even if the purchaser has a right to treat the contract rescinded, he has at most a personal claim against the seller for the amount paid.

Error to circuit court, Wayne county; Joseph W. Donovan, Judge.

Action by Hugh R. Ryan against Samuel W. Wayson. Both parties complained of the judgment, and bring error. Modified.

Brennan, Donnelly & Van De Mark, for appellant. Harlow P. Davock and E. F. Bacon, for appellee.

HOOKER, J. It appears from the undisputed facts that on the 14th day of September, 1893, the defendant purchased from the plaintiff a stock of goods in the city of Detroit for an agreed consideration of $2,525. At the time of the purchase defendant paid all but $1,200 of the purchase price, the balance of which was to be paid at the rate of $100 per month, with interest at 7 per cent. per annum, the first payment to be made on the 14th day of October, 1893; but none of the balance of $1,200 was paid by defendant. At the time of the purchase a written contract of sale was drawn up and executed by the parties. Defendant failed to keep up his payments, and after several interviews between the parties an arrangement was made that one Ziegler should be placed in the store to look after plaintiff's interests, and to see that the stock was not allowed to be depre-

ciated below the sum of $2,000, as provided in the contract. A few days after Ziegler was put into the store, plaintiff went there while the defendant and his other clerks were at dinner, and, together with Ziegler, took possession of the stock, and locked up the store, keeping defendant and his employés out of the store. That night Mr. Wayson's clerks again obtained possession of the store, and on the following morning, January 13, 1894, plaintiff sued out a writ of replevin, and took the goods. The case was tried before a jury, and they rendered a verdict, in which they found that the value of the stock at the time it was replevined was $2,272; that the plaintiff had a claim against said stock for unpaid purchase money of $1,200 and interest, amounting to $1,272; and that the defendant had an interest in the property of $1,000. Upon this verdict a judgment was rendered finding that the defendant unlawfully detained the goods, that the plaintiff had a lien upon the goods for the sum of $1,272, and that defendant had a special property in the goods in the amount of $1,000; also finding that the plaintiff had recovered the goods on his writ, and adjudging that the plaintiff recover from the defendant the sum of six cents damages and costs to be taxed, and that defendant recover from plaintiff the sum of $1,000, the amount of his special property as found by the jury. The plaintiff and defendant joined in settling the bill of exceptions, and writs of error were taken out by each.

It will be observed that the effect of this is to cancel the defendant's debt, and create one of $1,000 against the plaintiff. The contract made by the parties contained the following provisions: "And it is further especially agreed between the parties hereto that the title of said stock of hardware and fixtures shall be and remain in the said Hugh R. Ryan until the whole of said purchase price is paid as herein provided. It is further agreed that the said Samuel W. Wayson shall have the right of possession of said stock of hardware and fixtures, and may sell the same at ordinary retail price: provided that said stock and fixtures shall not at any time be reduced below the sum of two thousand dollars." The defendant contended that the plaintiff had no right to the possession of the goods, for the reason that the contract gave the right of possession to the defendant, and contained no provision that the plaintiff might take them into his custody. The circuit judge held otherwise, and in this, we think, he was right. The defendant was in arrears $300, and by the terms of the contract the title to the stock was in the plaintiff until the whole purchase price should be paid. The right of possession was given to the defendant, but this must be held to be limited to the period that he should not be in default. A failure to pay according to the terms of the contract, or a reduction of the stock below $2,000 in value, would justify the plaintiff in taking possession. Wiggins v. Snow, 89 Mich. 477, 50 N. W. 991. We find nothing in the record showing a waiver of this right or an extension of the time of payment. Ziegler was put in the store by agreement, to see that the stock was not unduly reduced; but there was nothing to imply that the plaintiff reliquished his right to take possession in case of a breach of the contract by the defendant. We think, therefore, that the defendant has no reason to complain of the judgment. The plaintiff was the owner of these goods, and under the facts found by the jury was entitled to the possession of them at the time they were replevied. The circuit judge permitted the jury to find that both the vendor and vendee had special interests in or liens upon the goods, and, as the plaintiff had taken possession, the amount of the interest of each was fixed by deducting the amount of the defendant's debt remaining unpaid from the value of the goods as found by the jury, and gave the defendant a judgment against the plaintiff for the remainder; in other words, permitted the defendant to sell the goods to the plaintiff for such price as the jury might see fit to give him, by applying section 8342 of Howell's Annotated Statutes. There is nothing to indicate that the defendant had a special interest in or lien upon those goods. He had a right to purchase them by making payment acccording to the contract. If, as seems to be claimed, he had a right to treat the contract as rescinded, he would certainly have no interest in the property, and at most might have a personal claim against the plaintiff for amount paid. If there was any opportunity to find that the defendant was general owner of the goods, subject to plaintiff's lien, the latter ought not to be compelled to take the goods at a value to be fixed, and submit to a judgment in defendant's favor for the remainder, after deducting the amount of the unpaid purchase money. Thirlby v. Rainbow, 93 Mich. 164, 53 N. W. 159; Olin v. Lockwood, 102 Mich. 444, 60 N. W. 972; Farrah v. Bursley, 100 Mich. 547, 59 N. W. 245; Tufts v. D'Arcambal, 85 Mich. 185, 48 N. W. 497. Upon the undisputed facts and the findings of the jury the court should have entered a judgment for the plaintiff, with damages assessed at six cents. The cause will be remanded, with direction to vacate the judgment heretofore entered, and to enter a new judgment as above stated. The plaintiff will recover costs. The other justices concurred.

LANDYSKOWSKI v. LARK et al.

(Supreme Court of Michigan. March 3, 1896.)

CONTRACTS—PERSONAL LIABILITY—NOTICE OF TRIAL.

1. Where, in a building contract, "the parties of the first part herewith promise and agree for themselves, their heirs, executors, administrators, to pay," etc., they are individually liable, though the contract recite that it is "by and between

the trustees and building committee," of a church and the party of the second part.

2. Where it appears from the record that certain attorneys appeared for all defendants, and pleaded the general issue, and that subsequently two of defendants appeared by other attorneys, and pleaded the general issue, and there was no order of substitution, service of notice of trial on the attorneys first appearing was sufficient as to all defendants.

Error to circuit court, Wayne county; Joseph W. Donovan, Judge.

Action by Martin Landyskowski against Frank Lark, Joseph Bilski, Joseph Malicki, Leon Zwiernikowski, Robert Stubbe, and John S. Foley, bishop of the diocese of Detroit, for damages for a breach of a building contract. From a judgment in favor of plaintiff, defendants bring error. Affirmed.

June 16, 1890, the plaintiff entered into a contract with the defendants for the construction of a new schoolhouse, chapel, and parochial residence for the new parish of St. Francis, in the city of Detroit. That part of the contract which determines the capacity in which the defendants executed it, namely, whether as agents merely or as principals, is as follows: "Agreement for building, made this 16th day of June, 1890, in the city of Detroit, Wayne county, state of Michigan, by and between the trustees and building committee of St. Francis R. C. Church, Joseph Malicki, president, Frank Lark, secretary, Joseph Bilski, Leon Zwiernikowski, Robert Stubbe, members, all of the city of Detroit, by authority of the Right Rev. John S. Foley, bishop of the diocese of Detroit, parties of the first part, and the mason, Martin Landyskowski, of the same place, party of the second part, as follows." The contract further provides that "the parties of the first part herewith promise and agree for themselves, their heirs, executors, and administrators, to pay the said party of the second part, his heirs, executors, and administrators," etc. The plaintiff erected the schoolhouse and chapel, for which he was paid. He had drawn some material for the erection of the church. A dispute arose between the church authorities, and the defendants appear to have been deposed from their authority as trustees. While the record is not very satisfactory, we think a fair conclusion is that a second committee had assumed to act. Plaintiff was prevented from carrying out his contract, and instructed to draw his material away, which he did. He instituted this suit to recover damages for breach of contract, for which he recovered a verdict and judgment for $662.30. Upon the trial the court held that Bishop Foley was not a party to the contract, and could not be held liable, although the title to the land upon which the buildings were to be erected was in him. Plaintiff thereupon discontinued the suit against Bishop Foley, and proceeded against the other defendants.

Peter E. Park, for appellants. Charles Flowers, for appellee.

GRANT, J. (after stating the facts). 1. is contended on behalf of the defenda that they were simply agents, acting Bishop Foley, their principal, and theref they cannot be held liable. We are not vored with any brief on the part of the pellee, but infer that his position is that contract was a personal one with the fendants, and that there was no intentio bind others than themselves. We think clear that the defendants made themsel personally liable upon this contract. We not concerned with the reasons for not m ing the bishop a party to the contract. contract describes the defendants as per ally bound. It also makes it binding u their heirs, executors, and administrat They sign it as individuals, except that adds to his signature the title "preside and another the title "secretary." /Ag may bind themselves by their contracts, withstanding it be known to both par it is not for their benefit directly, but is the benefit of another. Having done they cannot evade their clearly-expressed bility under the contract by showing they were agents./ The defendants assu control of the church property and of contracts for building. Plaintiff dealt them as principals. It was their duty see that he had the opportunity to perfo Plaintiff made every effort to perform, after he was prevented, to obtain redr They were not in position to assert other church authorities interfered, therefore they are not liable. It is a inference that the very purpose of mak the contract with them as individuals ra than as a church corporation was to a just such disputes. We think the case properly submitted to the jury.

2. It is insisted that as to two of the fendants a trial was had without any no to them. This was brought to the atten of the court after judgment by affida and a motion to set aside the judgm which motion was denied. It appears f this record that Keena & Lighter, two pr nent and reputable attorneys, appeared all the defendants, and pleaded the gen issue. Subsequently two of the defend appeared by other attorneys, and pleaded general issue. There was no order of sub tution. Under these circumstances, ser of notice of trial upon Keena & Lighter sufficient. The judgment is affirmed. other justices concurred.

SHARP et al. v. MERRIMAN.

(Supreme Court of Michigan. Feb. 26, 19

WILLS — DELUSION OF TESTATOR — UNDUE IN ENCE — DISPOSITION OF PROPERTY — OPINION DENCE — PRESUMPTIONS — BENEFICIARY — MIS DUCT OF JURORS — AFFIDAVITS OF JURORS.

1. To invalidate a will because testa father was excluded, evidence that testator quarreled with his father because of an all

attempt to cheat him of bequests from his mother, and that afterwards he cherished an insane delusion against his father, is not admissible, where the will in suit was made many months before testator's controversy with his father, and no delusion existed at that time. Haines v. Hayden, 54 N. W. 911, 95 Mich 345, distinguished.

2. Such evidence is admissible only to show general mental incapacity on the part of testator.

3. Where the evidence shows that the relations between testator and his next of kin were strained, undue influence will not be presumed from his failure to give all his property to his near relatives.

4. In a suit to set aside a will, the question whether testator's disposition of the property was unnatural or unjust is not for the jury.

5. The weight of a witness' opinion as to the mental capacity of testator depends on the opportunity the witness has had to form such opinion.

6. Evidence that one who formerly lived in testator's family, and was in straitened circumstances, was a more worthy object of testator's bounty than those named in the will, is inadmissible.

7. To show B.'s undue influence on testator, testimony that, "as to B.'s manner, he always looked shy, and generally confused," etc., is inadmissible, where not confined to any particular occasion where the appearance of B. was a part of the res gestæ.

8. In a civil suit a verdict will not be set aside because two of the jurors drank beer during the recesses of the court, where it appears that such misconduct did not unfit the jurors for duty, and was not discovered till after verdict.

9. As to the questions whether undue influence is exerted by one of the jurors on his fellows, and his conduct indicates bias, the affidavits of fellow jurors are inadmissible.

Error to circuit court, Jackson county; Erastus Peck, Judge.

Suit by Dwight Merriman against Ella W. Sharp and others to set aside the will of Howard L. Merriman, deceased. From a judgment in favor of proponents, contestant brings error. Affirmed.

Pringle, Hewett & Henigan (Wilson & Cobb, of counsel), for appellant. Blair, Edwards & Blair (Benton Hanchett and Thomas E. Barkworth, of counsel), for appellees.

MONTGOMERY, J. Appellant has brought here for review the proceedings had in the circuit court on appeal from the probate of the will of Howard L. Merriman, deceased. On a trial before a jury the will was adjudged a valid will. The objections to the probate of the will stated in the appeal from the probate court are that the deceased was possessed of an insane delusion in regard to the appellant, the father of the deceased, which delusion deprived the deceased of testamentary capacity. On the trial in the circuit, the circuit judge submitted to the jury the question of whether the deceased possessed testamentary capacity, and also the question of undue influence, but held that there was no testimony in the case fairly tending to show the existence of an insane delusion. The charge of the court upon the subject was as follows: "I instruct you, in this regard, that if, independent of this question of mental delusion, you find the testator to have been of sound mind, the evidence is insufficient to prove such an insane delusion as would, considered independent, and standing alone, vitiate the will in question. It is, however, proper for you to consider the evidence bearing upon * * * these questions, in determining, first, whether the testator was in fact of sound mind when the will was made, and whether the will was the result of undue influence practiced upon him." Counsel for contestant contends that the testimony tended to show "that, after his mother's death, Howard Merriman felt wronged and aggrieved by her will, and agreed with his father that it should be contested; that he changed his mind, and wanted to support it, and that a feeling grew up on his part against his father, because he (the father) continued in his purpose to contest the will; that this feeling became intense and morbid"; also, that some months after the execution of the will "he fell into a passion, and swore and cried, and insisted that his father was trying to cheat him out of that money,—trying to rob him,—and that Walter Bennett had looked it up, and he knew how it was down there; he knew it was a regular scheme; and that he would put his father behind the bars, if necessary."

Mrs. Merriman, the mother of Howard, and wife of Dwight, died June 10, 1892, leaving a will containing bequests to charitable institutions, and named Howard as one of the executors. It appears that at first there was no intent to contest the will, and Dwight Merriman offered to go on Howard's bond when he should qualify as executor. Subsequently it was agreed that the will should be contested, and, as the testimony of contestant tends to show, Howard agreed with his father and sisters that the will should not be sustained; but he, later on, determined that the will should be sustained, and employed an attorney to do so That this litigation, in which Howard and his father took opposite sides, caused some bitterness between them, is manifest, but is no more manifest from Howard's course than from language used towards him by his father, which bitterness could alone excuse, and which was calculated to leave a sting which would cause, in the mind of Howard, towards his father, a sense of wrong which it would be a wide stretch to call a delusion. A delusion is a belief in a fact for which there is no foundation. It cannot be said that the belief of Howard that his father was trying to wrong him by contesting his mother's will had no foundation. It is said that Howard would have received more from his mother's estate if her will had been set aside, but it is in evidence that he felt a pride reposed in him by his mother in naming him as executor; and, if he became convinced that the will of his mother was properly made, it is certainly not evidence of an insane delusion that his father, in attempting to defeat the will, was guilty of a wrong, and a wrong against Howard himself, if it can be considered that a dutiful

son can have an interest in carrying out the last wishes of a deceased parent. So, as regards the statement which Howard made after the making of the will, implying that his father was trying to cheat him, it can be said of this that Merriman delayed in turning over to Howard his money, and while such a judgment of his father was harsh, and perhaps unwarranted, it cannot be said it had no foundation in fact. Furthermore, this delusion, if it existed, could not have influenced the making of the will, for it was not shown to have existed until months after the will was executed. So far as it had any tendency to show general mental incapacity, it was submitted to the jury. We are convinced, by a careful examination of the record, that the circuit judge was right in holding that there was no evidence tending to show an insane delusion. The testimony of the statement of Howard that his father was trying to rob him is not, within the ruling of Haines v. Hayden, 95 Mich. 332, 54 N. W. 911, admissible. In this case the statement was not only made after the making of the will, but related to transactions which had taken place after the will was made; and if, by any stretch, it can be said that a misjudging of the transaction amounts to an insane delusion, it certainly does not tend to show a delusion existing months before. In Haines v. Hayden the alleged delusion was as to a supposed fact, which, if it existed, antedated the making of the will; and the testimony was admissible, not for the reason that any delusion which found lodging in the mind after the will was executed would defeat the will, but as tending to show that the particular delusion did exist in the mind of the testator at the time that the will was made. The charge of the court defining the degree of mental capacity requisite to enable one to make a valid will was full and clear, and followed the previous holdings of this court.

Criticism is made of the charge upon the subject of undue influence. The court charged as follows: "Undue influence is such influence as suppresses the volition of testator, and constrains him to give expression to the will of another, instead. Undue influence need not be proven by direct evidence, but may be inferred from circumstances; and, in determining this question, you should take into account the confidential relations existing between testator and Walter A. Bennett, who, with others, is charged with having exercised such influence; the opportunities of said Bennett and others to exercise an influence over the testator; the fact that this will was made without the knowledge of the heirs of the deceased; changes, if any, between the testator's declared intention and the provisions of the will; any unnatural or unjust provisions the will may contain, if there are any; and, in fact, all the circumstances surrounding the testator at the time it is alleged this will was made." Contestant proposed charges as follows: "It is to be presumed that the testator, being of sound mind and free volition, will, in general, bestow his property on his next of kin, and will not disinherit his heirs." "If the testamentary dispositions of deceased's property are unnatural or unjust, this, of itself, is an evidence of undue influence." The first of these requests was clearly inapplicable to the facts in this case, for the reason that it ignored the fact, shown by the undisputed testimony, that the relations between the deceased and his next of kin were strained; and it is clearly going too far to say that the failure to give all his property to his near relatives, under such circumstances, raises a presumption of undue influence. The latter request is faulty in that it involves the proposition that an unjust disposition of one's property is presumptively the result of undue influence, and because the question of injustice is to be determined by the judgment of the jury. Such a rule is inconsistent with the right of an owner to do what he will with his own. In Wallace v. Harris, 32 Mich. 380, it was said: "The line between due and undue influence, when drawn, must be with full recognition of the liberty due every true owner to obey the voice of justice, the dictates of friendship, of gratitude, and of benevolence, as well as of the claims of kindred, and, when not hindered by personal incapacity or particular regulations, to dispose of his own property according to his own free choice."

Numerous errors are assigned upon the admission and rejection of testimony. Error is assigned upon the statement of the circuit judge, in his charge, as follows: "The opinions of others, sworn to upon the stand, are not controlling upon the jury. They are advisory and persuasive, merely." This clause, by itself, does not convey a correct idea of what the circuit judge said upon the subject. The whole clause is as follows: "You may consider, also, in reaching a conclusion upon the subject, the testimony given by these witnesses who have expressed their opinion upon the subject of his mental capacity. The opinions of others, sworn to upon the stand, are not controlling upon the jury. They are advisory and persuasive, merely. And, other things being equal, the judgment of a witness depends, so far as its value is concerned, upon the advantages which he has had as a basis for expressing his judgment. The judgment of a man who knew no more about Howard Merriman than you do would be no better than yourself, and no aid to you. So it is not allowed at all. The rule is, however, and the court has proceeded upon it in this case, that any person who has some knowledge of him, so as to enable them to form some judgment, might swear to their opinion as of his capacity or incapacity, and have his testimony considered by the jury. In considering the testimony of these witnesses,

you should remember what the evidence has shown as to their equipment, so to speak, to express opinions, how much they knew of him, what their acquaintance with him was, and what it covered, and so be able to give such value to their testimony as it really deserves." This, taken as a whole, could not have misled the jury. In effect, the rule stated is that the weight of an opinion depends upon the opportunity the witness has had to form such opinion, and this is the correct rule.

A Mrs. Beach had formerly lived in the family of the Merrimans, and had been named as a legatee in the will of Mrs. Merriman. She was asked as to her financial condition, and that of her husband; the avowed purpose being to show that, because of her lack of means, she would have been a more natural object of Howard's bounty than those named in his will. This was excluded. It is a startling proposition that the will of a testator may be defeated by showing that, among his acquaintances, there were those more in need of funds than those named as legatees. The ruling was right.

Mr. Bennett is charged with having exerted undue influence. A witness for contestant testified: "As to Mr. Bennett's manner, he always looked rather shy, and generally confused, as though he didn't know,—wanted to do something he was ashamed of, or something." This testimony, as given, was not confined to any particular occasion where the appearance of Mr. Bennett was a part of the res gestæ, but was general, and was properly stricken out. The testimony offered to show, by those who were intimately acquainted with the deceased, that he was a young man of average intelligence, was competent and responsive to the testimony put into the case by contestant. We discover no error committed on the trial. The court guarded carefully all the rights of the contestant, both in the reception of evidence, and in the instructions to the jury.

A motion for a new trial was made and denied. Error is assigned upon the rulings made. The grounds stated relate, in part, to misconduct of jurors during the trial, and to acts showing a bias of certain jurors, and a disposition to prejudge the case. These facts were shown by affidavits of other jurors of the panel. The admissibility of their affidavits will be considered later on. The other grounds are that two of the jurors drank beer during the recesses of the court, and did acts tending to show that they were not men of good moral character. The circuit judge found that it did not appear that either of these jurors drank during the time that court was in session, and that it did not appear that their misconduct was incited by, or known to, proponents or their counsel, and, in effect, that their misconduct did not unfit the jurors for the performance of their duty, except as it showed them to be wanting in that sense of duty to themselves and the county which is to be expected of those called to perform the important office of determining rights between litigants. The jurors were part of the regular panel, and, under the circumstances, we are of the opinion of the circuit judge,—that, at least in a civil case, inasmuch as the alleged misconduct did not directly influence the action of the jurors, a new trial should not be granted for this reason. The acts charged against them no more affected their conduct as jurors than as if they had taken place before they were called to serve, and it would be unsafe to set aside a verdict on the ground of such misconduct occurring before the jury is called, when discovered after the verdict.

The circuit judge held that that the affidavits of the jurors were not admissible to impeach their verdict, and this ruling involves the most important question covered by the motion for a new trial, and a question by no means free from difficulty. It is the universal rule that the affidavits of jurors are not admissible to impeach their verdict by showing misconduct in the jury room; but as to the other facts occurring during the trial, at a recess of the court, the authorities are not agreed. The great weight of authority, however, as well as the reason for the rule, supports the contention that, at least as to the question of whether any influence is exerted by one of the jurors unduly upon his fellows, or whether his conduct indicates bias, public policy forbids the proof of such claim by affidavit of fellow jurors. The reasons for the exclusion of such affidavits are stated to be because it would make it possible for a juror, by his own oath, to impeach his solemn act by affidavits, and would open the door for the defeated party to tamper with the jury. We are not able to see why these reasons do not apply with equal force to facts known only to the jurors, which occur during the trial, whether they occur in or out of the jury room. The cases upon this point are numerous, and the text writers in general agree upon the rule which excludes such affidavits. Hirsh, Jur. 623; Proff. Jur. 408. In Thomp. & M. Jur., the case of Deacon v. Shreve, 22 N. J. Law, 176, is cited as holding that, while the affidavit of a juror cannot be received to show his own misconduct, it may be shown by the oath of a fellow juror who is not inculpated therein. The authors say, "We have not found this qualification of the rule in any other case, and do not think it sound." The broad rule of exclusion is maintained by the following, among other, authorities: Williams v. Montgomery, 60 N. Y. 648; Bartlett v. Patton (W. Va.) 10 S. E. 21; Com. v. White, 147 Mass. 76, 16 N. E. 707; Sanitary Dist. v. Cullerton (Ill.) 35 N. E. 723; Johnston v. Allen (N. C.) 5 S. E. 667; Taylor v. Garnett (Ind. Sup.) 11 N. E. 309. The affidavit of a

juror may be received to show what took place in open court, and generally to sustain his verdict. And in Tennessee the affidavits of the jurors are received generally to impeach the verdict. In Iowa, Kansas, and Nebraska, affidavits of facts which are said not to adhere in the verdict are held admissible, at least to the extent of admitting affidavits to show that outside influence—that is, other influence than members of the panel—was exercised; and such was the case of Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50, which case adopts the rule in Woodward v. Leavitt, 107 Mass. 453, that a juror may testify to extraneous influence. In so far as the doctrine of Iowa, Kansas, and Nebraska goes beyond this rule, it is shown to conflict with the great weight of authority. Thomp. & M. Jur. §§ 452, 453. The Massachusetts court subsequently defined what was meant by "extraneous influence," and it is clear that by this was not meant improper communications between jurors themselves, whether in the court room or out of it. Com. v. White, 147 Mass. 76, 16 N. E. 707. We think the affidavits were properly excluded. We discover no error. Judgment affirmed. The other justices concurred.

CLEVELAND v. KOCH.

(Supreme Court of Michigan. March 3, 1896.)

CHATTEL MORTGAGE—INCREASE OF STOCK—LIABILITY OF MORTGAGEE FOR KEEPING.

1. A chattel mortgage on all the cows and calves of the mortgagor, or that may be "raised" on his farm during the season, is broad enough to cover calves from the cows mortgaged, which they carried at the time the mortgage was given.

2. The fact that a mortgagee of stock, for his own protection, furnishes feed for the stock while remaining in the mortgagor's possession, does not constitute the latter the mortgagee's agent, as to contracts afterwards made by the mortgagor for the keeping of the stock.

Error to circuit court, Washtenaw county; Edward D. Kinne, Judge.

Action in replevin by Frederick W. Cleveland against John G. Koch. Judgment for plaintiff, and defendant brings error. Affirmed.

Frank E. Jones, for appellant. D. C. Griffen, for appellee.

MONTGOMERY, J. This is an action of replevin, brought for the recovery of six red Durham cows, four red bull calves, one red heifer calf, and one spotted steer calf. The plaintiff claimed title under a chattel mortgage duly recorded, and defendant set up a lien for pasturage. It appeared that the cattle were left with the defendant by the mortgagor. The court, at the conclusion of the testimony, directed a verdict for the plaintiff, and defendant brings error.

Two questions are presented, viz.: Whether the description of the mortgage was broad enough to cover the natural increase in the stock, and whether there was testimony from which the jury might have been justified in finding that the plaintiff assented to the mortgagor's placing the cattle with the defendant for pasturage.

1. The description in the mortgage, so far as material to be stated, was as follows: "The following goods, chattels, and personal property, to wit: All hay, grain of all kinds, straw, cornstalks, horses, colts, cattle, calves, sheep * * * of all kinds, now on hand, or that may grow or be raised on our farm during the season of 1894 and 1895; intending thereby to mortgage all personal property of every kind and description (except household goods and furniture) now owned by us, or which we may acquire or raise, in any manner, during the time in which the above debt remains unpaid." At the time the mortgage in question was executed, the calves in question were carried by cows covered by the mortgage, and we think the description is broad enough to cover such increase, even though one of the calves was dropped after the cows were placed with defendant for pasturage.

2. It appears that in the spring of 1894 one Lyster, an agent of the plaintiff, had thought to foreclose the mortgage, but, finding the stock in poor condition, left it in the mortgagor's possession, and bought and furnished the mortgagor feed to be fed to the stock. It is contended that from that time the mortgagor was a mere bailee of the plaintiff, or that the jury would have been justified in so finding, and that the jury might have been justified in finding that the mortgagor was the agent of the mortgagee to place the cattle with the defendant for keeping. The affirmative testimony was (and it was uncontradicted) that the mortgagor, Inman, agreed that, if the plaintiff would furnish the feed in question, he (Inman) would care for the stock thereafter; but, in the absence of such testimony, the jury would not have been justified in inferring that the mortgagor had been authorized by the mortgagee to pledge stock for its keeping simply because the mortgagee had, for his own protection, furnished feed for it. There was no room for a different verdict than that directed by the circuit judge. Judgment affirmed. The other justices concurred.

MACOMBER et al. v. DETROIT, L. & N. R. CO.

(Supreme Court of Michigan. March 3, 1896.)

SALE—STANDING TIMBER—REMOVAL—CONVERSION INTO LOGS.

1. Timber sold to be removed from land within a specified time, and which remains uncut at the expiration of the time limited, reverts to the owner of the realty.

2. Under a contract of sale of the timber on a tract of land to be "removed" in two years, timber that had been cut into logs before the end of that time, which still remained on the land, having been changed in kind and converted into

personalty, will be considered as removed, and will not revert as forfeited to the owner of the land.

Error to circuit court, Montcalm county; Frank D. M. Davis, Judge.

Action by Allen Macomber and John Bale against the Detroit, Lansing & Northern Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

McGarry & Nichols, for appellant. Whittlesey & Kennedy (Vernon H. Smith, of counsel), for appellees.

MONTGOMERY, J. On the 22d day of July, 1892, the Cutler & Savage Lumber Company executed a writing to one John S. Wiedman, containing the following provisions: "The Cutler and Savage Lumber Company has this day sold to J. S. Wiedman, of Lake View, Michigan, all of the timber on the entire section twenty-nine, town thirteen north, range seven west. The said J. S. Wiedman is to remove the timber in two years from this date; and, in case the Cutler and Savage Lumber Company sell any of said land, the said J. S. Wiedman is to remove the timber from the land sold at once on being notified of said sale." On the 4th of November, 1892, Wiedman sold the same timber to plaintiff, and the lumber company afterwards sold the land to one Fred Bissell. No notice of this sale or request for immediate removal was made. Plaintiffs, within the two years, cut the pine in question into logs, but had not removed the logs from the premises within the two years. Bissell removed them, and defendant represents his title. The question is whether failure to remove the logs after they were cut, and within the two years named in the contract, forfeited the title. Contracts containing similar provisions have been construed in the courts in a number of the states, and the weight of authority supports the defendant's contention that, as to timber remaining uncut at the expiration of the time limited under a contract such as this, the title reverts to the owner of the realty. See Pease v. Gibson, 6 Me. 84; Howard v. Lincoln, 13 Me. 123; Saltonstall v. Little, 90 Pa. St. 422; Utley v. Lumber Co., 59 Mich. 263, 26 N. W. 488; Haskell v. Ayres, 32 Mich. 93, 35 Mich. 89; Gamble v. Gates, 92 Mich. 510, 52 N. W. 941. None of the Michigan cases directly determine the status of timber cut and manufactured into logs during the time limited by such a contract as that in question, but not removed until later. In Gamble v. Gates the contract covered all the timber standing, lying, or being on the land. It was provided expressly that whatever of said timber shall remain on said lands after the limit afforded shall revert back, and become the property of, the first party. The case was determined by the terms of the contract. In Golden v. Glock, 57 Wis. 118, 15 N. W. 12, a contract similar to that in question was held to convey title to only such timber as was removed within the time limited, but considered all such timber as was manufactured into hoop poles as removed. In Hicks v. Smith (Wis.) 46 N. W. 133, the same doctrine was reaffirmed by the same court. A contract not distinguishable from the one herein involved was considered, and it was held that, as to trees cut into logs, the severance from the realty had become complete. The property had become personalty, and its character so essentially changed by such manufacture that it was, in effect, removed from the premises, within the meaning of the deed. In Williams v. Flood, 63 Mich. 493, 30 N. W. 93, Mr. Justice Campbell, speaking of such a contract as the present, said: "It is not very important to discuss the exact nature of plaintiff's right under the written contract. Whatever they were, they included an absolute sale of all the timber described, subject only to such qualifications of the right of removal as the contract mentions. At most, this condition would only operate by way of forfeiture. The timber had all been paid for, and all belonged to the plaintiff, unless lost by forfeiture for nonremoval." The same can be said of the present case, and, if we apply the rule that forfeitures are not favored (Miller v. Havens, 51 Mich. 435, 16 N. W. 865), the rule of the Wisconsin court seems consistent with reason and justice. It is no stretch to treat the severance of the timber from the soil, and its manufacture into logs, as a removal, within the terms of the provision for forfeiture. The case of Boisaubin v. Reed, 1 Abb. Dec. 161, is opposed to the Wisconsin cases cited; but we think the doctrine of the Wisconsin cases more just, and are disposed to adopt it. Judgment affirmed. The other justices concurred.

CITY OF DETROIT v. BOARD OF WATER COM'RS OF CITY OF DETROIT.

(Supreme Court of Michigan. March 3, 1896.)

PUBLIC INSTITUTION—WHAT CONSTITUTES—DETROIT HOUSE OF CORRECTION.

The charter of the city of Detroit (Sess. Laws 1857, p. 106), as amended by How. St. c. 344, requires the city to pay the expenses of the Detroit house of correction to the extent that they exceed the earnings; but confides its management and its appropriations to a board of inspectors composed of the mayor, the chairman of the board of state prison inspectors, and three others appointed by the common council, on the nomination of the mayor, except that the assent and concurrence of the council is necessary to extraordinary appropriations. *Held*, that such house of correction is not a public institution of such city, entitled to be supplied with water free of charge by the board of water commissioners, a corporation created by Laws 1853, p. 180, to which is given the charge of the waterworks, with authority to regulate and collect water rates.

Certiorari to circuit court, Wayne county; Willard M. Lillibridge, Judge.

Mandamus proceeding by the city of Detroit to compel the board of water commis-

sioners of the city of Detroit to furnish, free of charge, water to the Detroit house of correction. There was a judgment granting the writ, and respondent brings certiorari. Reversed.

John J. Speed, for relator. Henry M. Duffield, for respondent.

HOOKER, J. The city of Detroit, through its corporation counsel, asks a mandamus to compel the board of water commissioners to furnish, free of charge, water to the Detroit house of correction. The writ was granted by the circuit court, and the respondent has brought the proceeding to this court by certiorari.

The Detroit house of correction appears to have been built by the city under a general power, given to the common council, "to establish and build jails, workhouses and houses of correction for the confinement of offenders, to erect, and provide for erecting the necessary buildings therefor, and control and regulate the same; to appoint all necessary officers for taking charge of the same and of persons confined therein; to prescribe their powers and duties, to provide for their removal from office, and the filling of vacancies." Sess. Laws 1857, p. 106, subd. 60. Other sections of the charter provide for the confinement of state offenders, at the expense of the state and the various counties, and subsequent statutes took away much of the control originally given to the council, and lodged it elsewhere. See How. St. c. 344. The status of this institution has been before the courts, and in the case of Detroit v. Laughna, 34 Mich. 402, this court said: "The city, indeed, built the prison, and has an interest in its finances, as it is responsible to a certain degree for its expenses; but, after the house was built under provisions of the city charter, which may or may not have been legally sufficient to provide for its future management, the legislature, either discovering defects, or, more probably, recognizing the manifest impropriety of allowing a prison to be managed by a city council, passed a statute which removed any doubt concerning the legal position of that establishment. On the 15th of March, 1861, an act was passed, entitled 'An act to establish the Detroit house of correction and authorize the confinement of convicted persons therein.' By this act, the government of the prison was put under the control of a board of inspectors, of whom three were to be appointed by the common council, on the nomination of the mayor, and, in addition to these, the mayor and the chairman of the board of state prison inspectors were made ex officio members. The regulation and discipline were to be under rules adopted by the board, leaving the council no voice except concerning the approval of rules relating to salaries and compensation of officers and employés. There is no very important power which the council can exercise without the concurrence of the inspectors, except in the selection of the superintendent, whose powers and duties are all governed by the act of 1861 and the general laws of the state. Any interference whatever by the common council, either in the selection of inferior officers or in the internal management of the prison, would be unlawful and nugatory. While it has, at various times, in legal experience, been customary to allow, and sometimes to compel, prisons to be built and maintained by larger or smaller municipal corporations, yet all criminal prisons are and must be public, and not private, places of detention, and no imprisonment can be lawful that is not authorized by public laws. In England, it is settled that all prisons, by whomsoever kept, are the king's prisons (2 Inst. 100; Ex parte Evans, 8 Term R. 172), and no new prison can be erected except by act of parliament." We find, therefore, that, while the legislature has required the city to pay the expenses of the house of correction to the extent that they shall be found to exceed the earnings, its management and its appropriations are not within the control of the council, these being confided to officers provided for by the law, except as the assent and concurrence of the council is necessary to extraordinary appropriations, etc.

The board of water commissioners is a corporation, created in the year 1853, by act of the legislature, and given the charge of the waterworks, which it is authorized to manage and extend, and to regulate, and fix and collect, water rates from the owner or occupant of each house or other building having or using water. Laws 1853, p. 180; 3 Laws 1873, p. 135: These water rates seem to be the only source of revenue provided for the running expenses of the waterworks. Jones v. Commissioners, 34 Mich. 273. Extensions, etc., are provided for from other sources, and five hydrants may be ordered by the fire commissioner, in which case they must be paid for from the funds of the fire commission. If required by the council, it must pay the expense.

It is now contended that the house of correction belongs to the city, and is a public institution, and, as such, is entitled to be supplied with water free of charge. It is a significant fact that those having in charge the management of the house of correction do not make this application, and that the city is the moving party. As already shown, the city must provide for the expenses of this institution, so far as they are not covered by the earnings. Such expense, then, should be a burden upon the whole body of taxpayers of the city. If the water must be paid for, it must come out of the general tax, unless it can be paid from the earnings. On the other hand, if the institution is entitled to have the water furnished gratuitously by the commissioners, the burden is

not borne by the city at large, but by those only who are private consumers of water. The fund derived from water rates is depleted to that extent, and it might easily be so seriously affected as to require a raising of the rates. If, as contended, the water commissioners cannot refuse to furnish water gratuitously to this institution, they have practically no alternative but to furnish what is required, nor have they any means of preventing wastefulness, or the extension of its use to many purposes to which steam or other power is now applied. The common council would be powerless to control it. The house of correction should be supported from its own fund, and if, as is reported, it produces a handsome balance over expenditures each year, it should not be permitted to increase such amount by compelling the water board to use a part of its income from water rates; and we can see no difference between requiring the water board to pay a sum of money directly to the management of the institution, and expending it for water to be furnished.

It is said that there is no merit in the defense, that it is merely a matter of bookkeeping, and that what is paid for water is taken from one city pocket and put into another; but we have shown that this is not true, inasmuch as one fund must be furnished by the city at large, or, possibly, by the county of Wayne and other counties, or the state at large, while the other is made up by a comparatively small portion of the inhabitants of the city, i. e. those who pay water rates. Again, if this were a mere matter of bookkeeping in the sense contended for, its natural tendency would be towards an economical use of water by the institution. It is probable that the board of water commissioners was created for the frugal and economical management of the waterworks, and the conduct of the business connected therewith, and that it could not have been intended that it should be at the mercy of every institution that may be called public. Whatever may be its duty as to furnishing water for the general purposes of the city, we think that it is not under an obligation to furnish it to this institution without pay. We think the order of the circuit court granting the writ should be reversed. The other justices concurred.

PEOPLE v. BEVERLY.

(Supreme Court of Michigan. March 3, 1896.)

HOMICIDE—INSTRUCTIONS—EVIDENCE—DYING DECLARATIONS—NEW TRIAL—MISCONDUCT OF JURY.

1. Where the evidence shows defendant guilty of murder, if any crime, the court need not charge as to manslaughter.

2. It is no objection to the admission of dying declarations that the exigencies of the case do not require it, that they were taken immediately after the injury to deceased, or that defendant had no notice of the taking of the statement.

3. A dying declaration is not within the provision of the statute requiring the names of witnesses to be indorsed on the information.

4. The action of the court in admitting dying declarations will not be reversed on the ground that deceased was under the influence of opiates at the time they were made, where it appears that her condition was before the court and jury, both as to the influence of opiates and her belief in impending death.

5. Where defendant was charged with killing his wife, it was not error to admit her dying declarations that defendant repeatedly threatened to shoot her if she should leave him, and refuse to cohabit with him, in connection with testimony that she did leave him; and that, being unable to induce her to return, defendant shot her.

6. Where the defense is insanity, it is proper to refuse to charge that if a man is insane he is irresponsible, and should be acquitted of crime.

7. Where defendant is charged with killing his wife, evidence that she was reputed to be a woman of loose character is not admissible.

8. It appeared that during the trial the jury was in charge of a sworn officer; that when the jurors were on the streets they were attended by such officer, and by another officer, not sworn; and that such officers communicated with the jurors to the extent of saying "Good morning," and supplying their wants. *Held*, not to entitle defendant to a new trial where the presumption of injury was overcome by affidavits filed by the state.

9. The fact that one of such officers was a witness in the case did not necessarily affect defendant's right to a new trial.

Error to circuit court, Monroe county; Edward D. Kinne, Judge.

Clarence Beverly was convicted of murder, and appeals Affirmed.

John O. Zabel and Ira G. Humphrey, for appellant. Fred A. Maynard, Atty. Gen., and H. A. Lockwood, Pros. Atty., for the People.

HOOKER, J. The defendant killed his wife by repeated shooting, under circumstances which clearly indicated murder, unless the defense of irresponsibility can be maintained. He was convicted of murder in the second degree. His counsel allege error upon the charge of the court, in that it did not sufficiently explain the offense of manslaughter, and it is claimed that it was so carelessly worded that it may have led the jury to infer that he could not properly be convicted of that offense. From our examination of the evidence (which is all incorporated in the bill of exceptions), we think that the defendant was guilty of murder, if any crime, and that the court might properly have said so to the jury. It therefore becomes unnecessary to discuss the points raised upon the subject of manslaughter.

Upon the trial, a dying declaration, made by the deceased, was read in evidence. Several reasons are alleged why this should have been excluded, viz.: (1) Because the exigencies of the case did not require it. (2) Because it was taken some days after the shooting occurred, and defendant had no notice. (3) Because counsel for defendant were not permitted to examine such statement until it was offered in evidence, and the intention to use it upon the trial was not indorsed upon the in-

formation, with the names of witnesses for the prosecution. (4) Because the deceased was under the influence of opiates at the time it was taken, and was not certain that she would die. (5) Because a large portion of her statement was about matters remote as to time and place, and not a part of the res gestæ. We do not find any authority supporting several of these claims, and see no occasion for discussing them at length. We know of no rule that makes the admissibility of a dying declaration depend upon the "exigencies of the case," or the fact that it was taken immediately after the injury; and we recall no case which holds that its admissibility depends upon notice of the intended taking of such statement to the defendant or his counsel, and we think it is not within the provisions of the statute requiring the names of witnesses to be indorsed upon the information. The condition of the witness at the time the statement was made was before the court and jury, both as to the influence of opiates and her belief in impending death. The judge was warranted in admitting the statement, and the jury were at liberty to give it such credence as it seemed worthy of. In the main it was in accord with undisputed facts, and as to those could not have injured the defendant. This statement alleged that the defendant had repeatedly threatened to kill his wife and others if she should leave him, but the court struck out that portion applying to others. The brief does not point out the objectionable matters, or show how the defendant was injured by them. But we suppose it was these threats that counsel objected to. Dying declarations are admitted in homicide cases upon the theory that the belief in impending death is equivalent to the sanction of an oath. They extend to statements of the cause and circumstances of the homicide. 6 Am. & Eng. Enc. Law, 105; People v. Olmstead, 30 Mich. 435, and cases cited; 1 Rosc. Cr. Ev. p. 54; 1 Greenl. Ev. § 159. In this case the statement showed that the defendant repeatedly threatened to shoot his wife if she should leave him, or refuse to cohabit with him. The testimony showed that she did leave him, and that, being unable to induce her to return, he shot her. There is an obvious and intimate connection between these threats and the act. They throw light upon the cause of the shooting, and, together with the circumstances, were properly included in the statement.

Error is assigned upon the charge and refusal to give defendant's requests upon the subject of insanity, which was the defense interposed. It seems necessary to reiterate what has been repeatedly said,—that a trial court is not required to take his charge from the pen of counsel. If the subject is fairly covered, it is sufficient. Insanity is not only a broad, but a very flexible, term, and men differ in their conception of it. A jury should never be told, in broad terms, that if a man is insane he is irresponsible, and should be acquitted of crime. It is for the jury to determine whether he is non compos mentis, or has no control of his mind or will, by reason of disease, and with reference to the act charged. Roberts v. People, 19 Mich. 401; People v. Finley, 38 Mich. 482. We think that the defendant has no cause for objecting to the charge upon this subject.

Counsel allege error upon the refusal of the court to permit him to show that the deceased was reputed to be a woman of loose character. The excuse for this attempt was that he had offered some testimony that syphilis sometimes induced insanity, and that there was evidence that the defendant had that disease. Just how it would be more likely to render the defendant insane if communicated from his wife is not apparent, but, at all events, the testimony was hearsay, and was properly excluded. It is unfortunate that, after a defendant has taken the life of his wife, it should be thought necessary to blast her reputation, and hurt the feelings of her friends, and children, if she had any, when no possible legitimate benefit was to be gained thereby. The defense of insanity was very weak, and it is creditable to the jury that they disregarded it.

During the trial the jury was in charge of a sworn officer, as required by Act No. 176, Laws 1893. It is shown that when the jurors were upon the streets such officer attended them, and was assisted by another officer, not sworn; and it appears that such officer communicated with jurors to the extent of saying, "Good morning," and to supply their wants. The better practice would have been to administer the oath to both officers, but it does not appear that the defendant was prejudiced, and we think any presumption of injury is overcome by the affidavits filed by the prosecution. The fact that one of the officers was a witness in the case does not necessarily affect the case (People v. Coughlin, 65 Mich. 704, 32 N. W. 905); nor does the fact that the jury saw one of defendant's witnesses in the jail.

This record discloses a most atrocious murder, and we only wonder that the jury consented to reduce the offense to second degree, as the proof of premeditation was ample. The judgment will be affirmed. The other justices concurred.

LEE v. KELLOGG.

(Supreme Court of Michigan. March 3, 1896.)

MORTGAGES—FORGERIES—BONA FIDE PURCHASER—RECORDING.

Where a mortgagee, after assigning his mortgage and secured notes, forges a like mortgage and notes, and assigns them, one taking them in good faith acquires no rights as against the assignee of the genuine instruments, though the assignment of the genuine mortgage was not recorded till after the assignment of the forged instruments.

Appeal from circuit court, Van Buren county, in chancery; George M. Buck, Judge.

Suit by Wilson Lee against Harriet T. Kellogg. Bill dismissed, and complainant appeals. Affirmed.

Mary Baker, being the owner of 40 acres of land, on March 30, 1893, executed to one George E. Beck a mortgage thereon for $1,000, collateral to six notes,—one for the principal amount, and five interest coupon notes. The mortgage was recorded on the day following its execution. June 26, 1893, Beck sold and delivered the notes and mortgage to one Hubbard, accompanying the same with the usual form of assignment. March 17, 1894, Hubbard sold, assigned, and delivered them to defendant Kellogg. These assignments were recorded September 25, 1894. August 17, 1893, Beck forged a mortgage and six notes, for the same amount as the others, upon the same land, with defendant Baker as the maker, and offered to sell and assign them to complainant, Lee. Lee went to an abstract office, and inquired if Beck was the owner, upon the record, of such a mortgage. The abstractor informed him that he was. He then purchased, Beck delivering to him the forged mortgage and notes as and for genuine ones. Subsequently complainant ascertained the true situation, viz. that defendant Kellogg was the bona fide purchaser and owner of the mortgage and notes, and that those held by him were forgeries. He thereupon commenced foreclosure proceedings in chancery by the ordinary suit, making defendant Kellogg a party thereto, "as having, or claiming to have, rights and interests in the premises as subsequent incumbrances or otherwise." Defendant Kellogg answered, setting up the true state of affairs, and praying affirmative relief by way of cross bill. Complainant answered the cross bill, denying that the mortgage and notes held by him were forgeries, and asserting their genuineness. Upon the hearing the bill was dismissed.

T. J. Cavanaugh, for appellant. A. M. Stearns and Heckert & Chandler, for appellee.

GRANT, J. (after stating the facts). 1. The theory of the complainant's bill, and of his answer to the cross bill, was that he owned and had in his possession the original and genuine mortgage and notes. He did not prove, or attempt to prove, their execution; but, although forgeries, they were admitted in evidence. The complainant made no case entitling him to relief. Under his bill it was incumbent upon him to prove and produce the original mortgage and notes. His bill was not framed upon the theory upon which he now seeks to recover. Forged papers cannot be made the basis of a recovery, either at law or in equity, against the supposed maker, or those in good faith holding and owning the genuine papers. Austin v. Dean, 40 Mich. 386; Camp v. Carpenter, 52 Mich. 375, 18 N. W. 113; Crawford v. Hoeft, 58 Mich. 21, 23 N. W. 27, 24 N. W. 645, 25 N. W. 567, and 26 N. W. 870; Laprad v. Sherwood, 79 Mich. 520, 44 N. W. 943; Williams v. Keyes, 90 Mich. 290, 51 N. W. 520. Had the suit been against Mrs. Baker alone, either at law, upon the notes, or in equity, to foreclose the mortgage, his suit would have failed, upon proof that the papers were forged. Where an assignor does not have the papers to be assigned, to deliver, this is sufficient to put the purchaser upon his guard, to put his good faith in doubt, and charge him with any defect in his assignor's title. Jones, Mortg. § 476. Forged papers cannot give to an assignee any greater or better right than he would have without any. Nor can they be made the basis of a valid assignment, or held to convey to such pretended assignee the original papers which have been, in good faith, purchased by another. The recording laws do not apply to such a case. Complainant might as well claim that if Mrs. Baker had sold and conveyed the land, by warranty deed to Kellogg, and, before she had recorded it, Beck had forged a deed from Mrs. Baker to himself, and then conveyed to complainant, he would have been a bona fide purchaser, entitled to the protection of the recording law. Kernohan v. Manss (Ohio Sup.) 41 N. E. 258. The decree is affirmed, with costs. The other justices concurred.

REED v. REED.

(Supreme Court of Michigan. March 3, 1896.)

VENDOR AND PURCHASER—FAILURE OF CONSIDERATION—DAMAGES.

Where a grantor conveys land in consideration of a certain sum in cash and all of the notes which he has made to the grantee, and the grantee, without the knowledge of the grantor, omits from the list of notes one which he had transferred to a stranger, the grantor may sue to recover the value of the outstanding note.

Error to circuit court, Wayne county; Robert E. Frazer, Judge.

Action by Warren P. Reed against Alfred Reed to recover damages for a breach of contract. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

Edwin Henderson, for appellant. James H. Pound, for appellee.

MONTGOMERY, J. Plaintiff became indebted to the defendant in the amount of about $5,000, represented by notes which had been given by plaintiff to defendant. Plaintiff had no memorandum of these notes, and, as the jury found, did not know the exact amount. Plaintiff owned two store buildings in the city of Detroit, and he made an agreement with defendant to sell and convey to him these store buildings in consideration of $3,500 cash and all the notes which he, plaintiff, had given to defendant. All the notes were delivered by defendant except

one, which had previously been transferred to a stranger, plaintiff not being aware of this, and defendant representing, and plaintiff believing, that the notes which were delivered were all the notes which he had executed to defendant. Plaintiff, having subsequently been charged upon this outstanding note, brought this action, and recovered damages for a breach of the contract. Defendant brings error, and his contentions can be reduced to the single proposition that plaintiff cannot affirm the settlement and yet recover for the fraud of defendant in failing to deliver the note in question. We think the defendant misunderstands, or at best fails to answer, the theory of plaintiff. This is not an attempt to repudiate a settlement. Plaintiff sold certain property to defendant, for which he agreed to pay a certain sum in cash and certain notes, which the jury found included the note in question. He paid the cash and part of the notes, but failed to deliver one of them, and plaintiff, so far from repudiating the agreement, relies upon it, and bases his action upon it. The case is like Lampson v. Cummings, 52 Mich. 491, 18 N. W. 232. Judgment affirmed. The other justices concurred.

PEOPLE v. SMITH.

(Supreme Court of Michigan. March 3, 1896.)

CONSTITUTIONAL LAW—EXERCISE OF POLICE POWER—CONSTRUCTION OF LEGISLATIVE ACT.

1. 3 How. Ann. St. § 1690z1, requiring emery wheels to be provided with blowers to carry away the dust arising from their operation, is not unconstitutional, as class legislation, since, within the limits fixed by it, the requirements apply to all operating such wheels.

2. In the exercise of police power, the state may prescribe regulations for the protection of those who by their contract of employment willingly perform dangerous service, and have no legal remedy if injured.

3. In determining the necessity of a legislative act for the public welfare, presumptions are in its favor, and validity will be given to the act, unless the courts find that the plain provisions of the constitution are thereby violated, or the act is not within the rule of necessity, in view of facts of which judicial notice may be taken.

Error to circuit court, Wayne county; George S. Hosmer, Judge.

Joseph N. Smith was convicted of a violation of statutory provisions regulating the use of emery wheels. From a judgment on a writ of certiorari from the justice's court of Detroit, defendant appeals. Affirmed.

Corliss, Andrus & Leete (Arthur Webster, of counsel), for appellant. Allan H. Frazer, Pros. Atty., and Ormond F. Hunt, Asst. Pros. Atty., for the People.

HOOKER, J. The defendant was convicted of a violation of the statute requiring emery wheels to be provided with blowers to carry away the dust arising from their operation. Pub. Acts 1893,[1] p. 151, and How. Ann. St. § 1690z1. Counsel for the defendant assert that they care to raise one question, viz. the constitutionality this law. It is not disputed that the st may regulate the use of private proper when the health, morals, or welfare of public demands it. Such laws have th origin in necessity. Prent. Police Powe 4–8, 52, 54, 161, 433. Counsel say that t law is invalid because it does not apply all, not even to all who use emery whe because some may use with water, and o ers may not work continuously. Again, it contended that it is invalid because it p hibits a man from running his own mach continuously without protection. We n not concern ourselves with the last obj tion, because we have not the case before and for the reason that the law may be va to the extent that others are protected, a invalid in the particular mentioned, if su a construction is unavoidable. For the p poses of this case, it may be said that persons who are given continuous empl ment over dry emery wheels are within provisions of this act. This singles out class, as it applies to all persons who emery wheels in that manner. Necessari the practical application is limited to th who engage in such business, but such is case with many laws. All criminal laws ply only to those who choose to break the This law applies to all who choose to use emery wheel. The legislature has seen to permit certain uses of the dry wheel wi out a blower, while in other cases it is quired. This is competent, and is not cl legislation, as between operatives. It fi the limits of use without a blower, and quires it after such limits are passed; the rules apply to all. The vital question this case is the right of the state to requ the employer to provide, and the employé use, appliances intended for the protecti of the latter. Laws of this class embr provisions for the safety and welfare those whom necessity may compel to subm to existing conditions involving hazar which they would otherwise be unwilling assume. Among them are provisions fire escapes, the covering or otherwise r dering machinery safe, the condition buildings, ventilation, etc. In the ma where the necessity is obvious, they co mend themselves to those who have at he the welfare of their fellows, and should upheld if they do not contravene priv rights. The constitution secures to the c zen the rights of life, liberty, and priv property, and, as the only value in the l ter consists in its use, it follows that right to use private property is within provision. There can, however, be no do

[1] Pub. Acts 1893 provide that "grinding chines upon which water is used at the point contact shall be exempt from the provisions this act." Section 1690z1.

that the use of private property may be regulated by law. No one would think of questioning the validity of laws regulating the manufacture, use, and sale of dangerous drugs or explosives, or laws designed to insure safety in railway travel. The inspection of boilers, fire escapes upon hotels, means of exits from churches and other buildings which the public are wont to frequent, are familiar instances of the exercise of the police power. These rules are defended upon the ground that they are necessary to the safety of the public; not the entire populace, but such persons as shall lawfully place themselves in a position requiring such protection. Where the law is aimed at acts or conditions which threaten contagion,—as where sewers, disinfection, or quarantine is required,—the necessity of and the power to make such laws are obvious. But at first blush they may not be so apparent where there is no direct danger to others than the party whose business is sought to be regulated, and those with whom he contracts. It is contended in this case that neither the public welfare nor health is involved, inasmuch as the protection sought to be afforded is limited to the individual employé, who, by his contract of employment, signifies a willingness to use the machine in its dangerous condition, and therefore cannot be heard to complain. It is the law that a manufacturer may provide inferior and even dangerous, machinery, tools, and utensils; and enterprises more or less hazardous are common and lawful. Men may contract to use such machinery, or to perform dangerous service, and have no remedy if injured. But we are not aware that the police power is limited by such contracts. As between the parties themselves, the contract may cut off legal redress for injuries sustained; but we are not satisfied that the authority of the state is limited to the protection of those who do not sustain contract relations with each other. In the absence of a law requiring fire escapes, one who works in a high building and is injured may be held to have assumed the risk incident to his employment, but we know of no rule that precludes the state from making a regulation requiring fire escapes to be placed upon high buildings, though the only object be to facilitate the escape of employés who are under contract to work there without such appliances for escape. Fire escapes in hotels, and means of exit in theaters and public halls are required by law for the benefit of patrons, who are there by virtue of contract relations with the proprietor. So long as the rule is general, and the danger to the public—i. e. that portion of the public who are subjected to the danger—is clear, it is a proper subject for legislative intervention. In re Jacobs, 98 N. Y. 98, is cited to sustain the proposition contended for, but it cannot be said to have decided the question, although allusion is made to voluntary submission to alleged dangerous conditions. The case does not dispute the power to regulate the business of private persons where the public welfare requires, but does deny the power of regulation in the absence of such necessity, where the law has no relation to the public welfare or health. See, also, Tied. Lim. § 122c, pp. 433–436. The case of People v. Warden of City Prison, 144 N. Y. 529, 39 N. E. 686, is an interesting one upon this question, and although the decision there laid down is criticised (perhaps justly) by Mr. Justice Perkham in a dissenting opinion, concurred in by two of his associates, the power to regulate private affairs where the public necessity exists is asserted in an exhaustive opinion by the same learned judge in the case of Health Department of New York v. Rector, etc., of Trinity Church, 145 N. Y. 32, 39 N. E. 833, in the course of which the power to regulate the appliances for manufacturing is asserted. 145 N. Y. 43, 44, 39 N. E. 833. The opinion says: "Hand rails to stairs, hoisting shafts to be inclosed, automatic doors to elevators, automatic shifts for throwing off belts or pulleys, fire escapes on the outside of certain factories, all these were required by the legislature from such owner, and without any direct compensation to him for such expenditure. Has the legislature no right to enact laws such as this statute regarding factories, unless limited to factories to be thereafter built? Because the factory was already built when the act was passed, was it beyond the legislative power to provide such safeguards to life and health, as against all owners of such property, unless upon the condition that these expenditures to be incurred should ultimately come out of the public purse? I think to so hold would be to run counter to the general course of decisions regarding the validity of laws of this character, and to mistake the foundation upon which they are placed." The trouble with these cases arises over the inability of the courts to fix a rigid rule by which the validity of such laws may be tested. Each law of the kind involves the questions: (1) Is there a threatened danger? (2) Does the regulation invade a constitutional right? (3) Is the regulation reasonable? In the present case no controversy is raised over the first of these. Hence we are not called upon to discuss it. As is implied by what has been said, the constitutional right to use property without regulation is plain, unless the public welfare requires its regulation. If the public welfare does require it, the right must yield to the public exigency. And it is upon this question of necessity that the third question depends. All, then, seems to be embraced in the question of necessity. Unless the emery wheel is dangerous to health, there is no necessity, and consequently no power, to regulate it. Unless the blower is a reasonable and proper regulation, it is not a necessary one. Who shall

decide the question, and by what rule? Shall it be the legislature or the courts? And, if the latter, is it to be determined by the evidence in the case that happens to be first brought, or by some other rule? Does it become a question of fact to be submitted to the jury or decided by the court? Of all the devices known to human tribunals, the jury stands pre-eminent in its ability to determine cases in direct violation of and contrary to law, without impairing the binding force of the law as a rule of future action. We have known of instances where the question of the constitutionality of acts, as applied to the particular case on trial, has been made to depend upon the finding of the jury upon the facts in the case. But there is a manifest absurdity in allowing any tribunal, either court or jury, to determine from testimony in the case the question of the constitutionality of the law. Whether this law invades the rights of all the persons using emery wheels in the state is a serious question. If it is a necessary regulation, the law should be sustained, but, if an unjust law, it should be annulled. The first case presented might show by the opinions of many witnesses that the use of the dry emery wheel is almost necessarily fatal to the operative, while the next might show exactly the opposite state of facts. Manifestly, then, the decision could not settle the question for other parties, or the fate of the law would depend upon the character of the case first presented to the court of last resort, which would have no means of ascertaining whether it was a collusive case or not, or whether the weight of evidence was in accord with the truth. It would seem, then, that the questions of danger and reasonableness must be determined in another way. The legislature, in determining upon the passage of the law, may make investigations which the courts cannot. As a rule, the members (collectively) may be expected to acquire more technical and experimental knowledge of such matters than any court can be supposed to possess, both as to the dangers to be guarded against and the means of prevention of injury to be applied; and hence, while under our institutions the validity of laws must be finally passed upon by the courts, all presumptions should be in favor of the validity of legislative action. If the courts find the plain provisions of the constitution violated, or if it can be said that the act is not within the rule of necessity in view of facts of which judicial notice may be taken, then the act must fall; otherwise it should stand. Applying this test, we think the law constitutional, and the judgment is therefore affirmed. The other justices concurred.

On Rehearing.

PER CURIAM. Our attention is called to the fact that under the opinion heretofore filed the act as originally passed might be held unconstitutional, inasmuch as it does not discriminate between dry and wet wheels, which last, it is said, cannot possibly produce dust, and therefore do not require the blower. This question was necessarily passed upon in the former opinion, as the amendment could not be sustained if the original act was invalid. In addition to what was said in the former opinion, we may say that two sufficient reasons may be given for not holding the first act void: First. We are not able to say that a wheel may not be run with or without water at pleasure, in which case it would seem proper that the blower should be required as an efficient means of preventing its being run without water. Second. If this were not so, the act might be construed as applicable only to wheels capable of producing dust, as the language of the act clearly shows that it was intended to reach such, and an act should always be so construed as to bring it within the constitution, if it can be reasonably done. Coit & Co. v. Sutton, 102 Mich. 324, 60 N. W. 690.

MOSHER v. BAY CIRCUIT JUDGE.

(Supreme Court of Michigan. March 3, 1896.)

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—ATTACHMENT BEFORE DEBT DUE—SUFFICIENCY OF AFFIDAVIT.

1. Pub. Acts 1889, No. 149, authorizing an attachment on a claim not due, does not contravene Const. art. 4, § 43, providing that the legislature shall pass no bill of attainder, ex post facto law, or law impairing the obligation of contracts.

2. Pub. Acts 1889, No. 149, authorizing an attachment on a claim not due, does not forbid the issue of the writ on the same kind of affidavit as was previously sufficient, viz. where the requisite facts, except the fact of indebtedness, are stated on information and belief; hence an affidavit, which alleges positively the existence of the debt, and when it is due, may be sufficient, though some of the facts are stated on hearsay.

3. An affidavit for an attachment against partners and M. on partnership notes not due stated that defendants were indebted; that M. was payee and indorser of the notes; and that M. himself stated that the notes were made and negotiated upon a joint venture; and it appeared that M. negotiated the notes fraudulently. *Held*, that the affidavit was sufficient to authorize an attachment against all the defendants.

Original mandamus proceeding, on the relation of Alfred Mosher, Jr., to compel the circuit judge of Bay county to quash proceedings in an attachment issued on a claim not due. Writ denied.

T. F. Shepard (McDonell & Hall, of counsel), for relator. John C. Weadock and O'Brien J. Atkinson, for respondent.

HOOKER, J. An attachment was issued upon a claim not due, under Act 149, Pub. Acts 1889. The circuit judge declined to quash the proceedings, and a mandamus is asked to compel such action. The return shows that the only question presented in the circuit court was the constitutionality of the law, and therefore that is the only question for us to

consider. We find nothing in the act which contravenes article 4, § 43, of the constitution,[1] which is the constitutional provision alleged to be violated by this law. Such laws have been held valid, and are in force in many of the states.

It is further contended that the affidavits for the writ of attachment were insufficient to support such writ. If that question can be reviewed upon this proceeding, it must be because the writ of attachment is void for want of a sufficient foundation. The statute (Act 149, Laws 1889) does not forbid the issue of writs of attachment upon the same kinds of affidavits as were previously sufficient, viz. where the requisite facts, except the fact of indebtedness, are shown upon information and belief. It attempts to enlarge the remedy by applying it to debts not yet due, and requires the affidavit to state additional and other facts, sufficient to satisfy the circuit judge of the propriety of allowing the writ to issue before the debt is due. The statute is silent as to the nature of the reasons upon which he may act, but we are of the opinion that evidence of circumstances that should indicate that the defendant's property was being disposed of or seized by others, and that there was danger that plaintiff might lose his claim, would be quite sufficient. In this case the affidavit alleges positively the existence of the debt, and when due. It states upon information and belief that the debt was fraudulently contracted, and it alleges circumstances—some positively, and some upon information and belief—which might well convince the judge that a writ should issue at once. We think there was sufficient to warrant the court in taking that view of the case, although some things are stated upon hearsay.

Several grounds set up in the motion are too broad to indicate of what the defects consist. Those which are not may be disposed of as follows: The affidavit of Hargrave may be dispensed with, and still leave the statutory cause shown for the issue of the writ. The affidavit of the plaintiff's cashier states that the two Moshers (being partners) and Maltby were indebted upon certain claims, and, although it is shown that the latter was payee and indorser of paper made by the Moshers, all might be sued together, under the statute, after maturity; and the affidavit states positively that Maltby himself stated that the notes were made and negotiated upon a joint venture, and it also appears that Maltby himself negotiated them fraudulently. We think, therefore, there is no difficulty in holding that this was a proper case for the issue of an attachment against all, although presentation and notice of nonpayment should be held necessary to hold the indorser before judgment taken,—a question we do not intend to be understood as determining at this time. The circuit judge returns that these questions were not pressed upon the argument of the motion, and there is force in the contention that they were waived. We have thought best to pass upon them, however. The writ is denied. The other justices concurred.

[1] Const. art. 4, § 43, provides as follows: "The legislature shall pass no bill of attainder, ex post facto law, or law impairing the obligation of contracts."

PEOPLE v. McGLAUGHLIN.

(Supreme Court of Michigan. March 3, 1896.)

CONSTITUTIONAL LAW—TITLE OF ACT—MARRIAGE—CIVIL LICENSE—CRIMINAL LAW.

1. 3 How. Ann. St. §§ 6222a–6222k, inclusive, entitled "An act for the requiring a civil license in order to marry, and the due registration of the same, and to provide a penalty for the violation of the same," is not in violation of Const. art. 4, § 20, providing that "no law shall embrace more than one object, which shall be expressed in its title."

2. Section 6222f of such act, providing that "any clergyman or magistrate who shall join together in marriage parties who have not delivered to him a properly issued license * * * shall be adjudged guilty of a misdemeanor," is within the entitling clause.

3. In a prosecution for a violation of section 6222f, it is no defense that one of the parties married was under a legal disability to enter into the marriage relation.

Exceptions from circuit court, Berrien county; Orville W. Coolidge, Judge.

Daniel J. McGlaughlin, a clergyman, was complained against for a violation of the statutory provisions in having performed a marriage ceremony without having received the civil license required by law, was tried, and found guilty. To a judgment on the verdict, defendant excepts. Affirmed.

Richard Price, for appellant. Fred A. Maynard, Atty. Gen., and N. A. Hamilton, Pros. Atty., for the People.

MOORE, J. The defendant is a clergyman who, on the 26th day of February, 1895, performed a marriage ceremony between James F. McNamar and Emma Nagle. At the time of such ceremony, James McNamar had a former wife living and was afterwards convicted of bigamy in the circuit court of Berrien county, and sentenced to the state's prison. At the time of such ceremony, McNamar represented to the respondent that he had applied for and procured a license to marry from the county, and that the same was on its way in the mail. As a matter of fact, he had made no such application, and no license was issued to him by the county clerk. Neither of the parties to said marriage procured the license provided for by section 6222a–6222k, inclusive,[1] of 3 How. Ann. St. The respondent was complained against for a violation of the provisions of Act No. 128, Pub. Acts 1887,

[1] Section 6222f provides, inter alia, that "any clergyman or magistrate who shall join together in marriage parties who have not delivered to him a properly issued license * * * shall be adjudged guilty of a misdemeanor."

as amended, in performing this ceremony under the circumstances stated, was tried, and found guilty. He brings the case here on a bill of exceptions.

The first assignment of error reads: "The complaint and warrant filed against said respondent are defective, and do not charge him with an offense under the laws of this state; the act upon which they are based being unconstitutional and void—First, because it does not comply with section 20 of article 4 of the constitution of Michigan, in that it embraces more than one object, and the same are not expressed in its title; second, because said act embraces more than one object; third, because the title of said act does not express its object; fourth, because that portion of said act with the violation of which defendant is charged is not expressed in the title of said act." Section 20, art. 4, of the constitution provides: "No law shall embrace more than one object, which shall be expressed in its title" The title of the act in question reads. "An act for the requiring of a civil license in order to marry, and the due registration of the same, and to provide a penalty for the violation of the provisions of the same." We think this title is broad enough to cover all the provisions of the act, and that its provisions are all germane to the object expressed in its title. People v. Mahaney, 13 Mich. 494; Kurtz v. People, 33 Mich. 280; Hall v. Judge, 88 Mich. 438, 50 N. W. 289; Gravel-Road Co. v. Paas, 95 Mich. 378, 54 N. W. 907; Van Husan v. Heames, 96 Mich. 507, 56 N. W. 22; Bissell v. Heath, 98 Mich. 476, 57 N. W. 585; People v. Kelly, 99 Mich. 83, 57 N W. 1090; City of Grand Rapids v. Burlingame, 102 Mich. 321, 60 N. W. 698.

It is urged that what was done by respondent is not an offense in the law; that, as it was charged, in the complaint and warrant, "that he did join together in marriage James F. McNamar and Emma Nagle, they nor either of them having delivered to him a properly issued license, etc.," and as the marriage ceremony performed by the respondent did not result in a legal marriage, because of the disability ot McNamar to enter into the marriage relation, what was done was simply an idle ceremony, of which the law will take no notice. This is, in effect, saying that, if he had joined in marriage, without a license, two persons who were legally qualified to marry, he would be guilty, but that, if he joined in marriage, without a license, two persons who could not legally marry, because of the disability of one of them, he would not be guilty. One of the objects of the law was to prevent the perpetration of fraud upon innocent persons, by others of evil design, leading them into the marriage relation, supposing it to be legal, when in fact it was void. To give the statute such a construction as counsel urge would be to defeat its purpose. The same course of reasoning would have prevented the conviction of McNamar of the offense of bigamy. According to the counsel, the ceremony between McNamar and Miss Nagle was an idle ceremony. He did not marry her, and therefore cannot be convicted. It is only necessary to state these propositions to show how illogical they are. The judgment is affirmed. The other justices concurred.

ROEDEL v. VILLAGE OF WHITE CLOUD.

(Supreme Court of Michigan. March 3, 1896.)

ILLEGAL TAX—INVOLUNTARY PAYMENT.

Payment of an illegal tax under written protest, after levy by an officer, is involuntary, though the taxpayer himself pointed out to the officer property on which the levy could be made.

Error to circuit court, Newaygo county; John H. Palmer, Judge.

Action by Phil. M. Roedel against the village of White Cloud to recover back the amount of an illegal tax paid under protest. From a judgment for plaintiff, defendant brings error. Affirmed.

M. Brown, for appellant. W. D. Fuller, for appellee.

GRANT, J. Plaintiff paid his taxes for the year 1893 under protest, specifying in his protest the reasons for the illegality of the tax. The case was tried before the court without a jury, and judgment rendered for the plaintiff. The sole question raised upon the record is, was the payment of the tax involuntary? Upon this point the court found as a fact that the "plaintiff refused to pay said taxes except under protest; and after the marshal had levied upon the personal property of the plaintiff to satisfy said taxes, but before he had removed the same from the premises of the plaintiff, the plaintiff paid the said taxes, and at the said time delivered the said officer a written protest." We think the conclusion of the circuit judge is justified by the evidence. The marshal who made the levy testified as follows: "I went to the bank, and demanded the tax, and Mr. Roedel said he would pay it only under protest. 'Well, then,' says I, 'I shall have to levy on something to get my pay.' He says, 'Very well; come on,' and went right out of the back door of the bank, and went into the barn, opened the door, and says, 'There are horses;' opened the other part of the barn, 'There are harnesses and cows.' I levied on those goods. He told me I could levy on them. I simply read my warrant to him, and told him I took the goods. I did not take them out of the barn. We walked back into the bank, and he gave me a check for the taxes." We think this was an involuntary payment. The collector went to plaintiff with his warrant, and demanded payment, which was refused, and the collector then threatened to levy, whereupon plaintiff showed him property upon

which he could levy. A payment is not made voluntary by the fact that the taxpayer, when a levy is threatened, shows or points out his property upon which a levy can be made. This statement made by the officer was an implication that payment would be enforced. No actual levy was required. Babcock v. Township of Beaver Creek, 64 Mich. 601, 31 N. W. 423. The judgment is affirmed. The other justices concurred.

BARNHARD v. VILLAGE OF WHITE CLOUD.

(Supreme Court of Michigan. March 3, 1896.)

PLEADING AND PROOF—VARIANCE.

In an action by A. B. against a village to recover personal taxes paid by plaintiff under protest, it appeared that plaintiff carried on a mercantile business under the name of "Mrs. S. P. B."; that the assessment was in the latter name, and that the protest was signed "Mrs. S. P. B." *Held*, that the variance in the names would not prevent recovery by plaintiff without amendment of the declaration, defendant not being misled.

Error to circuit court, Newaygo county; John H. Palmer, Judge.

Action by Augusta Barnhard against the village of White Cloud to recover taxes assessed on personal property, and paid by plaintiff under protest. Plaintiff had judgment, and defendant brings error. Affirmed.

M. Brown, for appellant. W. D. Fuller, for appellee.

GRANT, J. The proceedings in this case are in all material points the same as in Roedel v. Village of White Cloud, 66 N. W. 386. The court below found the same facts and conclusions of law. One question is present which was not in that case. Plaintiff carried on a mercantile business under the name of Mrs. S. P. Barnhard. Her real name was Augusta Barnhard, under which name she brought this suit. The assessment, it seems, was in the name of Mrs. S. P. Barnhard, and the protest was so signed. Defendant insists that no recovery can be had without an amendment to the declaration. Defendant admits that it was not misled. The question is too technical to require comment. Judgment affirmed. The other justices concurred.

BURT et al. v. BOARD OF SUP'RS IRON COUNTY.

(Supreme Court of Michigan. March 3, 1896.)

COUNTY OFFICERS—SUPERINTENDENT OF POOR—REMOVAL BY COUNTY SUPERVISORS—NOTICE OF CHARGES.

1. In a proceeding before the board of county supervisors for the removal of the superintendents of the poor, for improperly allowing to themselves claims, a bill of particulars, setting out the amount of the items improperly allowed, with date of allowance, sufficiently notifies the officers of the charge against them.

2. In proceedings, before the county supervisors, for removal of an officer on the ground of incompetency, the notice to the officer need not set out the specific charges of incompetency.

Certiorari by John Burt and another against the board of supervisors of Iron county to review the action of the board in removing them from the office of superintendents of the poor. Writ quashed.

Handy & Abbott, for plaintiffs. M. H. Moriarty, for defendant.

MONTGOMERY, J. This is certiorari to review the action of the board in removing the plaintiffs in certiorari from office as superintendents of the poor. In the brief filed on behalf of the plaintiffs in certiorari it is conceded that the meeting of the board at which the action was taken was regular, that notice of the hearing was properly given, and a copy of the charges duly served. The errors relied on are—First, the insufficiency of the charges; and, second, the insufficiency of the evidence.

As to the latter objection, it will suffice to say that the evidence is not returned, and that the return of the proceedings by the clerk of the board shows that, by mutual consent, the making of a record of the testimony in the case was dispensed with. Under these circumstances, the respondents are not in position to complain that the evidence is not returned, nor can we assume that it is insufficient. McGregor v. Supervisors, 37 Mich. 390. The petition for removal was in general terms, and charged: "(1) That the superintendents of the poor have audited and allowed their own bills for individual services performed by them in and about the management of the poor of said county. (2) That they have issued warrants drawn on the county treasurer in favor of themselves, in excess of the compensation allowed them by the board of supervisors of said county, and in excess of the amount justly due them, as fixed by said board or the statutes of the state of Michigan. (3) That they had been directly interested in contracts made with the county of Iron in and about the management of the poor, for the sale of wood and other materials purchased by the county, and in the rental of buildings hired by them for the use of said county, and have audited and allowed bills, and drawn their warrants on the treasurer of said county to their own order in payment of the same. (4) That they had drawn warrants upon the county treasurer of said county in excess of the amount appropriated by the board of supervisors of said county for the support of the poor of said county. (5) That they had used the county's credit for securing livery rigs for their own use, and have audited and allowed bills, and drawn warrants upon the county treasurer of said county in payment of the same. (6) The county poor fund is now overdrawn by them, in the sum $23,000, on account of their extravagance and incompeten-

cy to properly and economically discharge the duties of the office of superintendents of the poor, to which they had been appointed." On appearing before the board, the respondent moved to dismiss the proceedings, on the ground that the charges were not sufficiently specific; and, on this bill being denied, demanded a bill of particulars, which was furnished, as follows:

"You will please take notice that the following is a bill of particulars of the charges preferred against the superintendents of the poor, as near as your petitioner can furnish the same: 1895.

January 2. To Frank Raher, transportation, mileage, etc., audited and allowed	$ 23 00
January 2. To Frank Raher, allowed	8 00
February 1. To Frank Raher, for time, mileage, etc.	45 00
February 1. To Frank Raher, to board of Champion	8 00
March 1. To Frank Raher, services, mileage, etc.	39 00
April 1. To Frank Raher, for bill rendered	7 55
April 1. To Frank Raher, for bill rendered	5 65
April 1. To Frank Raher, mileage and services	14 80
April 1. To Frank Raher, to services as fixed by county board	100 00
May 3. To Frank Raher, time and mileage for April	39 00
January 2. To John Burt, mileage, services, etc.	22 00
March 1. To John Burt, mileage, etc	15 00
April 1. To John Burt, to services and mileage	15 00
April 1. To C. T. Roberts, to 4 months' services	133 33
April 1. To C. T. Roberts, to services as secretary	66 66

"Said board used the credit of the county, as shown by their records, for livery rigs, as follows:

January 2. To A. J. Boyington, livery	4 00
February 1. To A. J. Boyington, livery	5 00
April 1. To A. J. Boyington, livery	13 00
March 3. To A. J. Boyington, livery	6 25

"Which bills were audited and allowed by the superintendents of the poor at their meetings held on the dates herein mentioned."

Respondent then moved that the proceedings be quashed, except as to the fifth charge, "that being the only charge in which the bill of particulars is in any way clear." This motion was denied, and the board proceeded to take testimony, and at the conclusion thereof, and after hearing arguments by counsel, passed a resolution embodying the following: "Be it therefore resolved by the board of supervisors of the said county of Iron, that it is the opinion of the board, sitting in judgment in said cause, on this 9th day of July, A. D. 1895, and it does, by the adoption of this resolution, find the charges set forth in the petition of said M. H. Moriarty are true; and that the said Christopher T. Roberts and John Burt are wholly incompetent to perform the duties of the office of superintendents of the poor of said county of Iron, and unfit to longer hold the said office of superintendents of the poor to which they were appointed; and that the said Christopher T. Roberts and John Burt be, and they each are hereby, removed from the office of superintendents of the poor of the county of Iron, and that the office of said Christopher T. Roberts and John Burt, and each of them, be, and hereby is, declared vacant." The board of superintendents of the poor consisted of the two respondents and Frank Raher.

While the proceeding for removal is quasi judicial, and while it is well settled that the officer is entitled to notice of the charges, and such charges must be sufficiently specific to apprise him of what he is to meet, yet the technical rules of pleading are not to be applied. Throop, Pub. Off. § 389. We think the charges, as limited by the bill of particulars, were sufficiently specific, and apprised the respondents of the items which it is charged that the board improperly allowed to themselves. This proceeding was had under paragraph 17, § 483, 1 How. Ann. St., and it is held, in Trainor v. Board of Auditors, 89 Mich. 169, 50 N. W. 809, that, on removal for incompetency it is not essential to the validity of a removal under this section that specific charges be made. In any view, we think the respondent had no ground of complaint. The writ will be quashed, with costs against plaintiffs in certiorari. The other justices concurred.

MAYNARD, Attorney General, ex rel. HARWOOD v. STILLSON.

(Supreme Court of Michigan. Feb. 26, 1896.)

CONDUCT OF ELECTION.

Sess. Laws 1891, No. 190, § 21, provides that no person shall be allowed within the railing of an election room except to vote, or to assist an elector, as thereinafter provided. Section 31 provides that, "in case of necessity," an interpreter may be employed. *Held* that, where, in a county election, an interpreter hostile to one of the candidates was allowed within the railing of the polling place and conversed freely with foreigners, who only understood their own language, after they had been admitted to vote, although they had not applied for an interpreter, the vote of the entire township should be excluded, where its exclusion would change the result of the election.

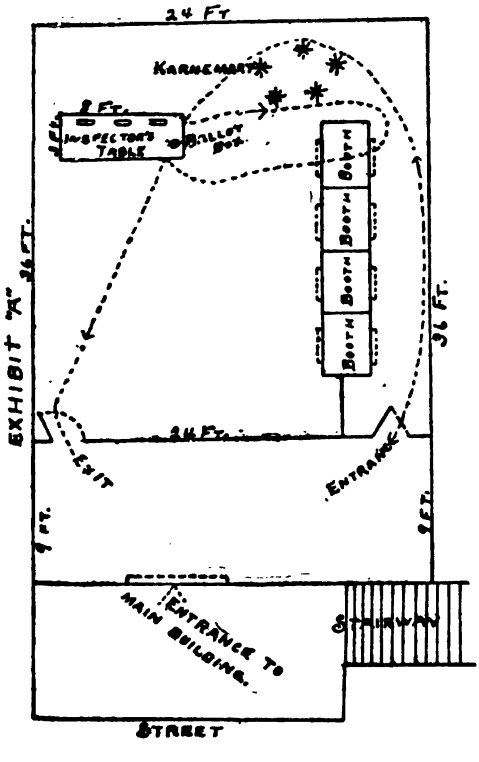
Quo warranto proceedings on relation of John Harwood, against Francis C. Stillson, to try title to the office of county commissioner of schools. On demurrer to the replication. Overruled.

Fred A. Maynard, Atty. Gen. (George Luton and M. Brown, of counsel), for relator. A. F. Tibbitts (Martin Rozema, of counsel), for respondent.

HOOKER, J. The relator was a candidate for the office of commissioner of schools in the county of Newaygo at the spring election of 1895. A certificate of election issued to Stillson, an opposing candidate, who entered upon the discharge of the duties of the office and an information was filed, at the

instance of the relator, to try the title to the office. It is before us on demurrer to the replication. The replication alleges that the relator received votes to the number of 1,351, outside of the township of Sheridan, as against 1,148 for Stillson,—a plurality for relator of 203; and that, in that township, the vote as canvassed gave the relator 42 votes, and Stillson 274 votes. The replication alleges that, of the voters in Sheridan township who voted at the election, 150 were Hollanders, who were able to converse in their language; that before the polls were opened the inspectors of said election appointed one John Karnematt, who was opposed to the election of the relator, to act as interpreter at the election, and he was sworn to faithfully discharge the duties of such interpreter; that he was thereupon permitted to be and remain, throughout the day, within the railing of the polling place, and he was permitted to, and did, freely converse with the electors who came therein, for the purpose of voting, after such electors had received their official ballots, and before making or depositing the same; that such conversation was in a foreign language, viz. the Holland language; that, of the 150 Hollanders who voted at such election, no one requested an interpreter; and that said inspectors in no instance called upon him to act as such.

The annexed diagram, showing the polling place, was attached to the replication, and a statement of the votes for the office of regent was given, which shows that, in the township of Sheridan, the candidate for regent upon the ticket upon which relator's name appeared received 176 votes, while his competitor upon Stillson's ticket received 174 votes. The replication asserts that such votes were illegal and void, and that the vote of the township should not have been counted, and that the respondent fraudulently and unlawfully holds the office.



It is plain that relator's right to the office depends upon the exclusion of the entire vote of the township of Sheridan, and the question of the validity of such vote is raised by the demurrer to the replication. Two questions are involved in the case: (1) Were the ballots of such voters as Karnematt conversed with void, so that they should have been excluded? (2) If so, inasmuch as it cannot be ascertained how they voted, should the vote of the township have been excluded from the canvass? We have frequently held that "electors are not to be deprived of the result of their votes, by the mere mistakes of election officers, when such mistakes do not indicate that the result has been changed thereby"; and many things may occur that can be treated as irregularities. See People v. Avery (Mich.) 61 N. W. 5, and authorities cited. On the other hand, where fraud appears upon the part of the inspectors, the voter must sometimes be deprived of his vote. Attorney General v. McQuade, 94 Mich. 439, 53 N. W. 944. And this must always be the case where mandatory provisions are disregarded, if the result would be thereby changed. The statute [1] in question is one which was passed under a clause of our constitution which emphasizes the necessity of measures for the promotion of purity at elections. It supplanted a law which permitted a voter to vote openly any ballot that he might choose. There was no obstacle to the immediate presence of any number of persons. We should be careless observers of current events, did we not know and recognize the circumstances, of a public character, preceding and attending the agitation and adoption of measures designed to correct the palpable evils connected with our elections as formerly conducted. We must admit that the legislature intended, and the public understood, that thereafter ballots should not be prepared, by the voter or others, before the elector reached the polling place, and that, when he reached there, he was not to be annoyed by importunities or more potent influences calculated to affect or prevent his free, untrammeled action. To this end, expensive booths and utensils were provided, and "a lawful fence" required to remove him from his fellows. It is now claimed that

[1] Sess. Laws 1891, No. 190, § 21, requires township boards to furnish rooms for elections, across which railings shall be placed, and that no person shall be allowed within the railing, except to vote, or to assist an elector, as thereinafter provided, in the preparation of his ballot. Section 31 provides that, "in case of necessity," an interpreter may be employed.

this is directory, and, unless the injured party can show that a radical departure from the plain provisions of the law actually resulted in a loss of votes to the relator, and a consequent change of result, there is no occasion to disturb the result as declared; and the reason alleged is, not that there is no probability that the relator has suffered, but that he must submit to a probable wrong, lest some voters not responsible should lose their votes.

We are not disposed to question the rule laid down in People v. Avery where there is a reasonable opportunity for applying it; but, on the other hand, we think that the possible loss of votes is not the greatest calamity that can follow improperly conducted elections. We are not sufficiently credulous to suppose that an election board could be so ignorant as not to know that the law was transgressed by the course permitted in this case; and, unless we are to put a premium upon such conduct, and invite its repetition throughout the state, we must conclude that some of the voters must lose their votes, through their offending officers. The readiest way to stop fraud and corruption at elections is to see to it that the same is not rewarded by success, and when, by the connivance and procurement of the election officers, the law is, in essential particulars, disregarded, so that candidates and voters lose the benefit of its protective provisions, under circumstances well calculated to produce the belief that such conduct may have changed the result from what it would otherwise have been, there is as great danger of wrong to the individual voter through counting, as excluding, the vote of the precinct. If we were to suppose a case where the booth was dispensed with, or where persons were allowed in the booth with all electors, it would be possible that no fraud was perpetrated, and that the result was in no way affected thereby; but, in the face of the law, such a practice would be only less surprising than such a result, for we all know that there could be but one object for such course. In such a case no one would contend that the election would be valid, and that the vote of the precinct should be counted. The provisions of the law would be held mandatory, and we think they should be in this instance. The law has attempted to provide uniform and strict regulations for elections. While we are not prepared to say that a vote of a precinct should be thrown out for a failure on the part of the inspectors to attain absolute perfection in the conduct of election, where, as in this case, the whole body of electors have been subjected to the possibility of a forbidden influence, and a large portion are shown to have been approached in forbidden ways, under circumstances strongly indicating a fraudulent design, the vote of the precinct should be thrown out, if the result would be thereby changed. The demurrer must therefore be overruled, and the respondent allowed 10 days within which to file a rejoinder. The other justices concurred.

KELSEY v. WELCH et al.

(Supreme Court of South Dakota. Feb. 19, 1896.)

MORTGAGE BY GUARDIAN—FORECLOSURE—PARTIES—SUBROGATION.

1. With the exception of a deficiency found to exist after a foreclosure sale, it is not necessary to present to an administrator a claim secured by mortgage upon the real property of a decedent.

2. In an action to foreclose such mortgage, the heirs of such deceased person are proper parties defendant.

3. An administrator is ordinarily a necessary party defendant in any action which will, if successfully maintained, result in a judgment prejudicial to the estate.

4. In the absence of anything to the contrary, the presumption is that men are able and willing, in the due course of business, to pay their just debts at maturity.

5. One who, through mistake of law, loans money with which a mortgage executed by and existing upon the real property of a person since deceased is satisfied, and takes therefor the promissory note of the guardian of the minor heirs of such deceased person, such guardian being also the owner of an undivided one-third interest in the premises, and by whom a mortgage upon said real property is executed to secure said promissory note, is not entitled to a decree in equity reviving and foreclosing the former mortgage, unless it appears from the complaint and evidence that said guardian and maker of the last-mentioned obligation is insolvent, or that his mortgaged interest in the land will be insufficient to secure the payment of the note when the same matures.

(Syllabus by the Court.)

Appeal from circuit court, Brookings county; J. O. Andrews, Judge.

Action by B. J. Kelsey against John Welch, individually and as guardian, and others, to revive and foreclose a mortgage. From an order overruling a demurrer to the complaint, defendants appeal. Reversed.

John C. Jenkins, for appellants. Mathews & Murphy, for respondent.

FULLER, J. From the complaint before us, it appears that John Welch and Mary Welch, husband and wife, on the 1st day of May, 1882, mortgaged to F. T. Day the land described in the complaint and of which Mary Welch was the owner, to secure their joint promissory note of even date therewith for $400, made payable to the mortgagee named in that instrument; and on the same day they executed a second mortgage on said property to the same party, to secure their joint promissory note for $40. These mortgages were both duly recorded in the office of the register of deeds. On the 8th day of April, 1886, Mary Welch died, intestate, leaving her husband, John Welch, and their eight minor children each and all of whom are made parties defendant herein, and are named in the complaint as the heirs at law of Mary Welch, deceased. On the 15th day of

March, the defendant John Welch was duly appointed and became the qualified and acting guardian of said minor heirs, and the duly appointed, qualified, and acting administrator of the estate of Mary Welch, deceased, and, as disclosed by the record, still continues to act as such guardian and administrator. At the time of her death, Mary Welch was possessed of no personal property whatever, nor real estate other than the incumbered land described in the complaint, and was entirely without means with which to pay off and discharge the above-mentioned mortgage indebtedness, all of which became due and collectible on the 1st day of May, 1887. With a view to promoting the welfare of the estate, and for the purpose of preventing a foreclosure of said mortgage, the defendant John Welch, as guardian of said minor heirs, on the 10th day of December, 1888, applied to and obtained an order from the judge of the probate court by which he was directed, as said guardian, for the purpose of satisfying the above-mentioned indebtedness, to negotiate a loan of $650, and to secure the payment thereof by executing a mortgage upon said real estate of which said Mary Welch died seised. Relying upon said order of the probate court, plaintiff's assignor, the Keystone Mortgage Company, on the 27th day of June, 1889, through the agency and negotiation of plaintiff, loaned to the defendant John Welch $800, taking his promissory note therefor, secured by a mortgage on the above-mentioned premises, and out of the proceeds thereof fully paid to the holder and owner of the $400 note the amount thereof, and obtained a discharge and satisfaction of the mortgage given to secure the same, which was duly recorded on the 21st day of December following, together with a discharge and release of the mortgage given to secure the $40 note, which had also been paid in full, out of the proceeds of said loan. As a part of the same transaction, plaintiff paid out of said loan delinquent taxes upon the premises aggregating $36.33, and paid to the defendant John Welch the unexpended balance thereof, amounting to $332.83. All instruments affecting the real estate involved herein, including the assignment to plaintiff by the Keystone Mortgage Company of the $800 note and mortgage above mentioned, were duly recorded in the office of the register of deeds; and plaintiff is now the owner and holder of said last-mentioned obligation of John Welch, no part of which has been paid.

The complaint contains, among others, the substance of which has been given, the following averments: "That the sums of money aforesaid were paid to and for the said John Welch, as guardian of the estate and persons of the minor heirs of Mary Welch, deceased, and constituted the consideration of the note or bond and mortgage aforesaid executed and delivered by the said John Welch to the Keystone Mortgage Company on the 27th day of June, 1889. * * * That the mortgage executed and delivered by John Welch as aforesaid to the Keystone Mortgage Company, to secure the payment of eight hundred dollars, is not a lien upon the estate of the minor heirs of Mary Welch, deceased, and does not secure to plaintiff the sums of money paid out for the benefit of said estate; but said mortgage is a valid and subsisting lien upon the interest of the said John Welch, surviving husband of Mary Welch, deceased, in and to the real estate above described, of which Mary Welch died seised. The above-described real estate, to wit, the northeast quarter of section thirty-four (34), * * * being the land owned by Mary Welch, deceased, at the date of her death, has never been sold, transferred, or disposed of in any manner since her death, and ever since has been, and is now, the property of the heirs of the said Mary Welch, deceased. * * * That no action or other proceeding has been taken to recover the several sums of money herein described, or any part thereof, or to foreclose the mortgage given by John Welch and Mary Welch, deceased, described in the third paragraph of plaintiff's complaint. That there is now due and owing this plaintiff the sum of four hundred and seventy-six dollars and thirty-three cents ($476.33), with interest thereon from the 13th day of December, 1889, under and by reason of the money advanced and payments made to release and pay off the mortgage described in the third paragraph of plaintiff's complaint, executed by John Welch and Mary F. Welch, deceased, to F. T. Day, and for taxes, paid as aforesaid, as provided for in said mortgage. That there is now due and owing plaintiff from the said John Welch the further sum of three hundred and thirty-two dollars and eighty-three cents, with interest thereon from the 24th day of January, 1890, by virtue of the payments made and money advanced for his use and benefit, as alleged in said complaint. Wherefore, by reason of the premises and circumstances set forth in the foregoing complaint, plaintiff prays the judgment of this court—First. That the lien of the mortgage aforesaid, executed by John Welch and Mary F. Welch, mortgagors, to F. T. Day, mortgagee, and paid off by the plaintiff, as aforesaid, be decreed to continue against the lands and premises described in this complaint, in behalf of this plaintiff; and that this plaintiff be subrogated to the rights, powers, and privileges of the original mortgagee and his assignee under said mortgage, and all the conditions of said mortgage be decreed to exist in favor of, and with the same force and effect as they did exist in favor of, the original mortgagee and his assignee. Second. That each of the defendants, and all persons claiming under them or either of them, subsequent to the commencement of this action, may be foreclosed of all equity of redemption or other interest

in said premises. Third. That the said premises, or so much thereof as may be necessary, be sold, and the proceeds applied to the payment of the costs and expenses of this action, and the amount due on said note and mortgage and attorney's fees as stipulated in said mortgage executed by John Welch and Mary Welch, deceased, to F. T. Day, as aforesaid, and the amount of the aforesaid taxes paid by this plaintiff, with interest on said sums from the time of such payment. Fourth. That the plaintiff have and recover judgment against the defendant John Welch, surviving husband of Mary Welch, deceased, for the sum of three hundred and thirty-two dollars and eighty-three cents ($332.33), and interest thereon from December 13, 1889; and that said judgment be decreed to be a lien in behalf of this plaintiff upon all the right, title, and interest of the said John Welch in and to the residue of the estate aforesaid of Mary Welch, deceased, and for such other and further relief as may be just and equitable in the premises."

This appeal is by the defendants from an order overruling a demurrer to the foregoing complaint, in which the following grounds were specified: "First, that the complaint does not state facts sufficient to constitute a cause of action; second, that there is a defect of parties defendant in this, to wit: that the administrator of the estate of Mary Welch, deceased, is not made a party defendant, and that the said minor heirs of Mary Welch, deceased, are improperly made defendants herein."

It is conceded by counsel for both parties that the order directing John Welch, as guardian of the minor heirs of Mary Welch, deceased, to mortgage the real property belonging to the estate, was, when made, beyond the jurisdiction and power of the probate court, and that the same is therefore nugatory and void.

At the death of Mary Welch, her surviving husband, John Welch, by succession, under subdivision 1 of section 3401 of the Compiled Laws, became the owner, subject to existing debts and incumbrances, of a one-third interest in the land mortgaged by said John Welch to respondent's assignor, to secure the $800 loan; and appellants' counsel confidently maintain that the demurrer should have been sustained, for the reason that it is nowhere alleged in the complaint that said one-third interest of the mortgagor is insufficient to secure the loan, or that said John Welch, who appears to have executed said mortgage in a personal capacity, is insolvent. Appellants' further contention, that respondent's complaint is demurrable because it fails to state that a claim for the amount due upon the mortgages was presented to the administrator, as required by the probate code, cannot receive favorable consideration. With the exception of a claim for a deficiency which may exist after a foreclosure sale, and which must be presented within a month after the amount thereof has been ascertained, creditors whose demands are secured by mortgage upon decedent's real property are expressly relieved from the operation of the statute requiring claims to be presented to the administrator within a specified time, or at all. Section 5790, Comp. Laws; Purden v. Archer, 4 S. D. 54, 54 N. W. 1043. Where the equitable doctrine of subrogation must be invoked, to substitute one who has satisfied a mortgage to the rights of a mortgagee under circumstances like the present, such a demand is not a claim, in the sense of the statute, which an administrator would have power to adjust, and presentment to him thereof is unnecessary.

In support of the objection presented by the demurrer that there is a defect of parties defendant, it is urged by counsel for appellants that the administrator of the estate of Mary Welch, deceased, being charged with the management and settlement of the estate, and for that purpose required by the statute to take and maintain exclusive possession thereof, should have been made a party defendant. Ordinarily, an administrator is a necessary party defendant whenever a claim is made against an estate which will, if successfully maintained, result in a judgment prejudicial thereto. Maxw. Code Pl. p. 66; Carr v. Caldwell, 10 Cal. 380. Section 5860 of the Compiled Laws is as follows: "The executor or administrator must take into his possession all the estate of the decedent, real and personal, except the homestead and personal property not assets, and collect all debts due to the decedent or to the estate. For the purpose of bringing suits to quiet title or for partition of such estate, the possession of the executors or administrators is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator, for the purposes of administration, as provided in this title." The statute of California defining the powers and duties of executors and administrators is, in effect, the same as ours. Deering's Ann. Code, p. 552, c. 8. Under that statute, in an action to foreclose a mortgage executed by another and a person since deceased, the heir of whom was made a party defendant, with the surviving mortgagor, it was held that the administrator, being charged with the possession of all the property belonging to the estate, was a necessary party defendant in all suits in any manner affecting the same. Harwood v. Marye, 8 Cal. 580. Our conclusion, therefore, is that the administrator should have been made a party defendant. The heirs being the owners, subject only to the mortgage and administrator's superior right to possession, they are proper, if not necessary, parties defendant. Bliss, Code Pl. 102. Concerning the heirs of a deceased mortgagor, Mr. Wiltsie says in his treatise that "it is the safest practice to make the heirs of the deceased owner par-

ties to the foreclosure." Wiltsie, Mortg. Forec. 122.

It is alleged in the complaint that the mortgage executed by appellant John Welch to respondent's assignor, to secure his individual promissory note for $800, is a valid and subsisting lien upon the interest of said John Welch in the property under consideration, and there is no averment or anything in the complaint to show that said one-third interest is insufficient security for the $800 note, or that said mortgagor is insolvent or unable to pay his note and interest on demand at maturity. In the absence of anything to the contrary, the presumption is that John Welch is perfectly solvent, and that he is honest, and that he will pay his note of $800 in the due course of business, as soon as the same matures according to its terms. 1 Rice, Ev. 68, 96. As a general rule, courts of equity administer their remedies in cases only where equitable relief is required to prevent a failure of justice. If the court to which the legislature has given jurisdiction over all probate matters was without power to authorize an incumbrance of the interest of the minor heirs in the estate of their deceased mother, a court of equity will impose no such burden by granting the relief prayed for in this action, in the absence of an allegation that John Welch is insolvent, or something from which it appears that his mortgaged interest is insufficient to secure the payment of his promissory note for $800.

The foregoing views lead to a reversal of the order overruling the demurrer, and it is so ordered. The case is remanded to the trial court for further proceedings not inconsistent herewith.

JACKSON v. STATE

(Supreme Court of Wisconsin. Feb. 18, 1896.)

CRIMINAL LAW—APPEAL.

An order denying a motion for a new trial, made after judgment (Rev. St. § 4719), is not a final judgment, nor an order in the nature of a final judgment. Pinney and Winslow, JJ., dissenting.

Error to circuit court, Iowa county; George Clementson, Judge.

Motion by William T. Jackson for a new trial, after judgment of conviction, which was affirmed on error. 64 N. W. 838. The motion was denied, and defendant brings error. Dismissed.

Spensley & McIlhon and P. A. Orton, for plaintiff in error. J. L. Erdall, Asst. Atty. Gen., for the State.

MARSHALL, J. This case was before this court on a writ of error, to review the judgment of the circuit court, and was decided October 2, 1895, the judgment being affirmed. After such affirmance, a motion for a new trial was seasonably made, based on newly-discovered evidence, under section 4719, Rev. St., which provides that "the circuit court may, at the term in which the trial of any indictment or information may be had, or within one year thereafter, and either before or after judgment, on petition or motion, in writing, of the defendant, grant a new trial for any cause for which a new trial may be granted, or when it shall appear to the court that justice has not been done, and on such terms and conditions as the court may direct." The motion for a new trial was denied, and the order of the trial court in that regard is here for a review at this time, if a writ of error may properly be had to bring such a matter before the court.

By the organic law of the territory at the time of the adoption of the state constitution, a writ of error was allowed only from final judgments, or orders in the nature of final judgments (Hill v. Bloomer, 1 Pin. 283); and this right was preserved and secured by article 1, § 21, of the constitution, which provides as follows, "Writs of error shall never be prohibited by law." As said by Mr. Justice Lyon, in Buttrick v. Roy, 72 Wis. 164, 39 N. W. 345, in effect, this constitutional provision renders the writ inviolate, as it existed when the constitution was adopted, and at that time its scope and function were to correct some supposed mistake in the proceedings or judgment of the court. Hence, it lies only after judgment in an action at law in a court of record, or after an order in the nature of a final judgment, to correct some supposed mistake in the proceedings in respect to such judgment or order. Such is the measure of the constitutional right to the writ, and section 3043 is merely declaratory of the constitutional right, neither extending nor attempting to restrict it. Section 4724, Rev. St., provides that writs of error in criminal cases may issue in the manner and within the time allowed in civil actions, and section 3043, that writs of error may issue to review final judgments in actions tried by jury; the proceeding and judgment to be in accordance with the course of the common law and the rules and practice of the supreme court. This statutory provision, in connection with article 1, § 21, of the constitution, has been repeatedly considered by this court, in cases, from first to last, covering nearly half a century, and the conclusion promulgated soon after the adoption of the constitution has been since reiterated, over and over again, that a writ of error lies only in case of a final judgment, or an order in the nature of a final judgment, given in a court of record proceeding according to the course of the common law. Hence, an extended rediscussion of the subject at this time cannot serve any valuable purpose. In Crocker v. State, 60 Wis. 553, 19 N. W. 435, in an opinion by Mr. Justice Cassoday, the authorities in this and other states are collated; and the conclusion there reached, as explained in Buttrick v. Roy, 72 Wis. 165, 39 N. W. 345, and followed in State v. Ryan, 70 Wis. 676, 36 N. W. 823,

State v. Brownell, 80 Wis. 563, 50 N. W. 413, and State v. Smith, 65 Wis. 93, 26 N. W. 258, leaves very little, if anything, that can profitably be said on the subject.

However much the ends of justice may appear to demand a review of the decision of the trial court refusing to exercise the discretionary power granted by section 4719, Rev. St., in favor of the plaintiff in error, the settled law on the subject forbids this court from doing so, though the peculiar circumstances disclosed by the record, and the able presentation of the matter both orally and in the printed briefs of counsel, have led to such careful consideration of the jurisdiction of this court in the premises as the apparent exigencies of the case required, in view of the prior adjudications in respect to the general principles involved. We must hold that an order denying a motion for a new trial, under section 4719, is not a final judgment, or an order in the nature of a final judgment. Hence, the writ of error was improvidently issued, and must be dismissed. Ordered accordingly.

WINSLOW and PINNEY, JJ., dissent.

PINNEY, J. (dissenting). I cannot concur in the determination of the court, resting, as it seems to me it does, upon what I regard as a mistaken view of its constitutional power and duty as an appellate tribunal. The constitution (section 3, art. 7) provides that "the supreme court, except in cases otherwise provided by this constitution, shall have appellate jurisdiction"; and, with this grant of appellate jurisdiction, and as incident thereto, and without any legislation in its aid, the court took the right to issue and use all common-law writs and process, with the right to frame and issue such other writs as might be necessary to make its appellate jurisdiction effective. Hence it took the right to issue writs of error as common-law process, and to hear and determine the same. The writ was never of statutory origin, though, to a certain extent, its use was regulated by statute, and it was this common-law writ which the constitution provided (section 21, art. 1) should "never be prohibited by law." It is not material to inquire upon what foundation writs of error rested under the organic act or the statutes of the territory. The legislature might regulate their use, but could not prohibit them for any purpose within their scope at common law. As was said by Ryan, C. J., in Attorney General v. Railroad Cos., 35 Wis. 515: "The framers of the constitution appear to have well understood that, with appellate jurisdiction, the court took all common-law writs applicable to it, and, with superintending control, all common-law writs applicable to that; and that, failing adequate common-law writs, the court might well devise new ones; as Lord Coke tells us, 'a secret in law.' Hence the constitution names no writ for the exercise of the appellate or superintending jurisdiction of the court." It is provided by statute (Rev. St. § 2405) that the appellate jurisdiction of the supreme court "shall extend to all matters of appeal, error, or complaint from the decisions or judgments of any of the circuit courts, county courts or other courts of record, and shall extend to all questions of law which may arise in said courts, upon motion for new trial, in arrest of judgment, or in cases reserved by said courts." And, by section 2406, it is provided that "in addition to the writs mentioned in section 3, art. 7, of the constitution, the supreme court shall have power to issue writs of prohibition, supersedeas, procedendo, and all other writs and process not specially provided by statute, which may be necessary to enforce the due administration of right and justice throughout the state." Provisions in substance the same have been in force ever since 1849. Rev. St. 1849, c. 82, §§ 5, 6. It will thus be seen that the utmost caution was taken to render the appellate powers of the supreme court complete and adequate to any contingency. While sections 3043 and 4724 contain provisions regulating the manner of issuing writs of error, they do not in any manner limit or restrict the statutory provisions quoted, and could not qualify in the least degree the constitutional appellate jurisdiction and functions of the court. This view of the appellate jurisdiction of the court is sustained by the case of Brunson v. Burnett, 2 Pin. 79, which was a motion to dismiss a writ of error to review the judgment of the district court in respect to the probate of a will, the statute not providing in terms that either an appeal or writ of error might be had. The court denied the motion, Stow, C. J., stating that it was "of no moment which proceeding—a writ of error or an appeal—was pursued; * * * that, in the absence of authority or precedent, the court felt at liberty to adopt such a course as was deemed most expedient; and that, on the whole, a writ of error was preferable to an appeal." After the organization of this court, in 1853, a writ of error was sued out in a similar case concerning the probate of the will of Edward Fisher, in the case of Fisher v. Berkley (unreported). No procedure having been prescribed by statute in which to obtain a review in cases determined in the circuit courts in relation to probate matters, the court dismissed the writ, but allowed a writ of certiorari for the review of such cases, whereupon such a writ was issued, and the case was heard thereon and decided. Rules 26–28, 2 Pin. 80, 81, 3 Pin. 492, 493; In re Fisher, 4 Wis. 54. These cases serve to show that the court is not dependent upon legislation for means to exercise its appellate jurisdiction, but that, when occasion requires, it can and should frame rules and adopt such writs as are essential to the discharge of its constitutional functions. There is nothing in Buttrick v. Roy, 72 Wis. 164, 39 N. W. 345, to show that the writ of error as used in this

state is in any respect other than a common-law writ. It lies after judgment in any action at law in a court of record to correct some alleged error in the proceedings or judgment of the court; but it is entirely well settled that it will lie to review an order in the nature of a final judgment, which determines the suit (Lawler v. Fitzpatrick, 3 Wis. 573; Cavenaugh v. Titus, 5 Wis. 143), but will not lie to review an intermediate order or interlocutory judgment, as was held in Hill v. Bloomer, 1 Pin. 283. It certainly cannot be a valid objection to the present writ that there had been a former writ upon which the final judgment given against the defendant was reviewed before the subsequent order was made denying the motion for a new trial made under the statute after such judgment, and which is sought to be reviewed by the present writ. I think that the order denying this motion was so far in the nature of a final judgment that it is the subject of a writ of error. It was a final determination of the new case made by the plaintiff in error, and a denial of an important right secured by the statute, so that it comes fairly within the rule. A writ of error is a remedial process, and ought to be used so as to advance the remedy, and ought not to be administered in the spirit of rigid and inflexible technicality. The plaintiff in error was entitled to the judgment of the appellate court on this motion. Only such motions and rulings as were made before the judgment of conviction could be reviewed on the first writ. The plaintiff in error had a right to make a motion for new trial after judgment, and the statute (section 2405) declares that the appellate jurisdiction of the court "shall extend to all questions of law which may arise upon a motion for a new trial," irrespective of whether made before or after judgment. In State v. Smith, 65 Wis. 93, 96, 97, 26 N. W. 258, the order of a circuit court affirming the order of a court commissioner discharging a prisoner on habeas corpus was held to be in the nature of a final judgment, and reviewable on writ of error, and Cole, C. J., said: "There is no express provision made by statute for reviewing such a decision of the circuit court, but we are inclined to hold that it may be had on a writ of error. The order made in such a proceeding by the court is in the nature of a final judgment, and the policy of our constitution and laws is to allow a review of such an adjudication; and it is most in accord with our rules of practice to allow this to be done on writ of error." In Com. v. Coy, 157 Mass. 200, 217, 32 N. E. 4, an application for a writ of error to an order denying a motion for a new trial made after judgment under a statute the same, in substance, as our own, was denied, for the reason that the discretion of the court in refusing a new trial could not be reviewed on a writ of error; the court stating that it did not appear that any ruling had been made upon a question of law. From this it must be understood that a writ of error would lie to such an order if it involved a question of law. It has been the settled law of this state for more than 40 years that this court will review a discretionary order on a writ of error, and reverse it if the discretion of the lower court has been abused or improperly exercised (Knox v. Arnold, 1 Wis. 71; West v. State, Id. 209); for in such case the question becomes one of law. I think, therefore, that the writ of error should have been sustained, and that the matter presented on the motion drawn from unwilling witnesses was such as to require a reversal of the order and a new trial. But, if the right to review the order on this writ is open to such serious doubt that it ought not to be maintained, then it is clearly the duty of the court, with the record before it, and the plaintiff in error seeking the exercise of its undoubted appellate jurisdiction, to adopt suitable rules, and frame a writ of certiorari for all such cases, and to issue the writ, and proceed to a review of the order, as the court did in Re Fisher, referred to.

WINSLOW, J. I concur in the foregoing opinion of Mr. Justice PINNEY.

NOTE (Marshall, J.). In preparing the opinion of the court, Com. v. Coy, 157 Mass. 200, 32 N. E. 4, was examined, but not cited, because the statute of that state, which first appears in the Revision of 1860, authorizes the review of questions of law and final judgments in criminal cases upon writs of error. Gen. St. c. 146, § 11. Formerly the law provided only for a writ of error to review a final judgment or award or order in the nature of a final judgment. Rev. St. 1836, c. 82, § 31; Laws 1842, c. 54. The holding of the court was then accordingly. Cooke, Petitioner, 15 Pick. 234–237. Whatever change afterwards occurred in the ruling of the court followed the change in the statute.

TOWNE v. SALENTINE.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

DEED — RESERVATION — VALIDITY OF TAX TITLE.

1. A deed in which the description of the property is followed by a reservation of a portion of that described, to be used for a specified purpose, as an alley, operates as a conveyance of the fee of the portion reserved, subject only to the easement declared.

2. Plaintiff owned the fee of a strip of ground on which rested an easement for its use as an alley in perpetuity in favor of the owners of both plaintiff's and defendant's properties. The strip was erroneously assessed to defendant as a part of his property. He allowed his property to be sold for taxes, and procured it, together with the strip, to be bought for his benefit, and after the execution of a tax deed the tax title was conveyed to him, under which he claimed ownership of the alley. No notice of the application for a tax deed was served on plaintiff. *Held*, that the tax deed was void, and should be set aside on repayment by plaintiff of the taxes, as required by statute.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Action by Annie L. Towne against Christian Salentine. Judgment for plaintiff, and defendant appeals. Affirmed.

On the 18th day of September, 1876, John Nazro owned lots 12, 13, and 14 in block 27, in the Fifth ward of the city of Milwaukee. Each lot was 50 feet wide, and fronted on Reed street. The three together constituted a tract 150 feet wide by 160 feet long, bounded by Reed street on the west, by Virginia street on the north, and a public alley on the east. On the day named Nazro conveyed a portion of said land to Joseph Burnham by deed, describing the tract conveyed as follows: "The west 105 feet of lots 12, 13, and 14, of block 27, 5th ward, and south 12½ feet of the east 55 feet of said lot 12 in block 27, reserving therefrom the east 5 feet of the west 105 feet of said lots 12, 13, and 14, and the south 12½ feet of the east 55 feet of said lot 12, to be used for and kept open as an alley for all owners of said lots 12, 13, and 14, in said block 27, for them and their heirs and assigns, forever." At the same time he conveyed the balance of said lots to Augusta Salentine by deed, describing the part conveyed as follows: "The east 55 feet of lots 12, 13, and 14 in block 27 in the city of Milwaukee, except therefrom the south 12½ feet of the east 55 feet of said lot 12, which are to be used as an alley for all owners of said lots 12, 13, and 14; also reserving therefrom the west 5 feet of the east 55 feet of said lots 12, 13, and 14, and the north 12½ feet of the south 25 feet of said lot 12, to be used for and kept open as an alley for all owners of said lots 12, 13, and 14 in said block 27, and for them and their heirs and assigns, forever." At the time of the commencement of this action, and for more than four years theretofore, plaintiff owned that portion of said lots described in the first-mentioned conveyance, and defendant that portion described in the second-mentioned conveyance, except so far as the title was affected by a tax deed hereinafter mentioned, under which defendant claimed the exclusive title to the 12½-foot strip. Since the two conveyances mentioned were made, the 10-foot alley, extending from Virginia street south through the lots, and connecting with the 12½-foot strip on the south side of lot 12, so as to allow the free passage by way of said alley and strip from the public alley on the east side of said lots to Virginia street, had been kept open with slight interruptions, and used in accordance with the terms of said conveyances. For several years prior to the commencement of this action, and including the year 1889, the 12½-foot strip was assessed as a part of the east 55 feet of lot 12, and, for the purpose of obtaining a tax deed covering the said strip, and cutting off plaintiff's rights thereto, defendant, for the year 1889, omitted to pay the taxes on the east 55 feet of said lot, and it was thereafter sold at tax sale for delinquent taxes, and bought in by C. W. Milbrath, who bought at the tax sale by arrangement with defendant. Thereafter Milbrath, in the interest of defendant, on the 27th day of September, 1893, took a tax deed covering said east 55 feet, and thereafter, on the 6th day of November, 1893, he quitclaimed to defendant, who thereupon asserted title to said strip, and placed a gate across it, but did not wholly exclude plaintiff therefrom. Defendant paid the taxes on the strip as a part of the east 55 feet of said lot 12 each year after 1889. The court found, among other things, the facts as above set forth, and that the only notice of the application for the tax deed served upon anybody was served on defendant; that he was not, at the time of such service, the owner or occupant of said strip, but that plaintiff was such owner, and in possession of the same. The court decided that the tax deed was void, and ordered plaintiff, as a condition of recovery, to pay the taxes assessed on the strip that had been paid by the defendant, with interest and charges, as provided by statute in such cases. It was stipulated by the parties that one-tenth of the tax on the whole lot would be an equitable division, and the court ordered accordingly. The amount of taxes was computed on the assessed valuation of the lot, exclusive of improvements, and was paid, and thereupon judgment was rendered in plaintiff's favor, from which judgment this appeal was taken.

Julius E. Roeber and Howard & Mallory, for appellant. Quarles, Spence & Quarles, for respondent.

MARSHALL, J. (after stating the facts). Several questions are presented by the exceptions to the findings of the trial court and the order for judgment. The first in order is that the deed from Nazro to Burnham conveyed only an easement; hence that plaintiff, claiming under that title, never was the owner of the 12½-foot strip, or had any interest therein, except that of an easement. This claim is based on the principle that in the construction of a deed the part excepted from the grant is held to be something not granted, and which does not pass at all from the grantor making the exception, unlike a reservation, which is the taking back of something included in the grant. Fischer v. Laack, 76 Wis. 313, 45 N. W. 104; Id., 85 Wis. 280, 55 N. W. 398; Rich v. Zeilsdorff, 22 Wis. 544. In the last case the rule which appellant invokes is stated as follows: "A reservation is always of something taken back out of that which is granted, while an exception is some part of the estate not granted at all." Testing the two conveyances made by Nazro,—the one to Burnham, through which respondent claims, and the other to Augusta Salentine, through which appellant claims,—it is plain that the title to the 12½-foot strip was by clear and unambiguous words in the first conveyance vested in Burnham, reserving the easement of a right of way over the strip for all owners of or persons interested in lots 12, 13, and 14; and that the words of exception in the deed to Augusta Salentine excepted out of the grant to her the 12½-foot strip, so that no title pass-

ed to her or any interest whatever except an easement in the strip to use the same as a passageway in common with the other proprietors of the lots. The deed appears to have been made advisedly. The conveyance in the one of the fee reserving the easement is consistent with the exception out of the grant in the other of the 12½-foot strip; the same, however, to be for use as a passageway for all persons interested in the three lots. Such was the holding of the trial court, and it is clearly right.

Error is assigned in that there was no allegation of possession, and hence that the complaint fails to state a good cause of action; but it appears that the complaint was properly amended on the trial so as to allege possession, and the fact was found by the court in plaintiff's favor on sufficient evidence.

There are sufficient facts found to avoid the tax deed. Either the fact that the strip was assessed as a part of the east 55 feet of lots 12, 13, and 14, instead of separately, and to plaintiff, the true owner; or the fact that no notice was served upon the plaintiff, as the owner and the party in possession, of the application for the tax deed,—was sufficient to avoid such deed, the action having been brought before the defects in that regard were cured by the statute of limitations. Whittaker v. Janesville, 33 Wis. 76; Jenkins v. Supervisors, 15 Wis. 11; State v. Williston, 20 Wis. 228; Hamilton v. Fond du Lac, 25 Wis. 490; Orton v. Noonan, Id. 672; Siegel v. Supervisors, 26 Wis. 70; Potts v. Cooley, 51 Wis. 353, 8 N. W. 158; Howe v. Genin, 57 Wis. 268, 15 N. W. 161.

It was stipulated that payment of one-tenth of the taxes chargeable to the whole lot, with interest and charges, under section 3087, Rev. St., as a condition precedent to respondent's right to recover, would be sufficient compliance with such section, and on that stipulation and the evidence the court ordered the payment of $46.12. It appears that this included about four-sevenths of the total taxes paid by defendant. In arriving at a conclusion the trial court considered only the tax on the lot, exclusive of the improvements. That is clearly indicated in the findings. Objection is made to this, and it is said by appellant that there is no evidence in the case to show upon what basis the computation was made. An examination of the printed case bears out such contention, but the bill of exceptions in the record discloses the fact that the east 55 feet of lots 12, 13, and 14 were assessed as a single tract, exclusive of the improvements, at $2,000, and the improvements at $1,500. The form of the stipulation was as follows: "It is agreed by the parties that a fair proportion of the taxes assessed on the entire tract of 55 by 150 feet would be ten per cent. of the whole for the 12½-foot strip embraced in the alley." The court obviously considered this stipulation, under the facts of the case, as requiring payment of 12 per cent. of the taxes, exclusive of the improvements, and made the computation and finding accordingly. We think the construction was right, and a verification of the computation shows that it is substantially correct. We see no reversible error in the case, and it follows that the judgment of the circuit court must be affirmed. The judgment of the circuit court is affirmed.

GOLDSMITH v. DARLING et al.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

STATUTE OF FRAUDS — SURRENDER OF WRITTEN LEASE.

An executed verbal agreement to surrender a written lease is not within the statute of frauds.

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by Bernard Goldsmith against R. H. Darling and another to recover rent. From a judgment for plaintiff, defendants appeal. Affirmed.

This action was brought to recover installments of rent alleged to be due on a written lease under which defendants rented a room in a building in the city of Milwaukee, known as the "Goldsmith Building," for a period of three years. Defendants admitted the execution of the lease, but alleged that they never entered into possession of the room, and that, after signing the lease, it was surrendered to plaintiff's assignee, and that such assignee accepted such surrender by taking possession of the room. A verdict and judgment were rendered for plaintiff, and defendants appealed.

Kinne & Curtis, for appellants. Miller, Noyes & Miller and Loyal Durand, for respondent.

MARSHALL, J. The trial court left it to the jury, on the evidence, to determine whether there was an executed verbal agreement to surrender the leased premises. The instructions which were excepted to did that, in effect, and nothing more. The exceptions to the charge of the court in this regard, now pressed upon the attention of this court, proceed upon the theory that it was error to admit evidence of a verbal agreement to surrender the rooms and lease, and error to leave it to the jury to find whether there was such verbal agreement entered into, because the surrender of a written lease cannot be properly established by parol evidence. The rule which appellants invoke is because of the statute of frauds (section 2302, Rev. St.): "No estate or interest in lands * * * shall be * * * surrendered unless by act or operation of law or by deed or conveyance in writing subscribed by the party * * * surrendering * * * the same." The learned counsel for appellants are in error in respect to proving by parol the surrender of a written lease. The rule of law invoked does not go to the extent of prohibiting proof by parol of a verbal agreement to surrender, but only that such an agreement does not, per se, effect such surrender and

a cancellation of the lease. To that effect are Kneeland v. Schmidt, 78 Wis. 345, 47 N. W. 438; Telford v. Frost, 76 Wis. 172, 44 N. W. 835; Witman v. Watry, 31 Wis. 638, and other cases cited by counsel. Also, O'Donnell v. Brand, 85 Wis. 97, 55 N. W. 154, and many other cases that might be cited. Also, all text writers on the subject. But the same authorities also hold, and it is elementary, in fact, that a verbal agreement to surrender, acted upon by an actual surrender and acceptance, is sufficient to cancel the lease.

The learned circuit judge charged the jury as follows: "In order to constitute a valid surrender of a written lease for a term exceeding one year, there must either be a surrender in writing, or there must be an agreement made between the parties, one side offering to surrender the lease and to surrender the premises, and an acceptance on the part of the landlord. If there was simply an agreement to surrender the lease, not acted upon or carried out by the parties, then there was no valid surrender of the premises and of the lease." Other portions of the charge proceed on the same line, all of which were excepted to. The instructions gave the law applicable to the case to the jury correctly. A written lease cannot be canceled by a parol agreement alone, but an executed parol agreement to surrender will effect such cancellation. We see no reversible errors in the case. It follows that the judgment of the superior court must be affirmed. Judgment affirmed.

CLOKUS et al. v. HOLLISTER MIN. CO. et al.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

CORPORATIONS—DEBTS DUE LABORERS—LIABILITY OF STOCKHOLDERS.

Rev. St. § 1769, providing that the stockholders of every corporation, other than railroad corporations, shall be personally liable for all debts that may be due and owing to laborers for services performed for such corporation, is not restricted in its operation to services performed in the state of Wisconsin.

Appeal from superior court, Milwaukee county; J. C. Ludwig, Judge.

Action by Charles Clokus and others against the Hollister Mining Company and others. From an order overruling a demurrer to the complaint, the Hollister Mining Company and certain other defendants appeal. Affirmed.

Plaintiffs brought this action, under section 1769, Rev. St., to enforce an alleged liability of the stockholders of the defendant Hollister Mining Company, a Wisconsin corporation, for debts due its laborers. The complaint does not show whether the claims, to enforce which this action was brought, accrued for labor performed in this state; but otherwise, by appropriate allegations, a good cause of action under the statute, it is conceded, is stated. Defendants Hollister Mining Company, William H. Morris, George P. Miller, and Benjamin K. Miller interposed a general demurrer to the complaint, which was overruled by the court, and from an order entered in accordance with such ruling this appeal was taken.

Edwin S. Mack, for appellants. Timlin & Glicksman (Julius J. Patek, of counsel), for respondents.

MARSHALL, J. (after stating the facts). Section 1769, Rev. St., under which this action is brought, reads as follows: "The stockholders of every corporation, other than railroad corporations, shall be personally liable to an amount equal to the stock owned by them respectively in such corporation, for all debts that may be due and owing to the clerks, servants and laborers for services performed for such corporation, but not exceeding six months' service in any one case." The sole question presented on this appeal is whether, under the statute, it is necessary to allege that the indebtedness accrued for labor performed in the state of Wisconsin. It is contended on the part of appellants that the statute was intended to protect only laborers for work done for corporations in this state; that persons who perform labor in another state, though for a Wisconsin corporation, cannot come here, to the home of the corporation, and invoke the benefit of the statute; therefore, in order to make out a complete statutory cause of action, the complaint must show that the work was performed in this state. We fail to see anything in the language of the statute to warrant appellants' contention. The words are plain, their meaning unmistakable. Therefore no resort can be had to the rules for judicial construction, for, "where the words of the law express clearly the sense and intent, we must hold to that." Smith, St. & Const. Law, § 478; Mundt v. Railway Co., 31 Wis. 451; Gilbert v. Dutruit (Wis.) 65 N. W. 511. "The stockholders of every corporation, other than railroad corporations, shall be personally liable to an amount equal to the amount of the stock owned by them respectively in such corporation, for all debts that may be due and owing to the clerks, servants and laborers for services performed for such corporation," etc., are the words of the statute. If the intention of the legislature was to restrict its operation to work performed in this state, such intention could have been made plain by saying so. For the court to construe the statute as if the words "in this state" formed a part of it, restricting the otherwise general application of the words "all work," would be judicial legislation, and not judicial construction. As has been held by this court, the statute under consideration should be liberally construed in favor of laborers. Mundt v. Railway Co., supra; Day v. Vinson, 78 Wis. 198, 47 N. W. 269. It was obviously enacted for their benefit, and should not be restricted in its operation by strict rules of construction, even if it were open to judicial interpretation, which it is not, by reason of the plain

and unmistakable meaning of the language used. All laborers, without reference to the place where the labor is performed, have a right to share, equally with laborers who perform work in this state, in the benefits of the statute. The action, when brought, is to be instituted and prosecuted for the benefit of all, without discrimination in respect to the place where the labor is performed. Day v. Vinson, supra; Day v. Buckingham, 87 Wis. 215, 58 N. W. 254. The order of the superior court, overruling the appellants' demurrer, is affirmed, and the cause is remanded for further proceedings according to law.

FOUNTAIN SPRING PARK CO. v. ROBERTS et al.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

LIABILITY OF THIRD PERSONS AIDING PROMOTERS TO DEFRAUD CORPORATION.

Appellants entered into an agreement with their codefendants whereby the latter were to form a corporation to purchase a tract of land; the promoters to represent to the stockholders that they would be compelled to pay $23,000 for the land, whereas in fact the land was to be purchased for about $13,000; appellants to receive as a consideration a portion of the $10,000 profits made by the promoters. *Held*, that appellants were, equally with the promoters, liable to the corporation for the money received from it by the fraud, in excess of the $13,000.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Action by the Fountain Spring Park Company against D. M. Roberts and others. From an order overruling a demurrer to the complaint, defendant Roberts and others appeal. Affirmed.

The complaint in this action, after appropriate formal allegations, sets forth, in effect, that about April or May, 1891, defendants Carrick and Willis formed a plan to promote the organization of plaintiff corporation, for the ostensible purpose of purchasing a certain tract of land, and selling the same at a profit, but in fact for the purpose of defrauding such persons as might become members of such corporation, and such corporation; that one Weber owned a land contract between him and Wells & Upham, the owners of the land which it was proposed to purchase, under which Weber had the right to become the purchaser thereof for the sum of $12,750, of which $6,000 consisted of a mortgage on the property, leaving, as the requisite cash payment to secure title to the premises under such contract, the sum of $5,750; that defendants Russell and Roberts, with knowledge of the fraudulent purpose of Carrick and Willis, entered into an agreement to assist them in carrying out the scheme, in consideration of receiving for their services a portion of the profits; that, for the purpose of inducing others to become stockholders in the proposed corporation, Carrick and Willis each took stock to the amount of $950, and then procured subscriptions for the balance of the capital stock, being $16,000, including their own subscriptions, by representing that the land was to cost $23,000, and was cheap at that price; that the persons who so subscribed for stock, relying upon such representations, paid in full for their stock, and took part in organizing the company; that all the money paid in was turned over to Carrick and Willis to enable them to secure the land at the price named; that, about the time Carrick and Willis were circulating the subscription paper and obtaining signatures thereto, Russell and Roberts, in accordance with their agreement with the former, and in furtherance of the fraudulent scheme to defraud the corporation, purchased the interest of Weber in the land contract for the sum of $600, and caused the same to be assigned to Russell, and held subject to the order of the conspirators, Carrick and Willis; that shortly thereafter the latter paid Russell and Roberts $2,000 out of the money paid in by the stockholders; that the title to the land was finally perfected in the corporation by the co-operation of all the defendants, each acting to carry out the general purpose of defrauding the corporation for their benefit; that the title was so perfected, subject to incumbrances amounting to $7,000, by the actual expenditure of $5,412.73; while it was made to appear to the corporation that the sum of $16,000 cash had been paid, making, with the incumbrances, the full sum of $23,000; that the sum of $10,587.27 was received by defendants Carrick and Willis from the corporation, over and above the amount which they actually expended in obtaining the land, which sum was unlawfully converted to their own use; that of this amount Carrick and Willis kept the sum of $8,525.27, and turned over to Roberts and Russell $2,062.27, which included a repayment to them of the $600 they paid to Weber. The entire history of the transaction is set forth in the complaint in detail, and judgment is demanded against the defendants for the amount of money which they retained as aforesaid. Defendants Roberts and Russell interposed a general demurrer to the complaint, which was overruled by the court, and from the order entered upon such ruling this appeal was taken.

P. G. Lewis and Williams & May, for appellants. Robinson & Geiger, for respondent.

MARSHALL, J. (after stating the facts). The law is well settled that the promoters of a corporation occupy such relation to it that they cannot legally take any advantage over other members of such corporation, and that they are accountable to it for any profits which they may, by a violation of duty in this regard, receive. Chandler v. Bacon, 30 Fed. 538; Mining Co. v. Spooner, 74 Wis. 307, 42 N. W. 259; Sewage Co. v. Hartmont, 5 Ch. Div. 394; Mining Co. v. Grant, 11 Ch. Div. 918; Short v. Stevenson, 63 Pa. St. 95; Oil

Co. v. Densmore, 64 Pa. St. 43; McElhenny's Appeal, 61 Pa. St. 188; 1 Mor. Priv. Corp. § 291; In re British Seamless Paper-Box Co., 17 Ch. Div. 471. In Mining Co. v. Spooner, supra,—a case precisely like this, in respect to defendants Carrick and Willis,—the law pertaining to the subject was most exhaustively discussed. Mr. Justice Taylor there stated the conclusion reached, as follows: "It being shown that the defendant formed the company for the purpose of purchasing this option, and having induced the present stockholders to furnish $90,000 of their money to make the purchase under the false impression, created by the defendants, that the defendants would be compelled to pay that amount for the purchase price, and the defendants having afterwards, as officers and agents of the company, purchased for the company such option, and paid themselves $70,000 more than they knew they could purchase it for, and $70,000 more than they in fact paid for the same, it seems to me there can be no doubt of their liability to refund to the corporation the $70,000 so obtained." It being conceded, as it must be, that there is a good cause of action stated in the complaint against Carrick and Willis, the actual promoters of the enterprise, and the persons who made the false representations, and directly received the fruits of the fraudulent transaction, the question is presented on this appeal of whether Roberts and Russell, whom they employed to assist them in perpetrating the fraud, for a portion of the profits, and who, with knowledge of the facts, aided them in the scheme, are also liable to the corporation. It is not alleged that they had any dealings directly with the plaintiff or its members, or occupied any "fiduciary relation," strictly so called, to them, or that they made any misrepresentations to the stockholders, or personally knew that any were made. To support the contention that they are not liable on the facts stated, counsel for appellants cite Oil Co. v. Densmore, and McElhenny's Appeal, supra but an examination of those cases fails to disclose wherein they are applicable to the facts alleged in the complaint. Here it is distinctly alleged that Carrick and Willis entered into an agreement with appellants whereby the former were to promote the organization of the corporation, and directly procure it to take the property at $23,000, and appellants agreed, in consideration of a part of the profits, to aid in carrying out the scheme which resulted in defrauding plaintiff out of $10,587.27; that appellants carried out their part of the agreement, and actually received a portion of the fruits of the fraudulent transaction, with knowledge of the facts. The principle of law that, where several persons combine to carry out a fraudulent conspiracy to cheat another, each and all of such persons are liable to the defrauded party, without reference to the amount of the fruits of the fraudulent transaction he obtains, or the degree of his activity in the scheme, is too well settled to admit of discussion, or to need any citation of authority in support of it. It is on that principle that defendants Roberts and Russell are charged in this case, and the allegations of the complaint in that regard, as appears from the statement of facts, make out a conspiracy to defraud, entered into and carried out by all the defendants; hence all are equally liable, and the complaint states a good cause of action, as to each. It follows from the foregoing that the demurrer to the complaint was properly overruled. The order of the circuit court for Milwaukee county is affirmed.

BACKHAUS v. CHICAGO & N. W. RY. CO.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

CARRIERS OF GOODS—LIABILITY AS WAREHOUSEMEN—OPPORTUNITY TO REMOVE GOODS—WHAT IS REASONABLE TIME.

1. The liability of a carrier, as such, ceases when a reasonable time has elapsed, after the goods reach their destination, for the consignee to remove them.

2. Actual notice of the arrival of goods, given by the carrier to the consignee's agent three days before the property was destroyed by accidental fire, released the carrier from liability.

Appeal from superior court, Milwaukee county; J. C. Ludwig, Judge.

Action by August F. Backhaus against the Chicago & Northwestern Railway Company. From a judgment for defendant on a special verdict, plaintiff appeals. Affirmed.

This action was brought to enforce an alleged liability of defendant, as common carrier, for goods, belonging to plaintiff, destroyed by fire while in possession of defendant. The facts requisite to a proper understanding of the case are sufficiently stated in the opinion.

Turner, Bloodgood & Kemper, for appellant. Winkler, Flanders, Smith, Bottum & Vilas, for respondent.

MARSHALL, J. Plaintiff, for a considerable period of time prior to the happening of the loss hereinafter mentioned, carried on the business of a commission merchant in the city of Milwaukee, handling and selling hops. He was not the owner of a warehouse, and had been accustomed to have his goods transported to Milwaukee over defendant's line of railway, and to leave the property in its possession, at its warehouse, till sold or reshipped; and it had been the custom of defendant, upon receipt of any such property at Milwaukee, over its line of road, to notify plaintiff by postal card, and of plaintiff to rely upon receiving such notice. For some weeks prior to the loss, plaintiff had been absent from the city, traveling in Dakota, while his son, a young man, was left to attend to his business. The property arrived in Milwaukee on the 24th day of October, 1892, and was unloaded and placed in defendant's warehouse October 26th, where it remained till October 28th, when it was destroyed by accidental fire. On October 25th

the son was personally notified of the arrival of the hops. On that day the defendant, in accordance with its uniform custom, caused a notice to be made out on a postal card for the purpose of notifying plaintiff, which it thereafter caused to be transmitted to him, at his Milwaukee address, through the mails. The jury found, specially, the facts in accordance with the foregoing statement, and also found in the affirmative in answer to the seventh question, which was as follows: "Was the plaintiff's son, on the 25th day of October, 1892, notified of the arrival of the two cars of hops at Milwaukee, containing, respectively, seventy-five and seventy bales?" Plaintiff moved to strike out the seventh question and answer, also the ninth question and answer, which last need not be particularly referred to, and for judgment, which motion was denied. Defendant moved for judgment on the special verdict, which motion was granted, and judgment was entered accordingly, from which this appeal was taken.

The turning question here is, did the liability of defendant as a common carrier terminate before the fire? The law in respect to the subject, generally, has been long settled in this state. In Wood v. Crocker, 18 Wis. 345, the case of Moses v. Railway Co., 32 N. H. 523, was approved, as correctly stating the true rule; and the decision then rendered, though in conflict with some authorities on the subject, has not since been departed from, though the matter has several times been before the court. Wood v. Railway Co., 27 Wis. 541; Parker v. Railway Co., 30 Wis. 689; Lemke v. Railway Co., 39 Wis. 455. In the early case it was held that the liability of a railway company, as a common carrier, for goods transported over its line, continues until the goods are ready to be delivered at the place of destination on the road, and the owner or consignee has had a reasonable opportunity to take them away; and, on the subject of "reasonable opportunity to remove the goods," the court held, in effect, that the words are not to be construed with reference to any particular circumstances in the condition of the owner or consignee of the property which may render it necessary, for his own convenience or accommodation, that he should have a longer time or better opportunity than if he resided in the vicinity of the depot, and was prepared with the means and facilities for taking the goods away, which doctrine has always since been adhered to. It follows that the owner or consignee of goods transported over a railroad is himself held responsible to be vigilant in determining the time of their arrival, and to remove his property as soon as practicable after the termination of the transit; that his own convenience or absence does not cut any figure in the matter.

It is contended by appellant that the circumstance of respondent's custom to notify, by mail, patrons of its road of the arrival of their goods at the place of destination, and of appellant to rely upon it, should be held to prevent the former from invoking the benefit of the established rule that notice is not necessary in order to terminate the liability of a common carrier; but the view we take of this case renders it unnecessary to decide that question. The jury found that actual notice was given to appellant's son on the 25th day of October, 1892; and the evidence clearly shows that the young man was his father's agent, and the only person to whom notice would have come within a reasonable time, if it had been seasonably sent by mail, as appellant claims it should have been. Hence, for the purposes of this case, notice was given to appellant, on the 25th day of October, of the arrival of the hops, which was three days before the fire. Three days, as a matter of law, constituted reasonable time to remove the property. Lemke v. Railway Co., supra. Hence, before the loss complained of accrued, the liability of the respondent as a common carrier had terminated. We conclude that the trial court properly overruled appellant's motion to strike out the seventh and ninth questions, and for a judgment, and properly gave judgment for respondent. The judgment of the superior court is affirmed.

BREVIG v. CHICAGO, ST. P., M. & O. RY. CO.

(Supreme Court of Minnesota. Feb. 7, 1896.)

CARRIERS—EJECTION OF TRESPASSERS—AUTHORITY OF BRAKEMAN—JOINT TRESPASSERS—CONTRIBUTORY NEGLIGENCE.

1. *Held*, a freight-train brakeman has implied authority to eject trespassers and apparent trespassers from the freight cars of the train.

2. But, where a person bribed such a brakeman to permit him to ride among the freight in a freight car, *held*, the brakeman and such person thereby became joint trespassers, and the brakeman's implied authority to represent his employer in ejecting such person thereby ceased, so that, unless it appeared that the brakeman had received subsequent express authority to eject such person, his act of doing so in an improper manner was simply the assault of one joint trespasser upon another, and not the act of the railway company.

3. This is true, even though the conductor had, in the meantime, discovered such person in the car, and locked him in the same, and he continued to be so locked in the car until such brakeman unlocked the door, and so ejected him.

4. On the evidence in this case, *held*, the plaintiff was not a passenger, but a joint trespasser with the brakeman who let him into the car.

5. But, whether the brakeman who let him into the car was the same one who drove him out was, on the evidence, a question for the jury.

6. Whether plaintiff was compelled, by force, to jump from the train, or whether his act was so far voluntary that he could be guilty of contributory negligence, and whether he was guilty of contributory negligence in jumping from the train, were, on the evidence, all questions for the jury.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Seagrave Smith, Judge.

Action by Edward H. Brevig against the Chicago, St. Paul, Minneapolis & Omaha Railway Company. Verdict ordered for defendant. From an order denying a new trial, plaintiff appeals. Reversed.

John W. Arctander and Ludvig Arctander, for appellant. Thomas Wilson, S. L. Perrin, and L. K. Luse, for respondent.

CANTY, J. Plaintiff claims damages from defendant in this action on the ground that, while a passenger on one of its railroad trains, he was by threats of bodily violence, to him made by one of defendant's servants, in charge of the train, and while the train was in motion, compelled to jump from the train, by reason of which he was run over, and one of his arms crushed under the wheels, so that it had to be amputated. On the trial a verdict was ordered for defendant, and from an order denying a new trial plaintiff appeals.

On the trial plaintiff testified that he and one Hanson left Minneapolis, May 8, 1894, to go to Lake Crystal, and walked out along the line of defendant's railroad as far as Hamilton. There he found a passenger train and a freight train, both going toward his destination. It was after dark in the evening. They saw a man at the freight train. Said the witness: "He asked us if we were going out West, and Hanson said we were going to Lake Crystal, and the man said he would take us there for 50 cents apiece. He was a train man. I know he was a train man, because he had gloves on his hands, and carried such a lantern as train men generally carry. We paid him 50 cents apiece. He put us in a box car full of machinery." On cross-examination he testified: "I did not ask the man to show me the caboose. He told us to go into the box car. * * * The man took us up to the box car, and let us in through the end door. I don't know how big the end door was. We had to climb up on the bumpers to get in. The train man opened the door for us, and we crawled in. It was rather dark in there. There was much machinery in there. The train man shut the door after us, but did not lock it, he left it a little open. Hanson and I did not go to sleep. I stood up there all the time. * * * I saw the caboose of the train. I did not go back to it. The train was made up of freight cars, except the caboose. * * * We did not take the passenger train, because the train man came around just then, just as we were going to the station to buy a ticket. He told us we could go on the freight train, and he charged us 50 cents apiece. I took this freight train, instead of the passenger train, because, when the man came and told me to, I thought it was all right, because I had never gone on this train. I had gone on passenger trains before. I would not rather ride in a box car filled with machinery than in a passenger coach; but I thought it was all right, when a person paid for it, and the train man came and took you up. I did not think that it was cheaper, but I had heard there was three classes of tickets. * * * I had never bought any different classes of tickets in this country before. * * * There were no seats in this box car. The machinery in there were binders and mowers. I did not think it was a proper place for passengers. * * * I did not know, for sure, what the fare was from Hamilton to Lake Crystal. I thought it was about $1.80." He further testified: "When we had come as far west as Minneopa Falls the train man came in. He told us to go out. He opened the door, and then said he was going to keep us in the car. * * * He had a lantern in his hand. He said he would keep us in the car until he found out how we got in there, and he asked how we got in there. He first said we should go out. Then we were ready to go out, and he shut the door, and told us to stay there until he came in. He shut the door so we could not get out. When he told me to go out, I said to him I had paid 50 cents to get to Lake Crystal; but I said that did not cut any figure, and we were ready to go out, and we started to go out, when the door was shut. We tried to open the door two or three times, but there was a bar on the outside so we could not open it. Then the train started up again, and when we had run about one mile from the station, a man came and opened the door, and told us to get out. That was a train man. He said we should get out, and that quickly. He swore. * * * My partner jumped first. The man stood with a coupling pin in his hand, and told me to get out; told me to get out, and jump. He said he would kill me. He had plenty of men on the train to get me out, if I did not go out. When he threatened to kill me, I was afraid he was going to knock me in the head; and, of course, I jumped out, and the wheels ran over my left arm." Further evidence was given as to the identity of the train man, or different train men, who took part in these transactions. Evidence was given, on behalf of plaintiff, tending to prove that the train man who took the 50 cents apiece from plaintiff and Hanson was the same one who locked them in the car, and afterwards drove them out, and compelled them to jump off the train. Evidence was also given, on behalf of plaintiff, tending to prove that one train man put them in the car, another locked them in, and still a different one drove them out. Evidence, so given, also tended to identify the conductor of the train as the man who locked them in the car. The evidence introduced by plaintiff was contradictory and confusing as to these matters. The conductor was called as a witness, and denied that he locked these parties in the car, or that he had any knowledge that they were

on his train until after plaintiff was injured. This is all of the testimony which it is necessary to state.

We are of the opinion that plaintiff's claim that he was a passenger is wholly untenable. Neither can any weight be given to his claim that he was so ignorant of the ways of the country, or of any other civilized country for that matter, that he did not know that a passenger of any grade would not be carried by a railway company stowed away in the dark in a freight car filled with freight. This question was lately before us in the case of Janny v. Railway Co., 65 N. W. 450, and we so held. We must hold, as a question of law, from the testimony, that plaintiff was simply a joint trespasser with the brakeman whom he bribed to violate his duty to his employer. As we have already stated, there was evidence tending to prove that, while the train was standing on the track at Minneopa, the conductor locked the plaintiff in the freight car, and that he was then carried to the point where he was compelled to jump off the moving train. It is claimed by plaintiff that this constituted him a passenger, and imposed on defendant the high degree of care for his protection which is imposed on it for the protection of other passengers. We are of the opinion that such a prisoner is not a passenger, in any proper sense of the word. The defendant could still eject the plaintiff in any proper manner, at any proper time and place, and he would not have a cause of action against it for being thus released and ejected. But, whether rightfully or wrongfully a prisoner (a question not argued), he would certainly be entitled to a much higher degree of care for his protection than would a mere trespasser not thus in custody; and the defendant would be liable for the wrongful act of its brakeman in ejecting him in an improper manner. But, even though the plaintiff was not thus in custody at all, but continued to be, what he originally was, a mere trespasser, we are of the opinion that the defendant is liable for the wrongful act of its brakeman in ejecting him in an improper manner, unless the brakeman who did so was the one who let him into the car.

This brings us to the principal question in the case. Has a brakeman on a freight train implied authority to eject a trespasser or apparent trespasser? There is a conflict in the authorities on this question, but we are of the opinion that he has such authority. It seems to us that correct reasons for holding he has such implied authority are given in Patt. Ry. Acc. Law, § 111. After stating that some of the cases hold that a brakeman has not such authority, it is said: "The doctrine of most of the cases, however, is that, whenever a railway servant is put in charge of any property of the railway, as a station master in charge of a station, or a conductor in charge of a train, or an engine driver or fireman in charge of an engine, or a brakeman in charge of a car, that servant is necessarily charged with the duty of protecting that particular property, and he is, therefore, for that purpose, vested with an implied authority to remove trespassers therefrom; and if he makes a mistake, either by removing a person who is rightfully therein or thereon, or by using unnecessary violence in the removal of a trespasser, the railway must be held liable for all such injuries as result, in the one case from the removal, and in the other case from the unnecessary violence with which that removal is effected." While the authority of a freight-train brakeman is quite limited, his duties do not consist merely of turning the brakes. By universal custom he has police duties as to the cars immediately under his charge. As said in Hoffman v. Railroad Co., 87 N. Y. 31: "The implied authority in such a case is an inference from the nature of the business, and its actual daily exercise, according to common observation and experience." "Suppose a train was standing still, and a trespasser was put off by force by a brakeman, using no unnecessary violence; would it not be a good defense, to an action against him for the assault, that he was a brakeman, and did the act complained of in that capacity, although without express authority?" Id.

But we are also of the opinion that the brakeman, who conspired with plaintiff to commit a trespass against defendant, had no implied authority, subsequently, to represent defendant in ejecting plaintiff, and that, if he was the brakeman who did eject plaintiff, it was simply the assault of one joint trespasser upon the other, for which defendant is not liable. This is true whether the conductor had locked the plaintiff up or not. By plaintiff's own procurement, the brakeman had ceased to be the disinterested servant of the defendant, or, as far as that transaction was concerned, its servant at all. His motive in driving plaintiff off the train while in motion might have been, not to serve his master, but to cover up his offense against his master. If there is any doubt as to that, the doubt must be resolved against the wrongdoer. Plaintiff and the brakeman became joint trespassers at the beginning of the transaction, and it must be presumed that they continued such to the end. The brakeman's implied authority to represent the defendant in ejecting his confederate had ceased; and if he was subsequently given express authority to eject him, the burden was on plaintiff to prove it. Then, if the same brakeman whom he bribed to let him into the car drove him out of it, he is not entitled to recover. But, whether or not it was the same brakeman, or another brakeman, was, on the evidence, a question for the jury. Whether plaintiff was compelled, by force, to jump from the train, or whether his act was so far voluntary that he could be guilty of contributory negligence, and, if so, whether he was guilty of con-

tributory negligence in jumping from the train, were, on the evidence, all questions for the jury. The order appealed from must be reversed, and a new trial granted. So ordered.

On Petition for Rehearing.

(Feb. 20, 1896.)

PER CURIAM. The application for a reargument of this case is mainly based upon the ground that the court overlooked and failed to consider the evidence of the conductor of the train that no brakeman had authority to eject trespassers; that, on the contrary, the exercise of any such authority by brakemen was expressly forbidden by the company. It is assumed that we have decided, not only that (a) the duties of a brakeman upon a freight train are such that, in the absence of evidence showing the scope thereof, it will be presumed that he has implied power to remove trespassers from the train, but also (b) that this will be conclusively presumed, even against the uncontradicted evidence that no such power was conferred, but, on the contrary, expressly withheld, and its exercise forbidden, by the railway company. Although the testimony of the conductor was very briefly referred to in defendant's statement of facts, it was not once alluded to in either the printed or oral argument, but the case was argued exclusively upon the question whether implied authority on part of brakemen to eject trespassers is to be presumed from the nature of their employment. This question we answered in the affirmative, but the further question, whether this presumption was conclusive, or whether it might be rebutted by evidence affirmatively showing that such authority was expressly withheld, or its exercise forbidden, was not considered or decided by us.

A railway company owes trespassers no contract duty. Neither are trespassers in a position to invoke the doctrine of apparent authority. They can only, under any circumstances, hold the company liable for acts of its agents or servants done within the scope of their actual authority, either express or implied. Therefore, while we are of opinion that the general duties of brakemen are such that their implied authority to eject trespassers will be presumed, yet we are also of opinion that as to a trespasser, which plaintiff clearly was, this presumption may be rebutted by evidence showing that such authority was expressly withheld, or its exercise forbidden; and, if that fact was established, the defendant would not be liable to the plaintiff for the acts of its brakeman in ejecting him from the train. How strong or complete this evidence should be, in order to make the question one of law, for the court, instead of one of fact, for the jury, it is unnecessary now to consider, further than to say that, in view of the general nature of the occupation of brakemen, the evidence that authority to eject trespassers had been expressly withheld or forbidden should be clear and full, in order to overcome the presumption of the existence of such implied authority. The testimony of the conductor of this particular freight train was the only evidence on the subject. It did not appear how long he had been in the employment of the defendant, or what was the extent of his knowledge of the rules of the company or of the general usage on its trains. The "bulletin" of the company to which he referred was not produced. No general officer of the company was called as a witness. In view of all these circumstances, we are of opinion that, although the testimony of the conductor was not contradicted, yet the question of the authority of the brakeman to eject the plaintiff was one for the jury. Application denied.

STATE ex rel. COOLEY v. SPIRK, County Treasurer.

(Supreme Court of Nebraska. March 3, 1896.)

REVIEW ON APPEAL.

There is, in this error proceeding, involved only a question of fact determined by the district court upon conflicting evidence. Its judgment is therefore affirmed.

(Syllabus by the Court.)

Error to district court, Saline county; Hastings, Judge.

Action by the state, on the relation of Emily J. Cooley, against one Spirk, county treasurer of Saline county. Judgment for defendant. Plaintiff brings error. Affirmed.

Joshua Palmer and Abbott & Abbott, for plaintiff in error. J. H. Grimm, Co. Atty., A. S. Churchill, Atty. Gen., and Geo. A. Day, Dep. Atty. Gen., for defendant in error.

RYAN, C. Emily J. Cooley, as relator, applied in the district court of Saline county for a mandamus requiring the county treasurer of said county to accept the money she had tendered him, and apply the same to the payment of delinquent interest, and receipt for the same according to law. The relator was the wife of Rufus Cooley, who died March 18, 1894, and she became his executrix June 15th immediately thereafter. On July 18, 1883, said Rufus Cooley purchased of the state of Nebraska the N. W. ¼ of the S. E. ¼ of section 16, in township 8, range 2 E. of the sixth P. M. This land was about three miles distant from the town of Friend, and was situate in Saline county. The purchase price of the land was $277.50, due July 18, 1893. On this sum, meantime, he was required to pay on the 1st day of January of each year $14.98. These installments of interest he had paid for the years 1885, 1886, and 1887, but, as alleged in the petition, through mistake or inadvertency he failed to make any further payment. In 1889 Mr. Cooley took a government homestead in Cheyenne county, and remained there until some time in 1890. On March 12, 1890, the

contract of Mr. Cooley was declared forfeited by proper state authority, and the only question presented by the record in this case is whether or not this forfeiture was without proper notice to Mr. Cooley. It is not clear just where Mr. Cooley was living when this forfeiture was declared, but we infer from all the evidence submitted on this question that he was in Cheyenne county. His wife and children, according to the testimony of Mrs. Cooley, had their home in Lincoln, Neb., during the years 1889 and 1890, but she further said that her children were attending the State University, and that she and her children vibrated back and forth between Lincoln and Cheyenne counties. She further testified that her husband's business address during 1889 and 1890 was in Lincoln. There were introduced in evidence a tax receipt and a redemption certificate issued by the treasurer of Saline county, both of which Mrs. Cooley testified had been sent to her at Lincoln by the aforesaid treasurer. These were of date March 4, 1890. There was also introduced a letter from J. P. Clarey, county treasurer of said county of Saline, addressed to R. Cooley at Lincoln, but, as this was dated December 15, 1887, it had but little bearing upon the important fact in this case of the knowledge possessed by another county treasurer of the whereabouts of Rufus Cooley in 1889 and in the forepart of 1890. Mr. Sadilek, who was treasurer of Saline county in 1889 and 1890, and Mr. Spirk, who was during said time his deputy, each testified that he had no knowledge during that time of Mr. Cooley, and that, not being informed as to his place of residence, one of them sent a registered letter addressed to Mr. Cooley at Friend, the post office nearest the land described in the school-land contract, in which letter was inclosed due and timely notice of the proposed forfeiture of Cooley's said contract. This registered letter was returned uncalled for, and thereafter, as shown by proof of publication thereof, there was notice published in the Wilber Republican, a weekly newspaper published in said county, for three consecutive weeks, being on September 5, 12, and 19, 1889, that within 90 days from the date of said notice—August 9, 1889—said school-land contract would be forfeited. This forfeiture in fact, as already stated, was declared on March 12, 1890. In the same newspaper there was published a notice that, if the amount due was not meantime paid up, the commissioner of public lands and buildings of the state would, on and after April 19, 1890, at the office of the county treasurer of Saline county, offer for lease the land described in the aforesaid school-land contract. No payment having been made, there was made by the proper state authorities another lease of this land on February 11, 1892, to John Jahn, Jr. The district court found adversely to the relator's contention, and from a judgment to that effect she prosecutes error proceedings to this court. Upon the question whether or not the county treasurer knew of the place of residence or address of Mr. Cooley in 1889 or 1890 there was such an amount of merely conflicting evidence that we cannot ignore the conclusion of the court in respect thereto. There seems to be no attempt by the plaintiff in error to controvert the proposition that, if this fact must be taken as established, then service by publication was proper, and that under the rules laid down in State v. Clark, 39 Neb. 899, 58 N. W. 585, the conclusions of the trial court must be sustained. We think counsel are correct in this assumption, and the judgment of the district court is affirmed. Affirmed.

JOHNSON v. REED.

(Supreme Court of Nebraska. March 3, 1896.)

ADMISSIONS BY PLEADING — ACTION ON APPEAL BOND—RELEASE OF SURETY.

1. A party is not required to prove an averment which is admitted by the pleading of his adversary.

2. The issuing of an execution is not a condition precedent to the right of a judgment creditor to maintain an action against the surety on an appeal undertaking given to enable the judgment debtor to appeal. Flannagan v. Cleveland, 62 N. W. 297, 44 Neb. 58.

3. The mere continuance of a cause on appeal, without the consent of the surety on the appeal bond, will not release such surety. Howell v. Milling Co., 54 N. W. 126, 36 Neb. 80.

4. Judgment was recovered before a justice of the peace against two makers of a promissory note, who jointly appealed to the district court. The undertaking of the surety on the appeal bond was to pay any judgment rendered against the appellants. *Held*, that the surety is liable, notwithstanding judgment in the appellate court was against only one of the appellants.

(Syllabus by the Court.)

Error to district court, Douglas county; Hopewell, Judge.

Action by James H. Johnson against David Reed in the county court. Action dismissed, and plaintiff brought error to the district court, where the judgment was affirmed, and plaintiff brings error. Reversed.

L. D. Holmes, for plaintiff in error. Robert W. Patrick, for defendant in error.

NORVAL, J. This was an action brought by James H. Johnson against David Reed in the county court, upon the following appeal undertaking:

"The State of Nebraska, Douglas County—ss.: James H. Johnson, Plff., v. Georgianna E. Crossle and Henry W. Crossle, Defts. Before A. C. Reed, a justice of the peace of Omaha precinct, Douglas county, Nebraska. Whereas, on the 27th day of December, 1888, James H. Johnson recovered a judgment against Georgianna E. Crossle and Henry W. Crossle before A. C. Reed, a justice of the peace, for the sum of $156.98, and costs of suit, taxed at $2.50, and the said defendant intends to appeal said cause to the district court of Douglas county: Now, therefore, I, David Reed, do promise and undertake to the

said James H. Johnson, in the sum of three hundred and thirteen dollars, that the said Georgianna E. Crossle and Henry Crossle shall prosecute their appeal to effect, and without unnecessary delay, and that said appellants, if judgment be adjudged against them on the appeal, will satisfy such judgment and costs. David Reed.

"Executed in my presence, and surety approved by me, this 5th day of January, 1889. A. C. Reed, Justice of the Peace."

The petition alleges the execution and delivery of the undertaking, the approval thereof, the prosecution of the appeal to the district court, the recovery therein by the plaintiff of a judgment against Henry W. Crossle for the sum of $182.90 and costs of suit, and that the whole of said judgment is unpaid. The answer sets up affirmative defenses, all of which, except that no execution has been issued upon the judgment recovered in the appellate court, were put in issue by the reply. At the close of the plaintiff's testimony in the suit on the undertaking, the defendant moved for a nonsuit, upon the following grounds: "(1) No evidence has been introduced showing that this defendant ever signed any bond as in the petition herein alleged. (2) No execution has been issued in pursuance of the judgment in said petition alleged to have been obtained against the principals in the bond, nor any proof that any attempt has been made to collect such judgment from the said principals. (3) That there was an alteration in the terms of the bond in the said petition pleaded, without the consent of this defendant. (4) That there was an alteration of the relations between the principals named in the bond in this petition pleaded." This motion was sustained by the county court, and the cause dismissed. Thereupon plaintiff prosecuted error to the district court, where the judgment and ruling of the county court were sustained. To obtain a reversal of said judgment of affirmance is the object of these proceedings.

Did the district court err in affirming such judgment of the county court? The proper determination of the question requires an examination and consideration of the different grounds set forth in the motion to dismiss, which we will take up in their order.

As to the lack of evidence on the part of plaintiff to show that the defendant signed the appeal undertaking, all that we need say is that the answer admits the signing of the instrument by the defendant. Plaintiff, therefore, was not called upon to prove the execution of the bond.

The second ground urged for the dismissal was equally untenable. There is no provision of statute which requires that an execution shall be issued upon a judgment before an action can be maintained upon an appeal bond. The conditions in the bond in suit are in the language of the statute,—that appellants will prosecute their appeal to effect and without unnecessary delay, and that said appellants, if judgment be adjudged against them on appeal, will satisfy such judgment and costs. Upon the recovery of the judgment against the principal in the bond, the surety became at once absolutely liable for the payment thereof, upon the default of the principal to do so. The right of action accrued upon the bond upon the rendition of the judgment, and the failure to issue an execution is no defense. Flannagan v. Cleveland, 44 Neb. 58, 62 N. W. 297.

The third ground of the motion is without merit. The question of the alteration of the terms of the bond could not have arisen at the time plaintiff closed the case. But, in any event, no such issue was tendered by the pleadings. The alleged alteration pleaded in the answer consisted in the continuance of the cause from which the appeal was taken, when it was reached for trial, without the knowledge and consent of the surety. This constituted no defense, as it did not operate to release the surety. Howell v. Milling Co., 36 Neb. 80, 54 N. W. 126.

We presume the decision in the county court, as well as in the court below, was based upon the fourth or last subdivision of the motion. The judgment from which the appeal was taken was against both Georgianna E. Crossle and Henry W. Crossle, while on the trial on appeal plaintiff recovered judgment against Henry W. Crossle alone. As the judgment appealed from was against two defendants, and in the appellate court plaintiff recovered against one of them alone, the question is squarely presented whether the surety is liable, under the terms of his bond, for the payment of this last judgment. Section 1006 of the Code declares: "In all cases, not otherwise specially provided for by law, either party may appeal from the final judgment of any justice of the peace, to the district court of the county where the judgment was rendered." Section 1007 reads as follows: "The party appealing shall within ten days from the rendition of judgment, enter into an undertaking to the adverse party, with at least one good and sufficient surety, to be approved by such justice, in a sum not less than fifty dollars in any case, nor less than double the amount of judgment and costs, conditioned: First, that the appellant will prosecute his appeal to effect and without unnecessary delay. Second, that if judgment be adjudged against him on the appeal, he will satisfy such judgment and costs. Such undertaking need not be signed by the appellant." Section 1014 reads thus: "When any appeal shall be dismissed, or when judgment shall be entered in the district court against the appellant, the surety in the undertaking shall be liable to the appellee for the whole amount of the debt, costs, and damages recovered against the appellant." The undertaking under consideration is purely statutory, and we must look to the statute under which it was executed in determining its legal effect. In speaking of the appellants,

the statutes use the singular number alone. It in unequivocal language makes the surety liable for any judgment recovered by the appellee against the appellant in the district court. Here judgment was against two in the justice's court, upon a promissory note, a joint and several obligation. Either one of the defendants alone had a perfect right, under the statute, to prosecute an appeal upon giving an undertaking; and, had that method been adopted, it would have brought up the case as to both. Wilcox v. Raben, 24 Neb. 368, 38 N. W. 844; Polk v. Covell, 43 Neb. 884, 62 N. W. 240. And there can be no room for doubt that the surety on such undertaking would have been liable for any judgment recovered in the district court against the defendants or either of them. While one out of two or more persons against whom a judgment has been rendered may alone appeal, he may, if he so prefers, unite with others in the appeal by giving a single undertaking, in which event the surety on the appeal bond is liable thereon when judgment in the district court is against part of the appellants only. When two or more appeal by uniting in a single undertaking, the sureties thereon are the sureties of all, and must answer for any judgment which shall be recovered against one or all of the appellants. The effect of executing this single undertaking was to prevent an execution issuing out of the justice's court upon the judgment against either of the appellants. The appeal, in effect, was several by each defendant; and it would be a narrow construction of the statute, and against the manifest intention of the lawmakers, to hold that the surety in this case is released from his obligation merely because the judgment in the appellate court was not against both the appellants. The precise question has been considered and passed upon by other courts in harmony with the conclusion reached by us, as an examination of the following cases will disclose: Seacord v. Morgan, 35 How. Prac. 487; Potter v. Van Vranken, 36 N. Y. 629; Bentley v. Dorcas, 11 Ohio St. 398; Alber v. Froelich, 39 Ohio St. 245; Helt v. Whittier, 31 Ohio St. 475; Hood v. Mathis, 21 Mo. 308. The only case we have found in our investigation of the question which holds a contrary doctrine is Lang v. Pike, 27 Ohio St. 498, which was decided by a divided court; and that decision was expressly overruled by a united court in Alber v. Froelich, reported in 39 Ohio St. 245.

None of the reasons assigned in the motion made in the county court for granting a dismissal of the cause being well taken, and no other sufficient cause appearing for sustaining said motion, the district court erred in affirming the judgment of the county court. The judgment of the district court must be reversed, and the cause remanded to that court, with directions to reverse the judgment of the county court. Reversed and remanded.

GOODIN v. PLUGGE.

(Supreme Court of Nebraska. March 3, 1896.)

ALTERATION OF NOTE — RECEPTION IN EVIDENCE.

Where a promissory note is offered in evidence, and it is apparent from an inspection that there has been a material alteration thereof, it may generally be received. Whether so altered prior or subsequent to its execution and delivery is a question, finally, for the determination of the trial court or the jury, as is any controverted fact in the case, from a consideration of all the competent evidence adduced by the parties explanatory or tending to settle the disputed point. Bank v. Morrison, 22 N. W. 782, 17 Neb. 341.

(Syllabus by the Court.)

Error to district court, Colfax county; Sullivan, Judge.

Action by C. W. Goodin against John H. Plugge. Judgment for defendant. Plaintiff brings error. Affirmed.

Phelps & Sabin, for plaintiff in error. T. W. Whitman and H. C. Russell, for defendant in error.

HARRISON, J. An action was instituted on a promissory note in the county court of Colfax county, and from a judgment rendered there was appealed to the district court of the same county. The defenses interposed were that there had been a material alteration in the note subsequent to its execution, and duress. There was a trial to the court and a jury, and a verdict and judgment for defendant; hence these proceedings in error on behalf of the plaintiff. With reference to the defense of duress it may be said that there was not sufficient evidence to sustain it, and we will turn our attention to the one in relation to a material alteration. Counsel for plaintiff contend that it devolved upon the defendant to show by a preponderance of the evidence that there had been such an alteration, and, further, that it was made subsequent to the execution and delivery of the note. The trial judge instructed the jury, in reference to the burden of proof, as follows: "As to each of said defenses the burden of proof is on the defendant, and before you can find in his favor on either of said issues he must produce a preponderance of the evidence thereon. If the evidence on either of said issues is equally balanced, or if the preponderance is with the plaintiff, you should find for the plaintiff as to such issue." The contention in behalf of defendant is, in substance, that when the defendant had offered proof which tended to show a material alteration, the burden of proof was then upon the plaintiff to explain it, or establish that it was made before execution. In cases in which the point here involved has arisen and been discussed and decided, there appears great contrariety in the opinions, and different and opposite rules have been announced. In Neil v. Case, 25 Kan. 510, it was said, with reference to this subject: "This is a vexed ques-

tion, and the books are full of diverse decisions. Four different rules are generally stated: First, that an alteration apparent on the face of the writing raises no presumption either way, but the question is for the jury; second, that it raises a presumption against the writing, and requires, therefore, some explanation to render it admissible; third, that it raises such a presumption when it is suspicious, otherwise not; fourth, that it is presumed, in the absence of explanation, to have been made before delivery, and therefore requires no explanation in the first instance. * * * The question as to the time of the alteration is, in the last instance, one for the jury. It is, like any other fact in the case, to be settled by the trior or triors of the facts. Generally, the instrument should be given in evidence, and in a jury case should go to the jury upon ordinary proof of its execution, leaving the parties to such explanatory evidence of the alteration as they may choose to offer. * * * Perhaps there might be cases where the alteration is attended by such manifest circumstances of suspicion that the court might refuse to allow the instrument to go before the jury until some explanation." The rule governing this question in this state was announced by the court in the case of Bank v. Morrison, 17 Neb. 341, 22 N. W. 782, as follows: "Where a material alteration is apparent on the face of a written instrument offered in evidence, the question as to whether such alteration was made before or after the execution and delivery of such instrument is, in the last instance, one for the jury or trial court. It is, like any other fact in the case, to be settled by the trior or triors of facts. Generally, in such case the instrument may be given in evidence, and may go to the jury or trior of fact, leaving the parties to such explanatory evidence of the alteration as they may choose to offer." The facts and circumstances of the present case bring it within the doctrine thus announced; hence it will be adopted, and applied herein.

The claim in regard to the alteration of the note in suit was that it was originally made for the sum of "seventy-four and $^{35}/_{100}$ dollars," and that, in the body of the note, and immediately in front of the above-named words as they there appeared, there was inserted the words "one hundred," thereby increasing it by the amount shown by the two added words, and, further, that the figures in the upper left-hand corner of the note had been so changed as to indicate the note to be for the sum of $174.35, when, as executed, such figures had shown it to be for $74.35. There was evidence more or less positive in relation to any alteration having been made, and, if so, the time when, and we cannot say that the finding of the jury was plainly opposed to the weight of the testimony, or clearly wrong. This being true, it will not be disturbed or reversed. McLaughlin v. Sandusky, 17 Neb. 110, 22 N. W. 24

cases cited. The court, in two of the
graphs of its instructions, each referr
the alleged alterations of the note, me
ed the insertions of the words "one hur
and the figure "1" in the same conn
coupling them together in a statem
what effect the alterations would ha
on the rights of the parties to the
and making no distinction between
Counsel for plaintiff state in their
"The court erred in submitting to th
as the material part of the note the
tion as to whether or not the figure
the left-hand top of the note had been
there before or after its execution.
figures are not a material part of the
and the jury should have been told tha
could only consider such change in f
if any, upon the question whether the
any alteration in the body of the note.'
record discloses that the court submit
the jury a special finding. We here g
with the answer: "The jury will
these questions: First. Was the note
altered after the execution by the in
therein of the words 'one hundred'
swer. Yes." From this it clearly a
that the verdict of the jury was ba
part, if not as a whole, on a finding th
note had been altered after its execut
the insertion of the words "one hun
and, this being ascertained, it becom
dent that the fact that the question
insertion of the figure "1" entered in
deliberations of the jury, and, by sanc
the instructions of the court, jointly
the question of the addition of the
did not prejudice the rights of the plai

Counsel for plaintiff prepared five i
tions, and presented them with a r
that they be read to the jury. This r
was refused. In the motion for new
the action of the court in this respect
signed for error as follows: "The cou
ed in refusing instructions numbered
3, 4, and 5, requested by the plaintiff
the argument in the brief filed coun
plaintiff refer to but two of these i
tions, the fourth and fifth. It seems
that the purpose for which the fifth o
instructions was prepared, and it w
pected its giving would subserve or
plish, was fully covered and effected
structions numbered 2 and 3, given
court on its own motion. If so, it w
error to refuse to give the one reques
counsel for plaintiff. This being our
sion, we need not further examine s
leged errors in the refusal to give th
structions as they were grouped in t
signment. Rea v. Bishop, 41 Neb. 202
W. 555.

There are no other or further qu
raised or discussed in the briefs, and,
cordance with the views herein exp
and conclusions announced, the judgm
the district court will be affirmed. Af

DENSLOW v. DODENDORF.

(Supreme Court of Nebraska. March 3, 1896.)

APPEAL FROM JUSTICE—DISMISSAL.

1. It is only from a final judgment of a justice of the peace that an appeal lies. Riddle v. Yates, 7 N. W. 289, 10 Neb. 510.

2. Where a district court has properly dismissed an appeal from a justice of the peace, such order of dismissal will not be reversed merely because a bad reason was assigned for the decision. Leake v. Gallogly, 52 N. W. 824, 34 Neb. 859, followed.

(Syllabus by the Court.)

Error to district court, Dodge county; Marshall, Judge.

Action by Ida Dodendorf against Jerry Denslow. Judgment for plaintiff before a justice. Defendant appeals. The appeal was dismissed, and defendant brings error. Affirmed.

A. H. Briggs, for plaintiff in error. T. M. Franse, for defendant in error.

NORVAL, J. Ida Dodendorf brought suit before Hal Christy, a justice of the peace of Cuming township, in Dodge county, against Jerry Denslow, to recover the sum of $82.41 for work and labor. The parties appeared, and trial was had before the justice on July 20, 1892, who on said date spread upon his docket the following entry: "Upon the hearing of the evidence, I find that there is due the plaintiff from the defendant the sum of $82.41 and cost of this action, taxed at $6.05. Dated this 20 day of July, 1892. Hal Christy, Justice of the Peace." On July 27th, the defendant filed with the justice an appeal bond, which was duly approved. A transcript of the proceedings, including the appeal undertaking, was filed by the defendant in the district court on the 20th day of August, 1892. Subsequently the plaintiff and appellee filed in the district court a motion to dismiss the appeal, because the transcript was filed after the expiration of the time required by law, which motion was sustained, and the appeal dismissed. To obtain a reversal of this decision is the purpose of this proceeding.

It is conceded by plaintiff in error that the transcript was filed in the office of the clerk of the district court one day beyond the period allowed by statute within which to perfect an appeal, but he insists that the delay was not occasioned through his fault or laches; hence the appeal should not have been dismissed. It is disclosed that the transcript was obtained by the plaintiff in error from the justice on August 18th, and upon the same day it was inclosed in an envelope, addressed to the clerk of the district court of Dodge county, with postage prepaid thereon, and deposited in the post office at Scribner, Neb., which was in ample time for it to have reached its destination by the usual course of mail, and to have been received and filed by said clerk within the statutory period. It is insisted by plaintiff in error that he had a right to rely upon the United States mail for the transmission of his transcript, and, having mailed it in time, he exercised that degree of diligence which the law required of him in perfecting his appeal; and Cheney v. Buckmaster, 29 Neb. 420, 45 N. W. 640, is cited to sustain the proposition. That case lacks analogy. There the request for the transcript was, it is true, made by mail 4 days after the entry of the judgment; yet the letter making the demand was promptly received by the county judge, who negligently failed to make a transcript of the proceedings until the expiration of more than 30 days after the entry of the judgment. It was ruled that the right to appeal was not lost by the neglect or failure of the county judge to prepare the transcript in time. No laches of a public officer is imputed in this case. The question discussed by counsel herein was not involved in Cheney v. Buckmaster. Nor do we now propose to express an opinion thereon. Conceding that Denslow exercised due diligence in attempting to perfect his appeal, and that he had a right to rely upon one of the agencies of the general government for the prompt transmission of the transcript (which we do not decide), nevertheless, the appeal was rightly dismissed, for the reason that no final judgment was rendered by the justice. He made findings, but rendered no judgment thereon; therefore, the cause was not appealable. Nichols v. Hall, 5 Neb. 194; Riddle v. Yates, 10 Neb. 510, 7 N. W. 289; Daniels v. Tibbets, 16 Neb. 666, 21 N. W. 454; Stone v. Neeley, 34 Neb. 81, 51 N. W. 314.

It is probably true that the learned district judge predicated his decision upon the ground that the appeal was not taken in time, and not because there was no final order or judgment to appeal from; but that is unimportant. The essential thing is that the appeal was properly dismissed, even though the decision of the court below may have been predicated upon grounds that were not tenable. This was expressly held in Leake v. Gallogly, 34 Neb. 859, 52 N. W. 824. The judgment dismissing the appeal is affirmed. Affirmed.

BARSBY v. WARREN et al.

(Supreme Court of Nebraska. March 3, 1896.)

CONTRACT—CONSTRUCTION.

Evidence examined, and *held* to sustain the judgment complained of.

(Syllabus by the Court.)

Error to district court, Fillmore county; Morris, Judge.

Action by John Barsby against N. H. Warren & Co. on contract. There was a judgment for defendants, and plaintiff brings error. Affirmed.

John Barsby and W. H. Morris, for plaintiff in error. Sedgwick & Power, for defendants in error.

POST, C. J. This was an action by the plaintiff in error in the district court for Fillmore county, who sought to recover upon the following agreement: "Whereas, a certain agreement was made and entered into the 22d day of July, 1885, by and between the village of Fairmont, Fillmore county, and state of Nebraska, party of the first part, and Ira E. Williams, of said Fairmont, party of the second part, whereby the said village of Fairmont agreed to pay to the said Williams the sum of eight thousand nine hundred and sixteen dollars upon the completion of a system of waterworks described in said agreement, and the acceptance of said works by the said village of Fairmont; and whereas, said agreement has been assigned by the said Ira E. Williams to James Peabody, and the said James Peabody has assigned the same to N. H. Warren & Co.; and whereas, the said Ira E. Williams has agreed to pay John Barsby five hundred dollars out of the money to be paid by the said village of Fairmont under the said contract: Now, we, the undersigned, in consideration of the premises, agree to hold for and pay to the said John Barsby the sum of $500.00 (five hundred dollars) as soon as we shall receive from the said village of Fairmont the said sum of eight thousand nine hundred and sixteen dollars, as provided in said contract. Witness our hands. Chicago, March 4, 1886. N. H. Warren & Co." The breach alleged is the sale and assignment by the defendants of the contract mentioned in the foregoing written agreement to Palmer, Fuller & Co., and their failure to complete the system of waterworks therein referred to, whereby they (defendants) were unable to demand or receive from the village of Fairmont the sum of $8,916, or any other sum of money. Reference will hereafter be made to the answer, so far as essential to a consideration of the questions presented by the record. At the conclusion of the plaintiff's evidence a verdict was returned for the defendants, under the direction of the court, upon which judgment was subsequently entered, and which it is sought to reverse by means of this proceeding.

We find in the record nothing to indicate whether or not the waterworks had been completed at the date of the assignment by defendant to Palmer, Fuller & Co. It does, however, appear that the village, for reasons not disclosed, refused to pay the stipulated price of $8,916, and that an effort was made to compromise the claim for $7,000, which was defeated; the village board being evenly divided thereon, and the plaintiff, the acting mayor, declining to vote. A compromise was, however, subsequently effected, whereby Palmer, Fuller & Co. received the sum of $6,500, in village warrants, in full satisfaction of their claim under and by virtue of said contract. It is evident from the pleadings that the defendants' liability is not absolute. Their undertaking, on the contrary, was to hold for and pay to the plaintiff the sum of $500 on the receipt by them of the full sum of $8,916. It is not at this time necessary to determine whether an action would lie for a breach of the particular agreement set out, except upon the actual receipt by the defendants of the sum of money therein named. It is sufficient that they would be legally answerable for any act of theirs which would incapacitate them to demand or receive the money due from the village, to the plaintiff's damage. The rights of the plaintiff appear to have been protected in assignment by the defendants to Palmer, Fuller & Co., judging by the following letter: "Chicago, Dec. 11, '90. John Barsby: We sold our interest in the waterworks claim to Palmer, Fuller & Co., showing them our contract with you, which they assumed. As by the contract, 'we agree to hold for and pay to the said John Barsby the said sum of $500 as soon as we shall receive from said village of Fairmont the sum of $8,916 as provided in said contract.' P. & F. attorney, when shown the contract, and required by us to assume it, said, 'Very well, we will, and hope we shall have it to pay.' Yours, truly, N. H. Warren & Co." Defendants, by their answer, in effect, charge that Palmer, Fuller & Co. were unable, with their assistance, after making all reasonable and necessary efforts, to collect from the village any sum on said contract in excess of the $6,500 above mentioned, and that they are not answerable for the loss resulting from such failure to the plaintiff, or to Palmer, Fuller & Co. The necessary inference from the plaintiff's evidence is that the $6,500 finally paid by the village represents the amount actually due from the latter at the time of the assignment of the contract to the defendants, as well as at the date of the assignment by them to Palmer, Fuller & Co. It follows therefrom that the plaintiff's loss did not result from the defendants' alleged wrongful act, but from antecedent causes, for which they (the defendants) are in no wise responsible. It follows that the judgment is right, and should be affirmed. Affirmed.

BARRY et al. v. DELOUGHERY et al.

(Supreme Court of Nebraska. March 3, 1896.)

HIGHWAYS—ESTABLISHMENT—PROCEDURE.

1. No petition is necessary to confer power upon a county board to open a section-line road.

2. The county board may, without petition or notice, make a preliminary order establishing a section-line road, or declaring that it shall be opened; but, before it can be actually opened, there must be proceedings, upon proper notice, to ascertain damages.

3. To authorize the opening of a section-line road, a finding that the public good requires it

need not be made of record by the county board.

4. The county board may, in one proceeding, open roads on different section lines, provided they connect with one another, and form a single scheme of highway improvement. Whether the opening of disconnected roads may be embraced in a single proceeding, quære.

(Syllabus by the Court.)

Error to district court, Dakota county; Norris, Judge.

Petition by J. M. Barry and others to the board of county supervisors for the opening of a highway. To a judgment of the district court reversing an order allowing the petition, and overruling exceptions filed by M. Deloughery and others, petitioners bring error. Reversed.

Jay & Beck, for plaintiffs in error. R. E. Evans, for defendants in error.

IRVINE, C. The object of this proceeding is to procure a reversal of a judgment of the district court, which reversed, on proceedings in error to that court, an order of the county board of Dakota county relating to the establishment of a highway. Unfortunately, most of the information sought to be afforded us is contained in the briefs, and finds little support in the record, by which alone we are governed. The record discloses that on April 23, 1892, there was filed with the county board a petition purporting to be signed by a large number of electors residing within five miles of the proposed roads, asking the establishment of two roads along section lines, joining at a section corner. To this a numerously signed remonstrance was filed, accompanied by specific objections to the opening of the roads. A notice was published, which will be referred to later. Thereafter certain of the remonstrants asked to have their names stricken from the remonstrance. Thereafter, at a meeting of the county board, the following record was made: "Now, at this time, in the matter of the Ryan section-line road, the same came up for final hearing, and was allowed as prayed for. The remonstrants duly except to the action of the board. Motions of R. E. Evans, attorney for remonstrators in the location of Ryan road, was overruled, and remonstrators except." From this order the proceedings in error were prosecuted in the district court, resulting in a judgment of reversal; the reason stated being "that said board of supervisors had no jurisdiction of the subject-matter of the action, and no authority to render such judgment or order." In support of the judgment of the district court, counsel argue that the board was without authority, because no sufficient petition was filed, because no proper notice was published, because there was no finding that the roads were required for the public good, and because the opening of two roads was embraced in a single proceeding. The district court must have proceeded on one or another of these grounds, because the other assignments of error are not based on any facts disclosed by the record.

All section lines are, by statute, declared to be public roads. Comp. St. c. 78, § 46. The law establishes them as highways, and the county board is empowered, whenever the public good requires it, to open such roads without preliminary survey, the sole limitation being that damages shall be appraised as nearly as practicable in the manner provided for the opening of other highways. Under this section it has been held that the board may, in its discretion, open any section-line road without a petition first presented. Throckmorton v. State, 20 Neb. 647, 31 N. W. 232; McNair v. State, 26 Neb. 257, 41 N. W. 1099; Howard v. Brown, 37 Neb. 902, 56 N. W. 713; Rose v. Washington Co., 42 Neb. 1, 60 N. W. 352. In Howard v. Brown, supra, it was held that section 46, being a special provision in relation to section-line roads, prevailed over the general provisions of the chapter; but, of course, in appraising damages, section 46 requires the procedure in relation to other roads to be followed so far as practicable. The procedure provided for such other roads is the presentment of a petition, and deposit by the petitioners of a sufficient sum to pay for laying out such road. Thereupon the county clerk appoints a commissioner to examine into the expediency of the road. The commissioner makes his report, and a notice is published fixing the time wherein all objections to the road or claims for damages must be filed. Thereafter the board, after considering such matters, determines upon the establishment of the road. A portion of this procedure is clearly inapplicable to section-line roads, but there can be no doubt that it must be followed in so far as the procedure for ascertaining damages is concerned. Before making the order here complained of, the county board had undertaken to publish a notice, but it may be assumed that it was not in substantial compliance with the statute, and was insufficient to justify the board in proceeding with the actual opening of the road. But the order made was not one for such final action. It is unintelligible, except through the petition to which it refers, and the petition is for the establishment of the road. We regard the order as merely a preliminary order looking to the opening of the road. Section-line roads being opened, in the discretion of the board, without the necessity of a petition, survey, or commissioner's report, some such preliminary action must be taken before damages can be ascertained. In McNair v. State, supra, the proceedings were instituted by a motion adopted by the county board, establishing the road, and thereafter the statutory notice was published. This court held that a road so opened was lawfully opened, and could not be vacated except by regular procedure. It was also held in McNair v. State that a finding that the public good required the road need not be entered of record.

As to the objection that the proceedings referred to two roads, as these were both along section lines, joined one another, and formed a single scheme of highway improvement, there could be no objection to the procedure on this ground. Whether two disconnected roads can be opened by a single proceeding, we need not determine.

The proceedings of the county board, so far as they had progressed, were not without authority of law, and the record discloses no irregularity presented by proper assignments of error. The judgment of the district court is reversed, and the order of the county board affirmed. Judgment accordingly.

BANKERS' LIFE ASS'N v. LISCO.

(Supreme Court of Nebraska. March 3, 1896.)

INSURANCE — ACTION ON POLICY — PLEADING AND PROOF — WITNESS — EXAMINATION — EXCEPTIONS.

1. In an action upon an insurance contract in the nature of a life insurance policy, the defendant, having alleged that the misrepresentations upon which it had acted to its own disadvantage were contained in the written application of the assured, was properly *held* not entitled on the trial to show what oral representations the insured had made to a physician at the time the examination was being made, with a view to the approval or rejection of the insurance applied for.

2. On the trial of an action for the recovery of the amount of a life insurance policy, an affidavit of the beneficiary, which tended to show that, contrary to the representation of the assured in his application, said insured had been subject to epileptic fits, having been introduced, it was proper to permit such affiant to show that she never knowingly subscribed to or made the statements in the affidavit contained.

3. Alleged misconduct of the counsel in the course of the trial in the district court, to which no objection was ruled upon, and as to which ruling consequently no exception was taken, cannot be considered in the supreme court. Gran v. Houston, 64 N. W. 245, 45 Neb. 813, followed.

(Syllabus by the Court.)

Error to district court, Douglas county; Ferguson, Judge.

Action by Sarah G. Lisco against the Bankers' Life Association. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Gregory, Day & Day and Sullivan & Sullivan, for plaintiff in error. Cowin & McHugh, for defendant in error.

RYAN, C. In this action in the district court of Douglas county, the plaintiff in that court recovered judgment upon a verdict in her favor in the sum of $2,341.97. To reverse this judgment, the Bankers' Life Association, the judgment defendant, prosecutes error proceedings in this court.

Sarah G. Lisco, the defendant in error, was the wife of John Lisco, who, on October 28, 1889, effected an insurance upon his life by becoming a member of the aforesaid Bankers' Life Association. On the 28th day of November, 1889, John Lisco died, and the present action was rendered necessary by the refusal of the plaintiff in error to pay the amount to which the defendant in error was apparently entitled by the terms of the contract under which its membership had been bestowed upon the deceased. In brief, the refusal to make the payment was, as stated in the answer, because of misrepresentations of John Lisco as to the history and condition of his health, and as to his habits, which were made in his application for membership, as aforesaid. In respect to his habits it was alleged by the answer that the drinking of wine, spirits, or malt liquor had been falsely represented by the applicant not to be with him a daily habit. It was further alleged that, by his excessive use of intoxicating liquors after he became a member of said association, John Lisco forfeited his rights as such member. In respect to the applicant's health and the true history thereof, it was by answer averred that he was subject to epileptic fits, which fact he failed by his application to disclose, though one question therein answered falsely by him should have disclosed that fact had it been answered truly. By the answer it was furthermore alleged that the death of John Lisco was caused by an epileptic fit, and that, by the terms of the express conditions of the contract between the Bankers' Life Association and John Lisco, the above misrepresentations rendered void the claim of the defendant in error.

The evidence as to whether John Lisco was in the daily habit of using intoxicating liquors was very contradictory, and therefore the special finding of the jury upon that proposition cannot be disturbed. There was also evidence from which the jury might have inferred that John Lisco had been subject to epilepsy for some years before he made application for membership in the Bankers' Life Association, but there was no evidence that his death was caused by epilepsy. There was an apparent preponderance contrary to the showing that he had ever been subject to epilepsy, and upon this the special finding cannot be disturbed. Of the evidence tending to establish the affirmative of the proposition last above referred to, one portion was an affidavit made by Sarah G. Lisco, the defendant in error, on January 11, 1890, in which was the following language: "I am the wife of the deceased, John Lisco, and my lamented husband had not, to my knowledge, had an epileptic fit for the last five or six years, and no other sickness; only occasionally that of sick headache, and, prior to that time not to exceed two or three fits a year; some years not any at all." This affidavit, it would seem, was sent to the Bankers' Life Association at Des Moines, Iowa, and was introduced in evidence, in connection with a deposition of one of the officers of the aforesaid association. It is insisted that there was error in permitting Mrs. Lisco to testify as to the ill health with which she was suffering at the date of said affidavit, and that she never knowingly subscribed or swore to the above-quoted statements. We

have had called to our notice, and have been able to discover no good reason why Mrs. Lisco should not have been permitted to deny these statements imputed to her. The weight to be given such denial was solely a question of fact to be considered by the jury.

The matters of defense pleaded in the answer to avoid the alleged liability of the plaintiff in error were all predicated upon written statements made in the application of Lisco. It was therefore improper to prove that oral statements were made by Lisco to the medical examiner outside the written matters pleaded as aforesaid for the purpose of obtaining insurance; at least, we are unaware of any theory on which such evidence could be competent, and upon this point there was no attempt to enlighten by offers of what the proposed testimony would disclose if permitted to be given. The district court therefore properly sustained an objection to the question propounded as to what these statements were, which were made to the medical examiner, and which were not included in the written application.

It is urged in the petition in error that the court erred in failing to state to the jury that in the answer it was pleaded that John Lisco warranted his statements in the application to be true. It may be that the force of this objection is not clearly understood, but it does seem to us that plaintiff in error has no just cause of complaint in view of the following considerations: The court, in describing the answer, used this language: "The defendant claims in its answer that the said Lisco, in his application for insurance, misrepresented and made untrue answers of his physical condition, and that, by reason thereof, said certificate had become null and void." The certificate referred to in the above instructions, in so far as it should be considered in this case, was described in the pleadings, and throughout the trial was treated as performing the same offices as are ordinarily performed by an insurance policy. In the first, fourth, and sixth instructions given upon request of the plaintiff in error, the jury were, in express terms, told that the several representations amounted to warranties, and we cannot see why any failure in the description of the issues in this respect raised by the answer were not cured, if, indeed, a fuller description thereof was necessary, which we greatly doubt.

To instructions 1, 2, 3, and 4, given by the court upon its own motion, a single exception in gross was taken, and in the motion for a new trial the same method was pursued. Although, by the amended petition in error, the correctness of the particular instruction given by the court numbered 2 is challenged separately from any other, we are not justified in overlooking the above-described previous grouping of the instructions; and, as some of them were undoubtedly given properly, we cannot consider whether or not there was error in giving instruction numbered 2, separately assailed by the amended petition in error.

It is finally urged that there was misconduct upon the part of the counsel for the defendant in error, as asserted, in presenting as facts a whole series of matters which were outside the record, were not embraced in any evidence, and in reality were untrue. While the fact that objection was made to this language was recited in the affidavit, in which alone is there found any reference to this part of the trial, there was no ruling upon or exception as to such ruling taken by the plaintiff in error. This was indispensably necessary to secure a review of alleged errors of this nature. Gran v. Houston, 45 Neb. 813, 64 N. W. 245.

There being discovered no prejudicial error in the record, the judgment of the district court is affirmed. Affirmed.

MURRAY v. LOUSHMAN.

(Supreme Court of Nebraska. March 3, 1896.)

AMENDMENT OF PLEADING—MORTGAGED CHATTELS—RIGHT TO USE.

1. Notwithstanding the liberal provision for the amendment of pleadings, the subject is one resting largely in the discretion of the trial court; and its rulings in that regard are not, in the absence of an abuse of discretion, the subject of review by this court.

2. The title of property pledged by chattel mortgage remains in the mortgagor until divested by means of foreclosure proceedings. Mussel v. King, 29 N. W. 744, 40 Neb. 892.

3. One who takes possession of mortgaged chattels in order to satisfy his lien thereon by means of notice and sale in the manner prescribed by law does so with the implied obligation to proceed without unreasonable delay, and with due regard for the rights of the mortgagor.

4. The mortgagee's right to the use of chattels mortgaged is, in the absence of a special agreement, merely such as is incident to the foreclosure proceeding, and the breach of his obligation in that regard is an actionable wrong.

(Syllabus by the Court.)

Error to district court, Douglas county; Keysor, Judge.

Action by Anton Loushman against Thomas Murray. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Slabaugh & Rush, for plaintiff in error. G. A. Rutherford, for defendant in error.

POST, C. J. This was an action by the defendant in error (plaintiff below), who sued to recover for the use of a span of mules for the period of seven months. The answer admits the allegations of the petition, except as to the value of the use of the mules described, and charges, in justification thereof, the following facts: (1) A chattel mortgage on the mules in controversy for $180, long past due; (2) that the defendant took possession of said mules for the purpose of foreclosing his mortgage, September 12, 1889, and kept them at his own expense, with the plaintiff's

consent, until May 16, 1890, when they were sold at public auction, for the sum of $101. Accompanying the answer is an allegation of indebtedness by the plaintiff for rent due the defendant in the sum of $71.32, and for which judgment is asked by the latter. The reply is a general denial. A trial was had in the district court, resulting in a verdict for the plaintiff therein in the sum of $126.43. Subsequently, having remitted $95 of the amount so found, in accordance with the order of the court, judgment was entered in his favor in the sum of $30.93, and which has been removed into this court by the petition in error of the defendant below.

The first assignment of error relates to the ruling of the district court during the trial in denying the defendant's request for leave to so amend his answer as to set off against the plaintiff's cause of action the balance secured by the mortgage mentioned. The proposed amendment was not to conform the pleadings to the facts proved, but for the purpose of inserting a new and distinct cause of action in favor of the defendant. Although liberal provision is made for the amendment of pleadings (Civ. Code, § 144), the subject is one resting largely in the discretion of the trial court, and its rulings in that regard are not, in the absence of an abuse of discretion, the subject of review by this court. Mills v. Miller, 3 Neb. 87; Hedges v. Roach, 16 Neb. 673, 21 N. W. 404; Johnson v. Swayze, 35 Neb. 117, 52 N. W. 835; Bank v. Gibson, 37 Neb. 750, 56 N. W. 616. We are unable to say that the ruling complained of involves any abuse of discretion. The defendant was fully advised of his rights at the commencement of the action, more than a year and a half previous, and had ample opportunity to interpose whatever claims were available in his favor against the plaintiff; and, having failed to assert the mortgage debt until the plaintiff had rested his case, he will not now be heard to complain of the action of the court in denying his request to amend.

It is argued that the plaintiff had no right to the use of the mortgaged property after condition broken, his remedy being an action for redemption, or to recover the surplus, if any, remaining after the satisfaction of the defendant's mortgage. That argument is based upon the proposition, once recognized as the law of this state, that the effect of a chattel mortgage is to transfer to the mortgagee the legal title of the property conveyed, subject to be defeated only by performance of the stipulated conditions. But in Musser v. King, 40 Neb. 892, 59 N. W. 744, it was held, overruling Adams v. Bank, 4 Neb. 370, that the mortgagee has a lien only upon property pledged by chattel mortgage, and that the title thereto remains in the mortgagor until divested by means of foreclosure proceedings. See, also, Bedford v. Van Cott, 42 Neb. 229, 60 N. W. 572. The right of the mortgagee under a chattel mortgage to possession of the property conveyed pending foreclosure proceedings will not be controverted. But when he takes possession of property in order to satisfy his lien thereon, by means of notice and sale in the manner prescribed by law, he does so with the implied obligation to proceed without unreasonable delay, and with due regard for the rights of the mortgagor. The mortgagee's right to the use of chattels conveyed is, in the absence of a special agreement, such only as is incident to the foreclosure of the mortgage, and a breach of his obligation in that regard is an actionable wrong.

The judgment in this case is vigorously assailed on the ground that it is clearly unsupported by the evidence. We shall not, however, attempt a synopsis of the testimony. It is conceded that, so far as the number of witnesses is concerned, the advantage is decidedly in favor of the defendant. But, as has been repeatedly held, the credibility of the witnesses is a question for the jury; and a verdict based upon conflicting evidence will not be set aside on account of any mere difference of opinion between this court and the trial judge or jury. The evidence introduced by the plaintiff below tended to prove that the mules in question were used by the defendant without the consent of the former, from the time they were taken under the mortgage, in September, 1889, until the date of their sale, in May, 1890, and which was worth from 75 cents to $1 per day. Assuming the defendant's claim for rent to have been established to the satisfaction of the jury, the amount of the recovery allowed on the plaintiff's cause of action, $102.25, is certainly not so unreasonable as to call for interference by this court.

Exception was also taken to the refusal of the following instruction: "You are instructed that the defendant, under the testimony, has a just and valid claim against the plaintiff for the amount due on the two notes set out in the answer, together with interest thereon." The instruction was rightly refused. Although the notes therein mentioned represent the debt secured by the mortgage, they are not alleged as a cause of action against the defendant. Had the action been for the wrongful conversion of the mules, it is possible that the amount due on the mortgage would, even under a general denial, have been a proper subject of inquiry, as bearing directly upon the question of the plaintiff's interest in the property converted. But that rule can have no application to the case made by the pleadings, in which the only ground of recovery is the implied obligation of the defendant below to reasonably compensate the plaintiff for the use of his mules. There is no error in the record, and the judgment is affirmed. Affirmed.

STRAHLE v. FIRST NAT. BANK OF STANTON.

(Supreme Court of Nebraska. March 3, 1896.)

REPLEVIN—PLEADING AND PROOF—VARIANCE.

1. An allegation of general ownership in a petition and affidavit in replevin is not supported by the introduction of the chattel mortgage under which the plaintiff claims the right of possession of the property replevied. Musser v. King, 59 N. W. 744, 40 Neb. 892; Randall v. Persons, 60 N. W. 898, 42 Neb. 607; Sharp v. Johnson, 62 N. W. 466, 44 Neb. 165; Camp v. Pollock, 64 N. W. 231, 45 Neb. 771.

2. *Held*, that the evidence fails to sustain the verdict.

(Syllabus by the Court.)

Error to district court, Stanton county; Norris, Judge.

Replevin by the First National Bank of Stanton against Carl Strahle. There was a judgment for plaintiff, and defendant brings error. Reversed.

Mapes & Licey, for plaintiff in error. John A. Ehrhardt, W. W. Young, and A. A. Kearney, for defendant in error.

NORVAL, J. This was an action in replevin for a stock of merchandise brought by the First National Bank of Stanton against Carl Strahle; the plaintiff claiming the property under two chattel mortgages executed to the bank by one Theodore G. Asch, and the defendant claiming under the levy of an execution, placed in his hands as constable, issued upon a judgment recovered against the mortgagor. Upon the trial, the jury, by direction of the court, returned a verdict for the plaintiff, and judgment was entered thereon.

The chattel mortgages under which the bank claims, and the notes which they were given to secure, were introduced in evidence by the plaintiff, over the objections of the defendant, which rulings are assigned for error. The petition and affidavit in replevin do not set up a special ownership in the goods and chattels in the plaintiff by reason of the giving of the chattel mortgages, but plead that plaintiff is the general owner of the property replevied. The record discloses that, when the mortgages were tendered in evidence, the defendant objected to their admission, "for the reason that the plaintiff had not pleaded any special ownership in the property in controversy in this action, and for the further reason that it is irrelevant, immaterial, and incompetent, and that no proper foundation has been laid for the introduction of the chattel mortgages. * * * And the affidavit upon which the action is founded makes no plea of special ownership, and does not allege that any of the conditions of the chattel mortgages are broken." Adams v. Bank, 4 Neb. 370, to the effect that a chattel mortgage transfers the legal title to the mortgaged chattels to the mortgagee, is cited to sustain the rulings of the trial court. Since the case at bar was decided by the district court, this court has overruled the decision mentioned above. Musser v. King, 40 Neb. 892, 59 N. W. 744. In this last case it was decided that the legal title to mortgaged chattels remains in the mortgagor until divested by foreclosure proceedings, and until then the mortgagee has merely a lien on the property; that, in an action of replevin to recover the possession of mortgaged chattels by the holder of the mortgage, the facts constituting his special ownership or lien must be pleaded; and that, under allegations of ownership and right of possession, the note and chattel mortgage under which plaintiff bases his right of possession are inadmissible in evidence. The same doctrine was held and applied in Randall v. Persons, 42 Neb. 607, 60 N. W. 898; Sharp v. Johnson, 44 Neb. 165, 62 N. W. 466; Camp v. Pollock, 45 Neb. 771, 64 N. W. 231; Murray v. Laushman, 47 Neb. —, 66 N. W. 413. Inasmuch as no claim of special ownership was made in the pleadings in the case before us, it was error to admit the mortgages and notes in evidence.

There was likewise error in the ruling of the court in directing a verdict for the bank, for the obvious reason there was no evidence to show that the plaintiff was the owner of the property. At most, it had but a special interest therein, by virtue of the mortgages. The allegata et probata did not agree; hence the plaintiff failed to make out its cause of action. It follows that the judgment of the district court must be reversed, and the cause remanded for further proceedings. Reversed and remanded.

CITY OF OMAHA v. McGAVOCK.

(Supreme Court of Nebraska. March 3, 1896.)

CONSTRUCTION OF VIADUCT — DAMAGES TO ABUTTING OWNER—EVIDENCE.

1. *Held*, that the evidence set out in the opinion was competent for the jury to consider, in connection with the other evidence adduced on the trial, for the purpose of determining whether the plaintiff's property was damaged by reason of the location and construction of the viaduct in the street in front of said premises.

2. The refusal of an instruction must be excepted to in the trial court, in order to lay the foundation for its review in this court.

3. A general exception to instructions, whether given or refused, is not sufficient. Exception must be specifically taken to each instruction, in order to have the same considered by the supreme court.

4. The verdict is supported by sufficient evidence.

(Syllabus by the Court.)

Error to district court, Douglas county; Keysor, Judge.

Action by Alexander McGavock against the city of Omaha. There was a judgment for plaintiff, and defendant brings error. Affirmed.

E. J. Cornish and J. H. Macomber, for plaintiff in error. Francis A. Brogan, for defendant in error.

NORVAL, J. Alexander McGavock recovered a judgment in the court below against the city of Omaha, in the sum of $2,374.50, for damages alleged by him to have been sustained by the reason of the location and construction of the Tenth street viaduct in said city, upon which street plaintiff's property abuts. To review said judgment, the city has removed the cause into this court. The assignments of error argued in the brief of the city attorney may be divided into three groups, namely: (1) Those relating to the rulings of the court upon the admission of testimony; (2) alleged errors in the giving and refusing of instructions; (3) the damages assessed by the jury are excessive, and contrary to the evidence. We will consider them in the order stated.

Complaint is made of the introduction of certain testimony of J. J. Berger and John W. Bell, witnesses for the plaintiff below. The former was tenant of the plaintiff, occupying the premises in controversy for business purposes prior and subsequent to the erection of the viaduct, which structure was completed in 1891. He testified that the travel over and along Tenth street, in front of plaintiff's property, previous to the construction of the viaduct, was fair, and the premises were in a first-class location for the business in which the witness was engaged, but that since the completion of the viaduct only a small portion of the traffic is over this street. The major portion goes over the viaduct, and some over the Eleventh street viaduct. The witness, being interrogated by plaintiff's attorney, testified, over the objections of the city, as follows: "Q. What portion of the traffic has gone over the street since the construction of the viaduct? (Objected to by the defendant as incompetent, immaterial, and not the proper way to prove damages; too remote and uncertain. Overruled, and defendant excepts.) A. I should judge it was a small one-third. Q. How does the change in the amount of traffic affect business in stores fronting on Tenth street? A. It affects it to quite an extent. Q. To what an extent, in your business? (Objected to by the defendant as calling for a conclusion, improper, immaterial, and not the proper way to prove damages, and too remote. Overruled, and defendant excepts.) A. I should guess it was about one-third; that is, I am getting one-third I used to have." John W. Bell was called and examined as a witness on the part of the plaintiff, who, after testifying that he was engaged in the drug business in a part of the plaintiff's premises; that he was familiar with the traffic on Tenth street before and since the viaduct was constructed; that, prior to the commencement of the erection of the viaduct, plaintiff's property was an elegant location for retail purposes; and that the construction of the viaduct destroyed the traffic and affected the business on Tenth street,—testified as follows: "Q. Now, you may state, in your particular case, what effect the struction of that viaduct, and the traffi the old surface Tenth street, have on business. (Objected to by defendant a competent, immaterial, irrelevant, and ing for a conclusion of the witness. O tion overruled. Defendant excepts.) made a difference in my business by a three thousand in a year. Q. What pr tion was that of your entire business? jected to as incompetent, immaterial, an relevant, and calling for the conclusio the witness. Objection overruled. De ant excepts.) A. About one-quarter. Q you mean that your gross receipts fel by that much, or your profits? (Objecte by defendant as incompetent, immate and irrelevant, and calling for the conclu of the witness. Objection overruled. fendant excepts.) A. Do you mean fron time the viaduct was completed until I ed? Q. I would rather take it from definite period,—sum per annum, if know. A. My business was destroye that much. Q. Can you state by what portion your custom suffered by reaso the construction of the viaduct? (Obj to by defendant as incompetent, immat irrelevant, and calling for the conclusio the witness. Objection overruled. De ant excepts.) A. From a good busines none at all." It is argued by the city it did not have a fair trial, by reason o introduction of the foregoing testimony. value of the real estate in controversy, before and after the location and erecti the Tenth street viaduct, was shown the trial by numerous witnesses. The timony of the witnesses upon that b of the case was exceedingly contradic It is believed by my associates, althou cannot fully yield assent thereto, that testimony quoted was competent, as ten to show that the market value of the pr ty was greatly diminished by the buildi the viaduct. If, by reason of such struc the travel was diverted from the surfa the street, and the premises were not s sirable or accessible for business purp that was a matter for the jury to take consideration in arriving at a verdict. too, it was pertinent to show that the ness of the occupants of the property wa fected by the improvement. Not that it proper for the jury to base their verdic on such fact or testimony alone, but it sh be considered, in connection with the c testimony adduced, in determining whe plaintiff has been damaged or not. Sup the situation of the property had been that by the building of the viaduct it w have been more desirable for the uses which it was intended or devoted, or for other purpose, and the volume of busine the occupants had been greatly incre thereby; could there be any room for d that the city might not have shown facts? Clearly not. It was equally pr

in the case at bar, to show that the decrease of travel along and upon the surface of the street, and the destruction of the business of plaintiff's tenants, was attributable to the location and erection of the viaduct. The assignments relating to the admission of the testimony above set out are overruled.

Objections are urged in the brief of the city to the giving of the fourth and fifth instructions requested by the plaintiff, and the refusing of the defendant's fifth, eighth, ninth, and eleventh. The defendant's eleventh instruction was not excepted to in the trial court. Therefore no foundation is laid for its review here. Scofield v. Brown, 7 Neb. 221; Warrick v. Rounds, 17 Neb. 412, 22 N. W. 785; Nyce v. Shaffer, 20 Neb. 507, 30 N. W. 943; Darner v. Daggett, 35 Neb. 695, 53 N. W. 608; Barr v. City of Omaha, 42 Neb. 341, 60 N. W. 591. The other instructions—those given as well as the ones refused—of which complaint is made cannot be considered by us, because no exception was specifically taken to any of them in the district court. A general exception was taken to all, which was insufficient for the purpose of review in this court. Brooks v. Dutcher, 22 Neb. 644, 36 N. W. 128; Bank v. Lowrey, 36 Neb. 290, 54 N. W. 568.

It is finally insisted that the evidence fails to show that McGavock has sustained any damages by the building of the viaduct. The testimony introduced by the plaintiff in error tended to show that the fair market value of the property was not depreciated by the improvement. Some of the witnesses on that side testified to the effect that the value was the same after the construction of the viaduct as immediately prior to its location, while the construction to be placed upon the testimony of others called and examined by the city is that the property was enhanced in value by the erection of the viaduct. The several witnesses examined by the plaintiff, the most of whom appear to be disinterested, and familiar with the property and the value of real estate in Omaha, placed the market value of the premises before the location from $16,000 to $20,000, and by reason of the construction of the viaduct they have been depreciated from one-third to one-half. If the jury had accepted and acted upon the testimony of the plaintiff's witnesses alone, they would have been warranted in finding a verdict for a much larger sum than was returned. Considering all the testimony relating to the damages, we are satisfied it is ample to support the findings of the jury. The judgment is affirmed. Affirmed.

CORBETT et al. v. FETZER.

(Supreme Court of Nebraska. March 3, 1896.)

ACTION ON NOTE — INDORSEMENT — PAROL EVIDENCE.

1. The words "without recourse," following the name of the first, and preceding the name of a second, indorser of a bill or note, may be shown by parol evidence to apply to the former, instead of the latter.

2. As against a subsequent bona fide holder, the liability created by the indorsement in blank of a bill or note cannot be varied by parol evidence. But, as between the original parties to such an indorsement, the terms of the contract is a proper subject of inquiry, and may be established by parol evidence. Holmes v. Bank, 56 N. W. 1011, 38 Neb. 326.

3. Plaintiffs in error, on the evidence in the record, *held* not liable as indorsers.

(Syllabus by the Court.)

Error to district court, Douglas county; Irvine, Judge.

Action by John C. Fetzer against Charles Corbett and another. There was a judgment for plaintiff, and defendants bring error. Reversed.

B. G. Burbank, for plaintiffs in error. J. J. O'Connor, for defendant in error.

POST, C. J. This was a proceeding by Fetzer, the defendant in error, in the district court for Douglas county, to foreclose 57 different mortgages executed by William B. Cowles and wife to Editha H. Corbett upon certain property in North Side addition to the city of Omaha, to secure payment of as many notes, of even date therewith, payable by said Cowles to the order of the mortgagee named. It is alleged in the petition that the said Editha H. Corbett, Charles Corbett, Day & Cowles, and R. W. Day, who were made defendants, indorsed said notes, and thus became liable thereon. The prayer is for a foreclosure of the mortgages, and for personal judgment against Cowles & Day, R. W. Day, and the Corbetts, for any balance remaining due on their said indebtedness after applying thereon the proceeds of the mortgaged property. Of the defendants named, the Corbetts (husband and wife) only answered; admitting the allegations of the petition, except as to their personal liability, and charging that the notes above described were indorsed without recourse upon them. The reply is a general denial. The district court, upon the issues joined, found generally for the plaintiff, accompanied by a special finding that the Corbetts were liable as indorsers of said notes, and a decree was entered in accordance therewith, which has been removed into this court for review.

Practically, the only question presented by the motion for a new trial and the petition in error relates to the liability of the Corbetts as indorsers of the notes above described. On the back, and near the top, of each of said notes, appears the following:

"E. H. Corbett
"Chas. Corbett
"Without recourse on us
"Day & Cowles
"R. W. Day."

Said notes, according to the claim of the Corbetts, had been pledged to Samuel R. Johnson, bearing their indorsement in blank as collateral security; and, shortly before the

consummation of the sale thereof to Fetzer, the words immediately following their names, as shown above, were added, in order to limit their liability thereon. The transaction which resulted in the purchase of the notes by Fetzer was conducted, on the part of the Corbetts, by R. W. Day, one of the defendants named, who testified that the indorsements "Day & Cowles," and "R. W. Day," were made during such negotiations at the request of the plaintiff, and that previous to such indorsement the words, "Without recourse on us," were written thereon, in his presence, by C. W. Johnson, a clerk in the office of Mr. Corbett; and in which he is corroborated by both Johnson and Corbett. There are observable, from the record, facts which tend strongly to sustain the contention that the words of limitation were intended to apply to the indorsement of the Corbetts, rather than that of Day & Cowles or R. W. Day. They were, in the first place, written with different ink, apparently at a different time, and certainly in a different hand, from that employed in the subsequent indorsement. They were also written by Corbett's clerk, by his order and direction, pending the negotiations for the sale of the notes, and at a time when the question of their liability upon paper of like character would naturally be uppermost in the minds of solvent indorsers, as the Corbetts are shown to have been. Johnson was asked on cross-examination why the words "Without recourse" were not written over the names of the indorsers, to which he answered, in substance, that Mrs. Corbett's name was written so near the upper margin of the note as to leave no room therefor,—an explanation which is shown by the record to be entirely consistent with the facts. Again, the claim that the subsequent parties, instead of the Corbetts, indorsed without qualification, finds support in the fact that both R. W. Day and the firm of Day & Cowles were beneficially interested in the sale of the notes, and the further fact that their absolute liability thereon is established by the personal judgment entered against them in this case by default, as also by the admission under oath of Day, who testified in behalf of the defendants. On the part of the plaintiff below, Fetzer, it is shown that when the notes were first exhibited to him by Day, four or five days previous to the close of the transaction, they bore no indorsements, aside from the names of the Corbetts, and that when next seen by him they were indorsed as now, except the name of Mr. Day, which was added in his (Fetzer's) presence at the time they were delivered to him. He testified, also, that he purchased the notes described, relying upon the indorsements of the Corbetts, paying therefor 78 per cent. of their face value, and that at the same time he purchased other notes executed by Cowles, and indorsed by the Corbetts without recourse, at 54 per cent. of the amount due thereon. He is also corroborated to some extent by his brother, William Fetzer, and Mr. Martin, who were present during the several interviews with Day.

A final anaylsis of the evidence shows the following facts, as to which there is no substantial controversy: (1) When the notes were first offered for sale to Fetzer, they bore the blank indorsement of the Corbetts. (2) Afterwards, pending negotiations for the sale thereof, Charles Corbett, for the purpose of limiting the liability of himself and wife as indorsers of said notes, caused to be written thereon, immediately below their names, the words, "Without recourse on us." (3) The names of the said Editha H. Corbett and Charles Corbett were written so near the margin of said notes, and each of them, as to leave no room for the words quoted, above their names. (4) R. W. Day, one of the subsequent indorsers, has expressly admitted his liability on said notes, and the absolute liability of the firm of Day & Cowles thereon is established by the decree in this case, entered by default. (5) That said notes, when finally purchased by Fetzer, bore all the indorsements now appearing thereon, except the name of R. W. Day, and were at said time indorsed by said Day at his (Fetzer's) request. (6) Fetzer purchased said notes, paying therefor 78 per cent. of their face value, relying upon the indorsement of the Corbetts, who were then solvent.

The remaining questions merely involve the application of the law to the facts above stated. A case in point is Bank v. Greenwood, 2 Allen, 434. Upon the back of the note produced at the trial of that case, there appeared, in three successive lines, the following indorsements: "Greenwood & Nichols. Without recourse. Asa Perley, 2d." Parol evidence was offered by Greenwood & Nichols tending to prove that the words "Without recourse" were written by them for the purpose of limiting their liability as indorsers, and rejected, in the absence of an offer to prove notice by the plaintiff, a remote indorsee, and alleged bona fide holder. In reversing the judgment of the lower court, Bigelow, C. J., said: "There is no rule of law which requires a party to limit or qualify his indorsement by any writing preceding his signature. Such qualification may, and often does, follow the name of the party. Text writers of approved authority recognize this mode of limiting the liability of an indorser as regular and appropriate." The doctrine of that case is sustained by the following authorities therein cited: Chit. Bills (10th Am. Ed.) 234, 235; Story, Prom. Notes, § 138, and note. And in 2 Rand. Com. Paper, § 720, we observe it is approved in the following emphatic language: "The words 'Without recourse,' following the name of an indorser, A., and preceding the name of indorser B., may be shown by A. to apply to his indorsement, even against a bona fide holder, who

supposed it to apply to B.'s." It may be, as intimated, that there existed a purpose, shared by Day and Corbett, to deceive the plaintiff, by inducing him to purchase the notes in the belief that the Corbetts were liable thereon. Such a contention has, however, no foundation, either in the pleadings or the proofs, which show that he (Fetzer), throughout the entire transaction, relied upon his own judgment respecting the value of the paper in question. Nor is there any force in the objection that the evidence explanatory of the indorsement of the notes by the Corbetts tends to change or vary their written obligation. As bearing upon that question, we quote further from the opinion above cited: "It [the evidence offered] had no tendency to vary or control the written contract, or to change the legal effect of the indorsement. It only proved what the contract really was at the time it was entered into by the defendants. * * * The attempt in this case is not merely to hold the defendants on a contract, according to its meaning and legal effect, but to fasten on them a contract into which they never entered. If the plaintiffs mistook the application of the words which were written for the purpose of qualifying the indorsement of the defendants on the note, this fact furnishes no ground for employing or changing their liability on the contract into which they in fact entered." It will be remembered, too, that this cause presents no question of fraud or estoppel. Nor is the action one between the indorser and a bona fide holder of commercial paper, but between the parties to the contract of indorsement, and therefore within the rule recognized in Holmes v. Bank, 38 Neb. 326, 56 N. W. 1011. It was held in the case last cited that, as against a subsequent bona fide holder, the liability created by the indorsement in blank of a bill or note cannot be varied by parol evidence, but that, as between the original parties thereto, the precise terms of such contract is always a subject of inquiry, and that parol evidence is admissible for that purpose. The conclusion we reach is that the provision of the decree of the district court for a deficiency judgment against Corbett and wife is unsupported by the evidence, for which it should be reversed, and the cause dismissed, as to the plaintiffs in error. Reversed.

IRVINE, C., not sitting.

UNION STOCK-YARDS CO., Limited, v. WESTCOTT et al.

(Supreme Court of Nebraska. March 3, 1896.)

CUSTOM—EVIDENCE—LIABILITY OF CARRIER—DELIVERY TO WRONG PERSON—INDEMNITY.

1. Proof of knowledge is required, to give effect to a custom, unless it is so widely and generally known and so well established as that knowledge thereof may well be presumed.

2. A carrier who delivers property, for which a bill of lading has been issued, to any one except the owner and holder of such bill, is liable for the loss thereby incurred.

3. Directions, contained in a bill of lading, to notify a certain person of the arrival of the shipment at the place of destination, is no authority to the carrier to make delivery of such shipment to the person so to be notified, without the production of the bill of lading.

4. *Held*, that the petition states a cause of action against the sureties upon an indemnity bond given to a stock-yards company to secure it against any act or negligence of a certain firm of commission merchants.

(Syllabus by the Court.)

Error to district court, Douglas county; Davis, Judge.

Action by the Union Stock-Yards Company, Limited, against George E. Westcott and others. Judgment for defendants. Plaintiff brings error. Reversed.

James M. Woolworth and Frank T. Ransom, for plaintiff in error. George G. Bowman, for defendants in error.

NORVAL, J. This was an action against A. V. Miller and C. C. Miller as principals, and George E. Westcott, Eli H. Doud, W. G. Sloane, and Frank Pivonka as sureties, upon a bond of indemnity. Two general demurrers were interposed to the petition,—one by the principals upon the said bond, and one by their sureties. The demurrer of the Millers was overruled, and the court entered judgment against them for the amount claimed. The demurrer filed by the sureties was sustained, and the action dismissed as to them. Plaintiff complains of the judgment sustaining this demurrer.

The following is a copy of the bond upon which the suit is brought:

"Know all men by these presents, that we, A. V. Miller and C. C. Miller, under the firm name of Miller Bros., as principal, and Geo. E. Westcott, Eli H. Doud, W. G. Sloane, & Frank Pivonka, as surety, are held and firmly bound unto the Union Stock-Yards Company, Limited, of Douglas county, state of Nebraska aforesaid, in the sum of ten thousand dollars, good and lawful money of the United States, to be paid to the Union Stock-Yards Company, Limited, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents. Signed and sealed with our seal. Dated this 9th day of July, A. D. eighteen hundred ninety.

"The consideration of this obligation is such that if the above bound, or either of them, or their heirs, executors, and administrators, shall well and truly pay, or cause to be paid, to the Union Stock-Yards Company, Limited, as follows: All accounts, consisting of railroad freight charges or advanced freight charges, all feed and yard charges, and other charges that may occur, or for any damage that may occur in the handling of stock in the aforesaid stock yards in consequences of the mixing or turning out

wrong stock, or any act of A. V. Miller or C. C. Miller, as principal, or their agents or employés, by reason of which the said Union Stock-Yards Company, Limited, shall suffer loss or damage, or by the negligence of the said A. V. Miller and C. C. Miller's agents or employés, and to fully satisfy and to pay the same upon demand, and to deliver up all keys or other property, if any, belonging to the said Union Stock-Yards Company, Limited, when called upon so to do, then this obligation to be void. Otherwise to remain in full force and effect.

"Dated July 9th, 1890.

"Signed and sealed in presence of

"Miller Bros. [L. S.]
"Geo. E. Westcott. [L. S.]
"Eli H. Doud. [L. S.]
"Frank Pivonka. [L. S.]
"W. G. Sloane."

The petition alleges, in substance: The incorporation of the plaintiff, and that it owns and operates the stock yards at South Omaha. That the Millers were partners engaged in the live-stock commission business in said city under the name of Miller Bros. That about the time they commenced said business at said place, and in order to receive permission to carry the same on in and upon plaintiff's premises, and to secure plaintiff against all acts, doings, or default of said Miller Bros. in and about the conducting of said business of live-stock commission merchants, the defendants executed and delivered to plaintiff the bond set out above. That in January, 1891, one E. B. Rogers was the owner of 50 head of cattle, which he had purchased with funds furnished him by the Merchants' Bank of Sidney, which cattle were then in the possession of said bank, and held by it to secure the sum of $1,250, the amount so advanced. That said Rogers, as further security, made and delivered to said bank a draft in words and figures as follows:

"$1,250. Sidney, Nebraska, January 19, 1891. Pay to the order of Edward M. Mancourt, cashier, twelve hundred and fifty dollars, for value received, and charge the same to account of E. B. Rogers.

"To Miller Bros., South Omaha, Nebraska."

—That when said sum was so advanced it was understood between the bank and Rogers that said cattle were to be shipped to South Omaha in the name of the bank, and that the bill of lading therefor should be taken from the railway company conveying said cattle, and attached to a draft for the amount of the bank's advances. That on January 20, 1891, the bank shipped for its own benefit, in its cashier's name, from Sidney to South Omaha, over the Union Pacific Railway, all of said cattle, taking the bill of lading for said shipment, showing Mancourt, the cashier, to be both consignor and consignee. That said bill of lading had the words "Notify Miller Bros." written thereon, which was a direction to plaintiff, when the cattle were received in its yards, to notify Miller Bros. of their arrival. That the bank attached said draft to the bill of lading, and forwarded the same, through the usual mode, to South Omaha, for collection against Miller Bros., and that by reason of said facts they were not entitled to receive said cattle until they paid said draft, and obtained the bill of lading attached thereto. That said cattle were carried to and received by plaintiff at its yards in South Omaha, and placed in pens to await the orders of the owner, and while there Miller Bros. called upon and produced to plaintiff a written order purporting to be signed by said Mancourt, in whose name they had been [illegible]ped, directing the delivery of said cattle to Miller Bros. by plaintiff. That said order had not been signed by said Mancourt, nor by his authority, but was forged, which Miller Bros. at the time well knew, yet they represented to plaintiff that the same was genuine, and that they were authorized to receive said cattle. That thereupon, plaintiff, not knowing of the rights of said bank in and to said cattle, but believing said order to be genuine, and relying thereon, and upon said representations, delivered said cattle to Miller Bros., who sold them upon the market, received the proceeds, and retained the same, and refused to pay such proceeds over to said bank or the plaintiff, or to pay said draft. That it was the custom with the plaintiff, at and before the execution of said bond, and ever since has been, to permit live-stock commission men, whom the waybill of shipment of cattle directed plaintiff to notify of the arrival thereof, to receive such cattle without the production of the usual bill of lading, and it is customary for the live-stock commission merchant so notified to demand and receive the shipment without waiting the arrival of the usual bill of lading, which custom was well known to Miller Bros., and observed by them. The petition further alleges that the bank brought suit against this plaintiff for the value of the cattle, and at the request of Miller Bros. the stock-yards company employed counsel and defended said action upon a statement of facts furnished by Miller Bros.; that the bank recovered a judgment therein for the sum of $1,317.07 and costs, taxed at $58.83, which sums the stock-yards company was compelled to and did pay, and the further sum of $150, expended by it for attorney's fees in defending said action, no part of which amounts have been paid by Miller Bros., although requested so to do, save the sum of $700.

The question raised by the demurrer is whether the acts of the plaintiff in turning out the cattle in question to Miller Bros. the sale thereof by the latter, and the conversion by them of the proceeds arising from such sale, are covered by the conditions of the bonds in suit, so as to bind the sureties therein. It must be conceded that the conditions

contained in this bond are broad and comprehensive in their scope and nature. They, among other things, bind the sureties to pay all loss or damages which the obligee shall sustain, resulting from any act or negligence of Miller Bros. or their agents or employés. If the plaintiff was justified in delivering this shipment of cattle to Miller Bros. without requiring the production by them of the bill of lading, then it is entitled, upon the facts pleaded, to recover against the defendant sureties; otherwise the demurrer was rightly sustained. The important inquiry in the case is whether plaintiff was or was not in fault in delivering the cattle to Miller Bros. Defendants insist that the delivery was an act of negligence on the part of the plaintiff, while the stock-yards company contends against the proposition. It is conceded by counsel for plaintiff that where a person delivers property, for which a bill of lading has been issued, to any one except the owner and holder of said bill, he does so at his own risk, and is liable for the value of the property. The proposition is sound, and abundantly sustained by the authorities. Hutch. Carr. § 130, and cases cited in brief of defendant; Shellenberg v. Railroad Co., 45 Neb. 487, 63 N. W. 859. As an excuse for the delivery of the cattle without the production of the bill of lading issued by the railway company, plaintiff relies upon the custom which it alleges existed at the time the delivery was made, as well as when the bond was executed. Undoubtedly it is competent, in many cases, for a party to allege and prove that a particular custom existed. As was said by the present chief justice in his opinion in Investment Co. v. Johnston, 35 Neb. 561, 53 N. W. 475, "Custom or usage in a trade or business may be shown for the purpose of interpreting a contract or controlling its execution, but not for the purpose of changing its intrinsic character, provided it is known to the party sought to be charged thereby, or is so well settled and so uniformly acted upon as to create a reasonable presumption that it was known to both contracting parties, and that they contracted with reference to it." A custom which is uniform, long established, and generally acquiesced in, and so widely and generally known as to induce the belief that the parties contracted with reference to it, is binding, without proof of actual notice thereof to the parties. But a person is not bound by the custom or usage of an individual, unless personal knowledge thereof is brought home to the party sought to be charged. In 27 Am. & Eng. Enc. Law, 749, it is said: "In regard to the usage of a particular individual, it may be said that no person, without knowledge of such usage, can be bound by it in his dealings with the individual. It would be unfair to hold that the business usage of a particular bank or merchant or manufacturer or hotel keeper could have any effect upon the rights of a person dealing in ignorance of such usage. But if the usage be known and assented to, and dealings are had with such knowledge and assent, the usage impliedly forms a part of the contract between the parties, and is therefore binding." See Walsh v. Transportation Co., 52 Mo. 434; Stout v. McLachlin, 38 Kan. 121, 15 Pac. 902; Bliven v. Screw Co., 23 How. 420; Loring v. Gurney, 5 Pick. 15; Keogh v. Daniell, 12 Wis. 163; Manufacturing Co. v. Chandler, 27 Fed. 9; Scott v. Maier, 56 Mich. 554, 23 N. W. 218. Applying the doctrine stated to the case at bar, it is obvious that the sureties are not bound by the custom set up in the petition. No general custom or usage among stock-yard companies is pleaded, but that it was customary with this plaintiff alone to deliver cattle to commission men whom the waybill directed it to notify of the arrival of the shipment, without producing the usual bill of lading. Notice of such custom to Miller Bros. is alleged, but it is not averred that the sureties had any knowledge of its existence. Therefore it cannot be said that they signed the bond with reference to plaintiff's custom.

Reliance is made by plaintiff upon the fact that the bill of lading accompanying this shipment contained directions to notify Miller Bros. of the arrival of the stock at plaintiff's yards in South Omaha. It is argued that the clause referred to in the bill of lading was evidence to plaintiff that it was the intention of the shipper that the persons designated to be notified were his agents to make the sale of the cattle, and the stock-yards company had a right to rely upon the honesty of such agents, and trust them with the shipment. If this were true, it would have been sufficient to defeat the action brought by the Merchants' Bank of Sidney against this plaintiff for the value of the stock. But the direction in the bill of lading to notify Miller Bros. did not authorize the plaintiff herein to deliver the stock without the production of the bill of lading. Hutchinson on Carriers (2d Ed., § 131b), in discussing this subject, says: "It is a common practice, where the bill of lading provides for delivery to the consignor's order, and has gone forward attached to a draft on the purchaser or other person by whom payment is to be made, to give directions that such person be notified of the arrival of the goods, in order that he may pay the draft and procure the goods. Such a direction to notify, however, does not dispense with the production of the bill of lading as in other cases, and if the carrier delivers the goods to the person so to be notified, without requiring him to produce the bill of lading, he will be liable for the loss thereby incurred." The following cases are directly in line with the above decision: Bank v. Bissell, 72 N. Y. 615; Furman v. Railroad Co., 106 N. Y. 579, 13 N. E. 587; Myrick v. Railroad Co., 107 U. S. 102, 1 Sup. Ct. 425; North Pennsylvania R. Co. v. Commer-

cial Nat. Bank of Chicago, 123 U. S. 727, 8 Sup. Ct. 266; Joslyn v. Railroad Co., 51 Vt. 92; Libby v. Ingalls, 124 Mass. 503; North v. Transportation Co., 146 Mass. 315, 15 N. E. 779; National Bank of Chester v. Atlanta & C. A. L. Ry. Co., 25 S. C. 216. While Miller Bros. were to be notified of the arrival of the stock, yet this fact did not authorize them to receive the cattle without the production of the bill of lading. The use of the words "Miller Brothers" in the bill of lading showed that they were not intended as the consignees, but indicated merely that they were to be advised of the arrival of the cattle. Besides, it was stated in the bill of lading that Mancourt was the consignee, and this the plaintiff knew, or should have ascertained before parting with the possession of the stock. Delivery could alone be safely made to the consignee, or some one authorized by him to receive the cattle.

Considerable stress is laid upon the fact that Miller Bros. obtained possession of the cattle by reason of a spurious order for their delivery, purporting to have been signed by the consignee. Of course, as between the owner of the bill of lading and this plaintiff, that fact could make no difference, since the forged order conferred no authority upon plaintiff to deliver the cattle to the persons presenting it. This is too obvious to require discussion. That the stock-yards company was liable to the consignee of the cattle for their value, there can be no question. If the sureties are liable to the plaintiff, it is by reason alone of the fact that their principals obtained possession of the cattle upon the fictitious order already mentioned, and failed to account for the proceeds. The question, therefore, presented for determination, is whether the receiving of the shipment in controversy by Miller Bros. upon an order which they at the time knew to be forged, and which they falsely represented to plaintiff to be genuine, is within the stipulations or conditions of the bond which is the foundation of this action. Although, where a person delivers property consigned for transportation without the production of the bill of lading therefor, if one is issued it is at his own risk, it does not follow that he is liable in damages in case the delivery is made to the party entitled to receive the same, notwithstanding the bill of lading is not exhibited or produced. The bill of lading is the evidence of the holder of his right to receive the shipment, but its surrender or production is not indispensable to a proper delivery. It would be difficult, we apprehend, to find any one to contend against this proposition. The important thing is that the shipment is received by the person entitled thereto. Had the cashier of the bank given an order to plaintiff to deliver these cattle to Miller Bros., then it is obvious plaintiff would have been protected in turning out the stock to them, though no bill of lading was produced. But that was not done. On the contrary, possession of the cattle was obtained from plaintiff by Miller Bros., who had no right to them, upon an order presented by them, which they represented to be the genuine order of the owner of the stock, when they knew it was fictitious. It was this act that occasioned the loss to plaintiff, and it falls within the scope of the bond, since the sureties obligated themselves to indemnify plaintiff against loss or damage it might sustain by reason of "any act" of their principals. As between these sureties and the plaintiff, the latter, under the facts pleaded, cannot be charged with negligence in making the delivery.

It is said that the shipment would have been delivered, even though the order had not been presented, inasmuch as it was the custom with plaintiff to allow commission men, whom the waybill directed it to notify, to receive the shipment without waiting the arrival or production of the bill of lading. Although such custom is pleaded, it does not appear that the delivery of the stock would have been made without the order, or if the fraud had not been practiced. On the contrary, it is affirmatively stated that plaintiff, in making the delivery, relied upon said order, and the representations of Miller Bros. that it was genuine, and that they were entitled to receive the cattle thereon. It is sufficient that plaintiff had a right to, and did in fact, rely upon the genuineness of the order, and the representations of Miller Bros., in parting with the possession of the cattle, although it, in part, may have been influenced by its local custom. Whether reliance was placed upon the order is a question of fact for the jury upon the trial of the case. From the views expressed, it follows that the petition states a cause of action against the sureties, and the court erred in sustaining their demurrer. The judgment is reversed, and the cause remanded for further proceedings. Reversed and remanded.

PJARROU v. STATE.

(Supreme Court of Nebraska. March 3, 1896.)

ROBBERY—EVIDENCE—INSTRUCTIONS.

1. Evidence examined, and *held* sufficient to support the verdict.

2. It is the duty of the trial judge, particularly in criminal actions, to instruct the jury as to the rules of law governing the disposition of the cause, whether he is requested to do so or not; and if a charge to a jury, by omission to instruct on certain points, in effect withdraws from the consideration of the jury an essential issue of the case, it is erroneous. Dolan v. State, 62 N. W. 1090, 44 Neb. 643.

3. Where there is such an omission to instruct, but it is clear that the jury have formed the right conclusion, and no prejudice has resulted from the omission, it is not error which calls for a reversal of the judgment.

4. An instruction in this, a prosecution for the crime of robbery, was objected to by counsel on the ground that the instruction was erroneous, in that it submitted to the jury the question of

whether the accused, "either alone or in company with others," committed the acts alleged in the complaint, for the reason that there was no evidence that the defendant acted alone at any time, or without the co-operation of others in the matters charged. *Held*, that the testimony sustained the instruction given in the particular indicated by the objection.

5. Where it is urged as error that a designated instruction was not sufficiently explicit in its statement of the law applicable to a certain portion of the issues in the case, and it appears that no instruction was prepared by the complaining party and requested to be given in an effort to correct the alleged error, the objection cannot be sustained.

(Syllabus by the Court.)

Error to district court, Douglas county; Scott, Judge

F. A. Pjarrou was convicted of robbery, and brings error. Affirmed.

Pratt & Walkup, for plaintiff in error. A. S. Churchill, Atty. Gen., and Geo. A. Day, Dep. Atty. Gen., for the State.

HARRISON, J. October 10, 1895, there was filed in the district court of Douglas county an information in which Patrick Ford, Jr., James Gallagher, and the plaintiff in error were jointly charged with the commission of the crime of robbery in said county on September 24, 1895. Plaintiff in error was given a separate trial, convicted, and, after motion for new trial was heard and overruled, was sentenced to serve a term of three years in the penitentiary.

The first alleged error to which our attention is directed by the brief filed by counsel for plaintiff in error refers to the fourth instruction given by the court on its own motion, and which was as follows: "If the state has proven beyond a reasonable doubt that defendant, either alone or in company with others, at and within the county of Douglas, and state of Nebraska, and at any time within three years prior to the commencement of this prosecution, forcibly and by violence, or by putting in fear, unlawfully and feloniously made an assault upon the said August Volter, and that he alone or with others did then and there take from the person of the said August Volter money of some value, with the intent to rob said August Volter, or steal said money, you should convict the defendant." It is claimed that by this instruction the jury were told that they could find the plaintiff in error guilty of robbery, or, if not, must acquit him. In this connection attention is challenged to the failure of the trial court to define the crimes of larceny from the person, or assault, or any of the lesser crimes included in the crime charged in the information; and it is strenuously urged that the effect of giving the fourth instruction, and the failure to further instruct the jury, to which reference has just been made, combined, was to withdraw from the consideration of the jury the lesser crimes of which he might have been determined guilty; that it was not alone a failure to instruct in regard to the essential issues of the case or a nondirection, but amounted to more,—practically to a misdirection. The information charged, as was necessary according to the definition of the crime of robbery contained in our Criminal Code, (1) the taking of the money, (2) that it was from the person of the party alleged to have been robbed, (3) with a felonious intent, (4) by force, or by putting in fear; and this charge, it is clear, included the lesser crimes of larceny, assault with intent to commit a robbery, or a simple assault. By the plea of not guilty the charge of the information was traversed and put in issue in all its constituent elements, and to the extent that the lesser crimes were included and entered into the charge of the greater they became the subjects in the case, for necessary and strict proof. The fourth instruction, the objection to which we are now considering, was in and of itself a fair and sufficient statement of the general rule of law applicable to the charge of the crime of robbery, and the proof necessary to be produced to warrant a conviction of such crime, and was proper in the case at bar, or, at least, was not open to this objection. There is another urged, which we will notice in its order. The instructions examined and held vicious in the opinions in several of the cases cited by plaintiff in error to sustain this contention in particular each contained a further statement than did the one here, to the effect that, if the jury did not reach the conclusion indicated by the instruction, the defendant in the case should, by the verdict, be declared not guilty; thereby precluding the consideration of the guilt or innocence of the party as to any except the direct crime charged. Such was the instruction in State v. Vinsant, 49 Iowa, 241; also in Beaudien v. State, 8 Ohio St. 636; Vollmer v. State, 24 Neb. 839, 40 N. W. 420; Dolan v. State, 44 Neb. 643, 62 N. W. 1090. There were no instructions given in which the lesser crimes were defined or submitted to the consideration of the jury, and allowing the return of a verdict of guilty of either of such lesser crimes, if the evidence warranted it, and did not convict of the principal one stated in the information. There were no instructions prepared on any of these points by counsel for plaintiff in error and presented to the trial court with a request that they be read to the jury. If we view the failure of the court to instruct the jury in respect to the lesser crimes as a mere nondirection, then it may be said: "Mere nondirection by the trial court is not sufficient grounds for reversal on appeal, unless proper instructions have been asked and refused." That rule rests upon the soundest reasons, and applies to criminal prosecutions as well as civil cases. Jones v. State, 26 Ohio St. 208; Railroad Co. v. Finlayson, 16 Neb. 578, 20 N. W. 860; Thomp. Trials, 2339 et seq.; Hill v. State, 42 Neb. 503, 60 N. W. 916. But, if we look upon such action as more than a nondirection,—as, in effect, a withdrawal of such matters from the consideration of the jury, and a practical denial of

its right to determine the grade of the crime committed, if any—then it may be said to amount to a misdirection; not actively, or by commission, but by omission; and if by it essential issues of the case were withdrawn from the consideration of the jury, it may be reversible error. Carleton v. State, 43 Neb. 373, 61 N. W. 699; Dolan v. State, 44 Neb. 643, 62 N. W. 1090; Metz v. State, 46 Neb. 547, 65 N. W. 190; Stevens v. State, 19 Neb. 647, 28 N. W. 304.

The defenses made in the case at bar were the general issue and the affirmative one, an alibi; that the plaintiff in error was not at the place of commission of the alleged crime at the time it was stated in the information to have occurred, but was then at another or different place. The plea of the general issue raised for determination the question of the guilt or innocence of plaintiff in error of the principal crime charged, or of the lesser ones included within such charge, and the jury should have been instructed in relation to the lesser crimes, and this notwithstanding no request for such action was proffered in behalf of plaintiff in error. But from a full and careful review of all the evidence we are satisfied that the jury reached a correct conclusion without such instructions, and that the plaintiff in error was not prejudiced by the failure of the trial court to instruct the jury in the particulars indicated in the objection now under consideration. This being true, it was error without prejudice, and not cause for a reversal of the judgment and awarding a new trial. Manufacturing Co. v. Shiley, 15 Neb. 109, 17 N. W. 267; Loew v. State, 60 Wis. 559, 19 N. W. 437; Association v. Barnes, 39 Neb. 884, 58 N. W. 440; Head v. State, 44 Miss. 731.

It is further urged that there is error in the fourth instruction wherein it stated, "defendant, either alone or in company with others," referring to the committal of the acts alleged to have constituted the robbery; that there is no evidence that he or any of the parties informed against acted at any time alone or without the co-operation of others. This is wrong. There is testimony in regard to the plaintiff in error fully warranting the submission of the question of the plaintiff in error having committed the crime charged alone or in connection with his co-defendants. The determination of this question also disposes of the objection urged against instruction numbered 5.

It is contended that No. 8 of the instructions, which was in regard to the defense of an alibi, interposed for plaintiff in error, was vague, and not a plain and explicit statement of the law governing such defense. This instruction, while it might have been so worded and framed as to make the meaning clearer, and give it better expression, we think conveyed the correct sense of the rule embodied therein so clearly that no prejudice could have resulted to the rights of plaintiff in error from any possible obscurity or ambiguity in its terms. If a more explicit instruction was desired, it should have been requested. 2 Thomp. Trials, § 2341.

It is urged that the evidence was insufficient to sustain the verdict. We have carefully weighed all of the evidence, and need not quote from or summarize it here. From our examination we are convinced of its sufficiency to support the verdict rendered. The judgment of the district court is affirmed. Affirmed.

HERZOG v. CAMPBELL.

(Supreme Court of Nebraska. March 3, 1896.)

SLANDER—WORDS ACTIONABLE PER SE—INSTRUCTIONS.

1. In order to present for review the failure of the district court to properly number instructions, exception must, at the trial, have been taken on that especial ground.

2. While instructions should not be submitted to the jury with authorities noted thereon, still prejudice will not be presumed from the mere citation on the instruction of a volume and page of the reports. Railroad Co. v. Finlayson, 29 N. W. 860, 16 Neb. 578, followed.

3. Words spoken imputing an indictable offense are actionable per se, and no special damage need be proved.

4. Evidence examined, and *held* sufficient to sustain a verdict for $1,000.

(Syllabus by the Court.)

Error to district court, Clay county; Hastings, Judge.

Action by Jennie Campbell against George Herzog for slander. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Thomas H. Matters, for plaintiff in error. Leslie G. Hurd, for defendant in error.

IRVINE, C. The assignments of error in this case demand no protracted discussion. The first one urged in the brief is that "the court erred in giving instructions of the plaintiff as requested, instructions not being numbered, more than one instruction being given upon the same sheet without number, and further giving the instructions as requested by the plaintiff, citing authorities in the instructions." From the argument it would seem that the assignment is merely directed to the formal matters referred to; that is, to the failure to separately number the instructions and to the citation of authorities. No request to have the instructions numbered was made on the trial, and no exception was taken to the failure to number them. It is well settled that, while the provisions of the statute requiring instructions to be separately numbered, and marked "Given" or "Refused," as the case may be, are mandatory, still the failure to observe those requirements presents nothing for review, unless exception was specially taken on that ground. Tagg v. Miller, 10 Neb. 442, 6 N. W. 764; Fry v. Tilton, 11 Neb. 456, 9 N. W. 638; Gibson v. Sullivan, 18 Neb.

558, 26 N. W. 368; Omaha & F. Land & Trust Co. v. Hansen, 32 Neb. 449, 49 N. W. 456; City of Chadron v. Glover, 43 Neb. 732, 62 N. W. 62; Jolly v. State, 43 Neb. 857, 62 N. W. 300. At the end of one of the instructions appears in parentheses the following: "28 Neb. 330." This is, we presume, the citation referred to in the assignment. In Railroad Co. v. Finlayson, 16 Neb. 578, 20 N. W. 860, there was a similar complaint. The court disapproved the practice, and intimated that when instructions are requested, accompanied by such notations, the court, before giving them, should erase the notations; but held that, in the absence of special circumstances, the error was without prejudice, and that a judgment should not be reversed for such a reason, unless prejudice be made affirmatively to appear. This case is precisely like the one cited.

The other assignments argued reduce themselves to two grounds,—that the verdict was not sustained by the evidence, and that the damages were excessive. The action was for slander by the defendant in error, a girl of 16, against the plaintiff in error, a farmer, and presumably a man who should have reached the age of discretion. The words charged imputed that the plaintiff was pregnant by reason of incestuous intercourse with her father. The answer was a general denial. Witness after witness testified to the publication of the slanderous words in substance as laid in the petition. The defendant did not directly contradict the testimony of a single witness. As to some of the witnesses he said that a portion of their testimony was true and a portion not, without saying what was true and what untrue. As to another, the question and answer were as follows: "Did you make the statement concerning Jennie Campbell as related by George Hutton before the jury? A. No, sir; not in the shape he has given it." In other words, his testimony, by negatives pregnant, substantially corroborated the plaintiff's witnesses, and confessed the charge. But it is said that the evidence rebutted the presumption of malice, and there was no evidence of express malice. We need not, in this case, inquire how far the rules of the common law in regard to the admission of evidence establishing and rebutting actual malice in slander cases must be modified, because of our rule forbidding punitive damages. The publication of words imputing an indictable offense was here shown beyond question. No justification was attempted, no privilege was claimed. Conceding that under such circumstances the presumption of malice is a rebuttable presumption, it was not here rebutted. The defendant bases his argument on this point upon the fact, which the evidence tends to establish, that each publication of the slanderous words was accompanied by a statement that the girl's father had endeavored to procure the defendant to marry her, intimating that he was responsible for her alleged condition. If this were true,—which there is no evidence to show,—the fact that the defendant was smarting under an unjust charge made by the plaintiff's father would be no justification or excuse for his slandering the girl. It would tend rather to prove than to disprove malice in its legal signification.

The verdict was for $1,000, which defendant calmly argues is excessive. His counsel seem to be under the impression that proof of special damage was necessary. It is elementary that words imputing an indictable offense are actionable per se, and that no special damage need be proved. Boldt v. Budwig, 19 Neb. 739, 28 N. W. 280; Hendrickson v. Sullivan, 28 Neb. 329, 44 N. W. 448; Barr v. Birkner, 44 Neb. 197, 62 N. W. 494. The jury had a right, and it was its duty, on proof of the cause of action, to award such damages as, in its judgment, would fairly compensate the plaintiff for the injury sustained; and it requires some hardihood to contend that a verdict of $1,000 for a charge of incest, repeated over and over again, against a girl just on the verge of womanhood, is more than adequate compensation. Judgment affirmed.

OLTMANNS et al. v. FINDLAY et al.

(Supreme Court of Nebraska. March 3, 1896.)

APPEAL—ASSIGNMENTS OF ERROR—PRESUMPTIONS.

1. An assignment of error as to the giving of a number of instructions grouped in the assignment will be considered no further than to ascertain that any one of the group was correctly given.

2. To present for the consideration and determination of this court errors alleged to have occurred during the trial of a cause in the district court, a bill of exceptions settled and allowed in accordance with the legal requirements is indispensably necessary.

3. If an assignment of error which is predicated on the action of the trial court in giving several instructions is determined to be without force as to one of the instructions given, it must be overruled as to all.

4. If, in a case before this court, the record of which contains no bill of exceptions, or one not authenticated as prescribed by law, and which cannot be used, error is assigned, based on the action of the trial court in giving instructions to the jury, such instructions will be presumed to be free from error, if they do not contain misstatements of the law, and do not contain statements which could not be faultless under any possible conditions of the proof competent in the case, as error must affirmatively appear. If it does not, the presumption that the proceedings of the trial court were regular and without error must prevail. Willis v. State, 42 N. W. 920, 27 Neb. 98.

(Syllabus by the Court.)

Error to district court, Nemaha county; Bush, Judge.

Action by John Findlay and others against A. Oltmanns and another, partners as Oltmanns Bros. There was a judgment for plaintiffs, and defendants bring error. Affirmed.

Stull & Edwards and John S. Stull, for plaintiffs in error. W. H. Kelligar, for defendants in error.

HARRISON, J. The defendants in error commenced this action against the plaintiffs in error, alleging as the cause thereof, in substance: That on or about the 15th day of August they purchased of plaintiffs in error a horse or stallion, for general breeding purposes. That the value of a horse for such use depends largely upon his being well-bred or pure stock. That plaintiffs in error, to induce defendants in error to purchase the horse, falsely and fraudulently represented to them that said horse was a thoroughly bred German coach horse, registered in the studbooks of Germany, and that they would furnish and deliver to the plaintiffs (defendants in error) a certificate of such registration, from the studbooks of Germany, showing the registration of such horse therein; that the registration number of said horse in said studbooks of Germany was No. 51. Plaintiffs (defendants in error), relying upon such representations, did then purchase said horse for the sum of $2,200, then duly paid to the defendants (plaintiffs in error) in the negotiable promissory notes of the plaintiffs (defendants in error), delivered to defendants (plaintiffs in error). Here followed a statement, in detail, that the horse was not, in any of the particulars, as represented, and also the failure of the parties to furnish the certificate of registration as promised, and the consequent and resulting uselessness of said horse to the purchasers for the purpose for which they had bought him, and a prayer for damages in the sum of $1,900. The answer of plaintiffs admitted the sale of the horse to defendants in error for the sum of $2,200, and the execution and delivery of the promissory notes of the defendants in error to plaintiffs in error in that amount; that they represented the horse to be a thoroughly bred one. Averred that no part of the purchase price of the horse had ever been paid, and denied each and every other allegation of the petition. There was a trial to the court and a jury, resulting in a verdict for $1,100 in favor of defendants in error, from which there was afterwards remitted $400, and for the balance judgment was rendered.

One assignment of the petition in error is as follows: "The court erred in giving the 1st, 2d, 3d, 4th, 5th, 6th, and 7th paragraphs of the instructions given by the court upon its own motion." And, under this, objections to some of the instructions enumerated are urged in the arguments contained in the brief filed for the complaining parties. Of the instructions against which this assignment is directed the one designated as "1st," therein, is a part of a statement of the issues, or of the cause of action, as outlined in the petition in the case, and, as such, is proper, and not erroneous; and, this being determined, it disposes of the entire as ment, as the alleged errors in relation to ing the instructions designated are not rately assigned, but en masse, and nee be further examined or considered.

Another assignment of error is as foll "The court erred in giving the 1st, 2d, a paragraphs of the instructions asked by defendant in error." Instruction numb 2, included in this assignment, reads as lows: "The court instructs the jury th you find from the evidence that the pap troduced in evidence as Plaintiffs' Exhi was given by defendants to plaintiffs, represented at the time by defendants a certificate of registration or pedigree, in fact it was neither, this fact is, alo circumstance tending to prove fraud." contended by counsel for plaintiffs in that the trial court, by the use of the w "when in fact it was neither," referri Exhibit B, told the jury that the paper not a certificate of registration or pedi and that this should not have been done the jury should have been instructed t termine from the evidence whether it w was not such a certificate. Let it be ceded, for the purpose of argument, tha instruction was open to the objection against it; then, whether or not the erred in giving it must depend upon th swer to another question, viz. was ther not, uncontroverted testimony introd that such paper was not a certificate of tration, or was such fact fully proved, without conflict in the evidence adduce relation to it? If so, the court did no in giving the instruction. The deter tion of this latter query necessitates a ence to and examination of the testim The document attached to the record, w purports to be a bill of exceptions, has been allowed as required by law. The ties, by their counsel, stipulated that clerk of the district court might sign an low the bill of exceptions; but he faile exercise the power or right thus confe or to perform the duty of signing and a ing it. To present for the consideration determination of this court errors alleg have occurred during the trial of a ca the district court, a bill of exceptions, se and allowed in accordance with the legal quirements, is indispensably necessary; if not authenticated, it cannot be exam or used in the cause for any purpose. v. Spencer, 42 Neb. 632, 60 N. W. 892; v. Zutavern, 43 Neb. 334, 61 N. W. 579. being true, we cannot inspect the evid in this case to ascertain whether the stated to the jury by the court in the ins tion requested and given was thereby pr and undisputed, or not, and cannot say that it was entirely proper for the cou give the instruction. It will not be sumed that the trial court erred. Error be affirmatively shown. If not, the pres tion must prevail that the court acted

proceeded correctly, and that the testimony was such as fully warranted the giving the instruction as read to the jury. Willis v. State, 27 Neb. 98, 42 N. W. 920; Romberg v. Hediger, 47 Neb. —, 66 N. W. 283. The assignment of error was not directed to each of the instructions, but to all; and as it was without force as to one, in accordance with the well-established rule of this court, it fails and must be overruled as to all. Wax v. State, 43 Neb. 18, 61 N. W. 117.

There are other and further assignments of error which are urged in the brief filed for plaintiff in error, but, to arrive at a decision of the questions raised by each and all of them, an inspection or investigation of the testimony given at the trial must be made, or of portions of it. We have hereinbefore determined that such evidence has not been preserved in the manner provided by law, and is not before us, and cannot be used herein; that errors must be affirmatively shown, and, if not, it will be presumed that the proceedings of the trial court were without error in the particular of which complaint is made. It follows that the further assignments of error must be overruled, and the judgment of the district court affirmed.

VAN ETTEN v. COBURN.

(Supreme Court of Nebraska. March 3, 1896.)

SHERIFF'S FEES—TO WHOM CHARGEABLE.

Evidence in the case examined, and *held* not to sustain the finding and verdict of the jury in the trial court.

(Syllabus by the Court.)

Error to district court, Douglas county; Ferguson, Judge.

Action by Emma L. Van Etten against William Coburn. There was a judgment for defendant, and plaintiff brings error. Reversed.

D. Van Etten, for plaintiff in error. Bartlett, Crane & Baldrige and Thomas D. Crane, for defendant in error.

HARRISON, J. In this action, commenced in the district court of Douglas county, the plaintiff (also plaintiff in error) asked the recovery from the defendant of the sum of $11.70, fees received by him as sheriff, he then being such officer in Douglas county. It was claimed by the plaintiff that the amount sued for was illegally received by the officer as fees, and that he was thereby liable for their repayment, and also a statutory penalty of $50. A portion of the petition is as follows, after an allegation that the defendant was sheriff of Douglas county from about January 1, 1886, to about January 1, 1890: "The plaintiff complains of said defendant for that on or about the 19th day of June, 1888, he, acting as said sheriff, illegally and wrongfully, without plaintiff's knowledge or consent, took, retained, appropriated, and converted to his own use and benefit $11.70 of plaintiff's money, under the pretense and claim that he had on or about the 14th and 15th days of March, 1886, served for said plaintiff, and at her instance and request, subpœnas upon A. Gantner, N. Spellman, Wm. Klatt, Jacob Neu, Sullivan Bros. (Dan & John H.), John Libbie, N. J. Sander, James Morton, Charles Kosters, S. D. Crowford, and A. L. Wiggins, upon which he so took, appropriated, retained, and converted to his own use and benefit $7.20 in fees and mileage, claiming and pretending he had served said subpœnas at the instance and behalf of said plaintiff, as defendant in the action entitled 'George A. Hoagland v. Emma L. Van Etten et al.,' docketed in the district court of Douglas county, Nebraska, in Appearance Docket X., number 375, and that he had done and performed said services as said official for plaintiff, and at her instance and request, when in truth and in fact she had not caused said subpœnas to issue, and he had not done and performed any of said services for her, or in her behalf, or at her instance or request, and she has not at any time become liable therefor; and said defendant has not at any time become entitled to recover from plaintiff any of said fees which said defendant, as aforesaid, illegally and wrongfully took and retained from her, and as said official so appropriated and converted to his own use and benefit; and that said defendant, on the same day, illegally and wrongfully took, retained, appropriated, and converted to his own use and benefit, in the same action, and for other pretended services therein for plaintiff, and as such official, other $4.50 of plaintiff's money, without her knowledge or consent, when in truth and in fact said defendant, as said official or otherwise, had not done or performed any services in said action or otherwise, or upon which he was or might be entitled to recover from plaintiff, for which he had not been paid in full at or before the doing and performing of any such services, and whereby said defendant illegally and wrongfully took, retained, appropriated, and converted to his own use and benefit said $11.70, greater fees than the fees limited and expressed by law to said official for any and all services done and performed by him for plaintiff in said action or otherwise, and so illegally and wrongfully took, retained, appropriated, and converted to his own use and benefit said $11.70 of plaintiff's money as fees for such official, where the business chargeable for such fees was not actually done and performed for said plaintiff or in her behalf, or wherein she was liable or might become liable, and which said $11.70 said plaintiff has demanded of said defendant, and he has neglected and refused to pay the same, or any portion thereof. Whereby said defendant has become indebted to said plaintiff in said sum of $11.70, and interest from June 19, 1888; and she has become entitled under and by virtue of said

facts to recover from defendant, in addition to said $11.70 and interest, the sum of $50, debt, and an action has accrued against said defendant in favor of said plaintiff for the sum of $61.70, and interest on $11.70 thereof from June 19, 1888." The answer of the defendant admitted that he was the sheriff of Douglas county at the time stated in the petition, and denied each and every other allegation of the petition. There was a trial, and a verdict and judgment in favor of defendant, and the plaintiff brings the case to this court for review by proceedings in error.

The evidence in this case discloses that there was an action commenced in the district court of Douglas county, by George A. Hoagland, against Emma L. Van Etten et al., in which the sheriff served several subpœnas, one or two ordered by the defendant, Emma L. Van Etten, and the others by the plaintiff, Hoagland. On June 19, 1888, Hoagland's attorney paid into court $89.15; why or on what account does not appear, further than is shown in an entry in the appearance docket of the district court, wherein it was stated, "Received of plaintiff by Mr. Switzler, his attorney, $89.15, account of costs paid by defendant Van Etten." The $11.70 for which this suit was instituted was, so far as is shown by the testimony introduced during the trial in the district court, composed of fees charged and received by the sheriff for serving subpœnas in the case of Hoagland v. Emma L. Van Etten et al. Two of these subpœnas were issued, the evidence shows, for witnesses on the part of the defendant in the action, and the amount of fees charged for their service was $4.50,—$3.90 for one, and 60 cents for the other. This sum the plaintiff in the present suit claimed was paid to the sheriff in advance of the service; but the testimony on this point in the case was directly conflicting, and the jury having determined it in favor of the defendant, the sheriff, and the evidence being amply sufficient to sustain such finding, in accordance with a well-established rule of this court it will not be disturbed. The only issue raised in the trial as to this $4.50 of the amount claimed was that it had been paid in advance, and hence the sheriff was not entitled to receive it from the moneys paid into court, and nothing further is advanced in the discussion in the brief as a reason why he should not have been paid it by the clerk; and we conclude that, if determined that it had not been so paid, it was or will be conceded that he was entitled to receive it of the money paid into court of the money in Hoagland v. Van Etten as costs.

Of the $11.70 claimed by plaintiff in the case at bar, $7.20 was the amount of fees charged by the sheriff defendant in the action for service of subpœnas in the case of Hoagland v. Van Etten et al., issued for witnesses in behalf of the plaintiff in such action, and were not chargeable primarily against the defendant Emma L. Van Etten; and though it was not shown, or attempted to be, that any portion of the amount was illegal or excessive as fees, or that the services for which it was charged had not been performed, yet if the money paid into court was paid for Mrs. Van Etten, and belonged to her,—and, from the evidence adduced, we must conclude that this was true,—it could not be applied in payment on account of fees for services performed in the case by the officer at the instance and request of the opposing party, at least not until it had been finally determined that she was liable for the payment of such costs (and no such final determination was shown in this case), and, if so applied, it may be recovered of the party receiving it. This is within the doctrine announced in the case of Cady v. Bank, 46 Neb. 756, 65 N. W. 906. The facts or circumstances do not sustain a finding or verdict in favor of defendant as to $7.20 of the amount involved in the action; hence such finding must be set aside. There are other errors assigned and argued, but, as there must be a new trial, we need not now discuss them. Reversed and remanded.

TZSCHUCK et al. v. MEAD.

(Supreme Court of Nebraska. March 3, 1896.)

RES JUDICATA.

Order of the circuit court of the United States for the district of Nebraska, denying a deficiency judgment in a foreclosure proceeding upon the cause of action herein alleged, *held* to involve the merits of the cause, and not the question of jurisdiction only.

(Syllabus by the Court.)

Error to district court, Douglas county; Hopewell, Judge.

Action by William D. Mead against George B. Tzschuck and others. Judgment for plaintiff. Defendants bring error. Reversed.

E. W. Simeral, for plaintiffs in error. Wm. A. Redick, for defendant in error.

POST, C. J. On the 18th day of June, 1888, George W. Paul, a citizen of this state, executed to David Jamisen, also a citizen of this state, a mortgage upon certain real estate in Douglas county, to secure the three notes of the mortgagor, bearing date of October 15, 1887, amounting in the aggregate to $2,570. Paul, on the 11th day of September, 1888, sold and conveyed the mortgaged property to the plaintiff in error, Tzschuck, by deed containing the following recital, immediately following the habendum clause: "Subject to a mortgage of $2,570, given to David Jamisen, under date of June, 1888, and which mortgage the said George B. Tzschuck hereby assumes as a part of the purchase money for said lots, and agrees to pay the same when due." Subsequently the defendant in error, William D. Mead, Jr., a citizen of the state of New York, filed in the circuit court of the

United States for the district of Nebraska a bill in equity, wherein he prayed for the foreclosure of said mortgage and for a deficiency judgment against Paul and Tzschuck. It was in said bill alleged that the complainant therein acquired said notes and mortgage by assignment from Jamisen, but without disclosing the citizenship of the latter, who was then, and had been since the execution of said notes, a citizen and resident of this state. Process was issued for and served upon the defendants named, in accordance with the rules and practice of that court, and who in due time filed separate answers, as to which reference will be hereafter made, but in no way challenged the jurisdiction of the court over the persons of the defendant or the cause of action alleged. On July 8, 1889, a decree was entered in accordance with the prayer of said bill, accompanied by a finding that Tzschuck had assumed the payment of the mortgage therein mentioned, and was personally liable for any deficiency remaining after applying in satisfaction thereof the proceeds of the mortgaged property, and which decree was, on his (Tzschuck's) written request, stayed for the period of nine months. The stay having expired, the mortgaged premises were on the 4th day of October, 1890, by a special master, sold to the Mead Investment Company, of which report was in due time made to the court. Subsequently, on the 20th day of October, the complainant therein, by his solicitor, moved for a confirmation of the sale, and for a deficiency judgment against Paul and Tzschuck in the sum of $2,181.82, the ascertained balance due on the original decree. Tzschuck, by whom alone said motion was resisted, on October 23d, entered a special plea to the jurisdiction of the court, and praying for the vacation of the decree of foreclosure, on the ground that the complainant was a citizen of New York, and that Jamisen, his alleged assignor, was when said proceeding was commenced, and had been since the execution of said notes, a resident and citizen of this state. The sale was, it appears, on November 10th confirmed, and the special master ordered to execute a deed to the purchaser, although the record of said order contains no reference to the motion for a deficiency judgment, or to the defendants' plea to the jurisdiction of the court. Counsel agree, however, that the motion for deficiency judgment was at a subsequent term sustained as to Paul, and that the motion, so far as it related to the claim against Tzschuck, was, at a still later date, overruled. The record of the last-mentioned order, which has never been reversed or modified, is as follows: "This cause having been heard on the motion of the complainant for judgment for deficiency arising under the sale of the mortgaged premises under the decree herein, and the court, being fully advised in the premises, doth now, on this day, order, adjudge, and decree that said motion be, and the same is hereby, overruled, to which ruling and order the complainant, by his solicitor, then and there duly excepted." The complainant therein, to whom the mortgaged property in the meantime had been conveyed by the purchaser at the master's sale, in the month of June, 1891, filed in the district court for Douglas county his petition in equity, to which both Paul and Tzschuck were made defendants, praying a foreclosure of said mortgage, and alleging that the proceedings of the circuit court there set out were void for want of jurisdiction. There was also a further prayer for deficiency judgment against the defendants named in case the decree of foreclosure and the sale thereunder were found to be valid. To that petition the defendant Tzschuck interposed, as a defense, the decree of the circuit court, and particularly the order overruling the complainant's motion therein for a deficiency judgment. The plaintiff, by way of reply, alleged (1) that the order relied upon did not involve the merits of the motion for judgment, but the jurisdiction of the court only; (2) that the answering defendant, by his plea to the jurisdiction of the circuit court, was estopped to assert said order as an adjudication of the merit of the claim therein made. Upon the issues thus joined, a decree was in due time rendered, quieting the plaintiff's title to the property described as against the several defendants, in which it was found that the motion for deficiency judgment was overruled by the circuit court, on the sole ground that said court did not have jurisdiction of the cause, and the said order was accordingly no bar to that action. But, instead of awarding judgment as prayed, an order was entered directing the plaintiff to so amend his petition as to declare at law against the defendant Tzschuck for the amount remaining unpaid of the mortgage debt, and, in conformity with which, pleadings were filed, upon which the cause was subsequently tried to the same judge, who found upon the issues thus joined for the plaintiff, and upon which was entered the judgment presented for review by means of this proceeding. The issues raised by the pleadings are substantially the same as those involved in the proceedings to which they are supplemental, and do not require extended notice at this time.

The controversy in this court, notwithstanding the apparently complex character of the transactions shown, involves a single question, to which all others are merely incidental, and important only in so far as they assist in its solution, viz. did the circuit court, by the order denying the deficiency judgment, determine the merits of the complainant's claim therein against Tzschuck? The judgment below is defended on the ground, among others, that the finding of the district court in the equity cause is conclusive of the present controversy. But that claim is certainly without merit, for the reason, as we have seen, that there was in that proceeding no final decree against Tzschuck.

Such a record is no more available as an estoppel than would be the verdict of a jury without a judgment Aside from the documentary evidence bearing upon the subject, the solicitor for the complainant therein testified that the only question presented to or determined by the circuit court upon the hearing of the motion was that of its jurisdiction to render a deficiency judgment against Tzschuck, although he, in effect, admits that there was on that occasion an intimation by the presiding judge that the complainant was entitled to a personal judgment against the party primarily liable for the mortgage debt, and no other. The defendant therein testified in his own behalf that the judge, in passing upon the motion, remarked that the allowing of a personal judgment in a foreclosure proceeding against parties other than the mortgagor was discretionary, and had never been done in that court, in which he is to some extent corroborated by his solicitor. That evidence aliunde was admissible for the purpose of proving what issues were in fact tried and determined upon the hearing of the motion is a proposition not controverted in this proceeding. We assume, therefore, that such evidence was rightly received; and, if our judgment depended upon the testimony of the witnesses concerning the basis of the order in question, we could without difficulty agree to an affirmance of the judgment. We are, however, convinced that the trial judge either overlooked the evidence supplied by the record of the circuit court, or failed to accord it the consideration to which it is justly entitled.

We understand both parties to concede that the decree of foreclosure is valid and conclusive upon the parties thereto. It is true, we find in the brief of defendant in error this language: "The United States court never had jurisdiction of the case of Mead v. Paul et al., because of the citizenship of Jamisen, assignor of the complainant,"—which we interpret to mean that the circuit court would, had Jamisen's citizenship been disclosed before final decree, have refused to entertain the cause, or in any manner proceed therewith. That view is the correct one, and is sanctioned by numerous decisions of the supreme court of the United States in giving construction to the acts of congress defining the jurisdiction of the federal judiciary. See Blacklock v. Small, 127 U. S. 96, 8 Sup. Ct. 1096; Parker v. Ormsby, 141 U. S. 81, 11 Sup. Ct. 912. Further reference to the statutes mentioned is deemed unnecessary for the purposes of the present controversy. Nor would a review of the decision upon the subject by the federal courts, in this connection, be of profit to the parties or to the profession. It is sufficient for our purpose that the circuit court, according to the bill of the complainant therein, had jurisdiction of the cause, and the decree rendered thereon cannot be regarded as a nullity. True, it might, perhaps, have been reversed or vacated on appeal, or even by that court, but its validity cannot be assailed in a strictly collateral proceeding. See Erwin v. Lowry, 7 How. 172; Des Moines Nav. & R. Co. v. Iowa Homestead Co., 123 U. S. 552, 8 Sup. Ct. 217.

It follows as a necessary deduction from the foregoing proposition that the circuit court was possessed of jurisdiction to make such orders and take such steps as were necessary and appropriate for the enforcement of its decree, by sale of the mortgaged property, and by means of judgments and execution against the parties personally liable for the debt thereby secured. Let us again, in the light of these rules, briefly summarize the essential facts of the case. The circuit court, on November 10, 1890, expressly asserted its power to enforce the decree, by overruling Tzschuck's objection to its jurisdiction, and by confirming the master's sale previously made It also, at a subsequent day, further asserted its jurisdiction, by awarding personal judgment against Paul for the balance due on the notes executed by him, and later still denied the complainant's motion for judgment against Tzschuck. A reference to the last-mentioned order (above set out) discloses no doubt in the mind of the court with respect to its jurisdiction over the subject involved, while, on the contrary, it clearly appears to include the merits of the motion. Had the decision involved the question of jurisdiction only, the complainant would, we are bound to presume, have insisted upon preserving his rights by a truthful recital of that fact in the record of the court. We are therefore, in order to reach the conclusion of the district court, required to infer upon extrinsic and conflicting evidence, not that the ruling of the circuit court is erroneous merely, but an intentional reversal by it of a previous ruling in the same cause, deliberately made and confessedly sound. Such an inference will not be indulged, since it is unreasonable and altogether inconsistent with the presumption which exists in favor of the judgments of courts of general jurisdiction. The judgment will accordingly be reversed, and the cause remanded for further proceedings therein. Reversed and remanded.

DOUGLAS et al. v. CAMERON et al.

(Supreme Court of Nebraska. March 3, 1896.)

DESCENT AND DISTRIBUTION — INHERITANCE PER STIRPES.

1. A. died intestate, leaving surviving him neither issue, nor father, mother, brother, or sister. There were surviving four children of a deceased brother, eight children of a deceased sister, and three children of a deceased daughter of such sister. *Held*, that under our statute of descent the 12 surviving nephews and nieces took each one-twelfth part of the intestate's land, per capita, and that the grand nephews and grandnieces took nothing.

2. Such a case falls within the fifth subdi-

vision of section 30, c. 23, Comp. St., and not within the third subdivision.

3. Inheritance per stirpes does not obtain under our law, except where affirmatively provided.

4. The rule of inheritance per stirpes is in general applied only from necessity, as where the heirs are of unequal degree of kinship to the intestate. Where they are of equal degree, they take as principals.

5. It is the object of our statute to cut off inheritance per stirpes among collaterals, where, at any point beyond the children of brothers and sisters, the surviving kindred are of unequal degrees. In such case those nearest in degree take the estate, to the exclusion of those more remote.

(Syllabus by the Court.)

Appeal from district court, Cedar county; Norris, Judge.

Action by A. Norris Douglas and others against Fannie C. Cameron and others for partition. From a judgment for plaintiffs, defendants appeal. Affirmed.

W. E. Gantt, for appellants. J. M. Woolworth and J. P. English, for appellees.

IRVINE, C. Abijah Hart Norris died intestate August 31, 1894, seised of a large quantity of land in Dixon county. He left no issue, and no surviving father, mother, brother, or sister. A brother and a sister had, however, died before him. The sister had nine children, eight of whom survived the intestate, as did three children of the deceased daughter of the sister. Four children of the brother survived the intestate. This was an action for partition, brought by the eight children and three grandchildren of the deceased sister, as plaintiffs, against the four children of the deceased brother. The district court held that the three grandchildren of the deceased sister took no estate, and confirmed in each of the surviving children of the brother and sister a one-twelfth interest; that is, the estate was divided among the intestate's surviving nephews and nieces per capita. From this judgment the defendants, the four children of the deceased brother, appeal, contending that the estate should have been divided into halves, one half to be subdivided among them, and the other half among the children of the deceased sister; that is, their contention is that the inheritance was per stirpes, instead of per capita. The three grandchildren of the deceased sister also appeal, contending that their exclusion was erroneous; that the intestate's nephews and nieces should take per capita, each one-thirteenth; and that they should take among them the portion which would have gone to their mother, had she survived the intestate.

The question presented is purely one of statutory construction. But little direct light is thrown upon it by the authorities, because, as aptly suggested in one of the briefs, cases relating to the construction of statutes, especially such statutes as we must now consider, depend so much upon the peculiar phraseology of the statute that apparently slight differences in language may have a most important bearing, and render a foreign adjudication a source of danger, rather than an aid. None of the statutes passed upon by the cases to which we have been cited is exactly like our own, although those of Michigan and Massachusetts are so nearly like ours as to render the decisions of those states helpful in a general way. We will therefore forbear reference to cases of other states, except where those cases tend to throw light upon the general theory of modern statutes of descent, and the policy of their construction. But this last phrase suggests a comment which should be made in answer to certain arguments in the briefs. With the wisdom or justice of the statute we have nothing to do. The statutes of descent are creations of positive law, and effect must be given to them according to their obvious meaning, regardless of contingencies which the court might think the legislature should have provided for, and regardless of our own notions of abstract justice. Shellenberger v. Ransom, 41 Neb. 631, 59 N. W. 935. In cases of ambiguity, the fact that a particular construction would lead to an absurd or manifestly unjust result may be a reason for presuming that the legislature did not intend such construction. Beyond this, such reasoning is without value. Our statute is as follows: "When any person shall die seized of any lands, tenements, or hereditaments or of any right thereto, or entitled to any interest therein in fee simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, in the manner following: First. In equal shares to his children, and to the lawful issue of any deceased child by right of representation; and if there be no child of the intestate living at his death, his estate shall descend to all his other lineal descendants, and if all the said descendants are in the same degree of kindred to the intestate, they shall have the estate equally; otherwise they shall take according to the right of representation. Second. If he shall have no issue, his estate shall descend to his widow during her natural lifetime, and, after her decease, to his father; and if he shall have no issue nor widow, his estate shall descend to his father. Third. If he shall have no issue, nor widow, nor father, his estate shall descend in equal shares to his brothers and sisters, and to the children of any deceased brother or sister, by right of representation; provided, that if he shall have a mother also, she shall take an equal share with his brothers and sisters. Fourth. If the intestate shall leave no issue, nor widow, nor father, and no brother nor sister living at his death, his estate shall descend to his mother, to the exclusion of the issue, if any, of the deceased brother and sister. Fifth. If the intestate shall leave no issue, nor widow, and no father, mother, brother, nor sister, his estate shall descend to his next of kin, in equal degree, excepting

that when there are two or more collateral kindred in equal degree but claiming through different ancestors, those who claim through the nearest ancestor, shall be preferred to those claiming through an ancestor more remote; provided however, Sixth. If any person shall die, leaving several children, or leaving one child, and the issue of one or more other children, and any such surviving child, shall die under age, and not having been married, all the estate that came to the deceased child, by inheritance from such deceased parent, shall descend in equal shares, to the other children of the same parent and to the issue of any such other children who shall have died, by right of representation. Seventh. If, at the death of such child who shall die under age, and not having been married, all the other children of his said parent shall also be dead, and any of them shall have left issue, the estate that came to said child, by inheritance from his said parent, shall descend to all the issue of other children of the same parent; and if all the said issue are in the same degree of kindred to said child, they shall share the said estate equally; otherwise they shall take according to the right of representation. Eighth. If the intestate shall leave a widow and no kindred, his estate shall descend to such widow. Ninth. If the intestate shall have no widow, nor kindred, his estate shall escheat to the people of this state." Comp. St. 1895, c. 23, § 30. The first group of appellants claim that the case falls under the third subdivision of the section quoted, while the second group, the sister's grandchildren, claim that it falls under the fifth subdivision. Strictly speaking, it must fall within one or the other of these provisions, although, in determining which, and the construction to be given the clause found to apply, the whole section must be construed together. Indeed, the grandchildren referred to, in order to make out their claim, are compelled, not only to bring the case within the fifth clause, but to ingraft upon that clause the principle of representation found in the third clause.

We shall first consider the contention of the four defendants, the children of the deceased brother. Sir William Blackstone, after defining "inheritance per stirpes," says (speaking of the civil law): "And so, among collaterals, if any person of equal degree with the persons represented were still subsisting (as if the deceased left one brother, * * *), the succession was still guided by the roots; but if both of the brethren were dead, leaving issue, then, I apprehend, their representatives in equal degree became themselves principals, and shared the inheritance per capita,—that is, share and share alike,—they being themselves now the next in degree to the ancestor, in their own right, and not by right of representation. So, if the next heirs of Titius be six nieces, three by one sister, two by another, and one by a third, his inheritance, by the Roman law, was divided into six parts, and one given to each of the nieces, whereas the law of England, in this case, would still divide it only into three parts, and distribute it per stirpes, thus: One-third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother." 2 Bl. Comm. 217. This is stated as the common-law rule, but, immediately following what we have quoted, the reason therefor is given,—that it is a necessary consequence of the preference given at the common law to male issue, and to the firstborn among the males, to both of which the Roman law is a stranger. 2 Bl. Comm. 218. Blackstone's discussion of the canons of descent has been by no means free from criticism. But whether or not he, in this respect, accurately stated the provisions of the civil and of the common law, and the reasons for their distinction, his words are of great importance, because, during the whole formative period of the American law of descent,—at least, outside of the original colonies,—Blackstone's Commentaries was generally accepted as the embodiment of the common law. Every student resorted to it as teaching the elements of his profession. Most practitioners regarded it as the authoritative statement of the English law at the period of separation. So that those who framed the existing statutes of descent may safely be presumed to have been guided largely by what is there said as to rules of law which they were about to redeclare or alter, and as to the reasons for their existence. Referring to the text in this light, it is significant that in America the most general and earliest departures from the common law were in the abolishment of primogeniture and the preference of males. These changes swept away the reasons given by Blackstone for representation among collaterals, and it must have been in the minds of the framers of the statutes to follow another maxim frequently expressed by Blackstone, and sweep away the law itself, together with the reasons for its existence. Accordingly, we find Chief Justice Shaw saying, in 1850, "It is a plain rule of law that those who take property as a class of persons described, where there is nothing in the law making the appropriation to distinguish their respective rights, take in equal shares." Knapp v. Windsor, 6 Cush. 156. And elsewhere in the opinion it is said that the expression in the statute of a preference in the same words as that contained in the fifth clause of our statute shows that in other cases heirs take per capita, and again: "The rule of representation applies only from necessity, or where there are lineal heirs in different degrees." As before remarked, the statute of Massachusetts is very much like our own,—so similar, in fact, that it is more than probable that, directly or indirectly, ours was modeled upon that upon which Chief Justice

Shaw was commenting; so that his language is entitled to especial weight. The point, however, we desire to impress, is that, at the time he wrote, representation, in America, was not presumed, but was only applied where the statute affirmatively provided therefor. Other Massachusetts cases, of less weight as indicating a general policy of the law, but more directly in point as to interpretation, are Snow v. Snow, 111 Mass. 389, and Balch v. Stone, 149 Mass. 39, 20 N. E. 322. The significance of these cases is chiefly in the fact that they construe such language as "next of kin in equal degrees" as implying a taking per capita by the class described.

The case of Houston v. Davidson, 45 Ga. 574, is also instructive as indicating that a per capita distribution is intended, except within the degrees where representation per stirpes is expressly provided. Indeed, we understand counsel for the defendants to practically concede this point, by admitting that if the case does not fall within the third subdivision, which provides for representation, a distribution per capita must be made. We think, however, the case falls within the fifth, and not the third, clause. The section undertakes to provide a complete scheme of descent, beginning with the issue of the intestate, exhausting all blood kindred, providing for a single case (that of the widow) where the inheritance is made to pass by affinity, in the absence of kindred by blood, and ending with escheat to the state. The first clause provides that the children shall take in equal shares, and the lawful issue of any deceased child, by right of representation. This is followed by an express provision whereby, if no child of the intestate survive him, the estate shall descend to the more remote descendants per capita, if they are all in the same degree, otherwise per stirpes. This clause is significant on the question before us, in this: that thus, at the very outset, we find that the rule is different where one child survives, and where they are all dead. Representation is almost uniformly recognized more fully in the case of direct descendants than in the case of collaterals, and therefore it would be a strange thing if the legislature should provide for a descent per capita among lineal heirs under circumstances where the descent would be per stirpes among collaterals. The fact that this distinction is created in the first clause is of service in construing the third, fourth, and fifth. The second clause is unimportant to the discussion, except that, by the joint effect of the first and second, lineal heirs, both in the ascending and descending line, are provided for, so that with the third clause the consideration of collateral begins. The third provides that in the absence of issue, widow, and father, the estate shall descend in equal shares to brothers and sisters, "and to children of any deceased brother or sister by right of representation." It is contended that the case before us is covered by this clause, and that the provision for representation in favor of the children of "any" deceased brother or sister extends to the case where all brothers and sisters are deceased. If this were true, as we have already suggested, it would be somewhat remarkable, in view of the express provision to the contrary in the case of deceased children; but we think the subsequent clauses show that it is not true, and expressly carry out the analogy of the first clause. The third provides for the absence of issue, widow, and father, and the prior death of "any deceased brother or sister." The fourth provides for a case where there is neither issue, widow, father, "and no brother nor sister living at his death." In this case the estate goes to the mother, to the exclusion of the issue of any deceased brother or sister. Here, then, is evidently a case not within the third section, for the sole reason that there is no surviving brother or sister. In determining whether or not a case falls within the third or fourth clause, it becomes absolutely necessary to interpret the third clause as if, following the phrase, "any deceased brother or sister," there was added, "a brother or sister surviving." Then comes the fifth clause, which provides for the case where there is left neither issue, widow, father, brother, or sister, nor mother, which is the case before us, and which differs from the fourth section only in that it excludes the case of a surviving mother. These three clauses, therefore, form a scheme of inheritance among collaterals, embracing incidentally the case of the mother. They pursue an exclusive process, and must be read, in order to give the whole effect, as if, in addition to stating what kindred do not survive, they also stated that there were surviving those next in degree not named in the exclusive clauses. As the case falls within the fifth clause, it follows from what has already been said that a distribution per capita is required.

The case of the sister's grandchildren is perhaps less clear, but we think the district court was also correct in its ruling upon their claim. What we have already said in regard to the general policy whereby representation exists only by necessity, or in cases expressly provided for, is applicable to this branch of the case. Among lineal descendants, representation is expressly provided for, without limitation as to degree; the language being, "If all the said descendants are in the same degree of kindred to the intestate they shall have the estate equally, otherwise they shall take according to the right of representation." The sixth and seventh clauses, containing additional provisions for lineal descent, are in similar language. The language of the fifth clause is that the estate shall descend "to his next of kin in equal degree; excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote." By

section 33, degrees of kindred are to be computed according to the civil law; so that these three plaintiffs, whom, for convenience, we have referred to as grandchildren, stand one degree more remote than the other parties to the action. The first, sixth, and seventh clauses provide for representation among lineals of unequal degree. The fifth clause provides that those who are nearest shall be preferred to those who are more remote. The seventh canon of descent, as stated by Blackstone, is "that in collateral inheritances the male stock shall be preferred to the female." 2 Bl. Comm. 234. The term "preferred" was there used in the sense of entirely excluding the female stock, provided male stock survived; and that, we think, is the general use of the term in such connection. It seems to be the policy of all the statutes, at some point more or less remote, to cut off representation entirely among collaterals, and where, because of unequal degrees of kinship, representation would otherwise be necessary, to defeat it by making a per capita distribution among those nearest in degree, and excluding the more remote. Our law seems to reach that period where at any point among collaterals beyond the children of brothers and sisters, the surviving kindred fall into unequal degrees. This is the construction given elsewhere to statutes resembling ours. Van Cleve v. Van Fossen, 73 Mich. 342, 41 N. W. 258; Schenck v. Vail, 24 N. J. Eq. 538; Bigelow v. Morong, 103 Mass. 287; Davis v. Stinson, 53 Me. 493; Conant v. Kent, 130 Mass. 178. Cases holding a different rule, so far as we have found any, have been under statutes which, by their clear language, required a different construction. The judgment of the district court was in all respects correct. Judgment affirmed.

STATE ex rel. PATTERSON v. BOARD OF COM'RS OF DOUGLAS COUNTY et al.

(Supreme Court of Nebraska. March 5, 1896.)

DOUGLAS COUNTY CANAL CASE — MUNICIPAL CORPORATIONS—STATUTES—AMENDMENT—EXPRESSION OF SUBJECT IN TITLE.

1. By an act of the legislature there was provided to be appointed a board of trustees, which, when organized, should, in law and equity, be construed as a body corporate and politic, and which might, in its corporate name, sue and be sued, contract and be contracted with, acquire and hold real and personal property necessary for its corporate purposes, adopt and change its corporate seal, construct and operate a canal, for the purposes of commerce, and supplying power, heat, and light. *Held*, that this was not a municipal corporation, and that the attempt to make it a corporation was nugatory, because, in effect, the general corporation law in existence was thereby sought to be amended without its provisions being referred to in any way in the amendatory act.

2. In the title of an act, its scope was defined as authorizing counties of a prescribed description, among other powers conferred, to construct, own, and operate canals in certain defined ways, and also to acquire right of way and land for such purposes, and also to provide for the appointment of a board of trustees to carry such purposes into effect. In the act itself, provision was made for the appointment of a board of trustees, which, when organized, should, in law and equity, be construed a body corporate and politic; and in this board the act provided there should be vested the power to construct and operate such canal, and that, for those purposes, such board of trustees might, in its own name, acquire right of way and other required land, even by condemnation proceedings, if necessary. *Held*, that the subject of the act was not clearly expressed in its title, as required in section 11, art. 3, of the constitution of Nebraska, and that, since this defect rendered inoperative its other provisions, the entire act is null and void.

(Syllabus by the Court.)

Error to district court, Douglas county; Ambrose, Duffie, and Keysor, Judges.

Mandamus, on the relation of David C. Patterson, against the board of county commissioners of Douglas county. Guy C. Barton and others intervened. To the judgment rendered, relator brings error. Affirmed.

Charles J. Greene, John L. Kennedy, Chas. Ogden, Geo. W. Covell, and B. S. Baker, for plaintiff in error. Chas. Offutt, W. S. Poppleton, and H. H. Baldrige, for defendants in error.

RYAN, C. At the last session of the legislature of this state there was passed and approved an act, entitled "An act enabling counties in the state of Nebraska having a population of not less than 125,000 inhabitants to issue bonds, to construct, own and operate canals in the state of Nebraska for navigation, water power and other purposes, and generating of electric and other power and transmitting of the same for light, heat, power, and other purposes, and to acquire right of way and land for such purposes, and to provide for the appointment of a board of trustees to carry into effect the purposes of this act, and to levy taxes to pay the same and interest thereon, and to repeal section 2032a, Consolidated Statutes, 1893." Sess. Laws 1895, c. 71. Douglas county alone, in this state, has a population adequate to render available the above provisions. In the body of the act in question it is provided that the bonds which may be issued shall not exceed in amount 10 per cent. of the assessed valuation of the county, and that whether or not bonds shall be voted must first be submitted to the voters of the county, in compliance with the prayer of a petition signed by 2,500 legal voters asking such submission, which petition must be presented to and acted upon by the county commissioners. A petition in conformity with the above requirements was presented to the board of county commissioners of Douglas county. This board refused to call an election, and, by mandamus in the proper district court, it was sought, by one of the petitioners, to compel the county board to order an election. The judgment of the district court was adverse

to relator, and the correctness of this judgment is now challenged by this error proceeding.

It is very difficult to summarize the provisions of the above act within a reasonably brief space. Nevertheless, this shall now be attempted. After the proposition to issue bonds has been carried, it becomes the duty of the county commissioners to notify the judges of the district court of the result of the election, whereupon these judges are required to appoint five trustees. Each of the trustees must give an official bond, in such amount as the board of county commissioners may fix. It is provided that the board of trustees shall, "when duly organized be construed in law and equity a body corporate and politic, and shall be known by the name and style of 'The Board of Canal Trustees of ——— County, Nebraska,' and by such name and style may sue and be sued, contract and be contracted with, acquire and hold real estate and personal property necessary for its corporate purposes, and adopt a common seal and alter the same at pleasure, and shall exercise all the powers necessary to carry into effect the object for which such board shall have been appointed, and shall control and manage all the affairs and property which shall come into the hands or under the control of such board of trustees." Sess. Laws 1895, p. 307, c. 71, § 1. It further provided that "such board of trustees shall have full power to pass all necessary rules and regulations for the proper management and conduct of the business of such board, and of such corporate body, and for carrying into effect the objects for which such board is created. Any board of canal trustees organized as provided in this act shall have power to make preliminary surveys, lay out, acquire right of way and other lands within such county, or within twenty miles of the limits of such county, necessary for its purposes, establish, construct and maintain and operate a canal through any county or counties in this state for navigation, water power and all other purposes, except irrigation, for generating electric and other power and transmitting the same for light, heat, power, and all other purposes, except irrigation, and may dispose of the water in such canal for domestic and for all other purposes except irrigation, and to control and dispose of water power, electric, pneumatic, hydraulic, or other power generated by such water power, also to operate a line of boats on such canal or granting the right for such navigation to any party or parties upon payment of tolls, subject to such rules and regulations as shall be established and adopted by such board of trustees: provided, that no exclusive right shall be granted to any person or persons or corporations, except that such board may lease to any party ground for manufacturing or industrial purposes for a term of years, which ground so leased shall be subject to re-appraisal for rental purposes every twenty years. All revenues derived by said board of trustees from every source shall be deposited with the county treasurer of such county, and by him be placed in a fund to be designated as the canal fund. The general expense, maintenance, extension or enlargement of such canal or other works connected therewith shall be paid out of said canal fund by the county treasurer of such county upon official orders issued by the board of canal trustees. All surplus moneys in said fund not needed for canal expenses, improvement or enlargement shall be placed in the general fund of the county, and may be used for all purposes for which the county general fund as now designated may be used. Such board of trustees for and on behalf of such county may acquire by purchase, condemnation or otherwise, whether within or without the county limits, if within twenty miles of the limits of such county, any and all real property necessary to carry into effect the objects for which such board shall have been appointed and which may be required for its corporate purposes and right of way for the canal and right of way privileges and easements, sites for reservoirs and dams, power houses and additional lands to be leased to persons, parties or corporations purchasing or using such power: provided, that all the moneys for the purchase of any real estate property shall be paid before possession is taken thereof, or any work done thereon, and all moneys for the condemnation of any property shall be paid into the county court of the county in which such property shall be condemned. Whenever the board of canal trustees of any county appointed under this act shall require any private property necessary for the purposes aforesaid, such property shall be acquired or condemned as nearly as may be in the same manner as is provided by law for the condemnation of right of way for railroad corporations within this state: provided, that proceedings to acquire possession by condemnation of property so taken shall in all cases be instituted in the county where the property sought to be taken or damaged is situated: provided, that when it shall be necessary in making any improvement by such board of trustees to enter upon any property held for public use they shall have power to do so, and may acquire right of way upon and over such property held for public use in the same manner as is above provided for acquiring private property by condemnation of such board of trustees, and may enter upon, use, widen, deepen and improve any stream, water way or lake that may be necessary to be used for such canal purposes, but in cases where public roads are crossed by such canal or tailrace or outlets thereof such board of trustees shall cause to be constructed and maintained bridges over such canal or tailrace or outlets thereof." Sess. Laws 1895, p. 308, c. 71, § 1.

It is scarcely necessary, perhaps, to note that, in respect to the canal proposed to be

constructed and operated, the board of county commissioners of Douglas county, after they shall have ordered an election, have but little more to say or do. The duty is devolved upon the board to notify the district judges of the result of the election upon the proposition to issue bonds, whereupon the judges must appoint five trustees. These trustees, when organized so as to constitute a board, take charge of the construction and operation of the canal as property owned by itself for the use and benefit of the county. There is a provision that the title shall be held for the county, but there is no method by which the county, eo nomine, can assert ownership or an independent right of possession. All revenues, it is true, must be deposited with the county treasurer, but these must be kept as a distinct fund, and from this fund the board of trustees, upon its own orders, may require payments to be made, and only such surplus as the board of trustees does not require may be used by the county. The county commissioners have no voice in allowing or rejecting claims, and there is reserved no right of appeal in favor of either the county or a taxpayer. There is required no accounting by the trustees, either of moneys received or expended, and, without the consent of property owners thereby affected, the jurisdiction of these functionaries of Douglas county is extended over a circumjacent strip 20 miles in width, for certain purposes attached to and treated as a mere outlying province.

Counsel for plaintiff in error, in his reargument of this case, made in compliance with a request to that effect, contends that the provision with respect to the creation of a body corporate and politic finds judicial sanction in People v. Kelly, 76 N. Y. 475; Walker v. Cincinnati, 21 Ohio St. 14; People v. Salomon, 51 Ill. 37; and in several California irrigation cases. Before attempting an expression of our own views, we shall indicate why these cases fail to establish the proposition in support of which they were cited. In People v. Kelly, an amendment of the constitution of the state of New York had prohibited cities and other municipal corporations from becoming interested in any stocks or bonds of any corporation, and from incurring any indebtedness except for county, city, or village purposes. It became necessary, for the construction of the bridge between the cities of New York and Brooklyn, that those cities should own the aforesaid bridge, and, for its joint construction and control a board of 16 trustees, one-half of whom were to be appointed by the authorities of each city, was provided. This board was in no sense a body corporate or politic. In Walker v. Cincinnati, Scott, C. J., in delivering the opinion of the court, said: "The general scope and purpose of the act is to authorize any such city to construct a line of railroad leading therefrom to any other terminus in the state or in any other state, through the agency of a board of trustees, consisting of five persons, to be appointed by the superior court of such city, or, if there be no superior court, then by the court of common pleas of the county in which such city is situated. The enterprise cannot, however, be undertaken until a majority of the city council shall, by resolution, have declared such line of railway to be essential to the interests of the city, nor until it shall have received the sanction of a majority vote of the electors of the city, at a special election, to be ordered by the city council, after 20 days' public notice. For the accomplishment of this purpose, the board of trustees is authorized to borrow a sum not exceeding $10,000,000, and to issue bonds therefor in the name of the city, which shall be secured by a mortgage on the line of railway and its net income, and by the pledge of faith of the city, and a tax, to be annually levied by the council, sufficient, with such net income, to pay the interest and provide a sinking fund for the final redemption of the bonds." Speaking of the trustees above provided for, it was said, in the opinion above quoted from: "But it is clear that the trustees are a mere agency through which the city is authorized to operate for its own sole benefit. Neither as individuals nor as a board have they any beneficial interest in the fund which they are to manage, or in the road which they are to build. They are, in fact as well as in name, but trustees, and the sole beneficiary of the trust is the city of Cincinnati." These trustees, when organized as a board, certainly were not "a body corporate and politic."

In People v. Salomon, the scope of the decision, in so far as it is applicable to this case, is thus expressed in the fourth paragraph of the syllabus: "Under the act of February 24, 1869, providing for the location and maintenance of a park for the towns of South Chicago, Hyde Park, and Lake, those towns were erected into a park district; and, the people of the towns affected by the act having, by a vote, accepted its provisions, the board of park commissioners thereby created, to whom was committed the entire control of the park, became a municipal corporation, in whom it was competent for the legislature to vest power to assess and collect taxes, within the park district so created, for the special corporate purpose of its creation; and such is the effect of that portion of the act which requires the county clerk of the county in which the district is situated, on the estimate of the park commissioners, to place the amount required, within certain limits, in the tax warrants for the towns embraced in the district." The nature and functions of a district of the kind above referred to are found to exist in irrigation districts, and, as the discussion of districts of this latter class applies equally to the park district above referred to, no further space will be devoted to a consideration of People v. Salomon, supra.

Counsel for plaintiff in error cite several California cases as being analogous in principle to the one at bar, but apparently have

overlooked the case of Board v. Collins, 46 Neb. 411, 64 N. W. 1086, in which this court has already considered this class of adjudications. Referring to Chapter 69, Laws 1895, Post, J., in the case just cited, said: "The act provides for the creation of irrigation districts comprising property susceptible of irrigation from the same source and by means of the same system of works. It requires a petition to be filed with the county board, signed by a majority of the resident freeholders who are qualified electors, and who own a majority of the whole number of acres of land belonging to resident electors, particularly defining the boundaries of the proposed district. The county board may, on the final hearing of the petition, and after notice thereof to all parties interested, define the boundaries, making such changes thereof as may be deemed proper, but including therein no lands which are not susceptible of irrigation by the same system. The question is then, at a special election, submitted to the electors of the proposed district, who are also owners of real estate therein. Upon the adoption of the proposition, a record thereof is to be filed in the office of the county clerk of each county in which any portion of the land included in said district is situated, and immediately thereafter the county board shall call a special election, at which there shall be chosen a treasurer, an assessor, and three directors." In respect to the nature of irrigation districts it was said in this opinion: "The validity of this species of legislation was first called in question in Irrigation Dist. v. Williams, 76 Cal. 360, 18 Pac. 379, in which it was held, under constitutional provisions substantially similar to ours, that the districts contemplated by the statute of that state are quasi public corporations, in the sense that the purpose of their organization is the general public benefit." Having reviewed at some length the trend of judicial decisions in California, Post, J., quoted with approval the language of Harrison, J., in Re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675, from which quotation the following is reproduced: "It is contended that the act is unconstitutional for the reason that it is a delegation of the legislative power to create a corporation. If by this is meant that only the legislature can create such corporation, the answer is that the constitution prohibits such action. If it is meant that, because the corporation is not 'created' until the voters of the district have accepted the terms of the act, the answer is that such proceeding is in direct accord with the principles of the constitution. Having the power to create municipal corporations, but being prohibited from creating them by special laws, the only mode in which such corporations could be created under a general law would be by some act, on the part of the district or community seeking incorporation, indicative of its determination to accept its terms. As the constitution has not limited or prescribed the character of such general law, its character and details are within the discretionary power of the legislature. We know no more appropriate mode of such indication than the affirmative vote of those who are affected by the acceptance of the terms of the act."

From the very instructive case of Board v. Collins, there are clearly deducible the conclusions that irrigation districts, organized as above indicated, are public, rather than municipal, corporations; that their officers are public agents; and that, having been created by vote of the people concerned, duly authorized thereto by a constitutional law, an irrigation district may properly perform the appropriate functions with which it is endowed. Neither the California cases, nor the other cases cited on behalf of plaintiff in error, furnish any analogies which can be of use with respect to the case under consideration. How, then, shall we classify this "body corporate and politic" which, differing in its genesis and functions from any known political organism, nevertheless assumes the performance of duties and the exercise of functions which in no way resemble those by law devolved upon the board of county commissioners? The defendants in error contend that the individual trustees are public officers, and that, therefore, the very essential part of the act which provides for their appointment necessarily constitutes them county officers, and on this account it should be declared void. In opposition to this contention, we are reminded that the individual trustees have no authority as such, and that it is only as a board that they have recognition. In a brief submitted on behalf of the plaintiff in error it is said: "We insist that this act creates a new and independent municipal corporation. It is not a city or county corporation, but one wholly distinct from either," etc. "The act does not in any way abridge or curtail any of the rights of the counties heretofore existing or the rights of any of their officers, and does not amend or conflict with any of the provisions of the statute heretofore existing regarding counties." In another brief, submitted on behalf of the plaintiff in error, occurs the following language: "There is an important feature of the canal act which ought to be considered in this connection. The board of canal trustees, when duly organized, is to become, in law and equity, a corporation. No one of the trustees fills any office, except as a member of the board. The board itself—the corporation—is the agency of the state to carry into effect the purposes of the act." From these definitions and limitations, if accepted as correct, it would necessarily result that, by an act of the legislature, a method had been provided whereby a corporation, consisting of five private citizens, may be created. It is idle to insist that this

board of trustees, when organized, can be a municipal corporation in any sense. The following definition of the term "municipal corporation" is given by an eminent writer upon that subject: "We may therefore define a municipal corporation, in its historical and strict sense, to be the incorporation, by the authority of the government, of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper." 1 Dill. Mun. Corp. § 20. "A municipal corporation is a subordinate branch of the government of state." Mayor v. Ray, 19 Wall. 475. In argument, no claim has been founded upon the use of the term "body politic," also used as a part of the description of the board of trustees contemplated in the act, and we apprehend that none properly could be. We must, therefore, deal with the board as a corporation having no municipal attributes, and of which no municipal duties can be required.

It is provided in section 1, art. 11, of the constitution of Nebraska, under the head of "Miscellaneous Corporations," as follows: "Section 1. No corporation shall be created by special law, nor its charter extended, changed, or amended, except those for charitable, educational, penal, or reformatory purposes, which are to be and remain under the patronage and control of the state, but the legislature shall provide by general laws for the organization of all corporations hereafter to be created." Under this provision of the constitution, there was in existence, before this act was passed, a general law which provided how corporations, composed of and managed solely by private citizens, must be created. Previous to the commencement of business, corporations within the class indicated were required to adopt and file for record articles of incorporation, and to publish notice of the name, the place and nature of their business, the amount of capital stock, the time of commencement and termination, to what amount they might become indebted, and by what officers their affairs should be managed. It can scarcely be claimed by the plaintiff in error that the board of canal trustees can be a corporation designed for either "charitable, educational, penal, or reformatory purposes," and yet its creation is provided for by an act which in no way refers to the general incorporation law, which is to be found in chapter 16, Comp. St. This method of amending statutes already in existence is unquestionably in violation of the provision in section 11, art. 3, of said constitution, that "no law shall be amended unless the new act contain the section or sections so amended, and t
tion or sections so amended shall
pealed." Smails v. White, 4 Neb. 35
ereign v. State, 7 Neb. 409; Strich
State, 31 Neb. 674, 48 N. W. 820; T
v. Trumble, 37 Neb. 340, 55 N. W. 86
the sake of the argument, if it sho
conceded, to the contention of the p
that the board of trustees, duly org
becomes a municipal corporation, the
considerations would still have the
force; the difference being merely t
amendatory act invades the field of
tion governing municipal, as distin
from ordinary, corporations.

The right of eminent domain, by t
visions of the act, was delegated dir
the board of trustees as such, and t
of the property acquired by its exer
in any other way, for the constructi
operation of a canal, is to be held
board of trustees in its corporate c
The title of this act is, "An act enablin
ties * * * to issue bonds, to constru
and operate canals, * * * and to
right of way and land for such purpos
to provide for the appointment of
of trustees to carry into effect the p
of this act, and to levy taxes to pay th
and the interest thereon," etc. O
enumerated purposes, the power t
bonds, and the power to levy taxes
payment of the principal and interes
of, are contained in the body of the ac
out question. In a certain sense,
the provision in the title for the appo
of a board of trustees to carry into ef
provisions of this act finds response
provisions of the bill, which turn
said board the whole property as i
quired or constructed. But it is
that no power of construction is adeq
the task of demonstrating that the
of a county to own and operate cana
to acquire and hold land for such pu
as provided in the above title, are at
by providing in the bill itself that su
er shall be vested in a specially creat
tinct corporation even though munic
dependent of the county as well as
officers and taxpayers. The title of
is therefore misleading as to a part
act, without which its purpose could
accomplished, and since this part of
ject is not clearly expressed in the
required by section 11, art. 3, of the c
tion of this state, no part of the act
sustained. Ives v Norris, 13 Neb.
N. W. 276; State v. Ream, 16 Neb.
N. W. 398; Trumble v. Trumble, 3
340, 55 N. W. 869. The judgment
district court is affirmed. Affirmed.

NORVAL and HARRISON, JJ., co
result. IRVINE, C., not sitting. P
J., dissenting.

BROWN et al. v. WESTERFIELD et al.

(Supreme Court of Nebraska. March 4, 1896.)

DEED—DELIVERY—PLEADING.

1. An allegation in a pleading that the grantor "made and executed" a deed includes all acts essential to the completion of the muniment of title,—the delivery of the instrument to the grantee, as well as the signature of the grantor.

2. The loss or destruction of a deed, after delivery thereof, does not divest the title of the grantee.

3. The delivery of a deed is essential to render the conveyance operative.

4. Delivery is purely a question of intent, to be determined by the facts and circumstances of each particular case.

5. It is not essential to the validity of a deed that it should be delivered to the grantee personally. It is sufficient if the grantor delivers it to a third person, unconditionally, for the use of the grantee, the grantor reserving no control over the instrument.

6. A mother signed and acknowledged a deed before a justice of the peace, conveying to her minor daughter certain real estate, and delivered the deed to the justice for the use and benefit of the grantee, without any reservation of control, with the intention and understanding that the justice should retain the custody of the instrument until the grantor's death, when he was to file it for record. The mother subsequently told the daughter that the property belonged to the latter, and that it had been fixed so she would have a home. *Held*, that the delivery to the justice was sufficient to pass the title to the property to the grantee at the date of such delivery.

(Syllabus by the Court.)

Appeal from district court, Lancaster county; Tuttle, Judge.

Action by Ruthie Brown and others against Sam Westerfield and others. From the judgment rendered certain defendants appeal. Affirmed.

Pound & Burr, for appellants. B. F. Johnson and T. F. Barnes, for appellees.

NORVAL, J. This was a suit by Ruthie Brown against Sam Westerfield and Ida Westerfield, his wife, and Louis and Jimmie Brown, to quiet the title in plaintiff to the south half of lot C, a subdivision of lots 4, 5, and 6 in block 28 of Kinney's O Street addition to the city of Lincoln. The petition alleges that plaintiff is the only living child of Hannah and James Brown; that on the 20th day of June, 1883, the said Hannah Brown, now deceased, being the owner in fee simple of the real estate above described, together with her husband, said James Brown, made and executed a warranty deed to the plaintiff of said property, reserving a life estate therein to said James Brown; that said deed has become lost or stolen,—plaintiff is unable to state which, but is informed that the same was placed in the hands of Sam Westerfield, one of the defendants; that, though demand for the same has been made upon him, he has refused to comply therewith, and disclaims all knowledge of the deed; and that the defendants Sam Westerfield, Jimmie and Louis Brown, are not the issue of the said James and Hannah Brown, but are children of said Hannah Brown by a former husband. James Brown, plaintiff's father, was, subsequent to the institution of the suit, joined as party plaintiff; and, no service of summons having been had upon Louis and Jimmie Brown, the action was dismissed as to them. Sam Westerfield answered, admitting that plaintiff is the child and one of the heirs at law of said Hannah Brown, and denying all other averments of the petition. By way of cross petition, Westerfield sets up that Hannah Brown and her husband, James Brown, executed and delivered a mortgage upon said lot C to one Mary Jane Carman, to secure the payment of $27 and interest; that the defendant is the owner of said mortgage; and that the debt for which the same was given to secure has not been paid, nor any part thereof. The answer prays for the dismissal of plaintiff's suit, and for foreclosure of said mortgage. Upon the hearing a decree was entered quieting the title to the premises in controversy in Ruthie Brown, subject to the life interest therein of her father, and foreclosing said mortgage. From the decree quieting the title the Westerfields appeal.

The appellants contend, in argument, that the petition is defective, and fails to state a cause of action, in that it contains no specific allegation that the deed in question was ever delivered. The delivery of a deed is indispensable to its validity. While it is true there is no direct averment in the pleading that the deed had been delivered, yet this is not fatal. It is averred that the grantors "made and executed a warranty deed to the plaintiff" to the property. "Execute" is defined by Webster thus: "To complete, as a legal instrument; to perform what is required to give validity to, as by signing, perhaps sealing and delivering; as to execute a deed, lease, mortgage, will," etc. And the same authority gives the following as one of the definitions of the word "execution": "The act of signing and sealing and delivering a legal instrument, or giving it the forms required to render it valid; as the execution of a deed." In 1 Warv. Vend. p. 482, it is said: "The term 'execution' primarily means the accomplishment of a thing,—the completion of an act or instrument; and in this sense it is used in conveyancing, to denote the final consummation of a contract of sale. The term properly includes only those acts which are necessary to the full completion of an instrument, which are the signature of the disposing party, the affixing of his seal to give character to the instrument, and its delivery to the grantee." In this state the seal of the grantor is unnecessary, and an acknowledgment is no part of the deed conveying land other than the grantor's homestead, but an unacknowledged deed to such real estate, otherwise perfect, as between the parties, passes the title. The averment in the petition that the grantors "made and executed" the deed, under the definitions already given,

includes the delivery of the instrument, as a conveyance of the property.

The uncontradicted testimony shows that James and Hannah Brown signed and acknowledged a deed of conveyance to their daughter, Ruthie Brown, one of the plaintiffs herein, for the premises in controversy; reserving a life estate therein to James Brown, one of the grantors. It was never actually delivered to the grantee in person, nor was it ever placed upon record. The instrument is not now to be found. A deed is merely the evidence of the grantee's title. The loss or destruction of the deed did not divest plaintiffs of their title, if they ever acquired one. And whether the title ever passed from Mrs. Brown, the owner of the fee, to this property, depends upon whether the facts disclosed by this record amount, in law, to a delivery of the deed in question.

It appears from the evidence adduced that Hannah Brown, being the owner of the property in dispute, and another tract of the same size, adjoining it on the north, on the 20th day of June, 1883, caused two deeds to be prepared by J. H. Brown, a justice of the peace of the city of Lincoln,—one, covering the north portion, to Sam Westerfield, one of the defendants, and the other, covering the south tract, to Ruthie Brown, subject to a life interest in her father, James Brown. These deeds, properly witnessed, were signed and acknowledged by both Hannah and James Brown before said justice of the peace. The magistrate is the only person who testified as to what transpired at the time, and the disposition made of the deeds. He states, in substance: That he had acted as Mrs. Brown's legal adviser, having at various times transacted considerable business for her. That on the date already mentioned, at her request, he went to see her, when she informed him it was her desire that the property be divided between her two children, Ruthie and Sam, the former being then some 9 or 10 years old, reserving a life interest in her husband in the home property. That her two sons Jimmie and Louis had abandoned her, and it was her wish to make a division of the property then, for fear they would come in for a share at her death. In pursuance of this request the two deeds were prepared by the witness, and then signed and acknowledged. The magistrate was requested to keep them, and place them upon record after her death. He carried them for two or three days thereafter, when he went to Mrs. Brown's place of abode, put them in a tin box in which she kept her tax receipts and other papers; and at the time the witness, at Mrs. Brown's request, promised to see to the recording of the deed in question upon her death. That four or five times thereafter (the last one being about a week or 10 days before Mrs. Brown died) she talked the matter over, expressing herself satisfied with the disposition she had made of the property. That immediately after the death of Mrs. Brown the justice, with James Brown, looked for the deed, and then discovered that it was gone. Sam Westerfield testified that he has never seen the deed, but had heard it spoken of by several, and that the deed to himself he had recorded August 28, 1883, prior to his mother's death. Ruthie Brown testified that about a week before her mother died the latter told her, as she had frequently stated before, that the place was Ruthie's, and it had been fixed so that she would have a home; that about two weeks before the trial witness asked Sam Westerfield about the deed, and he replied that he had it, or knew where it was. This conversation Westerfield denies having ever occurred.

The matter of contest is whether there was, in law, a delivery of the deed, for a delivery is indispensable to its binding effect. But as was said by Chief Justice Lake in Brittain v. Work, 13 Neb. 347, 14 N. W. 421: "No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor, from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient." Delivery of a written instrument, like a deed, is largely a question of intent, to be determined by the facts and circumstances of the case. In the case at bar it depends on whether the intention of the grantor at the time was that the deed should operate as a muniment of title, to take effect presently. In other words, did Mrs. Brown part with control over the instrument, and place the title in her daughter? If such was the purpose, the delivery was complete, and the title to the property passed. 1 Devl. Deeds, §§ 260–262; Warren v. Swett, 31 N. H. 332; Jordan v. Davis, 108 Ill. 336; Burkholden v. Casad, 47 Ind. 418; Masterson v. Cheek, 23 Ill. 73. From an examination of the evidence, we are satisfied that it establishes a delivery of the deed. It was placed in the hands of the magistrate who took the acknowledgment, to hold for the grantee. This was sufficient to carry the title to the land. Byington v. Moore, 62 Iowa, 470, 17 N. W. 644; Hinson v. Bailey, 73 Iowa, 544, 35 N. W. 626; Black v. Hoyt, 33 Ohio St. 208; Mitchell v. Ryan, 3 Ohio St. 377; Albright v. Albright, 70 Wis. 528, 36 N. W. 254; Ball v. Foreman, 37 Ohio St. 132. In the case last cited the grantor delivered the deed to a third party, with the understanding that he should retain the custody of the same until the grantor's death, when he was to deliver to the grantee. It was held to be the grantee's deed in præsenti, and that the subsequent destruction of the instrument by the grantor did not have the effect to divest the title of the grantee. Cassody, J., in delivering the opinion of the court in that case, cites numerous authorities which sustain the proposition enunciated in the case. In Hinson v. Bailey, 73 Iowa, 544, 35 N. W. 626, Eva Hinson went to a

justice of the peace, and signed and acknowledged a deed, before him, conveying certain lands to her children. She left the deed in the possession of the magistrate, with directions to retain it until her death and then have it recorded. The justice told her that she could have the deed whenever she desired it, but she replied: "I don't want it. You must keep it until I die." It was held to be a good delivery, and that the deed took effect immediately upon the delivery to the justice. See, also, Wittenbrock v. Cass (Cal.) 42 Pac. 300; Bury v. Young (Cal.) 1 Am. Law Reg. & Rev. (N. S.) 140, 33 Pac. 338. It is true, in the case before us, that, after the delivery of the deed to Justice Brown, he took it to the grantor, and put it in a box where she kept her papers; but it was not with the intention of surrendering the deed, nor did that fact have the effect to divest the title of the grantee. Having once passed, it could not be divested in that way. Bunz v. Cornelius, 19 Neb. 107, 26 N. W. 621; Connell v. Galligher, 39 Neb. 793, 58 N. W. 438.

It is argued by appellants that the conveyance was intended to operate in the nature of a testamentary disposition of the property, not to take effect until the death of Mrs. Brown, and authorities are cited in the brief to the effect that such a deed is invalid. The facts do not warrant such conclusion. The intention clearly was that the deed should take effect at once. The recording alone was to be deferred until Mrs. Brown's death. This is not a case where a grantor has placed a deed in a depository, to be delivered to the grantee upon the death of the grantor, reserving the right to recall the deed at any time. The authorities cited by counsel for appellants are therefore not applicable here. We are constrained to hold that the trial court was, under the circumstances, justified in finding a sufficient delivery of the deed. The decree is affirmed. Affirmed.

MOORE v. SCOTT et al. (BANDERA FLAGSTONE CO., Intervener).

(Supreme Court of Nebraska. March 3, 1890.)

VENDOR AND PURCHASER—RESCISSION—FRAUD AND MISTAKE.

1. One who, as an inducement to a sale of land, in good faith states to the vendee that reliable third persons had represented the land to him as being of a certain character, and who at the same time states that he has no personal knowledge in regard to the land, does not thereby adopt such representations as his own, and rescission cannot be had merely because they prove false.

2. The statement that such third persons are reliable, being merely the expression of an opinion, is insufficient to charge the vendor in an action to rescind, at least where he honestly believed them reliable when the statement was made.

3. The jurisdiction of equity to relieve against mutual mistakes is, in general, confined to cases where, because of such mistakes, the minds of the parties never met, and there was therefore no contract, and to cases where the contract made was not correctly expressed by the instrument evidencing it. Relief cannot be given because of misapprehensions in regard to a collateral matter, as in regard to a fact incidentally affecting the value of the subject-matter of the contract, there being no deception or wrongful concealment.

(Syllabus by the Court.)

Appeal from district court, Buffalo county; Holcomb, Judge.

Action by R. A. Moore against C. R. Scott and others for rescission. From a judgment for defendants, plaintiff appeals. Affirmed.

R. A. Moore, in pro. per. C. R. Scott, for appellees.

IRVINE, C. In January, 1888, a contract was entered into between Moore and Scott whereby Scott assigned to Moore his rights under a contract for the purchase of 1,600 acres of land in Lincoln county. The consideration for this transaction was a conveyance by Moore to Scott of a lot in the city of Kearney, the transfer of a note for $300 made by F. H. Gilcrest & Co., a note of Moore's to Scott for $50, $5 in cash, and a box of cigars. This action was brought by Moore to rescind the contract. The Kearney Savings Bank and F. H. Gilcrest were made defendants, under allegations that the bank held the Gilcrest note, and was about to collect it, and pay its proceeds to Scott, the object of joining them being to obtain an injunction against the payment of the note to the bank by Gilcrest, and its collection and payment of the proceeds to Scott. The Bandera Flagstone Company intervened, claiming to be a bona fide purchaser from Scott of the Gilcrest note. The rights and claims of all the defendants except Scott may, however, be disregarded, as the case turns upon the issues joined between Moore and Scott and the decree thereon. The court found the issues generally in favor of the defendants; and, from a decree of dismissal entered upon that finding, the plaintiff prosecutes proceedings in error.

The ground upon which rescission was sought by Moore was false representations in regard to the character of the land, alleged to have been made by Scott. These were, in brief, that the land was nearly all good tillable land, a little rolling, but with valleys in it, and covered with a good growth of grass; that there was not enough sand upon it to prevent its being good farming land; that water could be obtained at a depth of 50 or 60 feet; and that the land was actually worth $4.50 an acre. It may be assumed as established that the land was not in these respects as plaintiff claims it was represented. Scott, however, denies that he made such representations, but avers the fact to be that he informed the plaintiff that he had never seen the land, and had no personal knowledge of its character, quality, or value, and would not be responsible for its character or quality upon that account. This was the controlling issue presented by the plead-

ings, as determined by their legal effect. As determined by their volume, the issues presented were more of the character indicated by the following excerpts from the answer and reply: The answer pleads that Scott was at the time in Kearney, attending court, and that, "while so in attendance upon said court, said plaintiff, through the kindness of his heart, and realizing that this defendant was a stranger in that part of God's heritage, kindly took this defendant in, and gave him meat and drink; that this defendant was then wholly unacquainted with the ways that are dark and the tricks that are vain on the part of said plaintiff, partook of his hospitality, being captivated by his blandishments and pretexts of friendship for the stranger." This allegation is met in the reply by the following: "Admits that part of the answer where the defendant alleges that he was given meat and drink by this plaintiff; and this plaintiff alleges that it was the most expensive meat and drink he ever dealt out to friend or foe; that relying upon the former friendship existing between this defendant and plaintiff, and not realizing that he was a wolf in lamb's clothing, and supposing that he was a friend, this plaintiff invited him into his home, and sat down with him in his parlor, and introduced him to his family, and that many a time since he has had reason to repent in sackcloth and ashes that he ever proffered said act of friendship and kindness; that the said defendant sat at his table, broke his bread, and ate his salt, and drank of his wine, and smoked his Havana cigars." Disregarding such issues as these and the evidence which incidentally crept in, in an attempt to support them, the case may be summarized by stating that the plaintiff's evidence tended strongly to support the allegations of his petition; while the evidence on the part of the defendant was equally positive to the effect that the defendant had at all times disclaimed personal knowledge of the character and value of the land, but that he had told the plaintiff that certain persons, whom he deemed reliable, and to whom he had been referred by his own vendor, had made statements in regard to the land substantially similar to those which the plaintiff charged the defendant with making. On this conflicting evidence, the finding of the trial court must be accepted as conclusive of the facts in favor of the defendant; and the question is therefore, assuming those facts to be in accordance with defendant's testimony, did the plaintiff make out his case?

It is true, as contended by plaintiff, that this court has repudiated the doctrine that, in order to make out a case of deceit, it must be shown that the defendant knew his representations to be false. The scienter is not material. Foley v. Holtry, 43 Neb. 133, 61 N. W. 120; Phillips v. Jones, 12 Neb. 213, 10 N. W. 708; Hoock v. Bowman, 42 Neb. 80, 60 N. W. 389; Johnson v. Gulick, 46 Neb. 817, 65 N. W. 883. But in all of these cases it is either expressly stated or necessarily implied that, in order to be actionable, the representations must have been made as a positive statement of existing facts. Now, in this case, assuming, as we must, that the defendant's account of the transaction is correct, the fact represented was that persons whom the defendant deemed reliable so represented the land to him. The defendant did not represent these matters in regard to the character of the land as facts within his knowledge, but he affirmatively disclaimed all knowledge in relation thereto. There is a class of cases where a party to a contract refers the other party to a third person for information, where it is held that, in so doing, he makes such third person his agent for the purpose of making the representations, and binds himself by the representations so made to the other party in pursuing that recommendation. A case of this class is Witherwax v. Riddle, 121 Ill. 140, 13 N. E. 545. But, in addition to there having been an express reference to the third person held out as knowing the facts, this third person was represented as being a reliable man, whereas, in fact, he was a fugitive from justice, and the decision of the court to a certain extent was based upon the fact that he was held out as a reliable man, when the defendant knew otherwise. In the case before us, the same representation was made as to the reliability of the persons from whom defendant obtained his information; but the case is distinguishable on two grounds: In the first place, when a man is held out simply in general terms as a truthful and reliable man, this must necessarily be merely the expression of an opinion; and there is here nothing to show that the reputation and character of the men named by the defendant were not as represented. In the second place, Scott did not refer Moore to these men for information. He merely stated to Moore what they had informed him; and there is nothing to show that he did not truthfully state it. A case directly in point is Cooper v. Lovering, 106 Mass. 77. In that case a vendor read to the vendee certain letters received from his brother containing statements in regard to the property. The court said: "If he intentionally misstated their contents, that would amount to a misrepresentation of a material fact, and would come within the established definition of 'deceit.' If he knew that the information contained in the letters was false, and hat the writer was not 'trustworthy and reliable,' it would, of course, be fraudulent it, by words or acts, he induced the defendant to act and rely upon them, and to incur damage and loss by such reliance. But if he himself believed the information contained in the letters to be true, and the writer to be entitled to confidence, and if he truly and honestly stated the contents of the letters, and explained to the defendant that he had no other personal knowl-

edge on the subject-matter, such representations on the plaintiff's part would not be fraudulent."

At some time during the trial, the plaintiff asked leave to amend his petition by asking rescission on the ground of mistake. Leave to so amend was refused. The amendment tendered alleged the same representations as the original petition, and averred that the contract was entered into because both parties, by mistake, believed the facts to be as represented. We do not think that a ground for relief from mistake was shown, and therefore there was no error in refusing the amendment. As we understand the law, the jurisdiction of equity to relieve against mutual mistakes does not extend to all cases where the parties to a contract, at the time it was made, were in ignorance of or misapprehended some matter incidental to the subject of the contract. If that were so, and A. sold his farm to B., he might rescind on its being subsequently discovered that there was a valuable vein of coal or other mineral underlying the land. As we understand it, the mistake against which a court of equity grants relief is such as either discloses that the minds of the parties never met, and that there was therefore no contract, or else where the contract was defectively executed, so as not to express the real agreement of the parties. Pol. Cont. p. 392; 1 Story, Eq. Jur. (13th Ed.) § 140, note a; 2 Pom. Eq. Jur. § 853. Thus, if a contract be made for the sale of land to which it turns out that the vendor had no title, relief may be had, and likewise if the conveyance misdescribed the land actually sold. In one case there may be a rescission; in the other, a reformation. But, where there is actually sold the land which the parties had in contemplation, a mere erroneous impression in regard to a collateral matter affecting the value of the land is not a mistake justifying the interposition of a court of equity. In Billings v. McCoy, 5 Neb. 187, the case made was that a number of cattle had been sold, at the price of 4½ cents per pound; that a mistake had been made in keeping account of the weight of the cattle, whereby too large a sum had been paid. It was held that the excess could be recovered back. But, when this transaction is scrutinized, it was a sale of cattle at so much per pound, so that the purchaser did not get what he had paid for in consequence of the mistake. If the contract had been for the sale of so many head of cattle, at an aggregate price or at so much per head, the parties merely believing that the cattle weighed a certain number of pounds, when in fact they did not weigh so much, there certainly could have been no recovery.

There are other assignments of error, but they relate to the admission of evidence which it is claimed was incompetent or immaterial. Under the long established rule, a judgment in a case tried without a jury will not be reversed on account of errors in admitting evidence where there is sufficient competent evidence to sustain the finding. Judgment affirmed.

SCOTT et al. v. KIRSCHBAUM et al.

(Supreme Court of Nebraska. March 3, 1896.)

ASSUMPSIT—PLEADING AND PROOF—INDEPENDENT TRANSACTIONS—GARNISHMENT—LIABILITY OF GARNISHEE.

1. In an action solely for money alleged to have been collected by the defendants, to whom, as attorneys at law, the collection of the same had been intrusted, a recovery for damages resulting from an unauthorized appearance by defendants as attorneys at law in an action entirely independent of the aforesaid collection cannot be sustained.

2. Garnishees who, in good faith, pay into court money due from them to an attachment defendant, not exceeding the attachment creditor's claim in such court, cannot be *held* liable afterwards to pay the same amount at the suit of the attachment debtor, even though such payment as garnishees was made before jurisdiction had been acquired of the person to whom the debt was originally due from the garnishees.

(Syllabus by the Court.)

Error to district court, Lancaster county; Strode, Judge.

Action by Ab. Kirschbaum and others against W. T. Scott and another for money had and received. There was a judgment for plaintiffs, and defendants bring error. Reversed.

Harwood, Ames & Pettis and E. A. Gilbert, for plaintiffs in error. J. S. Bishop and H. F. Rose, for defendants in error.

RYAN, C. In the district court of Lancaster county, the defendants in error brought suit for the recovery of the sum of $100, and interest from February 1, 1888, and recovered judgment as prayed. In the petition, Kirschbaum & Co. was described as a partnership firm, doing business in Philadelphia, and the defendants were alleged to have been partners, engaged in practicing law in York, Neb. For a cause of action in favor of the first-named firm, it was alleged that the firm last named had, as attorneys at law, collected for the first-named firm, about February 1, 1888, the sum of $100, which they had failed and refused to pay. By answer, Scott & Gilbert admitted that, as attorneys at law, in the employ of Kirschbaum & Co., they had collected $497.15 on February 9, 1888, but they alleged that on the same day, and immediately after the receipt of such money, said firm of Scott & Gilbert had been garnished under an attachment against Kirschbaum & Co. The action in which the garnishment process issued had been brought before a justice of the peace of York county by J. H. Hamilton, formerly sheriff of York county, upon an indemnity bond, for the recovery of certain expenses and attorney's fees which he had been compelled to advance in defending a suit brought against himself as sheriff on account of an attachment which he had lev-

led to enforce the collection of a claim upon which suit had been brought by Kirschbaum & Co. The case at bar has heretofore been before this court, upon which occasion a judgment in favor of Scott & Gilbert was reversed. In the opinion then delivered, it was said that the questions to be determined in the district court upon proper issues were whether or not the garnishment was in good faith, and whether or not the action was one in which an attachment would lie. Kirschbaum v. Scott, 35 Neb. 199, 52 N. W. 1112. As these requirements as to pleading have been satisfactorily met, there is no occasion for further reference to the former opinion. Not only have the issues presented these questions, but the evidence leaves no reason for doubt that Scott & Gilbert acted in the utmost good faith in respect to the notice of garnishment served upon them; and, having paid into court only what they were therein required to pay by due order of the court, they have satisfactorily to Kirschbaum & Co. accounted for the balance of the collection which they held at the time notice of garnishment was served upon them.

Upon request of Kirschbaum & Co., the district court gave three instructions upon the theory which is sufficiently illustrated by the first instruction, which was in the following language: "In this case it is urged that the money sought to be recovered is in part proceeds of a collection sent by L. C. Burr, attorney of plaintiffs, to the defendants, and that, respecting the collection thereof the defendants had no direct communication with the plaintiffs on the funds being attached, as appears from the evidence, it was the duty of the defendants to follow the directions of Mr. Burr, from whom they received the collection, in the matter of protecting the funds arising therefrom. And if you find in this case that said Burr instructed defendants that the claim was unjust the enforcement of which was sought by an attachment, and not to appear in such case, but to require notice to nonresidents to be published, as required by law, and await word from their principals, and that defendants, in violation of such direction, wrongfully assumed to appear in said cause for their principals, the owners of the attached fund, and on a judgment based on such wrongful appearance, without any service of summons made or notice published therein, paid out said funds, or any part thereof, then such payment would be voluntary and wrongful, and defendants are liable for any sum withheld from plaintiff on account thereof."

It is but fair, before discussing the principles contained in the above instruction, to say that, as soon as the notice of garnishment was served upon Scott & Gilbert, one of these garnishees telephoned Mr. Burr's law partner of the said garnishment. The garnishment was on February 9th, and, in a letter of Mr. Burr's of the date of five days thereafter, he admitted that he had knowledge of the garnishment. It was sc true—certainly, it was not fair to Sc Gilbert—to state in the instruction that agreed that the defendants had no communication with the plaintiffs o funds being attached, as appears fro evidence. Mr. Burr was the attorne Kirschbaum & Co., by whom their clai collection had been sent to Scott & G and while, in strictness, these latter att did not communicate the fact of the ga ment directly to plaintiffs, they did im ately notify the firm of attorneys of Mr. Burr was a member. Perhaps a re should not be predicated on this part instruction quoted. It is, however, d ously near prejudicial error.

As we understand the theory of the instruction, the liability of Scott & was thereby made dependent upon eit two propositions: First, because, before mons served, the court had no jurisdictio therefore the failure of the garnishees t test that fact rendered them liable to K baum & Co.; and, second, because Sc Gilbert appeared without authority torneys for the defendant, and thereby ferred jurisdiction upon the court to judgment against the firm of Kirsch & Co. In respect to this second grou alleged liability, it may properly be ren that, so far as this record shows, Kirsch & Co. have never sought to have set asi judgment which they now claim should have been rendered against that firm, has the justness of the claim of Hamil any way been called in question. Th however, one thing very certain, and t that by the petition there was present such question as the right to recover da caused by the unauthorized appearan Scott & Gilbert as attorneys for Kirsch & Co. The instructions which assume a right of recovery had by the petitio predicated upon their alleged unauth appearance misstated the issues, and prejudicially erroneous.

In respect to the assumption that Sc Gilbert were bound to contest the juris of the justice of the peace before paying upon garnishment, defendants in error, p unconsciously, assume that these garn were attorneys for Kirschbaum & Co. A nary garnishees, Scott & Gilbert were enti be discharged from their liability to K baum & Co. by paying just as they did pay. Civ. Proc. § 222. The requirement that particular garnishees should have de upon the ground of a want of jurisdict the persons of the attachment defendan tainly could not have been predicated the mere fact that they were garn Probably, the theory on which the re was for the most part held justifiabl that, before and without service of sum the attachment had no binding force consequently payment under and beca it afforded no protection to the garn

The very well-considered opinion in Darnell v. Mack, 46 Neb. 740, 65 N. W. 805, has destroyed whatever of plausibility there may theretofore have been in this contention, and no amplification of argument could do more. In any possible view of this case, a recovery could not be justified, and the judgment of the district court is therefore reversed. Reversed.

PYTHIAN LIFE ASS'N v. PRESTON.

(Supreme Court of Nebraska. March 4, 1896.)

INSURANCE—ADVANCE FEES—EFFECT OF NONPAYMENT.

A life insurance association approved an application, and issued and forwarded to its general agent a policy for delivery to the applicant. The application and policy each contained a condition, in substance, that there was no binding contract of insurance until the written application was received and accepted, and the policy issued by the association, and delivered to the proposed member in person, during his lifetime and good health, nor until the admission fee and advance premium were paid thereon; "that no agent of the association had authority to make, alter, or discharge contracts, waive forfeitures, extend credit, or grant permission, and no alteration of the terms of the contract should be valid, and no forfeiture thereunder should be waived unless alteration or waiver should be in writing, and signed by the president and another officer of the association." By a contract appointing this general agent of the association, which was signed by the president and secretary thereof, his compensation for soliciting and obtaining parties to become members of the association, and insured therein, was fixed at the whole sum of the admission fees and advance premiums to be paid by each person insured. *Held*, that the part of the contract in relation to the compensation of the general agent gave him the right to collect of each person of whom he received an application, when he delivered the policy, the membership or admission fees and advance premiums, and keep them. That, in collecting, he might, at his option, demand immediate payment or extend credit, and that, if he extended credit, it was not for the company, but for himself; that the association had surrendered the right to any further control or direction of the collection of the fees and advance premiums to be paid by persons insured through this general agent; that the contract with the general agent was inconsistent with their right to insist on the enforcement of the stipulations in regard to payment contained in the application and policy; that a delivery of the policy to the applicant, made or caused to be made by such general agent, was good, and the contract of insurance binding, notwithstanding credit was extended for the payment of the membership fees and advance premiums.

(Syllabus by the Court.)

Error to district court, Douglas county; Ogden, Judge.

Action by Mary A. Preston against the Pythian Life Association. From a judgment for plaintiff, defendant brings error. Affirmed.

J. Fawcett and W. C. Van Gilder, for plaintiff in error. H. C. Brome and I. R. Andrews, for defendant in error.

HARRISON, J. The defendant in error instituted this action in the district court of Douglas county against the Pythian Life Association, to recover the sum of $2,000, alleged to be due her from the life association under and by virtue of a membership certificate therein or a policy of insurance claimed to have been issued of date May 31, 1890, upon the life of Willet C. Preston, who was the husband of the defendant in error, and who had died since that date and prior to the commencement of this suit. The plaintiff in error, it appears, was a corporation, organized and existing under the laws of this state, engaged in the business of life insurance, with its general offices or headquarters in the city of Omaha; that on or about the 31st day of May, 1890, one David H. Caldwell, who was then its general agent, received the application of Willet C. Preston, in the city of Minneapolis, Minn., for membership in the association or a policy of insurance upon his life to be issued by it. This application was not procured by the general agent personally, but was solicited and procured by one Josiah Towne, who, Caldwell testifies, was a special agent appointed by him, and who, it further appears, was acting and working under him and his directions, and occupying the same office with him. The application was forwarded to the association at Omaha, in the regular course of business, and was approved, and a certificate or policy (the one upon which this suit was predicated) was issued, and sent to Caldwell, at Minneapolis, for delivery to the insured party. The articles of agreement under and by which David H. Caldwell was appointed agent of the association, and so acted, were signed by its president and secretary, and by the appointee; and, as portions of these articles may play a more or less important part in the final disposition of at least some of the vital questions to be herein decided, we deem it best to notice them here They were as follows: "Articles of agreement: This agreement, made this 4th day of January, 1890, between the Pythian Life Association, of Omaha, Nebraska, party of the first part, and David H. Caldwell, of Geneva, Nebraska, party of the second part, witnesseth: That the party of the first part hereby appoints the said party of the second part its general agent for the purpose of procuring and effecting applications for membership in said association that will be satisfactory to said party of the first part, and of collecting membership fees on applications thus effected; and for the further purpose of appointing and supervising district, special, and local agents. * * * The appointing of all subagents shall be at the sole expense of the party of the second part; the party of the first part to be in no way chargeable or responsible to the agents thus appointed for any salary, commission, or expenses incurred by them, or any of them, in procuring applications or prosecuting the business of any agency created hereby or hereunder, except as hereinafter stipulated. The party

of the second part to be responsible to the party of the first part for the good behavior of his subagents, and for their fidelity to the interests of the party of the first part. * * * The compensation allowed said party of the second part for his services rendered under the terms of this contract shall be 100 per cent. of the membership fee or advance premium adopted by the party of the first part, and collected by the party of the second part or his subagents, if applications are written for insurance on the mortuary rate or quarterly premium paying plans; but if written on the natural premium or endowment rate plan, with payments due semi-annually, then an additional compensation of 50 cents per $1,000 of insurance shall be allowed to said party of the second part, to become due and payable when the first semi-annual premium is paid to and received by the said party of the first part; but if application and policy are written on the natural premium or endowment rate plans, and premiums are paid annually, then the sum of $1.00 per each $1,000 shall be allowed in addition to the membership fee, to be due and payable when the first annual premium is paid to and received by the party of the first part. * * * The territory assigned to said party of the second part shall consist of the state of Minnesota and such other territory as may be hereafter agreed upon." In regard to the connection of Josiah Towne, who personally solicited and received Mr. Preston's application, with the business of the association at Minneapolis, where it was taken, and the relation existing between Towne and Caldwell, its general agent, the latter testified as follows: "Q. Are you acquainted with Josiah Towne? A. I am. Q. What relation did he occupy to you while you were general agent? A. As special agent." Josiah Towne himself testified on this point as follows: "Q. What was your business during the months of June and July, 1890? A. Soliciting insurance for the Pythian Life Association. Q. With whom were you associated? A. D. H. Caldwell." The president of the life association says: "Q. I will ask you whether or not the defendant company had, to your knowledge, during the months of May, June, and July, 1890, an agent in Minneapolis or Minnesota by the name of Josiah Towne? A. No, sir; we did not."

The application for insurance contained the following statements: "It is further agreed that under no circumstances shall the certificate hereby applied for be in force until the actual payment to and acceptance of the advance dues by the association, and actual delivery of the certificate to the applicant during his lifetime and good health, with a receipt for the payment of the advance dues. It is further agreed that this application, its warranties and agreements, together with all the conditions and stipulations contained in the certificate now applied for, shall be binding on me and on any further legal holder of the policy now applied for. I hereby agree to pay to said association the money required to keep the certificate issued hereon in full force and effect, as provided by the laws of said association; and I hereby adopt said by-laws, and agree to be governed by them, and will obey and comply with every article, its subdivisions, and its stipulations or provisions contained therein." And, on the same subject, there was in the policy: "This contract is not binding until the written application therefor shall have been received, accepted, and this policy of insurance issued by the association, and delivered to such member in person during his lifetime and good health, nor until the admission fee and advance premium is paid thereon. No agent of the association has authority to make, alter, or discharge contracts, waive forfeitures, extend credit, or grant permission, and no alteration of the terms of this contract shall be valid, and no forfeiture thereunder shall be waived, unless alteration or waiver shall be in writing, and signed by the president and one other officer of the Pythian Life Association."

It is contended by counsel for plaintiff in error: "First. Towne was not in any manner connected with plaintiff in error. He was not its agent or solicitor. He had never been authorized by it to do any business for it. He had absolutely no authority to make any oral agreement for credit, or any other kind of an agreement, either orally or in writing, for plaintiff in error. Second. Even if he had been a regular or general soliciting agent of plaintiff in error, he could not bind plaintiff in error by a delivery of the policy in question without full payment of the premium."

David H. Caldwell testified in regard to the delivery of the policy to the insured as follows: "Q. What did you do with the policy after you received it? A. In company with Mr. Towne, delivered it to Mr. Preston, at the schoolhouse, within a day or two from the time we received it. Q. Did you receive any money at that time? A. No, sir. * * * Q. What did you say about this policy having been delivered at the schoolhouse? A. It was delivered within two or three days of the time received by me at the schoolhouse where Mr. Preston then worked. Q. By whom? A. By myself. Mr. Towne had the policy in his possession, and handed it to Mr. Preston while I was with him. Q. Left it with him? A. No, sir. Q. What was done with it? A. I took it out of his hands. Q. You took it from Mr. Preston? A. Later. Q. How much later? A. Perhaps fifteen minutes. Q. Mr. Towne had it in his possession, and handed it to Mr. Preston, and then you took it back again from Mr. Preston? A. After a time. Q. Did you keep it in your possession after that? A. I can't say how long; I gave it to Mr. Towne either the same day or very soon, to be delivered by him. The policy has not been in my possession later than that day, further than to be in

that desk. Q. Then what? A. I think it was the same day that I gave it to Mr. Towne. Q. The same day, or about the same time, after you had taken it back from Preston, you gave it to Mr. Towne. Did you ever see it again after that? A. As it lay in our desk, the desk in Towne's and my office, in that vicinity. Q. You did not have any more to do with it? A. I did not." Josiah Towne stated in his evidence that the policy was received at the office occupied by Caldwell and himself, and, within the next day or two, they went to the schoolhouse in the city, where the applicant for insurance was employed as janitor, and there talked with him, and what the conversation was we will give as we find it recorded in the transcript of the testimony: "A. Went to the schoolhouse. Mr. Preston was not there. Went out on the side; 23rd avenue, I think it is. Went in on the street side, and went out on the avenue side. Just as we got on the sidewalk, Mr. Preston put in an appearance from his residence, and met us about twenty feet from the schoolhouse. I passed the time of day, and shook hands with him, and says, 'Tony,' (always called him 'Tony'), and took it out, and delivered it to him. He says, 'I can't pay for that to-day. I have just heard from the farm—I have lost a horse.' He spoke something in regard to a note of $80 or $90, that he had got to meet; taking into consideration the fact of the note and the loss of the horse, he could not take it then. He had it in his hand, and, during the conversation, Mr. Caldwell took the policy from him. 'Well,' I says, 'Tony, when could you take it?' This was some time during the middle of the week; the first or middle of the week. He says, 'I will meet you at the lodge on Friday night.' He says, 'I will meet you at my lodge on Friday night, and I will pay you.' I says, 'All right, I will be there.' Mr. Caldwell had the policy, and we left with the understanding of the arrangement of Friday evening at his lodge. That was the conversation then and there. Q. When did you next see Mr. Preston? A. On Friday night, by arrangement. Q. What talk, if any, did you have with him then? A. I went in to the lodge room, and he was paying his dues; and thought it would be hardly courteous,—I did not think it would; and without dunning him, I went and stood right by him. He said: 'Joe, I can't pay you to-night. I used more money than I expected. I am paying my dues to-night, but I will pay you at the office to-morrow morning, at ten o'clock,' which would have been Saturday, the 7th. This was the 6th day of June. I said, 'All right, Tony; I will be there at ten o'clock.' Q. Where did you next see Mr. Preston? A. At nine o'clock the next morning, at the office, or on the sidewalk first. He was waiting for me, and was ahead of time. * * * Q. State what took place there. A. I went into the office, and sat down, and took the policy out of my pocket. He immediately commenced to talk that he did not, could not afford to take that policy and pay for it now. He recited the fact of the loss of the horse, and the note that was coming due, and the expense he would be upon the farm; and I said to him,—you want all the conversation between him and myself,—I said to him: 'Tony, you are getting to be too old a man to refuse to take any insurance. It is not a matter of accommodation, it's a privilege that any man would insure a man of your age. You are getting old. You have been accepted. The policy is here. You are getting at that time of life you need it. Your expectancy is not a great many years.' 'Well,' he says, 'Joe, I would rather not take it. I can't pay for it.' But he says, 'I will pay you for all your trouble.' I says: 'Tony, I want nothing if you don't take the policy. I get no commission, but I will not take anything from you if you don't take the policy.' I says, 'You want to take it even if you don't pay for it all now.' I says, 'You are perfectly good. I had just as lief take your word as take a bond;' and I says, 'You want to take it out; you need it;' and I passed it over to him. He took it in his hand, unfolded it, not 'way open, but just merely the face of it in that shape. 'Well,' he says, 'I will take it, and I will pay you five dollars; and when I come down from the farm, which will be next month, I will pay you the balance.' I says, 'Tony, that is all right.' He paid me five dollars, and I made a memorandum of it in a book, opposite his name: 'Received of Tony Preston, on June 7th, $5.00.' He then handed the policy back to me. He says, 'You just keep the policy for me, will you?' I says, 'All right.' He wanted me to keep the policy; it would be just as safe with me as it would with him. I took, and put it in an envelope, and put it in my pocket. He got up and left the office." The policy remained in the possession of Towne until July 29, 1890, on which date it was given by him to the son of the insured, who at that time paid the balance of the amount due on the premium. The whole sum of the membership fee and advance premium, we will now state, was testified to be $21.66. The policy was taken home by the son, and handed to his father, who then gave it to his wife, the defendant in error. The insured had been ill for some days prior to this, and, about two or three hours after turning the policy over to his wife, died.

It appears that the following assessments or calls were sent from the main office of the association, addressed to Mr. Preston:

"Omaha, Neb., July 31st, 1890. Bro. Willet C. Preston, Minneapolis, Minn.: You are hereby notified that we have charged to your insurance account the amounts this day falling due in accordance with the terms of your policy Nos. 2348–2349, and that your account now stands as follows: * * *. The amount shown above to be now due to balance, $11.62, must be received at the home office on or be-

fore August 29th, 1890, in order to prevent forfeiture of your insurance. * * * Make remittances payable to the Pythian Life Association. Pay to D. H. Caldwell, R. 16, K. P. Block, Minneapolis, Minn."

"Omaha, Nebraska, July 1st, 1890. Brother: Satisfactory proof of death has been submitted to the association for the following claim: * * * In consequence whereof the managing board of directors, as provided in article 9, section 2, of the by-laws of the association, as set forth in your policy of insurance, have ordered that a mortuary call can be made upon all the members of the mortuary payment plan of a two-thirds quarterly, mortuary premium, and a 33⅓ per cent. dividend or deduction be made from the maximum quarterly premium of members insured on the natural premium plan. This call is made upon all members insured prior to this date. Fraternally yours in F. C. & B., George Esmond, Acting Secretary Pythian Life Association."

It further appears that the defendant in error wrote to the association, and requested that blank proofs of loss be sent to her; that this was done; that she procured them to be filled out and forwarded to the association; that they were received, and, after they were examined, a request was sent to Mrs. Preston to furnish some additional matters in the same connection, which she did.

The practical workings and benefits of insurance, both on life and property, are now universally acknowledged and adopted in countries where civilization and intelligence prevail, and people generally avail themselves of it under some of the different plans of issuance, either what is denominated the plan of the old-line companies, or the mutual plan, or the lodge or association plan, etc. Whatever the plan, there is usually, if not always, issued some contract or agreement most often styled a policy or certificate of membership, as the case may be. In some jurisdictions the forms and conditions of these are provided and prescribed by law, but in the majority are left to be agreed upon by the insurer and insured; the insurer usually making them as numerous and as stringent as seems best calculated, or, as experience has taught, will best subserve the end desired to be attained in the conduct of the business. If the public—the customers—could be induced to pay more attention to the matter, and examine the conditions and stipulations of the policies issued to them, and, where they are arbitrary or unreasonable beyond justice between the parties to the contract, demand that they be made less complicated, and consonant with a spirit of equity, or be refused or not received, no doubt the framers would soon discover a way by which they could be made safe and fair, and also bear and pass the scrutiny of the public,—the customers. But where it is, as it has heretofore been, the task of the legislator to pass laws to effect the purpose above sketched, or the judiciary or courts of the land to annul an unreasonable and unfair stipulation and condition when a case involving the validity is presented for adjudication, it was and is naught but a mere trial of the skill and ingenuity of the draftsmen of the policies to frame new conditions to evade the laws enacted by the legislature, or to fill the place of such as are declared void or robbed of their effect by the courts. Contracts of insurance occupy no different position in the eyes of the law than do any other agreements, and, when not unconscionable and unfair, should be enforced as made between the parties.

The stipulation in the contract sued upon in the case at bar that it should not be binding unless the membership fee and what was styled the "advance premium" were paid, and the policy actually delivered to the person whose life was to be insured thereby, during life and good health, and the condition that no agent had authority to extend credit, were neither of them unjust or unfair or incapable of enforcement, nor such as should not be enforced in exact conformity with the letter and spirit. The association, it appears, had appointed a general agent; and the agreement which gave his appointment effect, assigned or in effect made his, as his compensation for what business he might do for it, all membership fees and advance premiums, and apparently without any further regard for how he received them, or when or what arrangements he might make as to their payment, whether he exacted it as contemplated by the terms of the policy, or extended credit, as it is claimed he did in this particular instance. Our belief that the arrangement with the general agent should be thus construed is much strengthened by the facts that Preston had been considered by the association as one of its members, and it had recognized him in that relationship, by notifying him to contribute dues and premiums, and mailed him a notice of a mortuary call. Clearly, it would be violative of the principles of justice and right to hold that an arrangement might exist between the association and its agent by which the membership fees and advance premiums to be paid by an applicant for insurance became the property of the agent, and the association were no further interested in them or their payment, had no further control over them, and whether payment was exacted on delivery of the policy, credit was extended, or payment was entirely waived could in no manner affect the association or its rights or funds, and say that if the agent extended credit or made the applicant a present of the membership fees and advance premiums, and the party to whom a policy had been delivered under such circumstances died, the policy was not in force. While it is very evident that, under the terms of the application and policy, no credit could be extended for the association, or, rather, it was the intention that none should be, it is equally clear that, by their agreement, it had no further power or control over the membership fees or advance premi-

ums, and could make no objections to credit being extended by the general agent. The contract which the association entered into with him, by which he became entitled to the whole amount of such fees and premiums, was inconsistent with the stipulations contained in the application and policy in regard to the payment of the fees and advance premiums, or their enforcement as against a party to whom their general agent had granted time for their payment. The policy was prepared and forwarded to the general agent by the association, to be delivered, and he to receive payment of fees and premiums, of which no part belonged to the association, but to the general agent. If delivered, it was in full force, without regard to any arrangement made between the agent and the party insured respecting the time of payment of the advance premium. Smith v. Society, 13 C. C. A. 284, 65 Fed. 765, and cases cited. The facts of the case referred to were somewhat different from the facts in the case at bar, but the principle of law applicable and decisive the same, and equally applicable and controlling in the present case.

In regard to the contention that Towne was not an agent of the association, in no manner connected with it or its business, and could not bind it by delivering a policy to the applicant, or by any agreement to extend credit, the general agent testified that Towne was a special agent for the association, appointed by him (the general agent), by virtue of the authority conferred upon him by his contract with the association, by which, it will be remembered, he was empowered to appoint special agents; but, however this may have been, there was ample evidence to show that Towne was soliciting business for the association, working with and under the orders and directions of the general agent, and whether he was recognized by the association as an agent or in its service, or its officers had any knowledge of his work or his existence, is immaterial. The policy in question was forwarded to the general agent for delivery. He turned it over to Towne, who had solicited and received the application, and directed him to deliver it to the party for whom, by its terms, it was intended; and Towne followed the directions, and, as appears from the testimony, gave it to Willet C. Preston, who left it with Towne for safekeeping. And if the arrangement in respect to extension of credit for the payment of a portion of the amount due as fees and advance premiums, effected at the time of such delivery, was satisfactory to Caldwell, the general agent to whom the moneys to be paid belonged,—and it is a fair inference that it was,—no one could complain, and certainly not the association; for, as we have seen, it had no interest in the fees or premiums to be paid at that time, or how they were paid, or when. We must conclude from a full investigation of the testimony that it sustains a finding of the delivery of the policy sued upon in this action, and in such a manner and at such a time as constituted it a valid, subsisting, and binding contract between the party applicant, and thereby insured, and the association. What occurred between Towne and Preston at the time the policy was given by Towne to Preston, considered with all the other facts and circumstances shown by the evidence, and which were necessarily incident to, and had a direct bearing upon, this part of the transaction, constituted, in legal effect, a delivery of the policy.

There is an assignment of error which reads as follows: "The court erred in giving the 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16th instructions given by the court on its own motion, to which the plaintiff excepted." Instruction numbered 11, given by the court on its own motion, was without fault; also some of the others enumerated in this assignment. The assignment was as to all the instructions, and having determined that it is not well taken in respect to one or more, in accordance with a well-established rule of this court, it must be overruled as to all.

It is further assigned as error: "The court erred in refusing to give the 1st and 2nd instructions asked by the plaintiff in error, to which refusal plaintiff in error duly excepted." Number 2 of the instructions referred to in this assignment, in some of the statements contained therein, would have incorrectly informed the jury, and the refusal to give it was therefore proper. The error assigned was of the refusal to give the two instructions; and, it being determined that the action of the court as to either of them was without error, it disposes of the entire assignment.

This disposes of all the errors which were urged in the argument, and it follows from the views herein expressed, and the conclusions reached, that the judgment of the district court must be affirmed. Affirmed.

UNION PAC. R. CO. v. KINNEY et al.

(Supreme Court of Nebraska. March 4, 1896.)

BILL OF EXCEPTIONS—AUTHENTICATION—PRESUMPTIONS ON APPEAL.

1. If a bill of exceptions has not been authenticated by the certificate of the clerk of the trial court, as required by law, matters contained therein will not be considered or examined by this court.

2. Errors must be affirmatively shown by the record; if not, it will be presumed that the proceedings of the trial court were correct.

(Syllabus by the Court.)

Error to district court, Kimball county; Neville, Judge.

Action by J. J. Kinney and L. D. Sherer against the Union Pacific Railway Company. Judgment for plaintiffs. Defendant brings error. Affirmed.

J. M. Thurston, W. R. Kelly, and E. P. Smith, for plaintiff in error. H. D. Rhea, for defendants in error.

HARRISON, J. In this action, in the district court of Kimball county, the plaintiffs (defendants in error) sought to recover of the Union Pacific Railway Company, as damages, the value of a gray stallion, alleged to have been struck and killed by a locomotive on a portion of the company's line of road in Kimball county, Neb., it being further alleged that the striking and killing of the horse were due to the negligent and careless manner in which an engine and train of cars were operated and handled by the employés of the company at the time of the occurrence. Issues were joined by the pleadings filed by the parties, and a trial resulted in a judgment in favor of the plaintiffs in the action. The company presents the case here for review by error proceedings. In view of the disposition which we have, after examination, determined must be made of the case, a further or more extended statement is deemed unnecessary. In the argument in the brief filed by counsel for the railway company, it is urged: (1) "The court should have granted defendant's request to direct a verdict for defendant, or its motion for new trial." (2) "The fifth paragraph of the petition declares: 'Where the killing of said stallion occurred was in the county of Kimball, and in the state of Nebraska, and at a point about one and one-half miles west of Kimball, in the said county and state; and at said point there is a public highway running along said railroad track; and said defendant has carelessly, negligently, and knowingly utterly failed to construct a fence along said railroad, or in any manner protect stock from straying upon said track.' The evidence, as will be seen by referring to the preceding abstract and bill of exceptions, conclusively establishes that a fence had been erected by the plaintiff Kinney on the south side of defendant's right of way, and the public highway running along the said railroad track upon the south, said highway partially on defendant's right of way, leaving it between the fence and the road." (3) "The court erred in that by the third instruction it charged the jury that: 'The building of a fence on one side of a railway company's right of way by the owner and occupier of the lands on that side, does not release the company from its duty to build a fence on the other side of said railway company's right of way.'" (4) "The uncontroverted evidence shows that the plaintiff Kinney, in permitting his stallion to run at large, was guilty of a breach of section 91 of the Consolidated Statutes (Cobbey's Ed.)." (5) "The court erred in overruling the objection of the defendant below to the several questions put by the plaintiff on rebuttal to L. C. Kinney, Charles E. Cronn, and J. J. Kinney, as follows. * * *."

To properly determine the force of each of these questions raised by the assignments of error, a reference to and examination of the testimony introduced during the trial of the case, or portions of it, is made necessary. Attached to the transcript is what purports to be a bill of exceptions, and to contain the evidence; but it is not authenticated by the certificate of the clerk of the trial court, as required by law, and cannot be used for any purpose. Such a certificate is indispensably necessary. Wax v. State, 43 Neb. 18, 61 N. W. 117, and cases cited. In the decision of the case of Romberg v. Fokken, 47 Neb. —, 66 N. W. 282, opinion written by Norval, J., it was said: "That which purports to be a bill of exceptions, and which is attached to the transcript, does not appear to have been filed in the district court; nor has the clerk of that court certified that it is either the original bill of exceptions settled and allowed in the cause, or a copy thereof, as required by law. The pretended bill, therefore, must be ignored, and cannot be considered for any purpose. Aultman v. Patterson, 14 Neb. 57, 14 N. W. 804; Hogan v. O'Niel, 17 Neb. 641, 24 N. W. 213; Flynn v. Jordan, 17 Neb. 518, 23 N. W. 519. But it may be said the omission of the clerk's certificate authenticating the bill must be deemed to have been waived by the parties, inasmuch as they have conceded the validity of the bill of exceptions by raising no objections thereto in this court. Yates v. Kinney, 23 Neb. 648, 37 N. W. 590, recognizes such rule, but we do not hesitate to say that it is unsound. In the exercise of its appellate jurisdiction this court reviews the proceedings of the district court, and our only means of ascertaining what proceedings were had and taken in the trial court in any case, or what pleadings were filed therein, is the transcript of the record of that court, duly authenticated by the proper officer. If the parties may waive the certificate of the clerk of the district court to the original bill of exceptions, then there is no reason why they may not likewise waive the authentication of the transcript of the final judgment or order sought to be reviewed, and the pleadings in the case. The statute requires both the transcript and the bill of exceptions to be authenticated by the certificate of the clerk of the district court, and we have no right to ignore or disregard its mandatory provisions. Moore v. Waterman, 40 Neb. 498, 58 N. W. 940; Otis v. Butters, 46 Neb. 492, 64 N. W. 1093; Martin v. Fillmore Co., 44 Neb. 719, 62 N. W. 863; Yenney v. Bank, 44 Neb. 402, 62 N. W. 872." See, also, First Nat. Bank of Greenwood v. Cass Co., 47 Neb. —, 66 N. W. 300.

As the decisions of the questions raised by the assignments of error and discussed in the brief or argument of counsel for plaintiff in error necessitate an inspection of the evidence adduced, and we have just decided the testimony in this case is not before us, and as

alleged errors must be shown by the record, or be presumed not to have occurred (Willis v. State, 27 Neb. 98, 42 N. W. 920; Romberg v. Hediger, 47 Neb. —, 66 N. W. 283), it follows that the assignments of error must be overruled, and the judgment of the trial court affirmed. Affirmed.

IOWA INV CO. v. SHEPARD et al.

(Supreme Court of South Dakota. March 7, 1896.)

MORTGAGE FORECLOSURE—DEFECTIVE NOTICE.

Mere inaccuracies in a notice of a mortgage foreclosure under a power of sale, not calculated to be misleading, are insufficient to invalidate a title acquired thereunder, when the recitals of said notice readily convey to the mind all that the statute requires to be published.

(Syllabus by the Court.)

Appeal from circuit court, Kingsbury county; J. O. Andrews, Judge.

Action by the Iowa Investment Company against John Shepard, impleaded with Louis C. Tucker and others. Judgment for plaintiff, and defendant Shepard appeals. Affirmed.

R. W. Hobart, for appellant. S. E. Hostetter and Aikens, Bailey & Voorhees, for respondent.

FULLER, J. Basing its right upon a claim of ownership, plaintiff brought this action to quiet title to certain real estate described in the complaint, and this appeal is from an order sustaining a demurrer to the answer of John Shepard, who was the only party defendant appearing therein. The undisputed facts disclosed by the pleadings are confessedly sufficient to entitle respondent to all the relief prayed for, provided the following notice or advertisement of mortgage foreclosure sale under a power of sale is found to be in substantial compliance with the statute: "Mortgage Sale. Default having been made in the payment of the installment due June 1st, 1891, and the last installment, due January 1st, 1892, on a certain note secured by mortgage dated January 27th, 1887, given by Louis C. Tucker and wife, Betsie E. Tucker, to F. W. Little, and duly recorded in the office of the register of deeds of Kingsbury county, then territory of Dakota, now state of South Dakota, on the 12th day of February, 1887, at ten o'clock a. m., in Book 14 of Mortgages, on page 207. The amount claimed to be due thereon at the date hereof is $12.90, and the further sum of $50.00 attorney's fees, as provided in said mortgage; making in all $62.90 now due. No action or proceeding at law or otherwise have been instituted to recover the debt secured by this mortgage, or any part thereof. Now, therefore, notice is hereby given that under and by virtue of the power of sale contained in said mortgage, and the statute in such case made and provided, the mortgage will be foreclosed by sale at public auction, by the sheriff of said Kingsbury county, or his deputy, on the 9th day of April, 1892, at ten o'clock in the forenoon of that day, at the front door of the courthouse in the city of De Smet, in said county and state, and substantially described in said mortgage as follows, to wit: 'The southeast quarter of section eleven (11), in township one hundred and ten (110) north, range fifty-eight (58) west of the 5th P. M., being 159 acres, more or less.' Dated at De Smet, So. Dak., February 20th, 1892. F. W. Little, Mortgagee. A. P. Shenian, Attorney for Mortgagee." The following provision of the Compiled Laws is the statutory rule by which the foregoing notice must be measured: "Every notice must specify: (1) The names of the mortgagor and mortgagee, and the assignee, if any. (2) The date of the mortgage. (3) The amount claimed to be due thereon at the date of the notice. (4) A description of the mortgaged premises, conforming substantially with that contained in the mortgage; and, (5) The time and place of sale." Comp. Laws, § 5415. The contention of appellant is that the notice nowhere states that the mortgage will be foreclosed, that it is not stated that the property described in the notice is the property covered by the mortgage, that the mortgagor and mortgagee are not named therein, and that "a description of the mortgaged premises conforming substantially with that contained in the mortgage" is not given. Evidently the object of the notice contemplated by statute is to fully advise all interested persons and the general public of the existence of conditions which authorize a foreclosure by advertisement; and, even though the words of the statute be not employed, its requirements are sufficiently complied with when such notice is reasonably certain and clear as to the names of the mortgagor and mortgagee, the amount claimed to be due thereon at the time of the notice, the time and place of sale, together with a description of the premises to be sold, which conforms substantially with that contained in the mortgage. Mere inaccuracies, not calculated to be misleading, are insufficient to invalidate a sale, in the absence of a claim that any one has been injured. Wilts. Mortg. Foreel. §§ 784–788; 2 Jones, Mortg. (5th Ed.) pp. 704–716, incl. Although the syntax and grammatical construction of the notice under consideration is subject to criticism, a cursory examination of the recitals thereof readily conveys to the mind all that the statute requires to be published. While the statute does not specify that the notice shall state that the mortgage will be foreclosed by a sale of the mortgaged property, that fact is clearly ascertainable therefrom. "Said mortgage will be foreclosed by sale at public auction" is the language used. What mortgage? The one upon the land described in the notice. "And substantially described in said mortgage as follows, to

wit. * * * Dated January 27th, 1887, given by Louis C. Tucker and wife, Betsie E. Tucker, to F. W. Little," to secure the payment of their now past-due notes described in said mortgage and notice, which is signed "F. W. Little, Mortgagee." "The amount claimed to be due thereon at the date hereof is $12.90 and the further sum of $50 attorney's fees, as provided in said mortgage; making in all $62.90 now due." No question is raised as to "the time and place of sale," and the notice specifies everything required by section 5415, and is sufficient. The following decisions, in which similar sale notices under a power have been construed sufficient in the light of statutes substantially the same as ours, will be found instructive: Maxwell v. Newton, 65 Wis. 261, 27 N. W. 31; Model Lodging House Ass'n v. City of Boston, 114 Mass. 133; Leet v. McMaster, 51 Barb. 236. See, also, Powers v. Kueckhoff, 41 Mo. 425. We are convinced that neither the parties immediately interested, nor the public, who was by the notice invited to attend the mortgage foreclosure sale for the purpose of bidding upon the property, could have been misled or prejudiced in any manner; and the title acquired by a purchase at said sale by plaintiff's grantor ought not to be divested or invalidated. The order of the trial court sustaining a demurrer to the answer of appellant is affirmed.

SMAIL v. GILRUTH.

(Supreme Court of South Dakota. Feb. 26, 1896.)

CHANGE OF VENUE.

Under the provisions of sections 4890, 4891, Comp. Laws, the right of a defendant to have the place of trial changed to the proper county is absolute, if the demand and motion therefor are duly made, and the court cannot retain the case on the ground of the convenience of witnesses.

(Syllabus by the Court.)

Appeal from circuit court, Day county; A. W. Campbell, Judge.

Action by Edwin W. Smail against A. C. Gilruth. From an order denying a motion for a change of venue, defendant appeals. Reversed.

Bennett & Sheldon, for appellant. Josephus Alley, for respondent.

CORSON, P. J. The principal question presented by the record in this case, and the only one we shall consider, is as to the right of a plaintiff to resist a motion made by the defendant to change the place of trial to the proper county, where the defendant resided when the action was commenced, by proof that the convenience of witnesses and the ends of justice would be promoted by retaining the case in the county in which the action was commenced. This action was commenced in Day county, and the summons was served upon the defendant in ington county. Within the proper tim defendant, upon an affidavit showing he was a resident of Codington coun the time the action was commenced that the summons and complaint were ed upon him in that county, made de that the place of trial be changed to th ter county, which was followed by a tion to the court for an order so cha the place of trial. The facts stated fendant's affidavit were not controv On the hearing of this motion the pl submitted in opposition thereto an aff tending to prove that the convenience o nesses and the ends of justice wou promoted by retaining the action for in said Day county. This affidavit wa jected to by the defendant, but the tion was overruled, and the defendant excepted. The court thereupon denie motion of the defendant, to which rul the court the defendant duly exceptec

Section 4890, Comp. Laws, provides "in all other cases, the action shall be in the judicial subdivision in which th fendant or defendants, or any of them reside, or may be served at the comm ment of the action." And section 489 vides that, "if the county designate that purpose in the complaint be no proper county, the action may, not standing be tried therein, unless th fendant before the time for answerin pires demand in writing, that the tri had in the proper county. * * *" I be observed that the demand for a c of the place of trial must be made t the time for answering expires, and be made immediately upon the servi the summons. When the demand is therefore, the court will ordinarily ha knowledge of what the issues in the will be; and if the demand and motio made before answer or demurrer, as may be, the court cannot properly pos the hearing or reserve its decision unt issues are made up. Heald v. Hend Cal. 321, 4 Pac. 27. It would seem, fore, that under the provisions of our the defendant had the absolute right to the place of trial changed to the p county, where all the subsequent proce in the case should be had, subject t power conferred upon the court to fu change the place of trial, for the co ience of witnesses, or other causes spe in the statute, and that such a motion s not be defeated by proof that the co ience of witnesses requires the case retained. This right of the defendant important one, especially when a defe is sued in a county hundreds of mile tant from his place of residence. As said by the supreme court of Wisc in Meiners v. Loeb, 64 Wis. 343, 25 N 216: "It is the plaintiff's duty to comm the action in the proper county, and,

does not, it is his duty to consent to the change to the proper county when demanded by the defendant; and if he refuses to assent to such change, when demanded, it is the duty of the court, on motion made within the proper time, to make an order changing the place of trial to the proper county." Bringing the action in the wrong county is the fault of the plaintiff, and he has no right to be heard as to the place of trial for the convenience of witnesses, after the proper demand has been made, until the action is transferred to the proper county, where it should have been commenced. The decisions are not in entire harmony upon this question, but the later cases seem to sustain the views herein expressed. In the early case of Couillard v. Johnson, 24 Wis. 533, the supreme court of that state held the contrary doctrine. But in Meiners v. Loeb, supra, that case was overruled. The headnote of the latter case is as follows: "Under section 2621, Rev. St., the right of the defendant to a change of venue, when the county designated in the complaint is not the proper place of trial, is absolute, if the demand and motion therefor are duly made. The court cannot retain the cause on the ground that the convenience of witnesses and the ends of justice would be promoted thereby. Couillard v. Johnson, 24 Wis. 533, overruled." It is true, as stated by counsel for the respondent in his brief, that subsequently to the former decision the legislature of that state made an amendment to the law; but we think it is quite clear from the opinion in the case that the court would have overruled Couillard v. Johnson, had no such change been made in the law. In Hanchett v. Finch, 47 Cal. 192, the supreme court of California held a doctrine similar to that announced in Couillard v. Johnson, supra; but in the later decisions in that state Hanchett v. Finch seems, in effect, though not in terms, to have been overruled. Cook v. Pendergast, 61 Cal. 72; Heald v. Hendy, 65 Cal. 321, 4 Pac. 27; Ah Fong v. Sternes, 79 Cal. 30, 21 Pac. 381; McSherry v. Mining Co., 97 Cal. 637, 32 Pac. 711. The court of appeals of the state of New York, in Veeder v. Baker, 83 N. Y. 156, had before it the precise question now before this court, and the language of that court is so forceful and pertinent that we copy from the opinion at some length: "The counsel for the plaintiff, however, read in opposition to the motion affidavits and papers from which the court might have determined that the convenience of witnesses and the ends of justice would have been promoted by refusing the change; and an order denying the motion upon these grounds, it is claimed, would so far rest in discretion as not to be reviewable by this court. But we are of the opinion that the defendant's right to have the place of trial changed was an absolute right, and that his motion to secure the right could not be defeated by showing that the convenience of witnesses and the ends of justice would be promoted by retaining the place of trial in St. Lawrence county. The defendant, in such case, has the right to move for the change solely upon the ground that the proper county for the trial is not stated in the complaint; and if he can be met on the motion by affidavits showing that an impartial trial cannot be had in the county to which he demands the change, or that the convenience of witnesses and the ends of justice will be promoted by refusing the change, he may be taken by surprise, and cannot be prepared to meet such affidavits. Hence the orderly and regular practice is to order the change upon defendant's motion, and then, if the plaintiff desires a change to any other county, on the grounds stated in the two last specifications of section 987, he must make his motion upon affidavits which the defendant can be prepared to meet. Authority is given in that section, not to retain a place of trial, but to change the place of trial. These views as to the proper procedure are, so far as we are informed, in accordance with the uniform practice in such cases in the supreme court. Park v. Carnley, 7 How. Prac. 355; Hubbard v. Insurance Co., 11 How. Prac. 149; Assurance Co. v. Sweetland, 14 Abb. Prac. 240." And the orders of the general and special terms denying the defendant's motion, were reversed. As the provisions of our Code relating to the change of the place of trial were taken from the Code of New York, the decision of the highest court of that state construing these provisions is entitled to great consideration. Wallace v. Owsley, 11 Mont. 219, 27 Pac. 790; Pearse v. Bordeleau, 3 Colo. App. 351, 33 Pac. 140. The order of the circuit court denying the motion of the defendant is reversed, and that court is directed to grant the motion.

IOWA STATE SAV. BANK v. JACOBSON.

(Supreme Court of South Dakota. Feb. 26, 1896.)

ACTION AGAINST NONRESIDENT—ORDER FOR PUBLICATION — ATTACHMENT — JUDGMENT — PROOF OF PUBLICATION—CORRECTION ON APPEAL.

1. Leave to file a supplemental abstract for the sole purpose of presenting a corrected printer's affidavit of publication, not before the trial court, but filed therein, nunc pro tunc, long after an appeal had been perfected, will not be allowed.

2. In an action against a nonresident defendant having property within the state, an order for the publication of the summons may be granted before said property has been actually seized under attachment, and upon an affidavit which contains a statement of all the jurisdictional facts, together with evidence relating thereto sufficient to convince the court of the existence of a case authorizing a substituted service under the statute.

3. A judgment in a suit aided by attachment need not direct a sale of the property in satisfaction thereof, as the law explicitly imposes that duty upon the attaching officer.

4. Proof that a notice is published in a

weekly newspaper for seven successive issues commencing on December 25, 1891, and concluding on February 5, 1892, is sufficient to show a publication thereof "once in each week for six successive weeks," as required by statute.

(Syllabus by the Court.)

Appeal from circuit court, Davison county; D. Haney, Judge.

Action by the Iowa State Savings Bank against Jacob Jacobson. There was a judgment for plaintiff, and from an order denying a motion to vacate the same defendant appeals. Affirmed.

A. E. Hitchcock, for appellant. Palmer, Preston & Rogde, for respondent.

FULLER, J. This appeal is by the defendant from an order overruling a motion to vacate and set aside a judgment rendered in the above-entitled action upon his promissory note, together with all proceedings had therein before and since said judgment was entered. The substantive facts and proceedings, briefly stated, are as follows: A summons was issued by respondent's attorney, and placed in the hands of the sheriff with the direction that the same be personally served. In his return, dated December 23, 1891, said officer stated that he could not find the defendant in this state, and that he verily believed him to be a resident of Salem, Or. On the same day respondent's counsel presented his affidavit and verified complaint to the trial court, and obtained an order directing a substituted service of the summons by publication, which was thereupon filed in circuit court, together with an affidavit and bond for an attachment, upon which a writ of attachment issued on said 23d day of December, 1891, and by virtue of which the real property in controversy was levied upon and seized by the sheriff five days thereafter. On the 24th day of December, 1891, pursuant to the court's order above mentioned, copies of the summons and complaint were addressed and mailed as required by statute to the appellant, Jacobson, at Salem, Or., and the summons was published in the Mitchell Capital for the first time on the following day, as shown by the affidavit of the business manager of said newspaper. On the 18th day of April, 1892, a default judgment in respondent's favor against appellant for the full amount claimed was rendered and docketed in circuit court, and a special execution was issued, directing the sale of the attached real property in satisfaction thereof, which was accordingly sold, pursuant to a published notice of sale, on the 28th day of May, 1892, and the usual certificate of sale was executed and delivered to the purchaser thereof.

Before proceeding to an examination of the subjects presented by appellant's assignment of errors, we will dispose of the following question of practice, to which our attention is directed by respondent's amended abstract and appellant's objections thereto: More than five months after this appeal was perfected, and upon application of counsel for respondent to the trial court, an order was granted, by which respondent was allowed to file, nunc pro tunc, a corrected affidavit of the publication of the summons, and also a corrected affidavit of the publication of the notice of sheriff's sale, both of which were filed as of the date of the original affidavits, and by said order were made a part of the judgment roll herein. In our opinion, appellant is entitled to have the order appealed from considered upon the record before the trial court when the same was entered. Upon the hearing of the motion to vacate and set aside the proceedings, when the attention of respondent was first directed to the alleged imperfect affidavits, he appeared to be well satisfied with their form and substance, and it is now too late, after an appeal has been taken, to file supplemental or substituted affidavits for the consideration of this court. Ladd v. Couzins, 35 Mo. 514; Clelland v. People, 4 Colo. 244; Kirby v. Superior Court, 68 Cal. 604, 10 Pac. 119. It will be observed that the order for the service of the summons by publication was granted by the court on the day of the issuance of the attachment, and that the summons was published three days before the sheriff actually levied upon the real estate of appellant by virtue of the warrant of attachment. Appellant's contention is that the court was without power to order the summons to be published, because his real property had not, prior to the granting of said order, been seized under the warrant of attachment. Section 4900 of the Compiled Laws provides that: "Where the person on whom the service of the summons is to be made cannot, after due diligence, be found within the state, and that fact appears by affidavit to the satisfaction of the court or a judge thereof, and it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a proper party to an action relating to real property in this state, such court or judge may grant an order that the service be made by the publication of a summons in either of the following cases: * * * (3) Where he [the defendant] is not a resident of this state, but has property therein, and the court has jurisdiction of the subject of the action." Notice to a nonresident defendant having property within the state is the sole object of substituted service, and in order that such notice may be adequate, and constitute due process of law, the required jurisdictional conditions must be shown to exist, in the manner provided by statute. The verified complaint attached to and made a part of the affidavit upon which the order for the publication of the summons was granted states a cause of action in favor of the plaintiff and against the defendant, the subject-matter of which is clearly within the jurisdiction of the court. Affiant, in said af-

fidavit, states from his own personal knowledge that appellant removed from this state two or three years prior to the date thereof, and upon information and belief swears that he is not now a resident of this state, but a resident of the city of Salem, in the state of Oregon, where he is engaged in the lumber business. In further support of the recital "that the defendant, after diligent search, cannot be found within this state," but has property herein, and for the purpose of showing good faith and honest effort to obtain personal service of the summons, the following evidential facts were, by the affiant, submitted to the court: "Deponent is informed by C. J. Johnson, Esq., who advises affiant that he has communications from said defendant, and that he resides at Salem, Oregon, as aforesaid, and engaged in the business of a lumber dealer; and also from Mr. Joseph Rice, who advises affiant that his residence and post-office address, as he verily believes from his correspondence with him, is at Salem, Oregon; and from J. E. Wells, register of deeds of Davison county, South Dakota,—it appears that said Jacob Jacobson acknowledged a deed of conveyance for real estate before one John M. Payne, a notary public, residing at Salem, Or. * * * That affiant has made inquiries of the above-named persons for the purpose of ascertaining his residence, and he is advised by them as heretofore stated, and that it is impossible to obtain personal service upon the defendant within this state. That the defendant has property in this state, as this deponent is informed and believes, to wit, the southwest ¼ of section 32, township 103, range (62) sixty-two, in Davison county, and lot 7 in block 2 in Crider's addition to Mitchell, S. D." Upon the foregoing affidavit, which states all the ultimate statutory facts, together with specific probative evidence of their actual existence, the court was fully justified in granting the order appealed from, without ulterior inquiry as to the attachment of the real property therein described. Viewed in the light of the statute, and measured in all its parts by the rule promulgated by his honor, Judge Shannon, in 1 Dak. 500, Append., the affidavit before us meets every jurisdictional requirement. In order to justify the publication of a summons in an action like the present, it is only necessary to convince the court of the required facts, among which is the existence within the state of property belonging to a nonresident defendant upon whom personal service cannot be had; and, if the defendant fails to appear within the time limited by law, the action is effectual for no purpose, unless the property previously found, as shown by the affidavit for the publication of the summons, is seized under a writ of attachment. From the case upon which appellant measurably relies for a reversal of the order from which this appeal is taken we quote the following: "The court, in such a suit, cannot proceed, unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court." Pennoyer v. Neff, 95 U. S. 726. Upon the theory that property is always in the possession of its owner, and the assumption that he will look to any legal proceedings instituted to affect the same, the publication of a summons, immediately followed by the seizure of property under an attachment, in time to enable him to appear and defend before judgment, is sufficient to confer jurisdiction upon a court over the attached property of a nonappearing nonresident defendant. For the purposes of an attachment the action is deemed commenced against a nonresident defendant when the summons issues, provided publication thereof is commenced within 30 days; and the writ may then issue, or at any time afterwards, within the rule above announced. Comp. Laws, § 4993. No authorities have been cited, and we find none, based upon a statute like ours, that go to the extent of holding that a court is without jurisdiction to grant an order for the publication of a summons until the property of a nonresident defendant has been seized under an attachment. It is very clear that under the statute this action cannot be commenced by the publication of a summons unless property is found, and that it cannot be effectually prosecuted to judgment unless such property is previously seized in the manner above specified.

Counsel's contention that all proceedings in the action are void, and should be vacated and set aside, because the judgment contains no recital requiring the sheriff to sell the attached property in satisfaction thereof, is without merit. The action was upon a contract for the recovery of money only, and no question as to the right of an attachment was involved therein. The statute grants it pending the litigation as security for the satisfaction of the judgment when obtained, and provides the manner by which the attached property shall be sold, and the proceeds thereof applied in satisfaction of the judgment. By seizing the property under a valid writ based upon a proper affidavit and undertaking, the attachment lien was created, and, by a compliance with the statute, was preserved until judgment was entered, when it became the duty of the sheriff to satisfy the same out of the property attached and in his hands for that purpose alone. Section 5006, Comp. Laws, and preceding provisions, which create and relate to the attachment right. See, also, Anderson v. Goff (Cal.) 13 Pac. 73; Low v. Henry, 9 Cal. 538; Wap. Attachm. 510. Our conclusion is that a judgment in an action aided by an attachment need not direct the sheriff to sell the property seized thereunder, because the law

plainly defines his duty, and expressly indicates the successive steps to be taken by said attaching officer in subjecting the property to the satisfaction of the demand.

The order of the court upon which the substituted service is based directs that the summons be published in the Mitchell Capital once in each week for six successive weeks; and the printer's affidavit, so far as material, is as follows: "A. E. Dean, of said county and state, being first duly sworn, on his oath says that the Capital is a weekly newspaper of general circulation, printed and published in Mitchell, in said county and state, by the Mitchell Printing Co., and has been such newspaper during the time hereinbefore mentioned; and that I, A. E. Dean, the undersigned, am business manager of said newspaper, in charge of the advertising department thereof, and have personal knowledge of all the facts stated in this affidavit, and that the advertisement headed 'Summons,' a printed copy of which is hereunto attached, was printed and published in the said newspaper for seven successive issues, to wit, the first publication being made on December 25, 1891, and the last publication on February 5, 1892." It is not claimed that the service is in fact incomplete, and no point is made that the summons was not printed in the paper indicated by the court; but counsel for appellant confidently maintains that there is no sufficient proof that the summons was published "once in each week for six successive weeks," as required by the statute and directed by the court. Commencing on December 25, 1891, and concluding on February 5, 1892, the summons was published in a weekly newspaper for seven successive issues. In ordinary acceptation, the expression "weekly newspaper" unerringly conveys the idea of a paper issued once a week, and the phrase "for seven successive issues," when used with reference to a publication in a weekly newspaper, simply means that such publication appeared in the columns thereof once each week for seven consecutive weeks; and when the date of the first and last publication is given, as in the affidavit before us, the above conclusion is irresistible. What has been said concerning the publication of the summons applies with equal force to the notice of sale, and without hesitation we pronounce the proof of publication in each instance entirely sufficient. Finding no error in the record, the order appealed from is affirmed.

HANEY, J., took no part in the decision.

DAVIS et al. v. MATTHEWS.

(Supreme Court of South Dakota. Feb. 26, 1896.)

AUTHORITY OF AGENT.

A nonresident agent, authorized by his principal and charged with the exclusive management of a real-estate loan business in this including the examination of titles and fo sure of mortgages, has implied authority to a local subagent, through whom all the bu has been transacted, to retain a lawyer, whe the interests of his principal demand profes attention.

(Syllabus by the Court.)

Appeal from circuit court, McCook co Joseph W. Jones, Judge.

Action by Park Davis and others, pa under the name of Davis, Lyon & C against E. P. Matthews. Judgment for tiffs, and defendant appeals. Affirmed.

E. H. Wilson, for appellant. Davis, & Gates, pro se.

FULLER, J. At the trial of this ca the court below the jury returned a v of $100 against the defendant in plai favor, upon a claim for attorneys' fees. appeal is by the defendant from a judg accordingly entered, and from an order ruling a motion for a new trial. Whil testimony essential to a determination questions of law presented will be treat connection therewith, a proper unders ing of the theory upon which the case tried requires a statement of the most in tial facts disclosed by the record. There no question as to the value of the ser and it is not claimed that appellant perso employed respondents to perform the In this state and the territory from whic same was organized appellant, a reside Milwaukee, had been for more than 12 engaged continuously in the land and r tate loan business through his agent in city, to whom it appears he had dele full power and authority to transact the With actual knowledge on the part of lant, and under the immediate supervisi his Milwaukee agent, the business abo ferred to was all transacted for appella M. Grigsby, Esq., of the city of Sioux Frequently, and whenever Mr. Grigsby with appellant concerning his business i territory and state, he was invariably to understand by that gentleman tha Day, the Milwaukee agent, had full c of the same. Furthermore, the benefi rived from the numerous transactions c on and consummated by Mr. Grigsby request of Mr. Day, including the matt der consideration, seem to have been a ed and retained by appellant without an jection. Under this arrangement, and name of appellant, money was loaned, were paid, mortgages were foreclosed, was bought and sold, both at privat foreclosure sale, and all business incid thereto was transacted by Mr. Day as ager for appellant, through the agency Grigsby. Under the authority actual ostensibly conferred by appellant, Mr. had power "to do everything necessa proper and usual in the ordinary cou business for effecting the purpose c agency." Section 3981, Comp. Laws.

pears from the evidence that the owner of a certain tract of land upon which appellant held a mortgage to secure a loan made through the agency above mentioned had allowed the premises to be sold for delinquent taxes. A deed had been issued, and it became necessary to take immediate steps to remove the cloud thus occasioned, and protect the interests of appellant. The services performed by respondents were in connection with this matter, and are conceded by appellant to be of the value for which judgment was rendered. Before respondents were employed, Mr. Day and Mr. Grigsby had talked the matter over frequently, and had made numerous attempts to effect an adjustment of the difference between appellant and the holders of the tax deed without litigation. Mr. Grigsby testified: "They [the holders of the tax deed] wanted us to pay, I think, $400. I was frequently in Mr. Day's office, and we talked the matter over, and decided that we would fight the case, and not pay the sum." "Acting under the instructions of Mr. Day, I employed the plaintiffs to clear up the title to the tax deed, and to act as attorneys for Matthews in clearing up the same land." "My directions always came from Mr. Day. After these transactions, I saw Mr. Matthews, and he always expressed his satisfaction. Everything was all right, and he gave me to understand that Mr. Day had full charge of all his business." From the foregoing and other testimony of Mr. Grigsby found in the record, when considered with the numerous letters of Mr. Day in relation to the matter before us, it is evident that appellant cannot escape liability in case it should be found that Mr. Day had actual or ostensible authority to employ respondents to perform the service to recover for which this action was brought. Although Mr. Grigsby, as an attorney at law, had rendered professional services in other and distinct matters, under the direction of Mr. Day, his action in connection with the employment of respondents in this case was purely mechanical and ministerial, and in effect the same as though Mr. Day had merely directed Mr. Grigsby to request respondents to perform the service for Mr. Matthews. If Mr. Day had authority to employ respondents, he could delegate that power to Mr. Grigsby, under section 4003 of the Compiled Laws.

This brings us to a consideration of the most important question presented by the record. The time was near at hand when appellant, under the statutory limitation, would be estopped from commencing an action to avoid the force and effect of the tax deed recorded nearly three years prior thereto. Comp. Laws, § 1640. Appellant for many years had known that his managing agent, Mr. Day, was employing an attorney in this territory and state to render such professional services as might be required in connection with the local business of his principal, and had at all times acquiesced therein, and sanctioned the practice, by receiving the benefits derived therefrom, and by paying for the same without objection. Neither appellant nor Mr. Day, so far as disclosed by the record, was ever within the boundaries of this state; and it was manifestly necessary, from the methods employed, as well as from the nature and extent of the business transacted, that appellant should delegate to Mr. Day full authority to employ an attorney whenever it became necessary. The fact that Mr. Day had usually employed Mr. Grigsby does not tend to prove that he was without power to direct Mr. Grigsby to place the matter with which respondents were intrusted entirely within their hands, and that was just what appears to have been done. With reference to the business that was being transacted Mr. Day had the powers of a general manager, and was authorized to do or cause to be done, in the usual and accustomed manner, everything necessary to protect the interest of his principal. Mechem, Ag. 395; Insurance Co. v. Grunert, 112 Ill. 68; Bodine v. Insurance Co., 51 N. Y. 117; Bank v. Martin, 45 Am. Dec. 87; Briggs v. Town of Georgia, 10 Vt. 68; Clark v. Randall, 9 Wis. 138. Appellant concedes that the services rendered by respondents, for which he has paid nothing, were valuable; and under the law, as applied to the facts before us, he cannot escape liability. From a regardful consideration of the numerous assignments of error relating to the court's charge to the jury and to its rulings on questions of evidence, we find nothing for which the case should be reversed. The judgment appealed from is therefore affirmed.

BOWMAN v. KNOTT.

(Supreme Court of South Dakota. March 4, 1896.

EXECUTION SALE—NOTICE.

Under a statute that requires public notice to be given for at least 10 days before an officer can sell property levied upon by virtue of an execution, a sale and delivery thereof upon 8 days' notice is unauthorized, and renders the seizure and all subsequent proceedings the acts of a trespasser from the beginning.

(Syllabus by the Court.)

Appeal from circuit court, Minnehaha county; Joseph W. Jones, Judge.

Action by O. J. Bowman against George A. Knott. Judgment for defendant. Plaintiff appeals. Reversed.

C. A. Christopherson, for appellant. Bailey & Brockway, for respondent.

FULLER, J. This action in conversion is by a judgment debtor against a sheriff, to recover $57.60, the alleged value of certain personal property seized and sold under an execution issued by a justice of the peace, and directed to said officer. There was a judgment for defendant, and plaintiff appeals. Respondent filed no brief, and the only ques-

tion presented by appellant is the sufficiency of the notice of sale, which was published in a weekly newspaper once a week for two consecutive weeks, as follows: October 12 and October 19, 1894; and said notice specified that the sale would take place on the 20th of said month and year. Before an officer can proceed to sell property levied upon by virtue of an execution, he must cause public notice thereof to be given for at least 10 days before the day of sale. Comp. Laws, §§ 5141, 6117. Where but 8 days intervene between the first publication and the day of sale, it is very evident that the statute requiring such notice to be given "for at least ten days before the day of sale" is not satisfied. The statute is mandatory, and expressly prohibits a sale of property until at least 10 days' notice has been given, either by posting notices, or by publication thereof, as the case may require. An officer must strictly pursue a statute by which he is authorized to divest the title to property, and transfer it to another, without the consent of the owner. It was incumbent upon the sheriff to show a substantial compliance with the statute, and as the execution gave him no authority to sell until at least 10 days' notice had been given, a sale based upon an 8-day notice was without authority, and the seizure and all subsequent proceedings became the acts of a trespasser ab initio. Griswold v. Sundback (S. D.) 60 N. W. 1068; Carrier v. Esbaugh, 70 Pa. St. 239; Smith v. Gates, 21 Pick. 55. Respondent, having relinquished his lien by an unwarranted sale of the property, was without legal process under which to justify. The judgment of the trial court is reversed, and a new trial is awarded.

SCAMAN v. GALLIGAN et al.

(Supreme Court of South Dakota. Feb. 26, 1896.)

SEQUESTERED PROPERTY — CONVEYANCE — JUDGMENT—SALE—COURTS—JURISDICTION.

1. A mortgage executed by a party who has been enjoined from transferring or incumbering his property, real and personal, until the further order of the court, is not valid as against the interest of the plaintiff, in whose behalf the injunction order was granted, in the hands of a party having actual notice of the injunction order at the time the mortgage was so executed.

2. Where property of a judgment debtor has been sold for less than the amount of the judgment, and redeemed from such sale by the judgment debtor, the property may again be sold on a second execution issued on the same judgment for the balance due thereon.

3. It is not essential that the jurisdiction of a superior court should affirmatively appear in the judgment roll. If it does not, and the contrary does not therein affirmatively appear, jurisdiction will be presumed.

(Syllabus by the Court.)

Appeal from circuit court, Clark county; J. O. Andrews, Judge.

Action by Dora L. Scaman against Edward M. Galligan and Mattie Galligan. There was a judgment in favor of the latter defendant, and from an order denying a new trial plaintiff appeals. Affirmed.

F. E. Strawder, F. G. Bohrl, and C. X. Seward, for appellant. J. W. Wright, S. A. Keenan, and C. G. Sherwood, for respondents.

CORSON, P. J. This was an action to foreclose a real-estate mortgage executed by the defendant Edward M. Galligan to the plaintiff, Dora Scaman. The defendant Edward M. Galligan made no defense, but the defendant Mattie Galligan answered, and judgment was rendered in her favor. A motion for a new trial was made and denied, and from an order denying the same the plaintiff appeals.

Mattie Galligan, in her answer, states, in substance, that in the year 1888 the said Edward M. Galligan commenced an action for divorce against her, in the then district court in and for Clark county; that in July, 1888, said district court granted an order requiring the said Edward to pay this defendant a certain sum as alimony pending the action, and restraining and enjoining the said Edward from transferring or incumbering his property, real or personal, until the further order of the court; that said order was duly served upon the said Edward on or about the 23d of July, 1888; that said money has not been paid, and that the said order has at all times remained in full force and effect; that said divorce action was tried in June, 1891, and a decree of divorce was duly granted to this defendant, Mattie Galligan, together with a judgment against the said Edward for $75 temporary alimony, and $600 permanent alimony, and the costs of the action; that on or about August 15, 1891, an execution was duly issued upon said judgment, under and by virtue of which the property described in plaintiff's mortgage in this action was sold and bid in by the said Mattie Galligan for the sum of $1, costs and charges of sale; that the said sale was duly confirmed by the court, and certificate of sale duly issued by the sheriff thereon to the said Mattie Galligan. The said Mattie Galligan further alleges that the plaintiff, at the time of the execution of the mortgage in controversy in this action, had actual notice of said order of injunction, and that said mortgage was given by said Edward M. Galligan for the purpose of defrauding the said Mattie Galligan, of which the said plaintiff, through her agent, John A. Scaman, had full notice; and the said Mattie Galligan concludes with a prayer that said mortgage be adjudged null and void, and canceled. In a supplemental answer, she alleges, in substance, that the said Edward M. Galligan redeemed the property from the sale made to her, the said Mattie Galligan, hereinbefore set forth, and that a second execution was issued upon the said judgment in the divorce

action, and the said property included in the mortgage in this action was again sold under and by virtue of said second execution, and bid off by the said Mattie Galligan for the sum of $420 and costs and charges of sale; that said sale was duly confirmed, a certificate of sale duly issued to her, and she was still the owner of the same. To recapitulate as to dates: The injunction order was made and served upon Edward M. Galligan in July, 1888; the mortgage in suit was executed in February, 1889; the divorce action was tried in June, 1891; and the sale of the property under the second execution was made December 10, 1892.

On the trial, the defendant Mattie Galligan offered in evidence the injunction order made by the district court on July 23, 1888. This order was objected to on the ground that "the order was subsequently merged in the final decree." There seems to have been a stipulation made in connection with the offer, as follows: "It is stipulated and agreed that the action of Galligan vs. Galligan, in which the injunction order was granted which has been referred to and offered in evidence, was pending at and prior to the granting of said injunction, and pending and undetermined from that time until the decree which has been offered in evidence was rendered, and all of the time." The order, with this stipulation, was properly admitted. The evident purpose of offering the order was to prove that, at the time the defendant Edward M. Galligan executed the mortgage in suit, he was enjoined from selling or incumbering his property. This the order, in connection with the stipulation, tended to prove; and it was not material that the injunction order was subsequently merged in the judgment or decree, if such was the legal effect. The mortgage, being executed prior to the assumed merger, was not validated or affected by the subsequent decree; and, being executed while the injunction order was in full force and effect, it was not valid, as against Mattie Galligan, in the hands of any mortgagee who had actual or legal constructive notice of the restraining order, for the reason that the said Edward M. Galligan was, by reason of the injunction order, incapacitated from making a valid mortgage, as against her, to any person having actual or legal constructive notice of the injunction order. 1 High, Inj. § 338; 2 Story, Eq. Jur. § 908; Greenwald v. Roberts, 4 Heisk. 494; Willsie v. Ranch Co. (S. D.) 63 N. W. 546. The injunction order, with the sheriff's return of personal service upon said Edward M. Galligan, constituted an important link in defendant's evidence, to show the invalidity of plaintiff's mortgage as against the defendant Mattie Galligan, followed, as it was, by evidence that John A. Scaman, the husband and agent of the plaintiff, had actual notice of the injunction order when the mortgage in suit was executed.

The defendant next offered in evidence the judgment, execution, and return of the sheriff in the action of Galligan v. Galligan, which were admitted in evidence against the objection and exceptions of the plaintiff. By this judgment, Mattie Galligan was granted a divorce against the said Edward M. Galligan, and a judgment for $675 for temporary and permanent alimony, and the costs of the action. It was further adjudged and decreed that said judgment, from and after its date, should constitute a lien upon the land of said Edward M. Galligan and all improvements thereon. Whether or not this clause had any effect it is not material to inquire, as the judgment constituted a lien, when docketed, upon the real estate of said Edward M. Galligan. By the sheriff's return on the execution, it appears that the real estate included in plaintiff's mortgage was sold under said execution, and bid in by Mattie Galligan for one dollar and costs and charges of sale. It is admitted that this sale was duly confirmed by the court, and subsequently redeemed from such sale by the judgment debtor, Edward M. Galligan. We do not clearly perceive the object or purpose of offering this execution and return thereon as evidence on the part of Mattie Galligan, and it is somewhat difficult to discover any theory upon which they were admissible. But, if it was error to admit them, it was error without prejudice, and need not be further considered. The judgment was properly admitted, as it conclusively proved that said Mattie Galligan had secured a lien upon said Edward M. Galligan's property by reason of the injunction order, superior to that of the plaintiff, assuming, as the court found, that the plaintiff took her mortgage with notice of the said injunction order.

The defendant Mattie Galligan next offered in evidence a second execution issued upon said judgment, and the return of the sheriff thereon, from which it appeared that the same property was again sold under the second execution, and bid in by the said Mattie Galligan for $420. This sale was also confirmed, and a certificate of sale issued to said Mattie Galligan, which at the time of the trial had not been redeemed from sale. This execution and return were also admitted against the objection and exception of the plaintiff. The question therefore presented is: Can a second execution be issued upon the same judgment, and be levied upon the same real property sold under a former execution, and redeemed by the judgment debtor from the former sale? The Code of this state provides for a redemption of property sold by two classes of persons. The first class includes the judgment debtor and his successors. The second class includes creditors having liens by judgments or mortgages subsequent to that on which the property has been sold, and this latter class is termed "redemptioners." Comp. Laws, § 5150. The effect of a redemption by the judgment debtor is thus stated in section 5155,

Comp. Laws: "If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate." The section then provides for the manner of canceling the sale upon such redemption by the debtor. There would seem to be no valid reason why a judgment creditor under whose execution a sale has been made for less than the amount of his judgment, and which has been redeemed by the judgment debtor, should not have the right to issue a second execution, and sell the same property again after a redemption by such debtor. If the first sale is terminated, and the debtor is restored to his estate, the judgment for the unpaid balance still remains a lien upon the property. This seems to have been the view taken of a similar statute by the court of appeals of New York. In Bodine v. Moore, 18 N. Y. 347, on page 351, the court says: "A redemption by the debtor renders the sheriff's sale null and void, as though it had never taken place. The very judgment on which the sale was had becomes again a lien, if it was not fully satisfied by the bid, and the land may be again sold." Phyfe v. Riley, 15 Wend. 248; Warren v. Fish, 7 Minn. 432 (Gil. 347); Settlemire v. Newsome, 10 Or. 446; Boyce v. Wight, 2 Abb. N. C. 163.

It is further contended by the appellant that the court erred in overruling appellant's objection to the following question: "Q. Mr. Wright, I will ask you to give, as near as you can, the conversation you had with John A. Scaman at the time you claim to have notified him of the pendency of this injunction of which you have already testified, in the fall of 1888. (Objected to by plaintiff's counsel, as immaterial, on the ground that the relationship of principal and agent has not been shown to exist between these parties, and that John A. Scaman is not a party to this action.)" This objection was properly overruled. The additional abstract submitted by the respondent discloses the fact that there was a large amount of evidence tending to show that John A. Scaman was acting as the agent of the plaintiff in loaning her money, and that he actually transacted the business resulting in the giving of the mortgage in suit, as her agent. At the time this evidence was introduced, the case was being tried before a jury, but subsequently, by consent, the case was taken from the jury, and decided by the court. The court found that the said John A. Scaman was the agent of the plaintiff, and transacted all the business pertaining to this mortgage as her agent, and that, at the time the mortgage was executed, said John A. Scaman was fully informed of the existence of the injunction order. The objection, therefore, was not well taken.

The appellant, in rebuttal, introduced in evidence the answer or cross complaint of Mattie Galligan, in the action of Galligan v. Galligan, over the objections of the respondent; and she contends that it appears therefrom that the court had no jurisdiction to grant the defendant in that action a decree of divorce and alimony, for the reason that such cross complaint or answer shows that Mattie Galligan, the defendant in that action, was not a resident of the then territory at the time or prior to the filing of said cross complaint or answer. Waiving the question as to the admissibility of the answer or cross complaint, for the purpose of showing the want of jurisdiction in the court, without introducing in evidence the entire judgment roll, such cross complaint did not establish the fact that the court did not have jurisdiction to render the judgment and decree in that action. Such cross complaint did not affirmatively show that the court had not jurisdiction. It is not enough that the record of a superior court does not affirmatively show that the court has jurisdiction when the judgment is collaterally attacked, but the record must show affirmatively that the court had not jurisdiction; otherwise, the court's jurisdiction will be presumed. Richards v. Matteson (S. D.) 65 N. W. 428. See, also, Black, Judgm. §§ 270–279, inclusive, and cases cited. All that appears in said answer or cross complaint bearing upon this question is that certain acts of cruelty complained of are alleged to have been committed at Council Bluffs, in the state of Iowa; that the plaintiff, Edward M. Galligan, deserted her while there; and her prayer for alimony, which is as follows: "And, fifth, that all costs of this action, including the necessary traveling expenses of this defendant from Council Bluffs, Iowa, to Clark county, Dakota, and return, for the purpose of attending the trial of this action, to be paid by said plaintiff, and that the court grant such other relief as to him seems just and right." These allegations and prayer for relief come very far short of showing affirmatively that said Mattie Galligan was not a resident of the then territory, when such cross complaint was filed, or had not been such for the period of 90 days prior thereto. But it may be a serious question whether any term of residence is required on the part of a defendant who defends in an action for a divorce, and who seeks and obtains affirmative relief in such an action. The provisions of the statute relating to divorces prescribe no term of residence for a defendant, but the term of residence required seems to be limited to plaintiffs only. It is not necessary, however, to decide that question in this case, for the reason, as before stated, that the cross bill does not show affirmatively that said Mattie Galligan had not resided in the territory for 90 days. This court will therefore presume that, if such residence was necessary, satisfactory proof of that fact was made. This court concludes, therefore, that the execution of the mortgage in controversy by Edward M. Galligan, and its acceptance by the plaintiff, either personally or through her authorized agent, with knowledge that the injunction order had been made, constituted a contempt of the court's order, and rendered the mortgage invalid and of no force or effect as against said Mattie Galligan. The find-

ings of the court, its conclusions of law, and judgment are correct. The court's order denying a motion for a new trial is therefore affirmed.

CONNER v. KNOTT.

(Supreme Court of South Dakota. March 4, 1896.

CLAIM AND DELIVERY—GENERAL DENIAL—EVIDENCE.

Under a general denial in an action in claim and delivery against a sheriff, the defendant may show that the goods in controversy are the property of a third person, and that his possession is rightful, by virtue of a writ of attachment under which said property was seized.

(Syllabus by the Court.)

Appeal from circuit court, Minnehaha county; Joseph W. Jones, Judge.

Action by Jessie F. Conner against George A. Knott. Judgment for plaintiff. Defendant appeals. Reversed.

Joe Kirby, for appellant. Winsor & Kittredge, for respondent.

FULLER, J. Claiming to be the owner of certain household effects, including a piano, mentioned in the complaint, and alleged to have been wrongfully taken and detained by the defendant, plaintiff brings this action, in claim and delivery, to recover the immediate possession thereof. Under the answer, which is, in effect, a general denial, and after the defendant had introduced evidence tending to show that the property in question belonged to C. J. Conner, the husband of plaintiff, counsel for appellant attempted to justify the seizure and detention thereof by the defendant sheriff under a warrant of attachment fair upon its face, and directed against the property of said C. J. Conner. Upon the theory that justifying evidence of the seizure, possession, and retention of the property by the sheriff by virtue of the writ was not within the issues, nor admissible under a general denial, all of said evidence was excluded, and the ruling of the court thereon is assigned as error.

The trial resulted in a verdict upon all the issues against the defendant, in plaintiff's favor, and the defendant appeals from a judgment entered thereon, and from an order overruling a motion for a new trial. As the above ruling will require a new trial, and in view of the disposition of courts to allow amendments in the interest of justice, an assignment of error relating to a ruling upon what appears to be a valid objection to the introduction of any evidence under the complaint will receive no attention. While it is well settled, in replevin at common law, that an officer, in order to justify the seizure of property claimed by or found in the possession of a stranger to the writ, must plead the specific facts upon which he bases his special property or right to possession, he may, according to the code system, under a general denial, show that his possession of the property is rightful, by virtue of legal process under which the same was seized, or he may show that the property is not wrongfully detained, by proving title in himself or in a stranger. Agricultural Works v. Young (S. D.) 62 N. W. 432; Schulenberg v. Harriman, 21 Wall. 44. In Missouri it was held that "where, in such a proceeding, defendant makes a general denial of title in plaintiff, he may justify under legal process against the rightful owner." Bosse v. Thomas, 3 Mo. App. 472. "In an action in replevin the defendant may show, under the general issue, that the goods in controversy are the property of a third person, held by defendant, as sheriff, under a writ of attachment." Young v. Glascock, 79 Mo. 574; Bailey v. Swain, 45 Ohio St. 657, 16 N. E. 370; Jansen v. Effey, 10 Iowa, 227. In Snook v. Davis, 6 Mich. 156, it was said that "in replevin the defense that the property was taken under legal proceedings against a third person, claimed to be the owner thereof, is admissible under the general issue, without notice." See, also, Richardson v. Steele, 9 Neb. 483, 4 N. W. 83. "In replevin, all that is necessary, in order to enable the defendant to prove any defense which he may have, is to deny all the allegations of the plaintiff's petition." Bailey v. Bayne, 20 Kan. 657; Davis v. Warfield, 38 Ind. 461; Verry v. Small, 16 Gray, 121; Sopris v. Truax, 1 Colo. 89; Timp v. Dockham, 32 Wis. 146; Delany v. Cuming (Wis.) 8 N. W. 897. If, as alleged, plaintiff's property was seized and taken from her actual possession by the defendant, no surprise could result from an offer to justify the seizure, possession, and retention thereof under a writ of attachment. Wrongful detention, based upon a claim of ownership and the right to immediate possession, are the essential facts put in issue by the general denial, under which any material collateral fact tending to justify the taking and retention was clearly admissible. 1 Enc. Pl. & Prac. p. 822; Baylies, Code Pl. p. 233; Cobbey, Repl. p. 399. We believe the reasonable rule to be that a plaintiff in claim and delivery must recover upon the strength of his own title, and show his right to the immediate possession of the property in dispute as against everybody else, and that under a general denial an attaching officer may show property in a stranger to the suit, and justify under the process by which it was seized. The judgment of the trial court is reversed, and a new trial is awarded.

BURDICK v. MARSHALL.

In re SPAULDING et al.

(Supreme Court of South Dakota. March 4, 1896.)

CONTEMPT—RECEIVER—POSSESSION—EVIDENCE.

1. Proceedings for a contempt of court, being essentially criminal in their character, a conviction cannot be sustained unless the acts complained of constitute the offense.

2. Evidence offered in support of the charge examined, and found to be insufficient to sustain a judgment of conviction.

(Syllabus by the Court.)

Error to circuit court, Codington county; J. O. Andrews, Judge.

Ebenezer F. Spaulding, George W. Case, and others were convicted of contempt of court, and bring error. Reversed.

Cheever & Hall and George W. Case, for plaintiffs in error. Coe I. Crawford, Atty. Gen., and Glass, Weeden & Hanten, for defendant in error.

FULLER, J. Plaintiffs in error were charged in an affidavit for an order to show cause why they should not be punished for contempt of court for taking from the possession of a receiver appointed by the circuit court in the above-entitled action a certain locomotive dummy engine and car, upon which it is claimed a lien for repairs existed against the Watertown & Lake Kampeska Railway Company, in favor of the firm of Marshall & Burdick, whose copartership effects had been placed in the hands of said receiver pending litigation between the members of said firm. At the conclusion of the hearing, plaintiffs in error were adjudged to be in contempt, and it was by the court ordered "that said Ebenezer F. Spaulding pay a fine of one hundred and fifty dollars, and that in default of the payment thereof that he be committed to the county jail of Codington county until said fine is paid; that the said George W. Case pay a fine of one hundred dollars, and that he be suspended from practicing law in the circuit court of said state from the service of this order until said fine is paid, unless otherwise ordered by the court." From the foregoing judgment of conviction error is brought to this court for examination and review.

Dependent upon possession, one who alters or repairs any article of personal property for another has a lien thereon for his reasonable charges but such lien is extinguished by the voluntary restoration of such property to the owner, unless otherwise agreed upon by the parties. Comp. Laws, §§ 4345, 4450. As all questions of fact relating to the jurisdiction of a court to punish for contempt are within the scope of legitimate inquiry, we will first ascertain whether there is evidence sufficient to show that the property in question was rightfully within the possession of the receiver, Mr. Newby, by virtue of a lien for repairs thereon, at the time of the alleged interference therewith by plaintiffs in error. It appears from the undisputed evidence that the contemner Spaulding was the duly qualified and acting receiver of the Watertown & Lake Kampeska Railway Company, a corporation, by virtue of his appointment to that position by the United States circuit court, and as such was expressly charged with the possession, management, and control of all its railway property, equipments, and fixtures and franchises; and the contemner George W. Case, an attorney at law, duly licensed to practice his profession in all the courts of this state, was duly retained as counsel for said Spaulding in all matters pertaining to his duties as receiver. While Mr. Newby avers in his affidavit to show cause that a large portion of the amount claimed to be due the firm of Marshall & Burdick was for repairing the engine in controversy during the month of August, 1893, and prior thereto, it is also stated therein that materials and labor upon said engine, of the value of $41.80, were furnished on the 1st day of July, 1895, at the special instance and request of said Spaulding, no part of which has been paid; that at all times since furnishing such repairs said engine and car have been in the continuous possession of Marshall & Burdick, or certain other gentlemen who had acted in turn as receivers of said copartnership, prior to the appointment of affiant, and until the night of July 1, 1895, when plaintiffs in error unlawfully took said property from the possession of affiant, into whose hands the same had been delivered by one R. H. Bradley, his immediate predecessor as the receiver of said firm; and that they still maintain the actual control and management of said engine and car for the transportation of passengers upon said local railway between the city of Watertown and Lake Kampeska; and that said Spaulding and Case had actual knowledge at the time of taking said property that the same was in the possession and under the control of affiant by virtue of his appointment. As we are disposed to view the proceedings, it will not be necessary to consider mitigating evidence and circumstances, strong and almost conclusive in character, which was offered for the purpose of showing an absence of any intention to commit the offense of which plaintiffs in error were convicted. It seems that trains had not been operated upon the railway in question for several months. The engine and car, at the time of the alleged taking, stood upon the track and right of way of the company, immediately in front of the repair shops of Marshall & Burdick, and at the precise point where, according to the testimony of plaintiff in error Spaulding he had left the same the previous season, when he discontinued the operation of the line.

Concerning the taking of the engine and car Spaulding testified in part as follows: "I went down that night to steam up, and set my en-

gineers to work to make any further repairs that might be necessary. The repairs on the engine had been made during the Saturday night previous. The only object in going there in the night was to complete our repairs, and make a test of the engine, so that we might run it in the morning early. The encampment was already under way. We had lost two days' time already. The encampment was on the way, and I gave the engineer orders to commence running early in the morning. I did not take them secretly nor by stealth." The following testimony of E. J. Allen was offered on the part of the accused: "I reside near Watertown. I am an engineer. I have operated this dummy engine and car in question. I was employed by Dr. Spaulding last June as head engineer. I was present July 1st, when the car and engine were taken. Dr. Spaulding, myself, and the conductor went to the car, and Dr. Spaulding had the keys, and took them out, and I rather think it was him that unlocked the door. I told him the first thing to do was to get it somewhere where we could get water, and we ran it down to the Arcade. Before running it down, I spoke of a fireman who fired for me, and where he lived, and he sent after him. He was there when we moved the car. There was no one said a word to us. The engine and car was where I left it the year before; in the same spot. The engine and car were in the possession of Dr. Spaulding last year. I operated them under his instruction. There was no force or threats used in taking the car or engine." Concerning the contemptuous acts of Spaulding and Case, the witness L. D. Lyon testified that: "The cars were on the track of the Watertown and Lake Kampeska Railway Company, in front of the shop of Marshall & Burdick, where they were nearly always left. If the motor was to be run at all, it was necessary to run it as soon as possible. The encampment was already in progress. It ought to have run Sunday and Monday, and it was Tuesday morning before we got it in operation. If it was to be in shape to accommodate the encampment and the citizens in general, it was necessary that it be got in order as soon as possible. It takes three or four hours to fire it up. The engine and car was in the possession of Mr. Spaulding when it was left in that position last year. I saw Mr. Spaulding every time I wanted coal hauled out to the coal house, and I had the engine to haul out three cars of coal in April. When we left the engine it was then in its customary place. Marshall & Burdick didn't have possession, that I know of." Complainant Newby, after testifying that he had been receiver of Marshall & Burdick since April 10, 1895, and that the property in controversy was placed in his possession by his predecessor, Mr. Bradley, who said, "'You will take charge of the things you have here.' He called them a reverse lever, lubricator, connecting rods, tools, and headlights. The engine and car were on the tracks belonging to the Watertown and Lake Kampeska Railway Company,"—was cross-examined as follows: "Question. When did you file your oath of office as receiver? (By the Court. Objection sustained. Counsel ordered not to ask any more such questions. Exception taken by the respondents. Respondents offer to show that he did not take nor file his oath of office until the 5th day of July, 1895. Objected to by the complainant as incompetent. Objection sustained. Exception taken by the respondent.) Question. You didn't personally know, did you, that the firm of Marshall & Burdick had any claim against this railway company? Answer. I know from the books. I can only take the books as I find them. I don't undertake to state whether these charges are correct or not; simply what I find on the books. The engine and car was on the railroad track, in the possession of the receiver of the railroad company, on the evening it was taken. The account of $41.80 was and is stricken off the affidavit. It was paid before I signed the affidavit. I would not be positive whether I saw Mr. Case at the time the cars were being moved or not. I saw Eph Allen on the engine. I repaired the engine for the purpose of putting it in shape to run,—to be run by whoever the judge dictated should run it. I repaired the engine under the direction of Dr. Spaulding, because he and Case said that Case had seen Judge Andrews. Dr. Spaulding paid for the repairs. I left the engine and car on the company's track after repairing it. Everything was complete. It was not in our shop. It was not in our yards. It was not upon our grounds. As near as I can remember from the books, the account against the company was for 1892 and 1893. I do not know whether my predecessor took any steps to foreclose the lien or not. I do not know anything about the labor and repairs performed prior to my appointment, only by the books. The books are in the safe in the shop of Marshall & Burdick. Question. Did he [Bradley] state to you where the motor and car were? Answer. I could not help but see them. He said, 'Here is some repairs, some extras, that we always take off after running.' Question. What, if anything, did he say with reference to his possession? Answer. I don't remember as to that. I do not think that was discussed. I was not present when certain articles belonging to the engine were left in the shop. There is no record in the books as to why they were left." The foregoing is practically all the evidence offered at the hearing to establish in the receiver appointed by the state court the possession of the engine and car, and no further evidence was offered tending to prove the existence of a valid and subsisting claim for a lien.

Although it was held in Withers v. State, 36 Ala. 252, and Kane v. Haywood, 66 N. C. 1, that suspension from practice could only follow in a proceeding instituted for that purpose alone or for disbarment, and that such

punishment ought never to be inflicted upon an attorney at law for a contempt of court, we express no opinion thereon, because the question is not essential to a determination of the case before us. The process by which the accused were reached and brought into court, the offense with which they were charged and for which they were tried and convicted and sentenced to pay a fine or suffer imprisonment in one instance, and suspension from the practice of law in the other, are all distinctly and essentially criminal in their character, and in order to sustain a conviction it must appear that the acts committed constitute a contempt of court. State v. Knight, 3 S. D. 509, 54 N. W. 412; State v. Sweetland, 3 S. D. 503, 54 N. W. 415. Persons tried upon such a charge are presumed to be innocent until their guilt beyond a reasonable doubt is established by competent evidence. See 4 Enc. Pl. & Prac. p. 768, and numerous cases from different states collated in the notes. There is no primary evidence that any specific amount was due from the railway company to Marshall & Burdick for repairing the engine or car in dispute; nothing sufficient to show that said property, at the time in question, was in the possession of the receiver, L. A. Newby, or that any agreement had ever been entered into by which to perpetuate the statutory lien, notwithstanding the apparent restoration of the property to the railway company, or the receiver thereof appointed by the federal court. From a regardful examination of the entire record, we are unavoidably led to the conclusion that no essential element of the offense charged was established by the evidence. The judgment convicting plaintiffs in error of a contempt of court is therefore reversed, and the trial court is directed to dismiss the proceedings.

STATE v. REDDINGTON.

(Supreme Court of South Dakota. March 4, 1896.)

CRIMINAL LAW—FORMER JEOPARDY—REVERSAL ON APPEAL.

1. When the defendant in a criminal action is convicted of the crime charged, and subsequently, on writ of error sued out by himself, procures in this court a reversal of the judgment of conviction, for errors in the charge of the trial court to the jury, he is not entitled to be discharged on the ground that he has once been put in jeopardy.

2. On a reversal of the judgment in such case, it is proper for this court to order a new trial in the court below.

(Syllabus by the Court.)

Error to circuit court, Codington county; J. O. Andrews, Judge.

James Dempsey Reddington was convicted of manslaughter, and brings error. Affirmed.

Glass & Hanten and Bennett & Sheldon, for plaintiff in error. Coe I. Crawford, Atty. Gen., Lee Stover, State's Atty., and C. X. Seward, for the State.

CORSON, P. J. At the May, 1894, term of the circuit court of Codington county, the defendant was indicted for the crime of murder; and at the November term of said court was tried and convicted thereon, and sentenced to imprisonment in the state's prison of this state for life, and, in execution of said sentence, was taken to the said prison. No motion for a new trial was made, but, a bill of exceptions having been duly settled, the defendant sued out of this court a writ of error to the circuit court of said Codington county, upon which the record was removed to this court for review. At the time said writ of error was allowed the presiding judge of this court granted a certificate of probable cause, upon which the said defendant was removed from the state's prison to the jail of said Codington county. On review of the record in this court the judgment of the circuit court was reversed, for errors in the instructions of the court, and a new trial granted, and the case remanded for further proceedings. The opinion is reported in 64 N. W. 170. Upon the case being again called for trial, the defendant interposed the following plea (omitting formal parts): "Now comes the defendant, and pleads and objects to any further proceedings herein, on the ground that the defendant has been tried and sentenced at the November, 1894, term of this court, and has been once in jeopardy, and has not asked for a new trial herein, and has not waived his former trial and jeopardy; that the order of the supreme court ordering a new trial is of no force and effect; and the defendant having been once in jeopardy, tried, convicted, and sentenced in this court, and transmitted to the state prison at Sioux Falls, S. D., for life imprisonment, and the execution of the said sentence has commenced and is completed, and the defendant is not subject to further jeopardy, the defendant moves the court to dismiss the indictment and discharge the defendant from further custody." This plea was overruled by the court, and the motion to dismiss the indictment and discharge the defendant was denied. To these rulings of the court the defendant duly excepted. Subsequently the defendant was allowed by the court to withdraw his former plea of not guilty, and plead guilty to manslaughter in the first degree, upon which he was sentenced to imprisonment in the state's prison for a period of seven years, and under which sentence he was committed to said prison, where he now is. A second writ of error was thereupon sued out of this court by said defendant, and the record is again before us for review upon assignment of errors. The one we deem it necessary to consider is as follows: "Error to the court in refusing to dismiss the indictment and discharge the defendant on the ground of former jeopardy, and that the said defendant had been once tried and convicted, on a val-

id indictment, by a jury duly impaneled and sworn to try the cause; testimony having been submitted to them, the verdict having been returned, and sentence having been pronounced, and the defendant having been imprisoned under such sentence, and released from said prison by order of the supreme court."

Section 7521, Comp. Laws, under which the order for a new trial was made by this court on the former review of this case, reads as follows: "The supreme court may reverse, affirm or modify the judgment or order of the district court, and may, if proper, order a new trial." It is contended by the learned counsel for the plaintiff in error that while this court is authorized to order a new trial on a reversal of the judgment in a criminal action, when proper to do so, it was not authorized to do so in the case before us on the former writ of error, for the reason that the defendant had not moved for a new trial, and only demanded a reversal of the judgment for the errors committed on the trial. They further contend that, when the judgment in a criminal action is reversed upon the ground of errors in the instructions of the court, the defendant has been in jeopardy, and cannot, therefore, under the constitution, be tried a second time. But, though counsel have made an able and plausible argument in favor of their contention, we are unable to agree with them. It is true that Mr. Bishop, in his work on Criminal Law, takes this view, but he sustains it by no citation of authorities (section 1044); and in section 999 he frankly admits that the authorities are the other way. The theory upon which a plea of jeopardy is sustained is that a party has had a legal trial upon a good indictment. If he has not had a legal trial, then the jeopardy has not attached. And it is somewhat difficult to distinguish the difference between a trial upon a defective indictment, and a trial in which the verdict has been given under the misdirection of the court. In both cases it is but an error in the proceedings. In the first it is the error of the state's attorney in drawing the indictment. In the second the error is committed by the court in its instructions to the jury. The defendant has not been in legal jeopardy in either case. Under our present system, which allows to defendants in criminal prosecutions bills of exceptions and writs of error, the attempted distinction cannot be sustained. Mr. Wharton, in his work on Criminal Pleading and Practice (9th Ed., at page 510), lays down the law upon this subject as follows: "A conviction set aside, on the defendant's motion, on account of erroneous ruling by the judge, is no bar to a second trial. The defendant, by setting up the position that the ruling was erroneous, is afterwards estopped from disputing this. He affirms that he was never in legal jeopardy, and that the ruling of the judge against him, putting him in jeopardy, was not law. When he gains his point he cannot afterwards plead jeopardy. And he waives jeopardy by a motion for a new trial." It will be noticed that he states the proposition without any qualification, and he seems fully sustained by the authorities. Morrisette v. State, 77 Ala. 71; Kendall v. State, 65 Ala. 442; Cooley, Const. Lim. p. 400; McGinn v. State (Neb.) 65 N. W. 46; Bohanan v. State, 18 Neb. 57. 24 N. W. 390; Sutcliffe v. State, 18 Ohio, 469; State v. Sommers (Minn.) 61 N. W. 907. In the latter case Mr. Justice Mitchell, speaking for the court, says: "It is true that, notwithstanding some difference of opinion as to the reason for the rule, it is now universally held that if, upon a review of the case, either in the same or another court, a verdict of guilty is, upon the motion of defendant, set aside, he may be again tried for the same offense." The fact that the defendant did not move for a new trial does not seem to us very material. He did move to have the judgment reversed for errors occurring at the trial, and, among others, the misdirection of the jury. He must be presumed to have thus moved upon the theory that he had not been legally tried, and he thereby, in effect, affirmed that he was never legally in jeopardy. The fact that the defendant had had a lawful trial was deemed of the utmost importance in Shepherd v. People, 25 N. Y. 406, cited by counsel for the plaintiff in error, the headnote in that case being, "A plea of autrefois convict is supported by proof of a lawful trial and verdict, or confession on a sufficient indictment, though no judgment be given upon it." Our conclusion is that this court, on the former writ of error, properly ordered a new trial under the statute, and that the circuit court properly overruled defendant's motion for a dismissal of the action. The judgment of the circuit court is, in all things, affirmed.

FISH et al. v. DE LARAY et al.

(Supreme Court of South Dakota. March 4, 1896.)

CLAIMS AGAINST DECEDENT'S ESTATE.

A debt secured by a mechanic's lien made of record is not a claim that must, under section 5790 of the Compiled Laws, be presented to an administrator for allowance or rejection.

(Syllabus by the Court.)

Appeal from circuit court, Lawrence county; A. J. Plowman, Judge.

Action by James M. Fish and John Hunter, partners under the name of Fish & Hunter, against Harry De Laray and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Frawley & Laffey, for appellants.

FULLER, J. This is an action to foreclose a mechanic's lien for material furnished

for the erection of a dwelling house upon the real property of a decedent. The contract was made with the owner, and the lien was perpetuated, and made effectual for all purposes, by filing the same, as required by law, about one year prior to the death of said owner. While all necessary and proper persons, including the administrator, heirs at law, guardian, and a mortgagee, were made parties defendant, no resistance to the foreclosure proceeding was offered by any of them, and no brief is filed herein by respondents. For the sole reason that it did not appear that the claim upon which the lien was founded had been presented to the administrator for allowance or rejection, and upon full and specific findings of fact otherwise favorable to plaintiffs, the court found, as a matter of law, that plaintiffs were not entitled to the relief prayed for; and from a judgment dismissing the action, accordingly entered, plaintiffs appeal. The primary object of the statutory provision requiring a claim against the estate of a deceased person to be presented within a specified time is to apprise the administrator and the court of the existence thereof, so that a proper and timely arrangement may be made for its payment in full, or a pro rata portion thereof, in the due course of administration. Like the lien of a mortgage, which survives the obligor, and is enforceable by a foreclosure and sale of the incumbered property, a debt evidenced by a verified, itemized statement of the amount due, which is secured by a mechanic's lien made of record, so that the world is charged with notice of its existence and amount, ought not to be barred and lost, so far as it affects the property subject thereto, by a failure to present the claim thus secured. Without such presentation, the administrator is presumed to know of the existence of the demand, and the specific lien for its enforcement, which takes precedence, at least, over all subsequent incumbrances. In no respect is there an important distinction between the lien of a mortgage and that given by the statute to one who, relying upon its protection, enhances, by his labor or building material, the value of real estate, by erecting buildings thereon. "The operation of law," says Mr. Phillips, "is a convenient substitute for the giving of a mortgage or other express security, day by day, for the value of such work and materials, and is to be considered and enforced as such." Phil. Mech. Liens, p. 494. A debt secured by mortgage upon real or personal property is not a claim which must, under section 5790 of the Compiled Laws, be presented to the administrator. The claims to be thus presented are claims which, when allowed, shall be ranked as acknowledged debts of the estate, to be paid, in whole or in part, in the due course of administration. Comp. Laws, § 5795; Purdin v. Archer, 4 S. D. 54, 54 N. W. 1043; Kelsey v. Welch (S. D.) 66 N. W. 390. From page 213 of 5 Am. & Eng. Enc. Law, we quote the following: "A creditor may rely upon a mortgage or other specific lien, although the claim secured by it has not been presented, but in such case he has no claim upon the general assets in the hands of the administrator." Mr. Justice Field, in Fallon v. Butler, 21 Cal. 32, in defining the word "claim," as used in a statute similar to ours, says: "Whatever significance there may be attached to the word 'claim,' standing by itself, it is evident that in the probate act it has reference to such debts or demands against the decedent as might have been enforced against him in his lifetime by personal actions, for the recovery of money upon which only a money judgment could have been rendered." Our conclusion is that the facts, as found by the court, entitle appellants to the relief prayed for. The judgment of dismissal is therefore reversed, and the case is remanded, with the direction that judgment for plaintiffs be accordingly entered.

GADE v. COLLINS et al.

(Supreme Court of South Dakota. March 4, 1896.)

APPEAL FROM JUDGMENT—REVIEW.

1. The insufficiency of the evidence to justify the findings of the court or verdict of the jury will only be reviewed by this court when made one of the grounds for a motion for a new trial in the trial court, and the order denying or granting a new trial has been brought to this court for review by a proper appeal.

2. An appeal from the judgment alone does not bring to this court for review an order denying or granting a new trial made after judgment.

(Syllabus by the Court.)

Appeal from circuit court, Lawrence county; Charles M. Thomas, Judge.

Action by Frederick W. Gade against James A. Collins and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Joseph B. Moore and McLaughlin & McLaughlin, for appellants. Martin & Mason, for respondent.

CORSON, P. J. This is an action to quiet plaintiff's title to a mining claim located and known as the "Dividend Lode." The appellants, who were defendants in the action, claimed the same mining ground under and by virtue of a relocation of the same under the name of the "Cassie Lode." The case was tried by the court without a jury, and findings were made, and a judgment rendered in favor of the plaintiff and respondent. From this judgment the defendants appeal.

The principal ground relied on to sustain the relocation of the mining claim by appellants was the failure of the respondent, claimant of the Dividend lode, to expend in development work upon that claim during the year 1886 the full sum of $100, as required by section 2324, Rev. St. U. S., and section 2009, Comp. Laws, and by reason of such

failure the respondent's right to the claim was forfeited. The important question in the case therefore is, was the required amount of work done upon the Dividend claim? Appellants insist that there was a preponderance of the evidence in favor of their theory that the requisite amount of work was not done, and that is the only question discussed in appellants' brief on this appeal. The finding to which special objection is made as not justified by the evidence is as follows: "That during the month of January, 1886, the plaintiff caused to be performed and made upon said Dividend lode claim, and within the lines thereof, one hundred dollars ($100) worth of labor and improvements in sinking a shaft thereon; that the plaintiff has at no time abandoned or intended to abandon any part of said Dividend mining claim."

A preliminary question is raised by the respondent, to be first determined, and that is, can the court, upon the record in this case, review the questions of fact presented? The respondent contends that such review cannot be made in this case for four reasons: (1) Because the notice of intention to move for a new trial was not served within the time prescribed by the statute; (2) because the notice of motion to move for a new trial did not state whether the motion would be made upon affidavits, minutes of the court, bill of exceptions, or statement; (3) because the bill of exceptions was not served and settled within the time prescribed by the statute; (4) because no appeal has been taken from the order of the circuit court denying appellants' motion for a new trial. The first and third objections cannot be sustained, for the reason that it does not affirmatively appear that the time within which such notice of intention and bill of exceptions could be served was not extended, or another time fixed, as provided by section 5093, Comp. Laws. When it is not affirmatively shown that no such extension has been granted, or another time fixed, as provided by the statute, this court will presume that the court below proceeded regularly and in accordance with the provisions of the statute. Johnson v. Railroad Co. (N. D.) 48 N. W. 227. The second objection cannot be sustained for the reason that the objections to the notice of intention made in this court do not affirmatively appear to have been made in the court below. In such case this court will presume that the objections to the insufficiency of the notice of intention as to matters of form were waived by the respondent. The fourth objection has merit, and is entitled to a more careful consideration. It may be regarded as settled by the decisions of this court that this court will not review the evidence in a case to determine its sufficiency to justify the verdict of the jury or findings of the court, unless the same has been brought to the attention of the court below on a motion for a new trial, passed upon by that court, and brought before this court for review in some manner prescribed by law. Pierce v. Manning, 2 S. D. 517, 51 N. W. 332; Hawkins v. Hubbard, 2 S. D. 631, 51 N. W. 774; Plow Co. v. Bellou, 4 S. D. 384, 57 N. W. 17; Evenson v. Webster, 3 S. D. 382, 53 N. W. 747. When the motion for a new trial is made and determined before a judgment is entered in the action, an appeal from the judgment brings up the order of the court denying or granting the motion for a new trial as an intermediate order that can be reviewed by this court, provided the decision of the court denying or granting the motion is assigned as error. Hawkins v. Hubbard, supra; Granger v. Roll (S. D.) 62 N. W. 970. On such an appeal from the judgment the sufficiency of the evidence to justify the findings or verdict may be reviewed by this court. But when the order denying or granting a new trial is made after judgment in the action, an appeal from the judgment alone does not bring up such order, made after judgment. Hawkins v. Hubbard, supra; Manufacturing Co. v. Galloway (S. D.) 58 N. W. 565. And if the appellant desires a review of the evidence in such case he must appeal from the order denying or granting a new trial to entitle him to such review. A party may, however, include such an appeal in the notice of appeal from the judgment. Hawkins v. Hubbard, supra. Unless the order denying or granting a new trial, made after judgment, is appealed from, either in connection with the appeal from the judgment or independently, the decision of the court below upon the question of the sufficiency of the evidence to justify the findings or verdict will be res adjudicata. Weber v. Tschetter, 1 S. D. 205, 46 N. W. 201. In this case it appears from the record that more than a year elapsed after the judgment was entered before the order denying appellants' motion for a new trial was made. No appeal being taken from that order, the same is final and conclusive as to the sufficiency of the evidence to justify the court's findings of fact, and this court cannot disturb them.

The learned counsel for the appellants, in their reply brief, contend that under the last clause of section 5237, Comp. Laws, it is made the duty of this court to review the evidence when exceptions to the findings of fact have been duly taken by either party, and insist that the case of Randall v. Burk Tp., 4 S. D. 337, 57 N. W. 4, settles this question. But it will be noticed that in that case the appeal was from the order denying the motion for a new trial as well as from the judgment. Of course, therefore, the language quoted from that opinion, as follows: "The last clause of section 5237, Comp. Laws, which provides that any question of fact or of law decided upon trials by the court or by referee may be reviewed when exceptions to the findings of fact have been

duly taken by either party and returned, requires this court, in a cause tried by a court or referee, to review the questions of fact as well as law, where proper exceptions have been taken in the court below,"—was used with reference to the facts of the case then before the court. The court in that case did not intend to be understood as holding that the evidence could be reviewed, except in cases where a motion for a new trial had been properly made, and an appeal from the order denying or granting the motion duly taken. This question had been so fully considered in the prior case of Pierce v. Manning and other cases that the court in the Burk Tp. Case did not deem it necessary to again discuss the questions decided in those cases.

It necessarily follows from these conclusions that, as no appeal has been taken from the order of the court below denying the motion for a new trial, the question of the sufficiency of the evidence to justify the findings of the court is not before us for review, and that the decision of the court denying such motion for a new trial is conclusive upon the parties and upon this court as to the sufficiency of the evidence to justify the findings, and precludes this court from the consideration of that question on this appeal from the judgment alone. There are in the record other assignments of error, but counsel for appellants in their brief have only discussed the one relating to the sufficiency of the evidence. Following the rule, therefore, usually adopted in such cases, to consider the assignment of errors not discussed in the brief as waived, nothing is left for review except the judgment roll, and, finding no error in that, the judgment of the court below is affirmed.

STATE v. NEWSON et al.

(Supreme Court of South Dakota. March 4, 1896.)

BAIL BOND—DEFENSES—DEMURRER.

This action was instituted in the name of the state, as plaintiff, upon a bail bond given by the defendants in a criminal action. A demurrer to the complaint was interposed by the defendants, which was by the court, on motion, stricken out as frivolous, and judgment rendered for the plaintiff. *Held*, that the demurrer was so clearly and plainly without merit that the court was justified in treating it as frivolous, and rendering judgment upon the complaint.

(Syllabus by the Court.)

Appeal from circuit court, Pennington county; William Gardner, Judge.

Action by the state against William J. Newson and others. Judgment for the state, and defendants appeal. Affirmed.

Chauncey L. Wood and Chas. J. Buell, for appellants. James Boyd, State's Atty.

CORSON, P. J. This is an action instituted in the name of the state against the defendants, upon a bail bond executed by William J. Newson, as principal, and Hayes and Murphy, as sureties, to recover $1,000, the amount of said bond. The bond was given in a criminal proceeding in a justice's court, wherein said Newson was charged with the crime of grand larceny, to secure his appearance to answer to said charge in the circuit court of Pennington county. An indictment having been found against said Newson in the circuit court, and he having failed to appear and answer, his bond was duly forfeited, and this action commenced thereon. To the complaint the defendants interposed the following demurrer: "That it appears on the face of said complaint that the plaintiff has not legal capacity to sue; (2) that said complaint does not state facts sufficient to constitute a cause of action in favor of the said plaintiff, and against these defendants." The state's attorney, upon due notice, moved the court for judgment upon the pleadings, on the ground that the demurrer was frivolous. Said motion was granted, and judgment rendered for the plaintiff, and from this judgment the defendants appeal.

The learned counsel for the appellants contend that the court erred in treating the demurrer as frivolous, as it raised an important question of law not heretofore decided in this state, namely, whether the county or the state is the proper party in such an action. They further contend that the money when collected on the bond in suit will belong to the county, and hence it, and not the state, is the real party in interest, and should have been made the party plaintiff. The bail bond in suit was properly executed to the state. Comp. Laws, § 7608. When such a bail bond is forfeited, it is made the duty of the state's attorney to proceed with all due diligence to collect the same, by action against the bail. Id. § 7611. There is no provision in the statute requiring the state's attorney to proceed in the name of the county. The bail bond in this case is in the usual form, and stipulates that, if said Newson fails to perform either of the conditions therein specified, the defendants will pay the state of South Dakota the sum of $1,000. The county of Pennington is not named or referred to in the bond, and if appellants' theory is correct, that the money, when collected, will belong to the county, the action is properly prosecuted in the name of the state, under the last clause of section 4872, Comp. Laws, which provides "that the trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another." The exception contained in section 4870 must not be overlooked. The first clause of the section reads: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 4872." Under the provisions of the latter section, a party with whom or in whose

name a contract is made for the benefit of another is to be construed as the trustee of an express trust, and is expressly authorized to sue. And when the contract is in writing, as in the case at bar, it seems to be too clear for argument or the citation of authorities that the state is a proper party plaintiff. Hudson v. Archer, 4 S. D. 128, 55 N. W. 1099. Whether or not the county, as the beneficiary, could also maintain the action in its own name, it is not necessary now to decide. No objection seems to have been taken to the complaint in any other respect; and we conclude, therefore, that the court committed no error in holding the demurrer as frivolous, and rendering judgment for the plaintiff upon the complaint. The judgment of the circuit court is affirmed.

EMLAW v. TRAVELERS' INS. CO.

(Supreme Court of Michigan. March 11, 1896.)

ACCIDENT INSURANCE — TRIAL — INTRODUCTION OF EVIDENCE — ESTOPPEL — CLASSIFICATION OF RISK.

1. A judgment will not be reversed for the reason that leading questions were permitted in the introduction of testimony, where it appears that they were without substantial prejudice to appellant.

2. Possible error in the introduction of a copy in evidence is cured by the adverse party introducing the original instrument.

3. An application for accident insurance had a printed clause reading, "I have no other insurance in this company." A prior application had been taken by the same agent, and the two policies were issued by the same company, which received the premiums on both. *Held*, that the company was estopped from denying the validity of either policy.

4. Where an applicant for accident insurance has truthfully described his calling, and all the facts concerning his business are known by the insurance company, the fact that the assured was improperly classified is no bar to his recovery on the policy.

Error to circuit court, Ottawa county; Philip Padgham, Judge.

Suit by Andrew J. Emlaw against the Travelers' Insurance Company on policies of accident insurance. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

Walter I. Lillie, for appellant. McBride & Danhof, for appellee.

MOORE, J. The plaintiff held two accident policies of insurance in defendant company. In April, 1894, he received an injury that, he claims, totally disabled him, and entitled him to $50 a week for four weeks. His claim was disputed by the company. He brought suit, and obtained judgment for $200, and the case is appealed here. The plaintiff declared under circuit court rule 104. The defendant pleaded the general issue, and gave notice that the plaintiff was not entitled to any indemnity; that he was insured in the preferred class, and his application calls for only $25 per week when totally disabled; that he was not totally disabled; that when he was injured he was not acting as manager or proprietor of the gas works, but as a machinist, and voluntarily exposed himself to unnecessary danger; that in his application of November 9, 1892, he agreed to be classed as "preferred," and that, as a machinist, he would be classed as "medium," and would be entitled to no more than the premium he actually paid would purchase in that class in which he was actually injured, if entitled to anything. In said notice a copy of the application upon which one of the policies was issued was set up in full, and then the statement followed that the work of a machinist is classed as more hazardous than that of the "preferred."

Objections were made to some of the questions upon the ground that they were leading. The plaintiff was called as a witness, and after describing the accident, and its effect upon him, he was asked, "How long were you confined in the house, as a result of that accident?" and allowed to answer. After describing the character of his work, and the manner in which it was done, in detail, he was asked, "Will you state if part of your duties as proprietor of the gas works called you to do more or less manual labor about it," and he was allowed to answer. In view of the examination which immediately preceded these questions, and the cross-examination that followed, we do not think it was so prejudicial to allow these answers as to require a reversal of the case.

It is assigned as error that copies of the application furnished by the agent of the defendant company were allowed to be read in evidence. As defendant had set out in his notice of defense a copy of the application, and afterwards offered the original in evidence, the error, if any, was cured.

The last application made by the plaintiff had a printed clause reading, "I have no other insurance in this company." It is claimed that, as there was a prior policy, this statement was a fraud, and voided the first policy. Both applications were taken by the same agent. Both policies were issued by the defendant company. The printed statement was undoubtedly an inadvertence. The insured, the insurance agent, and the defendant company all knew it to be untrue. It deceived no one. The company, knowing the facts, acted upon both applications, received the premiums, and issued both policies, and they cannot now be heard to question the validity of either of them. Copeland v. Insurance Co., 77 Mich. 554, 43 N. W. 991.

It is urged that as the insured asked, in his application, to be classed as "preferred," when he should have been classed as "medium," that he cannot recover. It is sufficient reply to that to say the agent of the company had known Mr. Emlaw and his business for 25 years. Mr. Emlaw, in his application, truthfully described his calling as proprietor of gas works. If he was not properly classified, it was not his fault. The company had the

facts before them when the classification was made. O'Brien v. Insurance Co., 52 Mich. 131, 17 N. W. 726. Mr. Emlaw was injured while assisting in uncoupling a gas pipe with a wrench. It is insisted that this was not proper work for a proprietor of gas works to be engaged in. The questions growing out of that feature of the case were properly and guardedly submitted to the jury. The other questions involved in the case were properly disposed of by the trial judge. The judgment is affirmed, with costs. The other justices concurred.

AETNA INS. CO. v. FOWLER et al.

(Supreme Court of Michigan. March 11, 1896.)

PRINCIPAL AND SURETY — DUTY OF PRINCIPAL TO SURETIES OF AGENT.

A corporation principal, to whom an agent has given bond, owes to his sureties the duty of good faith in informing them of facts coming to its knowledge which may affect their future liability; and while mere negligence of the agent in accounting will not charge it with such duty of giving notice, if it continues him in his position after knowledge of his embezzlement, or of other acts for which the sureties would be liable, without informing them of the facts, it cannot hold them for losses resulting to it from his subsequent misconduct.

Error to circuit court, Saginaw county; Eugene Wilber, Judge.

Action by the Aetna Insurance Company against Charles G. Fowler, Chester Brown, and Gustavus H. Fuerbringer. Judgment for plaintiff, and defendants appeal. Reversed.

Wood & Joslin, for appellants. Weadock & Purcell, for appellee.

MONTGOMERY, J. Action on the bond of an insurance agent. Defendant Fowler was employed as the agent of the company at Saginaw, and in December, 1883, executed a bond, with his codefendants as sureties, the conditions being as follows: "The condition of this obligation is such that whereas the above-named Charles G. Fowler has been appointed agent of the Aetna Insurance Company in Saginaw, Saginaw county, state of Michigan, who will receive as such agent sums of money for premiums, payments of losses, salvages, collections, or otherwise, for goods, chattels, or other property of the said insurance company, and is to keep true and correct account of the same, pay over such money correctly, and make regular reports of the business transacted by him, to the said Aetna Insurance Company, and in every way faithfully perform the duties as agent, in compliance with the instructions of the company through its proper officers, and at the end of the agency, by any cause whatsoever, shall deliver up to the authorized agent of said company all its money, books, and property due from or in possession of said defendant, then or at any time: Now, then, if the aforesaid agent shall faithfully perform all and singular the duties of the agency of the Aetna Insurance Company, then this obligation shall be null and void." The instructions to agents were to send statements of all business transacted during the previous month as early as the 12th of each month. The testimony shows that for three months prior to September 1, 1893, the defendant Fowler failed to send remittances, and it was shown that it is not the custom of the company to insist upon absolute promptness in remittance, but that after three months' delay it was the custom of the company to discharge the delinquent agent. The testimony further shows that in the latter part of July or the first of August, 1893, the special agent of the company, a Mr. Neil, visited Saginaw, and, as he described it, found the agency in a rocky condition; and, while counsel were disagreed as to the effect of his testimony, we think it is at least open to the construction that he then learned that Fowler had misappropriated the funds of the company, and invested them in realty. The circuit judge directed a verdict for the plaintiff. The recovery included a shortage in accounts before August 1st, and a shortage of $344.16 arising from the August business.

Two contentions are made: First, that it was the duty of the company to notify the sureties of any delay in the remittance at once, and that the continuance of the agent after failure to remit in accordance with the instructions of the company to agents released the sureties as to future transactions; and, second, that the company, on the discovery of the misappropriation of funds, August 1st, was bound to discharge the agent, or, at least, the sureties were not bound to respond for his future defalcations, unless, after being informed of his previous acts of dishonesty, they consented to his retention.

We think that the court below correctly ruled that the mere fact that the company had knowledge that the agent had failed to remit did not impose upon it the duty to notify the sureties or discharge the agent. Insurance Co. v. Simmons, 131 Mass. 85; Telegraph Co. v. Barnes, 64 N. Y. 385. The duty which the company owed to the sureties was not a duty of active vigilance, to ascertain whether the agent had been guilty of fraud (the sureties' undertaking was a guaranty of his fidelity), but what was due from the employer was good faith to the sureties. Just as it would have been a fraud to withhold knowledge of previous dishonesty of the agent presumably not known to the sureties, but possessed by the company, so it would be a breach of good faith for the company to continue the agent in a place of trust after discovering his dishonesty or defalcation, which is presumptively and in fact unknown to the sureties, and without notifying the sureties of the facts, and giving them an opportunity to elect as to whether they will continue the risk. This is the doctrine of

the leading case of Phillips v. Foxall, L. R. 7 Q. B. 666. The cases of Insurance Co. v. Simmons and Telegraph Co. v. Barnes are not inconsistent with this. The substance of the holding in each of these cases is that the mere failure of remittance does not necessarily amount to notice of dishonesty on his part, and that applies to the present case as regards the charges occurring before August. There is no evidence that prior to August the company had actual notice that Fowler had converted any of the funds to his own use, or was more than negligent in remitting or collecting the premiums; but as to the transactions in August the case is different. Under section 9191, How. Ann. St., it is made an offense for an insurance agent to receive and invest money of the company without its assent; and, as we before stated, we think there was testimony tending to show notice to the company about the 1st of August that Fowler had invested the funds of the company in realty. If the company, through its special agent, then knew this fact, it cannot be said not to have had notice of the dishonesty of the special agent; and, if it had such notice, it was the duty of the company not to longer trust its funds with the agent until the sureties had consented, with knowledge of the facts, to be held responsible for the acts of a dishonest agent. See, further, Brandt, Sur. § 423; Insurance Co. v. Scott, 81 Ky. 540. Judgment reversed, and a new trial ordered. The other justices concurred.

DETROIT, L. & N. R. CO. v. McCAMMON.

(Supreme Court of Michigan. Feb. 26, 1896.)

JUDGMENT—RES JUDICATA—PLEA—SUFFICIENCY.

1. Where a bill is filed, alleging a mistake in the description of a deed, and asking for reformation thereof, and prosecuted to final decree, complainant cannot thereafter file a bill setting up the same transaction in amplified form, requiring the same facts to support it as in the former bill.

2. Chancery rule 25 provides that, when defendant pleads to a bill, the complainant shall have 20 days to file a replication to the plea, or amend his bill; that, if he does not take issue on the plea or amend the bill within that time, either party may notice the plea for argument; and that if, on argument, the plea is allowed, the complainant may, within 10 days, take issue on the plea, on payment of costs. *Held*, that such rule contemplates that the truth of the plea shall be determined after issue joined.

3. In an action for an injunction, a plea of former adjudication, which sets up a public record of the same court in which the action is pending, need not be verified.

4. A plea of former adjudication to a bill for an injunction need not confess or acknowledge any or all the matters set forth in the bill.

5. In an action for an injunction, a plea of former adjudication which sets up that complainant's former bill was dismissed must allege that it was dismissed on the merits.

Appeal from circuit court, Ingham county; Rollin H. Person, Judge.

Bill by the Detroit, Lansing & Northern Railroad Company against Melvina R. McCammon to reform a deed, and to enjoin the prosecution of an action in ejectment. From a judgment for defendant, complainant appeals. Reversed.

M. V. & R. A. Montgomery, for appellant. Cahill & Ostrander, for appellee.

MONTGOMERY, J. The complainant filed a bill setting up, in substance, that in March, 1871, the defendant was the owner of the quarter section of land within which the strip in controversy is included; that on March 8, 1871, the defendant conveyed to the Detroit, Howell & Lansing Railroad Company a strip of land described, etc.; that before the making of the deed the railroad company had completed the "entire work of clearing and grading across said quarter of said section"; that everybody supposed that the railroad track was laid on the strip so deeded until "some time in the year A. D. 1882," at which time the defendant "was advised that the roadbed was not located and constructed upon said strip"; that, as a matter of fact, however, the line was constructed nearly 200 feet south of the strip described in the deed; that in March, 1886, defendant began ejectment, "to recover possession of said last-mentioned strip"; that issue was joined, a trial had, and verdict and judgment for plaintiff, which judgment was affirmed by the supreme court (33 N. Y. 728), and thereafter the complainant paid the costs, and took a new trial. The prayer was that the amount of compensation, if any, to which the said defendant may be fairly, reasonably, and equitably entitled, because of the premises, may be ascertained under the direction of this honorable court; that, upon payment to said defendant by your orator of said sum to be ascertained, she (said defendant) may be thereafter perpetually enjoined and restrained from further prosecution of said suit in ejectment, and from interfering in any way with said last-described strip of land, and with your orator's possession and occupancy thereof; "and that your orator may have such other relief and such further relief in the premises as may be agreeable to equity and good conscience." To this plea defendant filed a bill setting up a former suit in bar. The plea stated "that complainant heretofore, to wit, on the 31st day of March, 1892, exhibited its bill of complaint in this court against this defendant and Hannah Rice (who was, at the time of the exhibiting of this bill, deceased) for the recovery of the very same rights, claims, and causes of action as in this bill now pending are sought to be recovered, as appears by a copy of said bill hereto attached, marked 'Exhibit A,' and made a part of this plea; and such proceedings were afterwards had that this defendant filed her answer to said bill in said court, and complainant filed a general replication thereto, and, the said cause

thereupon being at issue, proofs were taken on both sides in open court before the Honorable Rollin H. Person, then sitting as circuit judge, and the said cause was, after the taking of said proofs, duly argued by counsel for both parties; and afterwards, on due consideration thereof by the court, on, to wit, the 12th day of October, 1893, a decree was duly made, signed, filed, and entered in said cause dismissing said complainant's bill, which said decree and the proceedings theretofore had in said cause were afterwards, on the 12th day of November, 1893, duly enrolled by the register of said court, and now remain and are of record therein; that no appeal was ever taken from said decree, nor has said decree ever been set aside, vacated, or held for naught, but was, at the time it was entered and enrolled, and has ever since continued to be, in full force and effect,—all of which more fully and at large appears by said bill so formally exhibited, and by the answer and decree therein so made, entered, and enrolled, to which bill, record, and decree, for greater certainty, defendant prays leave to refer." The appended copy of the bill, in the first place, shows that there was set up in that proceeding the fact of the execution of the deed; that, when it was executed, the railroad company had filed its map, and had entered on the construction of its road over and across defendants' land, until the entire work of clearing and grading the roadbed was completed, and that the road was soon after completed, and that the complainant had since maintained a continuous and exclusive possession; that in 1882 defendants were advised that the roadbed and right of way over and across this land was not located in the strip described in the deed; that, at the time of the execution of the deed, the defendants knew precisely where the right of way was in fact located, and the said roadbed actually constructed; that there was a mistake made in the description of the land conveyed; that complainant had endeavored to effect an amicable settlement, but that its efforts had failed. The bill prayed "that said defendants, and each of them, be enjoined and restrained from further prosecution of their ejectment suit above mentioned; that the said deed from said defendant to the Detroit, Howell and Lansing Railroad Company be so reformed that the description of the premises thereby conveyed shall describe the land which was actually intended to be conveyed thereby, as above stated; and that your orator have such other relief and such further relief in the premises as may be agreeable to equity and good conscience." This plea was not verified. Complainant filed no replication. The defendant noticed the plea for argument under chancery rule 25. On the argument the plea was sustained, and the complainant, standing on the claim of insufficiency of the plea, appeals. A decree was made, after the lapse of 10 days, dismissing complainant's bill, and from this decree complainant appeals.

A preliminary question of practice is to be considered. It is contended by complainant that defendant should have obtained an order of reference to a master, and obtained a report as to whether or not the plea is true. Acting upon this idea, complainant, after the lapse of 20 days, petitioned for an order that the bill be taken as confessed. The circuit judge denied this order, and passed upon the sufficiency of the plea. We think the practice pursued is that prescribed by chancery rule 25. This rule provides that, when the defendant pleads to a bill, the complainant shall have 20 days to file a replication to the plea or amend his bill; and that, if he does not take issue on the plea or amend the bill within that time, either party may notice the plea for argument; and that if, on argument, the plea is allowed, the complainant may, within 10 days, take issue upon the plea, upon payment of costs. This rule clearly contemplates that the truth of the plea shall be determined after issue joined.

It is also urged that the plea is insufficient for the reason that it is not verified. But the practice does not require a verification of the plea when it sets up a public record of the same court in which the action is pending. Jenn. Ch. Prac. 69; Barb. Ch. Prac. 118. We conclude, therefore, that the question of the sufficiency of the plea was properly before the court, and we are to determine whether the circuit judge properly ruled that it was sufficient.

Some criticism is made of the formal parts of the plea. It is said the plea to the whole bill should protest that neither all nor any of the matters alleged in the bill are true. The form adopted was "by protestation, not confessing or acknowledging the matters and things in and by said bill set forth," etc. The complainant's counsel cite the precedent in Puterbaugh. It is proper to assert that defendant does not confess or acknowledge any or all of the matters set forth. Does it follow that it is essential to a good plea to do so? We think not. In Story, Eq. Pl. 694, it is said: "As to the form of a plea, it is, like a demurrer, always prefaced by a protestation against any acknowledgment or admission of the facts stated in the bill. But the only use of this seems to be to prevent any conclusion in another suit, because, for the purpose of deciding the validity of the plea, the bill, so far as it is not contradicted by the plea, is assumed to be true." Counsel are mistaken in assuming that the plea does not assert that it is to the whole bill.

Counsel contend that the plea is not sufficient in substance, for the reason that it does not assert that the former case was heard on its merits, or that the decree was based upon such hearing, or that the former decree determined that complainant had no title to the relief sought by his parent bill, or that the answer to the former bill was to the whole of the said bill. The plea must negative intendments. See Mitf. Eq. Pl. 348 (*238,

*299). The meaning of intendment is that, allowing an averment to be true, but at the same time a case may be supposed consistent with it which would render the averment inoperative as a full defense, such case shall be presumed, unless specifically excluded by particular averments. Id. 350 (*299), citing Lube, Eq. 343. We think this objection to the plea well taken. If it be assumed that the former case was dismissed on its merits, is it a bar? That is the principal question. The additional facts shown in the present bill are: "When the road was completed, and trains began to run, the officers of the Detroit, Howell & Lansing Railroad Company, as well as the defendant, each and all supposed that it [the road] was located on the strip described in the deed." "The road was not constructed upon the strip conveyed; but that, instead thereof, it was constructed in the center of a strip which began nearly 200 feet south of the land described in the deed," etc. "Until some time in the year 1882, all the officers and agents of the railroad company, as well as the defendant, supposed that the strip of land occupied by the railroad was the same strip described in the deed." "Complainant has expended many thousand dollars in constructing its line across this strip of land; that the same is of no use to the defendant; that the defendant does not expect or desire possession; and that she is not attempting or intending to secure such possession; but that, on the contrary, she is manifestly attempting and undertaking to compel complainant to pay her a large and unconscionable sum of money." "The new bill admits that the strip of land actually occupied contains one or two more acres than did the land described in the deed; that complainant cannot surrender it without subjecting itself to many thousand dollars damage; that, ever since the mistake was discovered, complainant has always been, and now is, ready and willing, and it now offers, to fully and liberally compensate defendant McCammon for such additional amount of land so occupied by it, and for any and all benefits accruing to it by reason thereof, as well as any and all damage or compensation to which said defendant may be fairly entitled by reason thereof." Do these statements present a different case than that presented in the former bill. It is not contended, of course, that the charges in the bill relate to a different piece of property. It cannot be contended but that the relief sought is based upon the same claim of mistake upon the part of complainant. The first bill avers action taken by complainant based upon such mistake, and in the belief that the company was occupying the land purchased. The additional facts set up are amplifications of the facts set up in the former bill. Can the complainant, then, set up a transaction like that in question the chief fact in which is the mistake of complainant as to the land intended to be conveyed, permit the case to proceed to a final decree, and then file a bill setting up the same transaction in amplified form, but still requiring the same fact to support the bill, i. e. the averment of mistake? We think not. To admit this would admit of as many new bills as there happen to be incidental facts which could be successively set up. Barker v. Cleveland, 19 Mich. 235; Pierson v. Conley, 95 Mich. 619, 55 N. W. 387. This rule may work a seeming hardship in the present case, as it appears that the solicitor for the complainant, who had charge of the former suit, died after the decree, and before time limited for appeal; but this is conjectural. At all events, the proper remedy would be by application for leave to file a bill of review. We think the plea defective in the one particular of not averring that the former decree was on the merits. We have no doubt of the right of the court to grant an amendment. Mitf. Eq. Pl. 327, note; How. Ann. St. § 7631.

The decree will be reversed and remanded. The defendant will be at liberty to apply to the court below for leave to amend within 20 days from the entry of this decree.

McGRATH, C. J., did not sit. The other justices concurred.

CAMPBELL v. PRATT.*

(Supreme Court of Michigan. March 11, 1896.)

Error to circuit court, Wayne county; Joseph W. Donovan, Judge.

Action by George Campbell against Stephen Pratt. From a judgment for plaintiff, defendant brings error. Affirmed.

James H. Pound, for appellant. Louis J. Siemon (Alfred Lucking, of counsel), for appellee.

MOORE, J. Plaintiff is a practicing physician, who sued defendant to recover for medical services rendered to a child of defendant. The plaintiff claimed the child was dangerously burned; that his patient caused him much anxiety, but was getting along nicely until his treatment was interfered with by the parents. The defendant admitted the child was severely, but not dangerously, burned. He claimed it was not skillfully treated by the plaintiff, and that, had it not been for the care of its mother, and a good constitution, it would not have lived. The plaintiff recovered a judgment of $50 in justice court, and $75 in the circuit court. The defendant brings the case to this court by appeal. We have examined the assignments of error and the record with great care. The questions raised are of no interest, except to the parties litigant, and for that reason we do not discuss them in detail. We find no material error in the proceedings in the court below, and for that reason the judgment is affirmed, with costs. The other justices concurred.

FLOOD v. STRONG et al.

(Supreme Court of Michigan. March 11, 1896.)

ADMINISTRATION—PURCHASERS FROM HEIRS—PRESENTATION OF CLAIMS—LACHES.

1. Purchasers of land from heirs of an estate, before administration, take it subject to debts and expenses of administration.

2. In 1888, the senior member of a firm, consisting of father and son, died intestate, the son

continuing the business, and paying interest on a note previously executed by the firm to defendant, a nonresident, until 1893, when he failed and absconded. Thereafter defendant caused letters of administration to be taken out on decedent's estate, and, after having his claim allowed, procured an order of court for the sale of certain real estate for the payment of such claim, there being no personalty. *Held*, that defendant was not guilty of such laches as to render the sale inequitable as against one who had purchased the land from the son prior to administration.

Appeal from circuit court, Shiawassee county, in chancery; Charles H. Wisner, Judge.

Bill by John Flood against Walter D. O. Strong and another to enjoin a sale of land. There was a decree for complainant, and defendants appeal. Reversed.

One Isaac M. Strong and his son, Walter M. Strong, were bankers in Bancroft, Mich., under the firm name of I. M. Strong & Son. While so in business, on September 1, 1883, they executed a note for $1,000 to defendant Walter D. O. Strong, and on December 3d, same year, another note for $505. Interest was paid upon these notes until the death of I. M. Strong, March 12, 1888. Defendant is and was a resident of the state of New York. He attended his brother's funeral at Bancroft, and has never been in the state since. Walter continued to carry on the banking business, and to pay the interest on this note until 1893, when he failed and absconded. Isaac, at his death, was possessed of the lot and building thereon in Bancroft, the subject of this suit, unincumbered, and some land in Charlotte which was heavily mortgaged. After Walter's failure, defendant Strong caused letters of administration to be taken out upon the estate of Isaac, deceased, and defendant Baldwin was appointed administrator. These two notes were allowed against the estate. The administrator found no personal property except a safe, and no real estate except the two pieces above mentioned. The administrator filed his petition in the probate court for a sale of this land to pay the debts and expenses of administration, which petition was granted. Complainant thereupon filed this bill of complaint to enjoin the sale, upon the ground that defendant Strong was guilty of such laches, by the delay in asserting his claim against the estate of Isaac, as to render it inequitable as against complainant's rights. Isaac died intestate, leaving his widow and Walter his sole heirs at law. September 9, 1889, the widow deeded to Walter her interest in the store and lot in controversy, and he deeded to her his interest in the Charlotte property. In April, 1889, Walter and his wife conveyed the Bancroft property to the complainant for a consideration of $1,000. Complainant took possession, and spent some money in improvements and repairs. The court entered a decree for complainant.

S. S. Miner and Lyon & Hadsall, for appellants. James M. Goodell and M. V. B. Wixom, for appellee.

GRANT, J. (after stating the facts). We think the conclusion of the learned circuit judge that defendant Strong was guilty of laches cannot be sustained. Walter, as surviving partner, was entitled to the possession of the partnership assets, and to continue the business for the purpose of winding it up. Whether there were personal assets at any time to pay the defendant's notes does not appear. There is nothing to show what the personal assets were, or what was their value, or that Walter misappropriated any of such assets. Defendant Strong was under no legal obligation to take steps to secure an administration, nor did he lose any of his rights by his failure to do so. Purchasers of land from heirs of an estate, before administration has been had and closed, take it subject to debts and expenses of administration. Armstrong v. Loomis, 97 Mich. 577, 56 N. W. 938, and authorities there cited. Plaintiff was chargeable with notice that no administration had been had. He took no steps to protect himself by bond or otherwise. Neither defendant Strong nor Walter said anything or made any representations by which he was misled. Briefly stated, the situation, then, is this: Complainant purchased, knowing that the land was subject to the payment of debts, if any existed, and knowing that there had been no administration, without making any inquiries, and without taking any measures to protect himself. Defendant Strong knew that Walter, as surviving partner, was entitled to the possession of the partnership funds. His interest was paid up to 1893. The property of the partnership was in lawful hands. He had no knowledge that it was being misused. He owed no duty to any supposed purchaser of the real estate of the deceased. He was, therefore, guilty of no wrong in resting so long as his interest was paid, the very purpose he had in investing his money. He had neither done nor said anything to mislead complainant. Complainant purchased at his risk, and must suffer the consequences. The decree must be reversed, with costs of both courts, and bill dismissed. The other justices concurred.

WILSON v. LA TOUR.

(Supreme Court of Michigan. March 11, 1896.)

AGENT—AUTHORITY TO RECEIVE PAYMENT OF MORTGAGE.

On an issue as to the authority of a corporation to receive, as agent of defendant, payment of a mortgage executed by complainant to the predecessor of said corporation, but subsequently owned by defendant, it appeared that said corporation was applied to by defendant to collect the interest on said mortgage and on others. The corporation collected a large part of the interest and the principal on said mortgages, other than complainant's, though the mortgages and notes were in defendant's hands; and, upon notice that the money had been collected, defendant forwarded the notes and mortgages to said corporation, with the necessary discharge papers, and the money was thereupon remitted to

defendant. Defendant repeatedly wrote to said corporation, with directions to urge the settlement of said mortgages, including complainant's, and stating that, if discharges of mortgages were sent to her, she would execute them. The corporation replied that they were looking after defendant's interests. The corporation received the principal of complainant's mortgage, and wrote defendant to that effect, and sent the papers discharging the mortgage to be executed; and, though defendant received the same, she did not reply thereto before the corporation's failure. Complainant did not know at the time he paid the principal to said corporation that defendant was the owner of the mortgage, though the assignment thereof was duly recorded. *Held*, that the evidence established the corporation's authority to receive payment of complainant's mortgage.

Appeal from circuit court, Otsego county; Nelson Sharpe, Judge.

Bill by Otis B. Wilson against Elizabeth A. La Tour to compel the cancellation of record of a certain mortgage. From the judgment rendered, defendant appeals. Affirmed.

Fedewa & Walbridge, for appellant. Lyon & Dooling, for appellee.

MOORE, J. Complainant has owned and resided upon a farm situated in Otsego county for the last 14 years. August 26, 1886, he executed and delivered to Walker & White, a firm engaged in the loaning business at St. Johns, Mich., his note of $350, due October 1, 1891, with interest; both principal and interest payable at their office in St. Johns. The interest was represented by 10 coupons, of $12.25 each, and accompanying them were 10 other (commission) coupons, of $1.75 each, due at the same times. To secure the payment of the note, complainant gave a mortgage on his farm, the mortgage being duly recorded in Otsego county. Walker & White assigned the mortgage and note to Jeanette L. Tefft on November 29, 1886, by written assignment duly recorded in Otsego county. Mrs. Tefft died before receiving any interest on the mortgage, and her executors assigned the note and mortgage to defendant, who resided in Buffalo, N. Y., April 22, 1887, and said assignment was duly recorded in Otsego county. Walker & White notified complainant, from time to time, of the maturity of his interest, collected and remitted it to defendant, and sent complainant his canceled interest coupons. In September, 1889, they were succeeded in business by the Michigan Mortgage Company, Limited, of which company they were the leading officers, and had charge of its affairs. From that time the mortgage company held substantially the same relations towards both parties that Walker & White had held. Complainant had no notice of the transfer of the note and mortgage, except that he knew that Walker & White were succeeded by the mortgage company, and always supposed they or the company still owned them. On March 22, 1893, he sent the company a draft of $364.10, which covered the principal, of $350; interest to April 1, 1893, $12.25; exchange, 10 cents; and commission, $1.75. The company acknowledged the receipt of the money in full payment of the mortgage, and advised complainant they had sent for the discharge thereof, and, as soon as received, would forward it to him. The mortgage company placed the principal sum of $350 to the credit of defendant on its books, and on the same day notified defendant of the payment of the money, sending her a discharge of the mortgage to execute and return with the canceled papers pertaining to the Wilson loan, and advised her that upon the receipt of the same they would remit. For some reason defendant failed to send the discharge of the canceled papers, or to reply to the company's letter. The mortgage company failed on February 6, 1894, and receivers were appointed. In the following April, complainant first learned that defendant claimed to own the mortgage in question, and filed his bill to cancel the note and discharge the mortgage and assignments from record, claiming that the payment made to the mortgage company was a payment of the mortgage debt. The defendant appeared, and insisted that the mortgage company had no authority from her to receive payment of the mortgage, and claimed the mortgage to be a subsisting lien upon the land. The circuit judge made a decree in accordance with the prayer of the complainant, and defendant appeals.

All of the business was done by correspondence. There were originally 16 mortgages running to Walker & White, which were assigned to Jeanette L. Tefft, and, upon whose death, became the property of defendant. The amount of the mortgages was $11,900. The record shows that soon after the defendant became the owner of these mortgages, she applied to Walker & White to collect the interest as rapidly as it matured, and that either Walker & White, or the Michigan Mortgage Company, as their successor, collected all of the interest that accrued upon these mortgages up to the time of the failure of the company. The total amount of interest collected and remitted during this time was $3,836.97, of which Walker & White collected and remitted $1,986.44, and the Michigan Mortgage Company collected and remitted $1,850.53. The record also shows that, of the principal of the mortgages, Walker & White collected and remitted to defendant $650, and that the Michigan Mortgage Company collected and remitted to defendant principal of mortgages to the amount of $9,650. In addition the company collected the principal of the mortgage in question, $350, making a total of $10,650 collected. A large amount of correspondence was received in evidence between the defendant and Walker & White and the Michigan Mortgage Company in relation to their conduct of the business of Miss La

Tour, in which she urges them to collect the mortgages of which we have before spoken. This correspondence indicates very clearly that her request was acceded to; that Walker & White, and afterwards the Michigan Mortgage Company, did receive payments of these mortgages when the mortgages and notes were in the hands of Miss La Tour, and upon their request she forwarded the notes and mortgages to them, with the necessary discharge papers, showing that she had knowledge of their method of doing business, and approved of it. In August, 1891, she asked the mortgage company to notify a number of the mortgagees that their mortgages would soon be due, and, among others, the mortgage of Otis B. Wilson, for $350, in October. In September she requested a report on the Wilson mortgage. In October, 1891, she wrote the company, calling attention to the fact that she had over $3,800 due her for interest and principal on the mortgages, called their attention to the Wilson mortgage, and added: "Miss La Tour wishes these parties informed that she will not renew or extend the time on these mortgages. Miss La Tour would like to hear from you, and, if you send discharge of mortgages, will send you the papers." Replying to that letter on October 14, 1891, the company wrote: "We hand you discharge of the Martin mortgage, which please have executed, and return with the canceled papers, and we will remit therefor. In reference to the Wilson mortgage, would say that Mr. Wilson paid his interest promptly, and asked for a short time on the principal." Defendant sent the Martin papers as requested, and received remittance to cover the same. On November 2, 1891, defendant wrote the company: "All of the mortgages Miss La Tour has (10 in number) are now due, or will be by December 1. She has been very patient with these parties, but now, as she has other use for her money, will require a settlement by the first of January, and those that are not closed up by that time she will place in her lawyer's hands. You can let these different parties know of her intentions, so that they can fix their affairs accordingly." Replying thereto on November 4, 1891, the company wrote: "Replying to yours of November 2nd, would say that we are looking after your matters, and collecting them in as promptly as possible; and if you will give us such time as we need, in the course of business, to collect in, we shall be able to collect all of the interest, together with the principal, without costs of any kind." On November 11, 1891, the company wrote defendant, "Inclosed we hand you discharge of the Bregenzer mortgage, which please execute and return to us with the canceled papers, and we will remit for the same." In reply thereto, under date of November 16, 1891, the defendant sent the papers, and shortly thereafter received a draft of $2,369 in payment thereof. On December 4, 1891, the company wrote the defendant, "Inclosed we hand you discharge of the John W. Saunders mortgage, which please execute and return to us with the old papers, and we will remit for the same." Defendant complied with that request on December 5, 1891. On December 5, 1891, the company wrote defendant to send the Staley papers, and that it would foreclose that mortgage for her. On December 7, 1891, defendant complied with that request, and they commenced the foreclosure. On December 28, 1891, defendant wrote in reference to the Saunders and Staley mortgages, and added: "There are seven other mortgages that have expired. Tell these parties to either pay up, or we must foreclose at once. They are as follows." And the list included the Wilson mortgage, in question. She also added, "Please attend to this at once, and let me hear from you." Replying to that letter, the company wrote: "Replying to yours of the 28th, would say that we have not forgotten your matters. We are giving them careful attention, and will report payment of the same as fast as they are ready." On January 19, 1892, defendant wrote the company in reference to certain mortgages, and added, "Let us know what the prospects are, for we are getting tired of waiting for money which is long due." Replying thereto on January 21, 1892, the company wrote, among other things, "We are looking after your matters to the best of our ability." On January 21, 1892, the company wrote the defendant in reference to the Brown mortgage, and advised her that it had been paid, and added, "We are glad to inclose the discharge thereof, which please have executed, and return to us with the canceled papers, and we will remit at once, by return mail." Defendant complied with this request on January 23d, and two days later draft was sent to cover that money. On January 22, 1892, the company wrote defendant, "We hand you discharge of the Charles A. Butler mortgage, which please have executed, and return to us with the old papers, and we will remit therefor." Defendant complied with this request on January 27th, and two days later draft was sent her to cover the money. On February 2, 1892, the company wrote defendant, "Inclosed we hand you discharge of mortgage, Thomas W. Robinson, which please execute and return to us with the old papers, and we will remit therefor." The request was complied with, and on February 9, 1892, a draft was sent her in payment therefor. On April 13, 1892, the company wrote the defendant, in reply to a letter which does not appear in the record: "As we have done in the past, we shall continue to get your matters cleaned up as fast as possible. Chadderton and Wilson will be arranged for at an early date." On June 15, 1892, defendant wrote the company: "Please inform me what prospect there is for a settlement of the other mortgages of Miss La

Tour's. She needs the money, and is getting impatient by the slow course these parties are taking." On October 17, 1892, the company wrote defendant as follows: "Some few days ago we wrote you concerning the William Chadderton mortgage, past due. Mr. Chadderton has arranged this matter with us, and we now hold the funds to pay the same, subject to your order. Will you kindly send the papers for collection, and execute the inclosed discharge? Upon receipt of the same, we will remit for principal and accrued interest." On November 5, 1892, the company sent defendant a draft of $937.10 in payment of the Chadderton mortgage and interest. On March 23, 1893, the company wrote defendant, "Inclosed we hand you discharge of the O. B. Wilson mortgage, which please execute and return with the canceled papers, and we will remit for the same."

The record shows some correspondence between the defendant and the company after this time, but for some reason she appears never to have replied to that letter. It is conceded by her counsel that she received it, and the record shows that, of the principal of the 13 mortgages collected for her before that time, she had been notified in substantially the same manner, had complied with the request of the company to forward the papers and an executed discharge in each case, and in each case had received her money. We have thought best to quote this testimony somewhat at length, as counsel claimed this case is governed by Joy v. Vance, 62 N. W. 140, and Trowbridge v. Ross and Ross v. Trowbridge (Mich.) 63 N. W 534. We think this case is not governed by those, for the reason that it is difficult to escape the conclusion, from the testimony, that the defendant instructed the Michigan Mortgage Company, Limited, to notify the mortgagors that these mortgages must be paid, and authorized it to receive payments, and knew that from time to time payments were made to the company on these mortgages, and approved of its receiving the money, and, at its request, forwarded the notes and mortgages, with a proper discharge. The trial judge found from the testimony that the Michigan Mortgage Company, Limited, was authorized to receive payment of the Wilson mortgage. We agree with the trial court. The decree is affirmed, with costs. The other justices concurred.

FOUNTAIN v. HUTCHINSON.

(Supreme Court of Michigan. March 11, 1896.)

ASSUMPSIT—SALE OF PARTNERSHIP INTEREST—EVIDENCE.

1. In assumpsit on a sale of a one-third interest in a partnership it appeared that plaintiff claimed to have bought it from her husband, who was indebted to her, and that in a subsequent transfer of the whole partnership assets to a corporation she was to receive one-third of the proceeds; that defendant, the other partner, claimed that plaintiff's husband had no real interest, that the partnership was insolvent, and that the proceeds of the transfer to the corporation were to be used to pay partnership debts. *Held*, that it was error to exclude evidence offered to establish the facts alleged by defendant.

2. The jury should have been instructed as to the effect of a sale of partnership property to pay individual debts.

Error to circuit court, Calhoun county; Clement Smith, Judge.

Action by Olive M. Fountain against Charles Hutchinson on an alleged agreement for the sale of partnership assets. From a judgment in favor of plaintiff defendant brings error. Reversed.

Plaintiff's husband, John Fountain, and defendant, were in partnership in the business of manufacturing cultivators, Fountain owning one-third interest, and defendant two-thirds. Among the partnership assets were a boiler and engine, machinery, and tools. February 20, 1892, Fountain claims to have sold to the plaintiff his one-third interest in the machinery, etc., and for which he made a bill of sale. The consideration was money which plaintiff claimed to have loaned to her husband in 1889, and for which she held his note for $450, dated January 30, 1889. Defendant, at the time of the sale, was not consulted, and knew nothing of it. Plaintiff claimed that through her husband, acting as her agent, she subsequently sold to the defendant her one-third interest in this property, and that defendant agreed to pay therefor one-third of the inventory price of the entire property, when transferred to a corporation then agreed to be formed. Fountain claimed to have made a memorandum of the agreement, which he produced, and which reads as follows: "Substance of contract between Messrs. Hutchinson and Cronin agree to form a stock company $25,000 at Battle Creek—it don't say that—$25,000. and to make one thousand cultivators the first year and more thereafter as trade demands. To employ Fountain at $2 per day and Fountain to have one-sixth of the profits. Hutchinson to put machinery from Ceresco in as his stock and pay Mrs. Fountain for the same one-third inventory price." Subsequently a corporation was formed, and this property transferred to the corporation. The business was located at Battle Creek, the property removed from Ceresco, and after its removal an inventory was taken. Defendant denied any such contract, and testified that the arrangement was that the corporation was to take the machinery, and allow so much stock for the entire lot; that the stock was to be issued to him, and its value to be applied to the settlement of the partnership accounts of Fountain & Hutchinson. Defendant also denied that he was informed of such transfer by Mr. Fountain, and knew nothing of it until some time after the shops were built in Battle Creek, and the machinery running, when Mr. Cronin, one

of the stockholders, and the secretary and treasurer of the corporation, called his attention to an assignment from Fountain to his wife, which he had found upon the floor of the office, and which had evidently fallen from Mr. Fountain's coat. Mr. Cronin testified to finding this assignment and showing it to defendant. The entire transaction rests in parol, and no one was present at the making of the alleged agreement except Mr. Fountain and the defendant. Plaintiff had verdict and judgment.

Louis C. Miller (Howard & Roos, of counsel), for appellant. Herbert E. Winsor, for appellee.

GRANT, J. (after stating the facts). Errors are assigned upon the admission and exclusion of evidence, upon the refusal to give certain requests, and the charge as given. The court refused to permit any inquiry to be made into the partnership agreement, and rejected testimony offered to the effect that Mr. Fountain, at the time of the alleged sale to his wife, had no real interest in the partnership property, and was in fact indebted to defendant. He also refused to instruct the jury as to the effect of a sale by one partner of his interest in any or all of the partnership property in payment of his individual debts, or as to the rights of partners in their joint property. We think it was important that the jury should have been instructed upon these matters. It is evident that Mr. Fountain was at the time insolvent. If it could be shown that in fact he had no real interest in the partnership property, but was in debt to his partner, this would be a very material circumstance for the consideration of the jury in determining who told the truth, Fountain or defendant, and what the contract was. Of course, plaintiff, under the bill of sale from her husband, did not obtain absolute title to the specific property, nor any title whatever, unless upon settlement it was found that Mr. Fountain had some interest to convey. The conveyance to her was subject to the rights of creditors and the other partner. It was her theory that, although her husband may have had no real interest to convey, yet defendant recognized that she was possessed of the title to the undivided one-third of the property described, and agreed to pay her its full value, regardless of his standing in the partnership. It was the theory of the defendant that all the partnership property was to be sold and conveyed to the corporation, and its value, issued in stock to the defendant, to be applied on the partnership accounts. While these accounts could not be settled in this suit if objection were made, still their condition was a pertinent inquiry in determining the probability of the contract as claimed by the plaintiff and as asserted by the defendant. Richardson v. McGoldrick, 43 Mich. 476, 5 N. W. 672; Colwell v. Adams, 51 Mich. 491, 16 N. W. 870; Campau v. Moran, 31 Mich. 280; Banghart v. Hyde, 94 Mich. 49, 53 N. W. 915.

Most of the errors assigned arise upon the erroneous view of the case taken by the circuit judge that the condition of the partnership and the rights of partners could have no bearing upon the issue. We need not, therefore, consider them in detail. The judgment must be reversed, and a new trial ordered. The other justices concurred.

PEOPLE v. THOMPSON.

(Supreme Court of Michigan. March 11, 1896.)

CERTIORARI—MOTION TO QUASH INDICTMENT.

A writ of certiorari will not be granted to review the action of a lower court in refusing to quash an indictment, prior to the final disposition of the case in the trial court.

Application by Thomas M. Thompson for a writ of certiorari to review the action of the circuit court. Writ denied.

Otto Kirchner, for petitioner.

MONTGOMERY, J. This is an application for a writ of certiorari to review the action of the circuit court refusing to quash an indictment found against the respondent by a grand jury. No trial has yet been had. The question suggests itself whether the court should interpose at this stage by a writ of certiorari, and arrest the proceedings by a writ upon which a final judgment cannot be given if the action of the circuit court is upheld. In the early case of Palms v. Campau, 11 Mich. 109, it was held that the writ of certiorari ought not to be so employed. It is true that under peculiar circumstances such a writ was issued in People v. Lauder, 82 Mich. 109, 46 N. W. 956. But at page 126, 82 Mich., and page 956, 46 N. W., it was said by Mr. Justice Morse: "We are not willing that this should be made a precedent in other cases for the use of the writs of mandamus or certiorari to decide matters arising upon motion to quash, or on issue joined in pleas of abatement to indictments or information in criminal cases. Usually such questions must come before us, on writ of error or certiorari, after trial and judgment." We have recently, in a number of cases, refused to grant writs of mandamus or certiorari to review the actions of courts in refusing to quash informations. The practice ought to be uniform, and we think the petitioner should be left to the customary remedy. The other justices concurred.

MOSHER v. BAY CIRCUIT JUDGE.

(Supreme Court of Michigan. March 11, 1896.)

ATTACHMENT—PERISHABLE GOODS.

Lumber is not perishable property, within How. Ann. St. § 8011, authorizing the sale of attached property where it consists of perishable goods.

Application on the relation of Alfred Mosher, Jr., against the Bay circuit judge for writ of mandamus to compel defendant to vacate an order directing a sale of lumber under attachment. Granted.

T. F. Shepard and McDonell & Hall, for relator. T. A. E. & J. C. Weadock and Atkinson & Wolcott, for respondent.

LONG, J. October 15, 1895, the First National Exchange Bank of Port Huron sued out a writ of attachment against relator from the Bay circuit court upon a debt not yet due to the amount of about $22,000, returnable November 5, 1895. The sheriff of that county seized and took into his possession, among other property, a large quantity of lumber and shingles belonging to the relator, situate in the yard of relator at West Bay City, near the Michigan Central Railroad Company's tracks and the power house of the street-railway company. An inventory and appraisal were made of the property, showing its value to be about $37,700. The property attached is also covered by chattel mortgages, making the whole of the claims under the attachment and mortgages about $50,000. Before the attachment was served on the relator, the plaintiff in that suit made an application to the circuit judge for Bay county for an order to sell the lumber and shingles so held under the attachment, on the ground that the property was perishable, within the meaning of How. Ann. St. § 8011. The claims set up for the order were that the property was so situate that it was liable to fire, that the insurance which had before that been carried had been canceled, and that the sheriff was unable to reinsure except for a small amount. No notice was given the relator of this application, but on October 11th the circuit judge made an order directing the sheriff to sell. On application here the sale was stayed until this petition for mandamus to set aside the order could be heard and disposed of. The parties have been heard, and we think the order must be set aside. The property attached is not perishable, within the meaning of the statute. It provides that: "When any of the property taken in attachment shall consist of animals or perishable property, the court or any judge thereof may make an order directing such property to be sold, and the money arising from such sale to be brought into court to abide the order of such court." There is no power vested in the circuit judge or circuit court to make an order for sale of perishable property except the power conferred by statute, and we think this not perishable property, within the meaning of the statute. The writ must be granted as prayed.

McGRATH, C. J., took no part in the decision. The other justices concurred.

SMITH v. AMERICAN EXP. CO.

(Supreme Court of Michigan. March 11, 1896.)

COMMON CARRIER — CONTRACT — LIMITATIONS OF LIABILITY TO ITS OWN LINE—LOSS BY FIRE—AMOUNT.

1. A carrier is not liable for loss or injury to property after delivery to a succeeding carrier, where the contract expressly limits its liability to its own line.

2. A carrier is not liable for loss of property by fire, where the shipping contract expressly exempts it from such liability unless there is evidence to show that it was caused by the carrier's negligence.

3. A provision in a shipping contract limiting the amount of the carrier's liability, if the value of the property is not given, is valid and binding on the shipper, where there is no evidence that the shipper was ignorant of the condition.

4. The receipt of a bill of lading issued by a carrier by the consignor without objection constitutes the contract of carriage, and fixes the rights and liabilities of the parties.

Error to circuit court, Wayne county; Willard M. Lillibridge, Judge.

Action by Howard D. Smith against the American Express Company for breach of contract. From a judgment for defendant, plaintiff brings error. Affirmed.

The defendant, a common carrier, on September 19, 1892, at its Detroit office, received from plaintiff a sealed package for carriage, marked, "H. D. Smith, Washington, D. C.," receiving for such package 25 cents, and delivering to the plaintiff a receipt or bill of lading, which reads as follows:

"Read the Conditions of This Receipt.

"The rates charged by this company for the carriage of small packages of merchandise and printed matter have been greatly reduced. Further particulars will be given upon application to agents of the company.

"American Express Company.

"Detroit, Mich., Sep. 19, 1892.

"Received of H. D. Smith, P., said to contain ..... valued at, not given, dollars. Marked Pd. 25.

"H. D. Smith,
"Washington, D. C.

—"Which we undertake to forward to the nearest point of destination reached by this company, subject expressly to the following conditions, namely: This company is not to be held liable for any loss or damage, except as forwarders only, nor for any loss or damage by fire, by the dangers of navigation, by the act of God, or of the enemies of the government, the restraints of government, mobs, riots, insurrections, pirates, or from or by reason of any of the hazards or dangers incident to a state of war. Nor shall this company be held liable for any default or negligence of any person, corporation, or association to whom the above-described property shall or may be delivered by this company, for the performance of any act or duty in respect thereto, at any place or point off the estab-

lished routes or lines run by this company; and any such person, corporation, or association is not to be regarded, deemed, or taken to be the agent of this company for any such purpose, but, on the contrary, such person, corporation, or association shall be deemed and taken to be the agent of the person, corporation, or association from whom this company received the property above described. It being understood that this company relies upon the various railroad and steamboat lines of the country for its means of forwarding property delivered to it to be forwarded, it is agreed that it shall not be liable for any damage to said property caused by the detention of any train of cars or of any steamboat upon which said property shall be placed for transportation, nor by the neglect or refusal of any railroad company or steamboat to receive and forward the said property. It is further agreed that the company is not to be held liable or responsible for any loss of or damage to said property, or any part thereof, from any cause whatever, unless in every case the said loss or damage be proved to have occurred from the fraud or gross negligence of said company or their servants. Nor in any event shall this company be held liable or responsible, nor shall any demand be made upon them, beyond the sum of fifty dollars, at which sum said property is hereby valued, unless the just and true value thereof is stated herein; nor upon any property or thing, unless properly packed and secured for transportation; nor upon any fragile fabrics, unless so marked upon the package containing the same; nor upon any fabrics consisting of or contained in glass. If any sum of money besides the charges for transportation is to be collected from the consignee on delivery of the above-described property, and the same is not paid within thirty days from the date hereof, the shipper agrees that this company may return said property to him, at the expiration of that time, subject to the conditions of this receipt, and that he will pay the charges for transportation both ways, and that the liability of this company for such property while in its possession for the purpose of making such collection shall be that of warehousemen only. In no event shall this company be liable for any loss or damage unless the claim thereof shall be presented to them in writing, at this office, within 90 days after this date, in a statement to which this receipt shall be annexed. And it is also understood that the stipulations contained herein shall extend to and inure to the benefit of each and every company or person to whom, through this company, the above-described property may be intrusted or delivered for transportation. Deliveries at all points reached by this company are only to be made within the delivery limits established by this company at such points at the time of shipment, and prepayment in such cases shall only cover places within such delivery limits. The party accepting this receipt hereby agrees to the conditions herein contained.

"For the Company: Stone, Agent."

There was printed across the face of the receipt "Not negotiable." Nothing appeared on the outside of the package to indicate its contents or value. Plaintiff's agent presented it, paid the charges, took the receipt, and went away, without making any statement of its value. In shipping goods from Detroit to Washington, Toledo, Ohio, was the nearest point of defendant's line, and to which it was accustomed to carry and deliver packages to the succeeding carrier. The package was carried safely and delivered in good condition by defendant, September 20th, to the Adams Express Company, the continuing carrier from Toledo to Washington. On that night a collision occurred between two trains of the railroad, upon one of which was the package in question, in charge of the express messenger of Adams Express Company. A fire resulted, which destroyed the express car and plaintiff's package. There is no testimony upon the record tending to show the cause of the accident, or to establish any negligence on the part of the railroad company. The sole evidence is that the accident occurred. The package contained 23 railroad tickets from Memphis to Niagara Falls and return. They had been used by passengers from Memphis to the falls, and, upon their face, were nontransferable. The court directed a verdict for the defendant.

Washington I. Robinson, for appellant. Wisner & Harvey, for appellee.

GRANT, J. (after stating the facts). The defendant's positions are summarized as follows: (1) The receipt or bill of lading is the contract for the carriage of the package in question. (2) It is not to be construed as limiting the defendant's liability in any way for loss or damage due to neglect or default of its employés. (3) By the safe carriage and delivery of the package to the Adams Express Company, defendant fully performed its duty under said contract. (4) No negligence is shown on the part of any one from which the loss resulted. (5) Plaintiff's recovery is limited to $50, the limit specified in the contract where the just and true value is not stated.

1. The second point is beyond discussion. It is conceded to be the law, and the rule is established by an overwhelming weight of authority. Citation of authorities is therefore unnecessary. In connection with this, we note the other well-established rule, that "a common carrier may limit his strict common-law liability, by express agreement, in such manner as the law can recognize as reasonable, and not inconsistent with sound public policy."

2. It has long been the established rule in this state that the receipt or bill of lading issued by a common carrier to a consignor,

and received by him without objection, and without any insistence upon the common-law liability of the carrier, is a contract between the parties, and fixes their liabilities and rights. McMillan v. Railroad Co., 16 Mich. 80. That is also the rule in other courts. Express Co. v. Caldwell, 21 Wall. 264; Belger v. Dinsmore, 51 N. Y. 166; Hill v. Railroad Co., 73 N. Y. 351; York Co. v. Central R., 3 Wall. 107; Express Co. v. Foley, 46 Kan. 457, 26 Pac. 665; Ballou v. Earle, 17 R. I. 441, 22 Atl. 1113. Without quoting it here, I call special attention to 16 Mich., pp. 113, 114, in McMillan v. Railroad Co., where the law is expounded by that learned jurist, Justice Cooley. In that case the plaintiffs had not read the bill of lading, and did not know its contents, although they had been accustomed to ship goods over the same road under similar bills. In this case both the defendant and his agent, who delivered the package for shipment and took the receipt, testified that they had frequently, for years, shipped packages by the defendant, and received similar receipts. Both were witnesses, and neither testified that he did not know what the receipt contained. The receipt expressly limited its liability to its own line. It had fully performed its duty to the complainant when it had safely conveyed and delivered the package to the succeeding carrier. McMillan v. Railroad Co., supra; Railroad Co. v. McKenzie, 43 Mich. 609, 5 N. W. 1031; Rickerson Roller-Mill Co. v. Grand Rapids & I. R. Co., 67 Mich. 110, 34 N. W. 269; Pratt v. Railway Co., 95 U. S. 43; Black v. Ashley, 80 Mich. 90, 44 N. W. 1120; Coles v. Railroad Co., 41 Ill. App. 607. The contract also exempted the defendant from liability for loss by fire. Such exemption is reasonable, and not against public policy, where the fire was not caused by the negligence of the defendant. Express Co. v. Sharpless, 77 Pa. St. 516. The defendant itself was not negligent. The accident which caused the fire happened on the line of the succeeding carrier, which was the plaintiff's, and not the defendant's, agent. Furthermore, there is entire absence of any evidence to show that the accident was the result of any negligence. Mere proof of an accident is not sufficient to establish negligence. Where suit is brought upon the negligence of the carrier, that negligence must be proven by the parties asserting it. Railroad Co. v. Kirkwood, 45 Mich. 56, 7 N. W. 209.

3. If the plaintiff could recover at all, his recovery would be limited, under the contract, to $50. Had the value of the property been disclosed to the defendant, it would have made a greater charge for carriage. The limitation is reasonable. There was nothing to indicate its value. It was shipped at the lowest rate. Plaintiff does not pretend that he was ignorant of this condition. It was therefore his clear duty to disclose the value, and to pay accordingly. It would be unreasonable to say that one could ship a package containing diamonds of the value of $10,000 under that agreement, and recover full value in case of loss. No man of common sense and prudence would ship property of so great value without informing the carrier of its contents and their value. Belger v. Dinsmore, supra; Muser v. Express Co., 1 Fed. 382; Express Co. v. Foley, supra; Ballou v. Earle, supra.

We consider it unnecessary to discuss the other point raised. The judgment is affirmed. The other justices concurred.

DE SALE v. MILLARD et al.

(Supreme Court of Michigan. March 11, 1896.)

INJUNCTION—COMPLAINANT AS A WRONGDOER.

The closing of a private alley will not be enjoined where it appears that complainant, to enable him to secure the injunction, destroyed the fence closing the alley, and after it was rebuilt by defendant, without knowledge that the preliminary injunction had issued, again destroyed the fence, and then served the injunction.

Appeal from circuit court, Wayne county; Joseph W. Donovan, Judge.

Suit by Albert H. De Sale against William J. Millard and another. There was a decree for defendants, and plaintiff appeals. Affirmed.

John Galloway, for appellant. James H. Pound, for appellees.

GRANT, J. The object of this suit is to enjoin defendants from closing a private alley alleged to exist in rear of the defendants' lots and the one occupied by the complainant. Complainant is a tenant, and evidently is not the real party prosecuting this suit. He was not sworn as a witness. There are four lots in the block, the defendants owning the outside lots, and complainant one of the inside lots. The alley is a little less than seven feet wide. Several defenses are raised, of which we need mention but one. The defendants contend that the alley was closed by the mutual consent and agreement of all the lot owners, in pursuance of which the defendants had erected fences at each end closing it. It had remained so closed for several months. Complainant's agent, the active mover in the affair, was informed that he could not serve an injunction unless the fence was down. He therefore went, tore down the fences, and then applied for a preliminary injunction, which was granted. The defendant Martin immediately, and before he had any knowledge of the suit or that any injunction was issued, restored his fence. When complainant's agent went to serve the injunction, he found the fence restored. He thereupon employed some men, provided them with axes, and proceeded to destroy the fence. Defendant Martin was present, warned him off, attempted to defend his possessions by force, was overpowered, the fence destroyed, and, after this was done, the injunction was serv-

ed. The complainant was not in position to invoke the aid of a court of equity. The defendants were in possession, peaceably; and whether lawfully or unlawfully it is not material to inquire. Equity will not interfere to assist a party who has obtained possession by force. People v. Simonson, 10 Mich. 335; McCombs v. Merryhew, 40 Mich. 725; Railway Co. v. Circuit Judge, 44 Mich. 479, 7 N. W. 65; Soule v. Hough, 45 Mich. 418, 8 N. W. 50, 159. The decree is affirmed, with costs, but without prejudice to future proceedings. The other justices concurred.

AUDITOR GENERAL v. CHANDLER.

(Supreme Court of Michigan. March 11, 1896.)

STATUTES—APPLICATION TO PENDING PROCEEDINGS—PROCEEDING TO COLLECT TAXES—BOARD OF REVIEW.

1. In the absence of a proviso to that effect, a law relating to procedure will not affect pending proceedings.

2. In proceedings under Sess. Laws 1893, No. 206, for the collection of taxes, which permits the filing of objections, the allowance of an amendment specifying the objections more in detail is within the discretion of the court, and will not be reviewed.

3. The provision of Sess. Laws 1893, No. 206, § 30, requiring the township boards of review to meet on the fourth Monday in May, and "continue in session during the day, and the day following," is mandatory; and, where a property owner is deprived of a hearing by the illegal adjournment of the board on the first day, there is no jurisdiction to levy taxes on his property.

Appeal from circuit court, Cheboygan county, in chancery; Oscar Adams, Judge.

Proceeding by the auditor general to enforce the collection of taxes against lands owned by Merritt Chandler. Decree for defendant, and petitioner appeals. Affirmed.

Victor D. Sprague (George W. Bell, of counsel), for appellant. Shepherd & Reilley, for appellee.

MOORE, J. This proceeding is an attempt to collect the taxes, interest, and charges claimed to be due thereon, upon the lands of the defendant for the year 1893 and previous years. The auditor general's petition was filed July 26, 1895. July 27, 1895, the court ordered a hearing on that petition, to be heard September 17, 1895, at the opening of court. September 13, 1895, proof of publication of the order and petition was filed. September 17, 1895, the defendant filed his objections to the taxes, only one of which is material to consider here. That is, "The board of review in the township did not hold its sessions at the time or times provided by law, and for that reason defendant was prevented from making his objection to them." The defendant did not serve any copy of his objections upon the prosecuting attorney prior to September 17th. Subsequent to the 17th of September the defendant was allowed, against the objection of counsel for petitioner, to file a supplemental list of the lands upon which were assessed the taxes he desired to contest. The counsel for the petitioner objected to the court's hearing the objections of the defendant: First, because he had not served a copy of them on the prosecuting attorney in season; second, because the supplemental list of lands filed by the defendant was filed too late. These objections were overruled, and upon a hearing the trial court held the taxes were improperly levied and were invalid. The record discloses that the township board of review met on the fourth Monday in May, as required by law; that no one appeared before it; that it then adjourned without day; that on Tuesday the defendant appeared at the house of the supervisor, the place where the board of review should have been in session, and learned that it had adjourned. One member of the board lived 2½ miles away, and the other 12 miles away. It is claimed the supervisor offered to call the board together the following day, and was told by Mr. Chandler that he had other engagements.

The first important question is, had the court the right to hear defendant's objections, when he had not served a copy of them upon the prosecuting attorney, as required by the law of 1895? The petition of the auditor general was filed, and the order of the court fixing a time for the hearing upon the petition was made, before the law of 1895 took effect. The order recited, as required by Act No. 206, Sess. Laws 1893, "that all persons interested in such lands or any part thereof, desiring to test the lien claimed thereon, * * * shall file with the clerk * * * their objections thereto, on or before the first day of the term." This was done by the defendant. The law of 1893 did not require a copy of the objections to be served upon the prosecuting attorney. The amendment of 1895 did not provide that it should affect pending proceedings. In the absence of any expression of intent on the part of the legislature to have the amendment affect pending proceedings, we think it would be inequitable and unjust to give the statute that construction. See Clark v. Hall, 19 Mich. 356; Smith v. Auditor General, 20 Mich. 398; Auditor General v. Monroe County Sup'rs, 36 Mich. 70. The allowance of the filing of the supplemental list of lands, which simply stated more in detail the objections originally filed, was a discretionary act upon the part of the trial judge, which we will not review, and it was a proper amendment to allow. Auditor General v. Jenkinson, 90 Mich. 526, 51 N. W. 643.

The only other question necessary to pass upon is, what is the effect of the failure of the board of review to remain in session as the law required? The statute provides that "said board of review shall meet at the office of the supervisor on the fourth Monday in May, at nine o'clock in the forenoon, and continue in session during the day and the day following," and that its sessions shall

continue at least six hours a day. Section 30, Act No. 206, Sess. Laws 1893. The construction of this or a similar provision of the statute is not an unfamiliar proceeding in this court. See Avery v. East Saginaw, 44 Mich. 587, 7 N. W. 177; First Nat. Bank v. St. Joseph, 46 Mich. 526, 9 N. W. 838; Williams v. Saginaw, 51 Mich. 120, 16 N. W. 280; Peninsula I. & L. Co. v. Township of Crystal Falls, 60 Mich. 510, 27 N. W. 666. In Township of Caledonia v. Rose, 94 Mich. 216, 53 N. W. 927, it was held that "the provision of the statute requiring the board to meet upon the days named is mandatory, and it cannot deprive the taxpayer of his hearing there, and thereby force him to a suit at law to obtain redress." Defendant was entitled to assume that the board would remain in session the full length of time provided by the statute, and to arrange to be present any day he chose. The decree of the court below is affirmed, without costs. The other justices concurred.

PEOPLE v. RICKETTS.

(Supreme Court of Michigan. March 11, 1896.)

CRIMINAL LAW—INSTRUCTIONS—APPEAL—REVERSAL.

1. A conviction in a case of assault with intent to rape will not be reversed because the prosecuting attorney offered to show that defendant on several occasions before the commission of the offense charged had committed similar acts, where the court refused to permit him to do so.

2. Where the charge is correct as a whole, a conviction will not be set aside because portions of it, standing alone, might tend to mislead the jury.

3. In a case of assault with intent to rape, in which the only evidence was that of prosecutrix, it was not error to charge that, if the jury believed her evidence, defendant was guilty of assault and battery at all events; and that, if they believed her evidence, he was certainly guilty of assault and battery, "and really the only question for you to debate and consider in this case is whether or not he is guilty of the more serious offense,"—especially where defendant's attorney stated to the jury that he was probably guilty of assault or assault and battery.

Error to circuit court, Osceola county; James B. McMahon, Judge.

Ira Ricketts was convicted of an assault with intent to rape, and appeals. Affirmed.

Charles A. Withey, for appellant. Fred A. Maynard, Atty. Gen., and C. H. Rose, Pros. Atty., for the People.

LONG, C. J. Respondent was convicted of an assault with intent to commit the crime of rape upon his own daughter, a girl just past 15 years of age. The errors relied upon by the respondent are:

1. That the prosecuting officer stated to the jury that he proposed to show by several witnesses that the respondent, on several occasions prior to the time of the commission of the offense charged, had committed similar acts. This offer was objected to, and the objection sustained. The contention is that respondent's rights were prejudiced by the offer of this testimony by the prosecution. It is not necessary to discuss the question which the prosecution now raises, that this testimony was competent. It is sufficient to say that, this testimony having been objected to and excluded, there is no ground for saying that the case should be reversed. If a case were to be reversed upon such a pretext as this, few verdicts could be sustained. The prosecution evidently made the offer in good faith, and the court promptly excluded the testimony.

2. It is contended that there was no evidence which warranted the jury in finding the respondent guilty. We need not set out the testimony here. The story, as told by the daughter, if believed by the jury, would warrant a verdict of guilty.

3. It is also contended that the court was in error in several portions of the charge. These portions are selected from the general charge, and, standing alone, might tend to mislead the jury, but as a whole we think the charge not open to the criticism made upon it by counsel. The court charged: "In order to find the respondent guilty of the offense, it will be necessary for you to find from the evidence, beyond any and all reasonable doubt, that at the time he made the assault upon her he had in his mind the intent to gratify his passions upon her person, and that he intended to do so at all events, and notwithstanding any resistance on her part; that he intended to have carnal intercourse with her, in other words, and to use such force as was necessary for that purpose to overcome whatever resistance she might interpose, and to have intercourse with her at all events." Certainly this was a fair statement of the law. But counsel claims that in a preceding portion of the charge the court took from the jury the question of the degree of the crime with which the respondent stood charged. After stating the claim of the prosecution, the court said: "If you believe the evidence of the prosecuting witness, this respondent is certainly guilty of assault and battery, at all events. If you believe her testimony that he threw her down against her will, and took these liberties in an insulting, offensive, and rude manner with her person, he is certainly guilty of assault and battery; and really the only question for you to debate and consider in this case is whether or not he is guilty of the more serious offense." The complaint is of the last portion of this section of the charge. The only evidence set out in the record is that of the prosecutrix, and apparently it was the only evidence given on the trial. The court was not in error, therefore, in saying that the only question was whether the respondent intended to commit the greater offense; and, indeed, it appears by the record that counsel for respondent stated to the

jury "the respondent is probably guilty of assault, or assault and battery, and I do not think it will take you many minutes to convict him of this offense." It was difficult to conceive how counsel can now contend in this court that respondent was prejudiced by the charge. Some other portions of the charge are criticised, but we find nothing which warrants further discussion. The judgment must be affirmed. The other justices concurred.

STEBBINS v. PATTERSON.

(Supreme Court of Michigan. March 11, 1896.)

LIMITATIONS—CONCEALMENT OF CAUSE OF ACTION.

Where moneys of complainant's intestate were fraudulently obtained by defendant by means of an apparent indorsement of a certificate of deposit by intestate, a few days before her death, and when she was incapable, on account of old age and physical and mental infirmity, of transacting business, and the possession thereof was fraudulently concealed by defendant, and not discovered by complainant until a short time before he brought suit for the recovery thereof, as belonging to his intestate's estate, the cause of action was not barred by limitations.

Appeal from circuit court, Kent county, in chancery; Allen C. Adsit, Judge.

Bill by Andrew J. Stebbins, administrator of the estate of Mary Patterson, deceased, against William Patterson, for the recovery of moneys fraudulently obtained from complainant's intestate, and converted by defendant to his own use. From a decree in favor of plaintiff, defendant appeals. Affirmed.

Stephen H. Clink, for appellant. T. J. O'Brien and James H. Campbell, for appellee.

LONG, C. J. The bill in this case sets out that Mary Patterson, in her lifetime, was possessed of a certain certificate of deposit drawn by the National City Bank of Grand Rapids, dated October 17, 1887; that she held such certificate of deposit in her possession until August 18, 1888, and on that day it was presented at said bank by the defendant, indorsed upon the back with the name of Mary Patterson, by her mark, which mark was witnessed by the defendant and Sylvia C. Patterson, and was duly paid by the bank on that date; and that said moneys are still held by the defendant. The bill further sets forth that, at the time of such indorsement, Mary Patterson was upward of the age of 70 years, and was ill of a serious and fatal malady, and died on August 25, 1888, intestate, at the city of Grand Rapids, this state; that at the time the defendant obtained possession of the certificate, the said Mary Patterson was mentally incapable of understanding and of making any gift, sale, transaction, assignment, or delivery of any property, security, or evidences of debt, or of writing her name, or of understanding that, by making her mark, the defendant could draw the money upon such certificate; that, when conscious, she could, and always did, write her name in business transactions; that the apparent transfer of said certificate to the defendant was fictitious and fraudulent, without consideration, and did not pass any right or title of said moneys to the defendant; that the same, as matter of equity and right, were the moneys of the complainant as administrator; and that the defendant has wrongfully and unlawfully withheld, and still withholds, said moneys from the complainant. The bill also alleges that the defendant has concealed from the complainant the fact that he obtained said certificate and the payment thereon, and has never informed or notified the complainant of the fact, although he has known, ever since October 5, 1888, that the complainant was the administrator of the estate of his mother, Mary Patterson, and that the complainant, from another source, recently obtained information of the fact that such certificate had been obtained, and the moneys drawn thereon by William Patterson, and of the fraud with which the transaction was tainted. The bill sets up the appointment of the complainant as such administrator on September 28, 1888, and prays that it may be decreed that the indorsement upon such certificate was fraudulent, and passed to the defendant no title to such moneys; that the deceased remained the owner of such moneys to the time of her death, and that the same became the moneys of her estate; that the defendant drew and received, and now holds, such moneys wrongfully and fraudulently; and that he be compelled to pay the same over to the complainant, with the legal interest from August 18, 1888. The defendant answered the bill, and claimed, by the answer, that more than six years elapsed after the alleged conversion of the certificate of deposit set out in the bill, before the commencement of this suit, and therefore the defendant could not be compelled to further answer or make defense to the suit. There are no allegations in the answer, except a denial of certain portions of the bill, and admitting other portions thereof. A replication was filed, and proofs were taken in open court, and a decree entered therein finding the material facts charged in the bill to be true, and decreeing that the complainant recover from the defendant the moneys claimed and the interest thereon. From that decree the defendant appeals.

It appears that the testimony was not settled in the case within the time prescribed by the statute, so that the case stands for hearing upon the pleadings. The only contention by the defendant is that the claim is barred by the statute of limitations, as the conversion of the moneys is charged to have taken place on August 18, 1888, and the bill in this case was not filed until September 24, 1894. The decree made by the court below is returned, and by it the court finds: "The mate-

rial allegations in the bill of complaint in this cause are true, and that the defendant, William Patterson, fraudulently obtained and appropriated the sum of $715.75 of the moneys of the said Mary Patterson, and has withheld the same from the complainant, who has been and is rightfully entitled to the same as administrator of the estate of said deceased; that said moneys were obtained from the bank in which they were deposited, on surrender by said defendant of the certificate of deposit, with the indorsement thereon, as set forth in the bill of complaint in this cause; that, at the time the apparent indorsement of such certificate was made, the said Mary Patterson, deceased, was incapable, on account of old age and sickness, and physical and mental infirmities, of writing her name, and of understanding, making, or assenting to the transfer and indorsement of said certificate, and of making a gift or disposition of said moneys; and that the defendant has no right to said moneys or any part thereof, and the complainant is entitled to have and recover of said defendant the said moneys, with interest thereon." The court below found, by the decree, that all the material allegations of the bill were true. The bill recites that "the apparent transfer of the certificate of deposit to said William Patterson was fictitious and fraudulent, and without consideration, and did not pass any right or title to said moneys to said William Patterson; * * * that the said William Patterson has concealed from your orator the fact that he had obtained said certificate and payment thereon, and had never informed or notified your orator of the fact, although said William Patterson has known, ever since the 15th day of October, 1888, that your orator was administrator of the estate of his said mother; that your orator, from another source, has recently obtained information of the fact that said certificate had been obtained, and the moneys drawn thereon by said William Patterson, and of the fraud with which the transaction was tainted." The bill also recites that the deceased was mentally incompetent to make the transfer at the time the certificate was obtained from her on August 18, 1888, and that she continued sick from that time until August 25, 1888, when she died. It will therefore be seen that, by the finding in the decree, the certificate was fraudulently obtained from Mary Patterson when she was incompetent to make the transfer, and that she died seven days thereafter from the same illness, and that from that time forward the defendant concealed the fact that he had the certificate or the moneys thereon. The findings in the decree must be taken as true.

As was said in Shelden v. Weatherwax, 75 Mich. 418, 42 N. W. 845, where the testimony in a chancery suit is taken in open court, and no case has been settled under the statute, it must stand for hearing on appeal upon the pleadings, orders, files, and decree alone; and it will be presumed that there was evidence in the lower court to sustain the decree made. Under these findings of fact, the statute did not begin to run against Mary Patterson during her lifetime, because she had no knowledge of the fraudulent conversion of the fund, and the statute would not begin to run against the administrator until the fraud was discovered. In Tompkins v. Hollister, 60 Mich. 470, 27 N. W. 651, it was said: "The statute of limitations does not apply, in this state, against a cause of action fraudulently concealed before the fraud is discovered. The complainant filed her bill within two years from her discovery of her rights as to this note and the deceit practiced upon her in reference thereto. She has thereby, if the fraud has been committed and concealed as claimed, saved her right of action." So, in the present case, the findings show that a fraud had been committed in getting this certificate from Mary Patterson, without consideration, and at a time when she was non compos mentis. She died from the illness with which she was then afflicted. From that time forward the defendant fraudulently concealed all the facts in relation to the transaction from the administrator, and it was only within a short time before the bill was filed that he discovered the fraud. The case falls within sections 8724, 8725, 2 How. Ann. St., and is not barred by the statute of limitations. The decree of the court below must be affirmed. The other justices concurred.

ESLER v. ADSIT, Circuit Judge.

(Supreme Court of Michigan. March 11, 1896.)

GARNISHMENT—BY WHOM MAINTAINABLE.

Under 3 How. Ann. St. § 8058, providing that, "in all cases" where there remains any sum unpaid on "any" judgment or decree, garnishment may issue on affidavit of the "plaintiff," his agent, etc., the word "plaintiff" refers to the party moving in the garnishment proceedings, and therefore a defendant who has recovered judgment against the plaintiff may sue out a writ of garnishment.

Original petition by Alexander D. Esler against Allen C. Adsit, Kent circuit judge, for a writ of mandamus. Writ granted.

Earle & Hyde, for relator. Hatch & Wilson, for respondent.

MONTGOMERY, J. This application for mandamus presents the question of whether a defendant who has recovered a judgment against the plaintiff may sue out a writ of garnishment, based on such judgment against a third party. The circuit judge held that the defendant is not entitled to the remedy. The statute (3 How. Ann. St. § 8058) reads as follows: "That in all personal actions arising upon contract, express or implied, brought in the several circuit courts or municipal courts of civil jurisdiction, whether commenced by declaration, writs of capias, summons or attachment, and in all cases where there remains any sum unpaid upon

any judgment or decree rendered in any of the several courts herein before mentioned or upon any transcript of a judgment filed in said courts, if the plaintiff, his agent or attorney, shall file with the clerk of said circuit court at the time of or after the commencement of said suit, or at any time after the rendition of judgment or decree or the filing of transcript of judgment, an affidavit stating that he has good reason to believe and does believe, that any person (naming him) has property, money, goods, chattels, credits or effects in his hands or under his custody or control, belonging to the defendant, or any or either of the defendants, or that such person is indebted to the defendant or any or either of the defendants, whether such indebtedness is due or not, and that the principal defendant or any or either of the defendants (naming them), is justly indebted to the plaintiff on such contract, judgment, decree or transcript, in a given amount over and above all legal setoffs, and that the plaintiff or affiant is justly apprehensive of the loss of the same, unless a writ of garnishment issue to the aforesaid person a writ of garnishment shall be issued," etc. The legislative intent, it must be conceded, is not made as clear as might be desired, and we are cited to no case which can be said to rule this. It is safe to assume, in view of the end aimed at by the legislation, that it was not the intent to afford to one party a remedy not open to the other. The ambiguity arises out of the fact that the provision for remedy on judgment was inserted in a section which previously provided for the suing out of the writ at the commencement of suit, and the provision for the making of the affidavit by the plaintiff was left unchanged. Literally construed, this provision would render nugatory the remedy given on a decree; for, strictly speaking, there is no party in chancery designated as "plaintiff." The construction contended for by respondent would also limit the general language giving the remedy in all cases where any sum remains unpaid on any judgment or decree. We think it not unwarranted to assume that by the word "plaintiff," as here used, was meant the moving party or suitor in the garnishment proceeding. A question having some analogy was presented to the supreme court of Massachusetts. The statute provided that after the rendition of a judgment in a civil action, if the execution has not been satisfied, the court or justice, upon petition of defendant, may order a stay supersedeas. It was held that the word "defendant," as used, was clearly intended to refer to the person against whom the judgment sought to be recovered was rendered, and who, as petitioner, asks for a stay of execution, and not to the defendant in the original action. Leavitt v. Lyons, 118 Mass. 472. See, also, Wescott v. Booth, 49 Ala. 182; Depot Co. v. Backus, 103 Mich. 564, 61 N. W. 787. It has been held that in garnishment statutes the word "plaintiff" should be construed to include the assignee, who is the owner of the judgment. Dugas v. Mathews, 9 Ga. 510. We are of opinion that it was intended to give this remedy to the person who recovered judgment or decree, whether he be plaintiff, complainant, or defendant, and that the word "plaintiff," as used in the statute, must be construed to mean the party moving in the garnishment proceeding. Writ granted. The other justices concurred.

MOSHER v. MOSHER.

(Supreme Court of Michigan. March 11, 1896.)

BILL OF REVIEW—WHEN GRANTED.

Where, after final judgment and the denial on appeal of motions for rehearing and for leave to introduce further testimony, the defeated party presents new affidavits, containing material evidence, discovered since the cause was heard in the court below, and shows that he was not at fault in not producing the same on the former hearing, leave will be granted to file a bill of review on payment of costs in the supreme court.

Petition by Orrin B. Mosher against Sally Mosher for leave to file a bill of review. Granted.

St. John & Merriam and Harrison Geer, for petitioner. J. S. Galloway, for respondent.

LONG, C. J. The bill in this cause was filed for the purpose of establishing a lost deed. The cause was heard in the court below in 1894, and a decree entered there in favor of complainant, establishing said deed. From this decree defendant appealed to this court, where the cause was heard at the January term, 1895, and an opinion filed therein on April 2, 1895, and is reported in 62 N. W. 706. In that opinion it was said: "While there is sufficient testimony in the case to justify a finding that a deed was executed and deposited with Mr. Weir, yet we are convinced that the allegation in the bill that it was upon a consideration actually paid by Alva Mosher is not sustained, and that such deed was subject to recall by Oliver E. Mosher; and the fair inference from the testimony is that it was recalled after his marriage." The facts are so fully set out in the opinion that further reference to them is unnecessary. After this opinion was filed, a rehearing was asked by counsel for complainant. Incidental to that motion, certain affidavits were filed, and leave was asked to introduce further testimony upon the main question in the case; that is, the question upon which the case was here reversed. The motion for rehearing was thereafter denied, as well as the motion for leave to introduce further testimony. Application is now made to this court for leave to file bill for review.

The application contains the affidavits upon which the motion was based for leave to

introduce further testimony, as well as several other affidavits, which are for the first time presented. If the affidavits now presented, taken with those which were produced on the former motion, are true, a very strong case is made showing that the deed was given for a valuable consideration, as stated in the bill of complaint; and the decree of the court below should have been affirmed, as Oliver E. Mosher would not have had the right to recall the deed and destroy it. Upon the showing now made it is clear that complainant should have the right to be heard upon the testimony discovered since the cause was heard in the court below. The showing is clear that the complainant was not in fault in not producing this testimony upon the former hearing, and equity requires that the case be opened to permit this testimony to be introduced. The prayer of the petition must be granted, and leave given to file a bill of review, on condition that complainant pay the costs of this court and a fee of $15 on this motion. The other justices concurred.

PETERSON v. CARPENTER, Circuit Judge.

(Supreme Court of Michigan. March 11, 1896.)

EXECUTION—ISSUANCE—VALIDITY—DISCHARGE.

1. Where stay of execution for 20 days was granted on a judgment for plaintiff from the date of its rendition, June 18, 1895, a writ of execution issued and delivered July 8, 1895, to plaintiff's attorney, but not delivered to the sheriff till July 9, 1895, was valid.

2. How. Ann. St. § 7621c, prohibits the granting of a stay of proceedings on a verdict or judgment in the circuit court for more than 20 days without bond. *Held*, that the filing of a bond and issuing of a writ of error after a 20-days stay authorized has expired will not discharge a levy made on real estate under an execution issued after the said stay had expired.

Application on the relation of Henry M. Peterson against William L. Carpenter, Wayne circuit judge, for writ of mandamus to compel defendant to discharge a levy under execution on real property. Denied.

James H. Pound, for relator. T. T. Leete, Jr., for respondent.

MOORE, J. May 27, 1895, Herbert J. Dawson and others obtained a verdict against relator, upon which judgment was rendered June 18, of the same year, and on the same day an order was entered staying all proceedings for 20 days. July 8th an execution was issued, and by the clerk delivered to the attorney for the plaintiffs, who delivered the execution to the sheriff July 9, 1895. On the same day the sheriff levied upon real estate, and afterwards proceeded to advertise said property for sale, which sale was to be August 31, 1895. August 26, 1895,—a month and a half after the stay of execution had expired,—a writ of error was issued, and a bond filed by the relator, in accordance with the statute. The sheriff was advised that his authority to make the sale was questioned. No further proceedings were taken by him towards making a sale. The proceedings up to this time involved costs and expenses which were borne by plaintiffs. Application was then made to the respondent to cause the levy to be set aside. The circuit judge issued an order to said sheriff to show cause why said levy should not be released. In answer to said order, the foregoing facts were made to appear. The circuit judge was of the opinion that the circuit court had not power to cause said levy to be discharged; that the writ of error and bond operated as a stay, but was not retrospective, and did not operate on the execution and levy anterior to its allowance, and declined to direct the levy to be recalled. The relator then asked for the writ of mandamus, to have the questions involved in the proceeding passed upon here.

The first question which arises is, was an execution issued July 8th, upon a judgment issued June 18th, which execution was placed in the hands of the sheriff July 9th, of any force or effect? When it was issued by the clerk, only 19 days had elapsed after judgment. When it was placed in the hands of the sheriff, 20 days had elapsed after judgment. In Bank v. Dwight, 83 Mich. 191, 47 N. W. 111, it is held that an execution "cannot be considered as issued until it is placed where it might have been executed, and some efficient act done under it. It must be issued to the sheriff, or other proper officer. How. Ann. St. § 7664. The officer is the only one who can do such efficient act. The attorney who takes out the writ can do nothing under it." We think the execution, when delivered to the sheriff, was a valid writ.

The other question in this case is whether the filing of a bond and the issuing of a writ of error after the stay of proceedings authorized by the statute has expired will discharge a levy made upon real estate under an execution issued after the stay of execution has expired, and before the bond was filed and the writ of error issued. It is claimed by the relator that it does have that effect. Where the levy made was upon personal property, it has been held that the filing of the bond required by law, and the issuing of the writ of error, would have the effect to release the levy. Ela v. Welch, 9 Wis. 395. And it is upon this case the relator chiefly relies to support his contention. It has been held, however, in a late case in the same court, that where a stay of execution had expired, and an execution had been issued, by virtue of which a levy had been made upon a large amount of personal property, the filing of a bond and perfecting an appeal operated to stay all further proceedings, but did not ipso facto recall the execution or release the levy. Tilley v. Washburn (Wis.) 64 N. W. 312, citing many cases. In Curtis v. Root, 28 Ill. 367, it was held that an appeal does not vacate the lien of the judgment; it only suspends its execution See Bassett v. Daniels,

10 Ohio St. 617. While in the case of Arnold v. Fuller's Heirs, 1 Ohio, 458, it was held that a levy upon real estate was not vacated by writ of error and supersedeas. The question has never been directly before this court, though there is a strong intimation in Blair v. Compton, 33 Mich. 417, that, under our statutory regulations governing stay of execution by bail in error, the stay does not vacate a completed levy upon personalty. See, also, People v. Stephenson, 98 Mich. 218, 57 N. W. 115 Since the decision in Blair v. Compton was rendered, the statute staying proceedings in court has been amended. For a long time the courts had the power, and in some instances were in the habit, of staying proceedings without requiring a bond to be given. This sometimes resulted in procuring writs of error for the purpose of delay, and it often happened that judgment plaintiffs were defeated entirely in securing their judgment, even when it was affirmed in the supreme court. To obviate this wrong the legislature enacted "that no stay of proceedings, upon any verdict or judgment, rendered in any circuit court of the state, shall hereafter be granted or allowed for the purpose of moving for a new trial, or settling a bill of exceptions, in the case in which such verdict or judgment was rendered, for a longer period than twenty days, unless the party applying for such stay, if judgment shall have been rendered against him, shall execute to the adverse party, a bond with sufficient surety or sureties, to be approved by the judge of the court in which such judgment was rendered, conditioned to pay such judgment if the same is not set aside or reversed." How. Ann. St. § 7621c. To give this statute the construction asked for by the relator would be to render the purpose of the legislature in passing it nugatory. In view of the fact that a levy on personal property may involve the question of incurring additional costs by the sheriff after the filing of the bond and the issuing of the writ of error, as by feeding animals levied upon, or the loss of perishable property levied upon, if the levy is not vacated, we express no opinion upon the question of what the effect of the filing of a bond and issuing the writ of error would be upon a levy upon personal property. The writ of mandamus is denied, with costs. The other justices concurred.

LEONARD v. CITY OF DETROIT.

(Supreme Court of Michigan. March 11, 1896.)

HIGHWAYS—TITLE BY USER.

Plaintiff's house stood on the lot line, and her porch and steps projected several feet over a strip claimed as a part of a public avenue. The strip was originally inclosed by a fence, during which time plaintiff had acquired title by adverse possession. Plaintiff had removed her fence, as had all property holders on that avenue, at the request of defendant city. The porch and steps had never been removed, the traveled way of the street widened, nor the sidewalk disturbed. *Held*, that the city did not acquire the strip as a part of the avenue by user.

Appeal from circuit court, Wayne county, in chancery; George S. Hosmer, Judge.

Bill by Cornelia S. Leonard against the city of Detroit to quiet title. From a decree in favor of defendant, plaintiff appeals. Reversed.

Albert P. Jacobs, for appellant. John J. Speed, for appellee.

LONG, C. J. This bill is filed to quiet title to a strip of land 4 feet wide along the John R. street side of said lot, and to another strip 9.65 feet wide along the Miami avenue side, and which strips the city of Detroit asserts form a part of the street and avenue mentioned. The lot in question is owned in fee by the complainant, and has been in possession of complainant and her grantors for more than 50 years continuously. These strips of land are situate within the sidewalk line, and have been inclosed most of the time for 50 years by a fence about 50 inches in height. There were no inner fences, so that the outer fence upon either side inclosed these strips with complainant's lot. The house occupied by her has stood upon the lot for about the same length of time. The porch and steps therefrom extend over upon these strips. On the hearing in the court below a decree was entered in favor of complainant, quieting her title to the strip along John R. street, but refusing to grant the relief prayed for as to the strip along Miami avenue, and complainant appeals from that decree.

It would not be necessary to discuss the question of complainant's right to a decree to the Miami avenue strip as well as the John R. street strip upon the above state of facts, as the question would clearly fall within the opinion of this court in Flynn v. City of Detroit, 93 Mich. 590, 53 N. W. 815; but counsel for the city contends that upon the proofs contained in the record relative to the action of the common council in 1881, and the acquiescence of complainant therein, whatever rights in the Miami avenue strip she might have acquired prior to that time by such adverse possession she is now estopped from claiming, it having become a part of the public highway by user. It appears that on May 24, 1881, the common council of the city adopted a resolution directing the board of public works to notify the owners and occupants of the property on Miami avenue to remove all fences and other like obstructions in said avenue in front of their respective premises; that in compliance with such notice the complainant and others removed the fences on Miami avenue; and since that time, and for nearly 12 years before this bill was filed, it is contended the complainant has by such act acknowledged the claim of the city that the line of the street includes the premises in controversy; and that, though the traveled part of the street has never been

extended beyond its then limits so as to include this strip, yet by user it is now a part of the street. The reasons of the court below for refusing to quiet the title of complainant to the Miami avenue strip are not stated in the record, but we are satisfied that the court was in error in not quieting the title in this strip as well as of that along John R. street. Complainant's house stands upon the lot line, and her porch and steps project several feet over upon this Miami avenue strip; the porch and steps have never been removed; the traveled way has never been widened; the sidewalk has never been disturbed, so far as shown by this record. Aside from the removal of the fence, there is no evidence that the complainant intended to dedicate this strip for city purposes; but, on the other hand, it is quite apparent that no such dedication was intended, as the porch and steps have continued to occupy a portion thereof. The city has done nothing, except to order the removal of the fence along Miami avenue, nor has attempted to use any portion of this strip for the purposes of the city. We think it clear that the city has not acquired the right by user to claim this strip as a part of Miami avenue. The decree of the court below relative to this strip of land will be reversed, and a decree entered here removing the cloud from complainant's title thereto. The complainant will recover costs of both courts. The other justices concurred.

SIGLER v. SIGLER.

(Supreme Court of Michigan. March 11, 1896.)

SPECIFIC PERFORMANCE — PAROL CONTRACT AS TO LAND — STATUTE OF FRAUDS.

A parol contract by a husband with his wife, who was about to leave him, that she should take certain personal property of his, and that, in consideration, he should have the right to occupy for life certain rooms in the house they then occupied, title to which was in her, and that he should have the use of a grapery and barn on the rear of the premises, is taken out of the statute of frauds, so as to be entitled to specific performance; he having taken possession of the rooms, grapery, and barn, and abandoned possession of the other part, and she having left him in possession, and taken possession of the other part, and rented it, and taken the personal property.

Appeal from circuit court, Lenawee county, in chancery; Victor H. Lane, Judge.

Suit by Artimus Sigler against Jennie Sigler. Decree for defendant. Complainant appeals. Reversed.

The object of this bill is to enforce the specific performance of a contract relating to land. Complainant and defendant are husband and wife. They were married in June, 1884. He was a widower 61 years of age, and she was 20 years younger. He owned a homestead in the city of Adrian, worth about $3,000. He and his first wife had executed a mortgage upon it to his nephew in Cleveland, Ohio, for $5,000. He failed in mercantile business soon after his second marriage, and was in debt about $10,000. His stock of goods had been sold under a mortgage, and this homestead was all the property he possessed, except the household furniture situated therein. The bill sets forth that she harassed complainant by her repeated demands for a conveyance of this homestead to her; that he finally yielded to her demands to this extent; that it was agreed that she should pay $800 upon this mortgage, that he would pay the balance (amounting to $1,540.43), that the mortgagee should make an assignment of the mortgage to her, and that she should hold and keep it for their mutual benefit. This was done. She paid the $800, and the mortgagee, his nephew, took his note for the balance. The bill further alleges that she importuned him to have the mortgage foreclosed; that he finally yielded to her threats and importunities; and it was agreed that the mortgage should be foreclosed, the title taken in her name, that he would not redeem, and that the same should be their joint homestead, to be occupied, enjoyed, held, and owned by them together. This was done, and the title perfected in her; the amount of a foreclosure sale being the original amount of the mortgage and interest added. This was in 1886. They lived in and occupied the homestead as husband and wife until 1892, when she declared her determination to separate from him, and to sell or rent the property. The bill then alleges that it was agreed between them that she should take certain personal property, which was specified, and that, "in consideration thereof, he should have the right to live in, occupy, possess, and have, for and during his natural life, certain rooms, including a clothespress, in the rear upright part of the house, with the right of access to and from the same by way of a stairway leading thereto from a wood shed in the rear of the house, and also to have the use, possession, and occupancy of a grapery and barn situated upon the rear of the premises." It is further alleged that this agreement was carried out; that she took the personal property away, and sold some of it; that the remaining furniture was moved into those rooms, of which complainant took possession; that defendant then left him, and rented the other portion of the house. For two years complainant was left in the undisturbed possession of these rooms. The defendant, thereafter, insisting upon her legal title, brought suit to eject the complainant therefrom, and thereupon he filed this bill. Proofs were taken in open court, and the bill dismissed.

J. C. Winne and L. H. Salsbury, for appellant. Watts, Bean & Smith, for appellee.

GRANT, J. (after stating the facts). The learned circuit judge who heard the case filed a written opinion. He did not determine whether the last contract, as claimed by the complainant, was made. He held

that the foreclosure proceedings were with the assent of the complainant, who hoped thereby to protect his property, and to keep it, for himself and wife, beyond the reach of his creditors, and that, therefore, he had no right which he could enforce, either in law or equity, after the maturity of the title in defendant. He then disposed of the case upon the ground that, at the time the last agreement was claimed to have been made, both the parties were in possession; that, if there was any change of possession, it was a restriction of it, and not the giving of an additional possession; and held that it was ruled by a case in 47 Mich. The opinion does not state what case, and counsel for complainant assert that it was Murphy v. Stever, 47 Mich. 522, 11 N. W. 368. Counsel for defendant assert that the judge had in mind Peckham v. Balch, 49 Mich. 179, 13 N. W. 506. The opinion of the judge contains the following statement: "In view of her marriage relation, and what she had done there, I think that the complainant could rightly insist that the wife could not say that she had all the money there was in this property, because, evidently, from the testimony in this case, what was advanced by Mr. Sigler, the nephew, to Mr. Sigler, the complainant in this case, was a matter between himself and the nephew, and it would, in the law, be the same as though he had paid his own money for it. But the surrender of rights here was when he permitted the wife to take this mortgage, and take the foreclosure deed in her own name. That was the time when he lost right, and he has not, I think, made such a subsequent contract as would enable him to retain this real estate."

We do not regard it as important to determine under what arrangement the foreclosure proceedings took place. The parties continued to live there for some years afterwards. If any affection ever existed between them, which is very doubtful, they had evidently become thoroughly estranged from each other. She had determined to leave him, and did leave him. Both were in possession. He was aware that she intended to leave him. It was, therefore, entirely natural that some arrangement should be made to determine their rights in the future. If any arrangement was made, it is important to first determine what it was. He positively asserts the agreement, as set forth in his bill of complaint. She positively denies it. Had the circuit judge determined the question, we might very properly say that his determination should stand, since he was in better position to determine which told the truth. We must, however, determine the question without the benefit of the conclusion of the circuit judge. The situation of the parties is important. Complainant was old and feeble. He had lived in this homestead for 37 years. He had no other property, and no children. Defendant had invested but $800 in it. It is not reasonable to suppose that he would give her other property, to which she was not entitled, and abandon to her his homestead besides. She left him in the undisturbed possession for two years. One witness, a Mr. Doolittle, testified that he applied to her to rent the place, and that she then said that complainant "had part of it as his home there," and that he refused to take it for that reason. She at one time offered him $500 to leave the premises. We think the contract is established by a fair preponderance of the evidence.

We think, also, that there was such a part performance as takes the contract out of the statute of frauds, although it rested in parol. She had taken the personal property under the contract. He had taken possession of the rooms, grapery, and barn, and abandoned possession of the other part of the house. So far as the consideration to be paid by him was concerned, it was fully executed. It was also executed on her part, by leaving him in possession and taking possession of the other part, controlling and renting it. We do not think the case of Peckham v. Balch applies. It is rather controlled by Murphy v. Stever. Many authorities are cited by both parties, but we deem it unnecessary to refer to them. The rule is well established that part performance of a parol contract for an interest in lands is valid, and not within the statute of frauds, and that a court of equity will decree specific performance. An action at law for damages will not afford an adequate compensation. Complainant contracted for the possession of a part of his homestead as a place of shelter for the remainder of his life. He was entitled to the specific thing for which he had contracted and paid, and of which he was in possession. It was not necessary to tender to defendant the money she had invested. This is not a suit to set aside her title. It is conceded that she has the title, subject to a life estate in a part of the premises. The decree must be reversed, with the costs of both courts, and decree entered in this court for the complainant. The other justices concurred.

PEOPLE v. WHIPPLE.

(Supreme Court of Michigan. March 11, 1896.)

INTOXICATING LIQUORS—CRIMINAL PROSECUTION—JURISDICTION OF JUSTICE—EVIDENCE TO SHOW WANT OF JURISDICTION.

1. A complaint before a justice showed that it was made on complainant's information and belief only; but the warrant recited that the complaining witness "this day made complaint in writing and on oath," etc., and that, on examination of such complainant "by me, the said justice, it appears to me, the said justice, that said offense has been committed," etc. *Held*, that the supreme court could not say that there was no other testimony taken by the justice before the warrant was issued than that set out in the complaint, and that the justice did not have ju-

risdiction, in the absence of anything requiring such examination to be reduced to writing.

2. After the jury has been impaneled, the defendant cannot introduce testimony to show that the justice issuing the warrant did not have sufficient evidence to authorize its issuance, where there was evidence of an examination before the justice.

3. Where saloon keepers have a room in the same building, but disconnected with the saloon, in which liquors are sometimes sold and served, the keeping open of such room, and selling liquor therein, on the 4th of July, is a keeping open of such saloon, in violation of the law prohibiting saloons from being kept open on such day. People v. Cox, 38 N. W. 235, 70 Mich. 247, and People v. Ringsted, 51 N. W. 519, 90 Mich. 371, followed.

Exceptions from circuit court, Ingham county; Rollin H. Person, Judge.

Amos Whipple, impleaded with Edward Sedweek, was convicted of keeping their saloon open on July 4, 1895, in violation of law, and appeals. Affirmed.

E. D. Lewis and Jason E. Nichols, for appellant. Fred A. Maynard, Atty. Gen., and L. B. Gardner, Pros. Atty., for the People.

LONG, C. J. The respondents were prosecuted for keeping their saloon open on July 4, 1895. Respondent Whipple was convicted, and respondent Sedweek discharged, by order of the court. Respondents were the keepers of a saloon in the village of Williamston, under the firm name of Sedweek & Whipple, and, as such, sold spirituous and other liquors usually kept in saloons. The saloon was on the first floor of a building leased by them for that purpose. The rent of the entire building was paid from the joint proceeds of their business. On the lower floor, the front part was used as a cigar and tobacco room. Back of this was the saloon proper, and in a wing back of that was a room with tables for card playing and serving liquors. The upper part of the building is reached by back stairs, the foot of which is 10 or 12 feet distant from the rear door of the saloon. The rooms above were kept by the respondent Sedweek as living rooms, though his family did not reside there. On the morning of the 4th day of July, 1895, Sedweek went away, leaving the keys to the upper rooms with a man who had been rooming with him. During that day, respondent Whipple occupied these upper rooms, or some of them, and sold beer and other liquors therein to different parties, but closed the rooms up again before the return of Sedweek in the evening.

But one question need be discussed. It is contended that the justice had no jurisdiction to issue the warrant in the case, for the reason that the complaint, which was in writing, charged the commission of the offense solely upon information and belief. The complaint and warrant are returned here, but none of the other proceedings taken before the justice. The complaint recites that the complainant says "that he has been informed, and which information he believes to be true, and does believe, that heretofore, to wit," etc. There is no statement in the complaint that the complaining witness had any knowledge of the facts set up in the complaint as to the commission of the offense. The warrant recites that the complaining witness "this day made complaint in writing and on oath," etc. It was conceded upon the argument here by counsel that an examination was had before the justice. The information is set out in full, but whether the respondents pleaded to it the record does not show. After the jury were impaneled and after a witness had been sworn on the part of the people and the examination commenced, the record shows the following: "Respondents hereby renewing their motion to quash the information, and to discharge the respondents from further custody, for the reason that the justice acquired no jurisdiction to issue the warrant in this cause, in this: that the complaint was made upon information and belief, and that no other testimony was taken by the said justice before the issuing of said warrant, and that the complaining witness was not sworn other than the reading of the complaint to him, which he then signed, and being asked by the justice who put him under oath and swore him as to the contents of the complaint by him subscribed. Respondents then offered to prove by the justice that the complaining witness did not testify to anything outside of the facts set forth in the complaint, and that no other witnesses were called or sworn by him before the issuing of the warrant." Respondents then offered to call the complaining witness, and to show by him that he gave no testimony before the justice who issued the warrant other than swearing to the complaint, and that he only knew of the facts as therein set forth on information and belief, and that no other witnesses were produced and sworn before the issuing of the warrant. The court refused to receive this testimony, and overruled the objection.

The complaint, warrant, and information are set out in the record. We are unable to say from the record as presented that there was no other testimony taken by the justice before the warrant issued than that set out in the complaint. The warrant recites that, "on examination on oath of the said Jeremiah Nichols by me, the said justice, it appears to me, the said justice, that said offense has been committed," etc. It therefore appears that the justice, from such examination, was satisfied that an offense had been committed. It was not necessary that such examination on oath of the witness or witnesses be reduced to writing.

The court very properly excluded the evidence offered to show that no other testimony was taken. The record does not disclose whether the respondent pleaded to the information or not; but it does appear that the trial had proceeded so far that the jury

had been impaneled to try the cause, and it is admitted that the respondent had an examination in the court below. We know of no rule that would permit the respondent, at least at this stage of the case, to adduce testimony to show that the justice who issued the warrant did not have sufficient evidence before him to warrant his issuing a warrant of arrest.

It is contended, further, that the charge in the information is not supported by the evidence; that, from such proofs, it appears that the place where the liquors were sold was wholly unconnected with the saloon, and was not a saloon within the meaning of the statute. The case falls so clearly within the rule laid down in People v. Cox, 70 Mich. 247, 38 N. W. 235, and People v. Ringsted, 90 Mich. 371, 51 N. W. 519, that no further discussion of the question is necessary.

The offense was properly charged, and was fully supported by the evidence. Judgment affirmed. The other justices concurred.

FARROW v. BRESLER.

(Supreme Court of Michigan. March 11, 1896.)

CONTRACT—WHAT CONSTITUTES—MEETING OF MINDS.

Negotiations for the formation of a partnership between plaintiff and defendant's son resulted in the drafting of a written agreement by defendant, which was signed by the parties, and under which defendant agreed to contribute the cash capital for his son. Afterwards defendant sent a modified contract to plaintiff, for his signature, which plaintiff signed and returned as requested, at the same time suggesting a further modification, which was approved by defendant, but never embodied in the writing. Neither defendant nor his son did anything towards carrying out the partnership. *Held*, that both parties had assented to the writing as signed, and it constituted a contract, and that plaintiff was entitled to recover thereon from defendant for proper expenditures made in furtherance of its object.

Error to circuit court, Wayne county; Joseph W. Donovan, Judge.

Action by Edward S. Farrow against Charles E. Bresler. Judgment for defendant, and plaintiff appeals. Reversed.

Bowen, Douglas & Whiting, for appellant. Peter E. Park, for appellee.

LONG, C. J. The plaintiff in 1891 was interested in certain lands at Barnegat Park, N. J., and Arthur L. Bresler, the son of the defendant, was the owner of a military academy at Portsmouth, Ohio, which he was then managing. Negotiations were had between Arthur and the plaintiff with reference to establishing the academy in New Jersey, which led the plaintiff to forward to the defendant a map of Barnegat Park, on which was marked the land which was intended to be donated to the institution. The arrangement between Arthur and the plaintiff seems to have been that the plaintiff should contribute the land at Barnegat Park for the purposes of a military academy, and that Arthur should contribute the academy at Portsmouth, and that each should pay, in equal proportions, the necessary cash for the erection of the institution and the conduct of the same. These facts were written by the plaintiff to the defendant, but the cash capital was not fixed in this letter. In answer to this proposition, defendant wrote a letter to the plaintiff, in which he acknowledged the receipt of the letter and map, but objected to the terms offered by the plaintiff, as not fair, and, after some further remarks, made a proposition that the plaintiff should donate the necessary land to the institution, and that the cost of the building, which might be $28,000, should be equally divided between the plaintiff and Arthur; the plaintiff paying his half in cash, and Arthur applying upon his half what his institution at Portsmouth and its good will was reasonably worth, and the plaintiff to manage the financial matters entirely. The letter closes as follows: "When you agree on this suggestion, the balance then due from my son will be paid by me." Soon after this, and about September 8, 1891, the plaintiff, at the request of defendant and his son, came to Detroit, and there an agreement in writing was made between plaintiff and Arthur. This agreement appears to have been dictated by the defendant, and written out by Arthur, and is as follows: "Edward S. Farrow and Arthur L. Bresler make the following agreement: That they will both form an equal copartnership to establish and maintain a naval academy at Barnegat Park, N. J., at a cash basis or capital stock of $25,000; that each will furnish half of the capital. Edward S. Farrow to pay $12,000 in cash. Arthur L. Bresler to give half of his plant and good will of the Ohio Military Academy, now established and maintained at Portsmouth, Ohio, in lieu of $6,000, and to pay $6,500 in cash. The expenses of the removal of the Ohio Military Academy from Portsmouth, O., to Barnegat Park, N. J., to be paid equally between both parties. This copartnership is to exist for ten years, unless sooner dissolved by mutual consent. Both parties, by mutual consent, to be at liberty to take any steps towards furthering the interests of the copartnership and the naval academy. Edward S. Farrow. Arthur L. Bresler." Plaintiff contends that, at this meeting in Detroit, defendant again promised him, orally, to pay Arthur's share of the cash capital. After this agreement was made, plaintiff returned to New Jersey, and, in a few days thereafter, received a letter from defendant calling attention to an error in the contract, and inclosing a contract in duplicate to correct this error; requesting the plaintiff to sign one, and return the same to him, and keep the other himself. This plaintiff did. The letter from defendant which accompanied this second contract states: "In the contract, the way it was made out, only one-half of Arthur's school is ceded into the

copartnership, so that he retains one-half unaccounted for. Now, I would suggest a capital of $30,000, when Arthur puts in his whole plant, as agreed, for $12,000, and pays $3,000 as his half, and you put in the equal amount of $15,000 in cash, which would balance correctly. * * * By reading the old contract, you will readily perceive the mistake." The second contract signed by the plaintiff is as follows: "Edward S. Farrow and Arthur L. Bresler make the following agreement: That they will both form an equal copartnership to establish and maintain a naval academy at Barnegat Park, N. J., at a capital basis at present of $30,000; that each will furnish half of the capital. Arthur L. Bresler to give his whole plant and good will of the Ohio Military Academy, as now established and maintained at Portsmouth, Ohio, in lieu of $12,000, and to pay $3,000 in cash. Edw. S. Farrow to pay $15,000 in cash. The expenses of the removal of the Ohio Military Academy from Portsmouth to Barnegat Park to be paid equally by both parties. The necessary lands for the academy at Barnegat Park to be donated by Edward S. Farrow, and to be owned equally by both parties. This copartnership is to exist for ten years, unless dissolved sooner by mutual consent. Both parties, by mutual consent, to be at liberty to take any steps towards furthering the interests of the copartnership and the naval academy. Arthur L. Bresler. Edward S. Farrow." Plaintiff, in returning this contract, wrote to defendant that he would go ahead with the erection of the barracks, and that the defendant might remit on account of Arthur's contribution. In the same letter, plaintiff suggested that the capital stock be increased to $37,000, so that the cash contribution on the part of the defendant might be more than $3,000, as plaintiff estimated to erect a more expensive institution. In reply to this letter, defendant wrote the plaintiff, signifying his willingness to increase the capital stock to $37,000. It was also suggested that it might be turned into a stock company. He then stated, "I will always be ready to contribute, when necessary, the colonel's share,—ay, and even more, when it shall appear to me for the benefit of the copartnership." This suggestion to increase the capital stock was never carried out, and the second articles of copartnership were never modified in any way. The plaintiff proceeded to erect the barracks, and to make the necessary arrangements to construct a military academy. He expended some $900 in grading the grounds, procuring materials, paying salaries and traveling expenses, etc. He procured a deed for the necessary lands to be donated to the copartnership, leaving only the name of second party blank until it should be agreed in what name the title should stand, and claims that he stood ready and willing to contribute the $12,000 in cash, or as much as was necessary to advance the copartnership interests, and to contribute one-half the necessary moneys to remove the Ohio academy to Barnegat Park. Before the proposed removal took place, the Portsmouth academy became run down, and after that time nothing was done by Arthur or the defendant in carrying out the terms of the contract with the plaintiff. This action is brought against the defendant, upon his promise to pay Arthur L. Bresler's proportion of the cash capital to the copartnership; and it is claimed that by reason of such failure the partnership collapsed, and plaintiff lost by it the advances made by him.

The court below directed a verdict in favor of the defendant, upon the ground that the minds of the parties never met; that the propositions made by the respective parties never culminated in an agreement between the plaintiff and the defendant as to what amount, or under what circumstances or conditions, the defendant was to pay for Arthur's share in the enterprise. The court below apparently placed his ruling upon the ground that the plaintiff, in his letter returning the corrected contract, suggested that the capital be increased to $37,000. It will be noted that this was simply a suggestion, which was never acted upon; but, upon the contrary, the plaintiff, in the same letter, stated, "I acquiesce in the suggestion in the contract." He signed and returned the contract as requested by Mr. Bresler, and asked him to remit on account of Arthur's share. We think the minds of the parties met when this second contract was signed; that is, that the agreement was then fully consummated upon which Mr. Bresler, the defendant, was to pay the share of his son Arthur in the contract. This he had agreed to do in his letters, as before stated. The court below was in error in holding that the minds of the parties did not meet. The proposition was in writing, and duly accepted by the plaintiff. The terms were clear and explicit, and there is no part of the agreement left in doubt. The judgment should have been for the plaintiff. Judgment is reversed, and a new trial granted. The other justices concurred.

MARKEY et al. v. COREY.

(Supreme Court of Michigan. Dec. 31, 1895.)

NEGOTIABLE INSTRUMENTS — INDORSER — TRANSFER BY ASSIGNMENT.

1. The writing on the back of a note by the payee, when transferring the same, of an assignment, above his signature, in the following form, "I hereby assign the within note to * * *," does not exclude or affect his liability thereon as indorser.

2. Where a note provides that it is given in accordance with the terms of a certain contract, its negotiability is not destroyed, though the contract provides that the series of notes of which it is one should be payable, at the option of the payee, on failure to pay any of them.

Error to circuit court, Wayne county; Willard M. Lillibridge, Judge.

Action by Matthew M. Markey and Catherine Sundars against Lorenzo Corey, impleaded with others. Judgment for plaintiffs, from which defendant Corey appeals. Affirmed.

Edgar Weeks (Moore & Moore, of counsel), for appellant. Ervin Palmer, for appellees.

LONG, J. Defendant Corey entered into a written contract with Waldo and Varney for the sale of certain personal property at the sum of $2,500, payable $200 the first year, $500 the second, and $600 each year thereafter, until the whole amount should be paid, according to five promissory notes executed at the same time. The contract also provided that certain stock should be deposited by the purchasers as further security for the payments. It was then provided: "But in case said payments shall not be made as above provided, and in case either or any should remain unpaid for the period of ninety days, then the party of the first part shall, at his option, have the right to declare the whole remaining amounts represented by said notes to have become due and payable." On the face of each of the promissory notes was written: "This note is given in accordance with the terms of a certain contract under the same date, and between the same parties." Subsequently the plaintiffs received from defendant Corey an assignment of all his right, title, and interest in and to the contract, stock, and notes. On the back of the note in suit was indorsed, "I hereby assign the within note to Matthew M. Markey and Catherine Sundars." This $500 note was not paid, and was protested, and the plaintiffs brought this suit upon it against Waldo and Varney as makers, and Corey as indorser. The declaration was upon the common counts in assumpsit, with a copy of the notes attached. On the trial, however, the court permitted the plaintiffs to amend the declaration by averring the assignment of the contract and notes. The case proceeded to trial, and plaintiffs' counsel offered in evidence the note and indorsement of assignment on it, together with the certificate of protest. Defendant's counsel objected to their introduction as against defendant Corey, claiming (1) that the note in question was not a promissory note, and that plaintiffs could not recover upon it against Corey as indorser, but that, if they took any title to it, it was under the assignment; (2) that the contract was evidenced by the note and the other writing,—the contract of sale. Plaintiffs' counsel then put in evidence, under objection, the contract of sale. The court thereupon directed a verdict in favor of plaintiffs for the amount of the note and interest, from which judgment defendant Corey alone appeals.

It is insisted here, by counsel for defendant Corey: (1) That, if the plaintiffs took title to the note, it was under the assignment, and that, therefore, they could not sue in their own names, but, if they had a right of action, it must be brought in the name of the original parties to the contract; (2) that the two papers must be taken as constituting the contract, and that the note was not, therefore, a promissory note; (3) that Corey, by making the assignments to the plaintiffs, was not the indorser of the note, and could not be held liable as such.

The usual mode of transfer of a promissory note is by simply writing the indorser's name upon the back, or by writing also over it the direction to pay the indorsee named, or order, or to him or bearer. An indorsement, however, may be made in more enlarged terms, and the indorser be held liable as such. In Sands v. Wood, 1 Iowa, 263, the indorsement was, "I assign the within note to Mrs. Sarah Coffin." In Sears v. Lantz, 47 Iowa, 658, the indorsement on the note was, "I hereby assign all my right and title to Louis Meckley." And in each case the party so assigning was held as indorser, the court in the latter case saying of Sands v. Wood: "He used no words that, in and of themselves, indicated that he had bound or made himself liable in case the maker, after demand, failed to pay the note. But it was held the law, as a legal conclusion, attached to the words used the liability that follows the indorsement of a promissory note." See, also, Duffy's Adm'r v. O'Conner, 7 Baxt. 498; Shelby v. Judd, 24 Kan. 166; Brotherton v. Street (Ind. Sup.) 24 N. E. 1068. The rule of the American cases is well stated in Daniel on Negotiable Instruments (section 688c) as follows: "The question arising in such cases is a nice one, and depends upon rules of legal interpretation. The mere signature of the payee, indorsed on the paper, imports an executed contract of assignment, with its implications, and also an executory contract of conditional liability, with its implications. The assignment would be as complete by the mere signature as with the words of assignment written over it. The conditional liability which is executory is implied by the executed contract of assignment, and the signature under it, which carried the legal title; and the question is, does the writing over a signature an express assignment, which the law imports from the signature per se, exclude and negative the idea of conditional liability, which the law also imports if such assignment were not expressed in full? We think not. * * * When the thing done creates an implication of another to be done, we cannot think that the mere expression of the former in full can be regarded as excluding its consequence, when that consequence would follow if the expression were omitted." The language used in the assignment to the note in suit does not negative the implication of the legal liability of the assignor as indorser, and as the words are to be construed, as strongly as their sense will allow, against the assignor, he must be held as indorser. This rule is fully supported in Hatch v. Barrett, 34 Kan. 230, 8 Pac. 129. See, also, Adams v. Blethen, 66

Me. 19. In the case of Aniba v. Yeomans, 39 Mich. 171, the assignment read as follows: "I hereby transfer my right, title, and interest of the within note to S. A. Yeomans." Mr. Justice Marston said in that case: "The right or interest passing, therefore, under the usual and customary indorsement, is much greater than the mere right, title, and interest of the payee; and when the transfer, as made, only attempts to pass the title and interest of the payee of the note, no greater right or interest than he then held can pass." In other words, the learned justice seemed to think that the words used limited the transfer to the right and title he then held. While this holding appears to be at variance with the cases elsewhere, we think it readily distinguishable from the present, as here the words are, "I hereby assign the within note to Matthew M. Markey and Catherine Sundars," and do not purport to limit the liability of Corey as an indorser. In Stevens v. Hannan, 86 Mich. 307, 48 N. W. 951, the note sued upon was negotiable in form, and made payable to Batchelder, and he assigned it before maturity, as follows: "For value received, I hereby assign all interest in and to this note to Ralph E. Watson." Defendant insisted in that case that the plaintiff could not sue in his own name, but should have sued in the name of the payee. It was said by Mr. Justice McGrath: "I do not think the point well taken. If Bachelder's indorsement did not affect its negotiability, then Watson's indorsement entitled the plaintiff, as holder of the note, to sue in his own name." It must be held, therefore, that the memorandum on the note did not relieve Corey from his liability as indorser.

The court was not in error in admitting the contract in evidence, as its purpose was to show that the note was not in fact limited by its provisions, and those provisions of the contract cited did not destroy the negotiability of the note. Daniel, Neg. Inst. § 48. The judgment must be affirmed. The other justices concurred.

KENNEDY v. DETROIT RY.

(Supreme Court of Michigan. Feb. 26, 1896.)

STREET RAILWAYS—RIGHTS OF ABUTTING PROPERTY OWNERS—LOCATION OF TRACKS.

1. Abutting property owners may require that a street railway be built in the center of the street, if possible, as required by the ordinance granting the company permission to lay its tracks upon the street.

2. A city ordinance authorized a street-railway company to lay its track along A. street to B. street, thence along B. street to the head of C. street, thence along C. street, and required that the tracks be laid in the center of the street. B. and C. streets intersected at a very acute angle, thereby leaving the thoroughfare at their junction, and until the eastern street lines of the two streets intersected, considerably wider than either of the two streets. The street beyond the intersection was known as B. street, and in an ordinance providing for the paving of B. street the entire thoroughfare beyond the intersection, to its full width, was treated as B. street. *Held*, that the tracks were to be located in the center of the thoroughfare caused by the intersection, and could not be placed on the center line of C. street extended.

Appeal from circuit court, Wayne county, in chancery; Joseph W. Donovan, Judge.

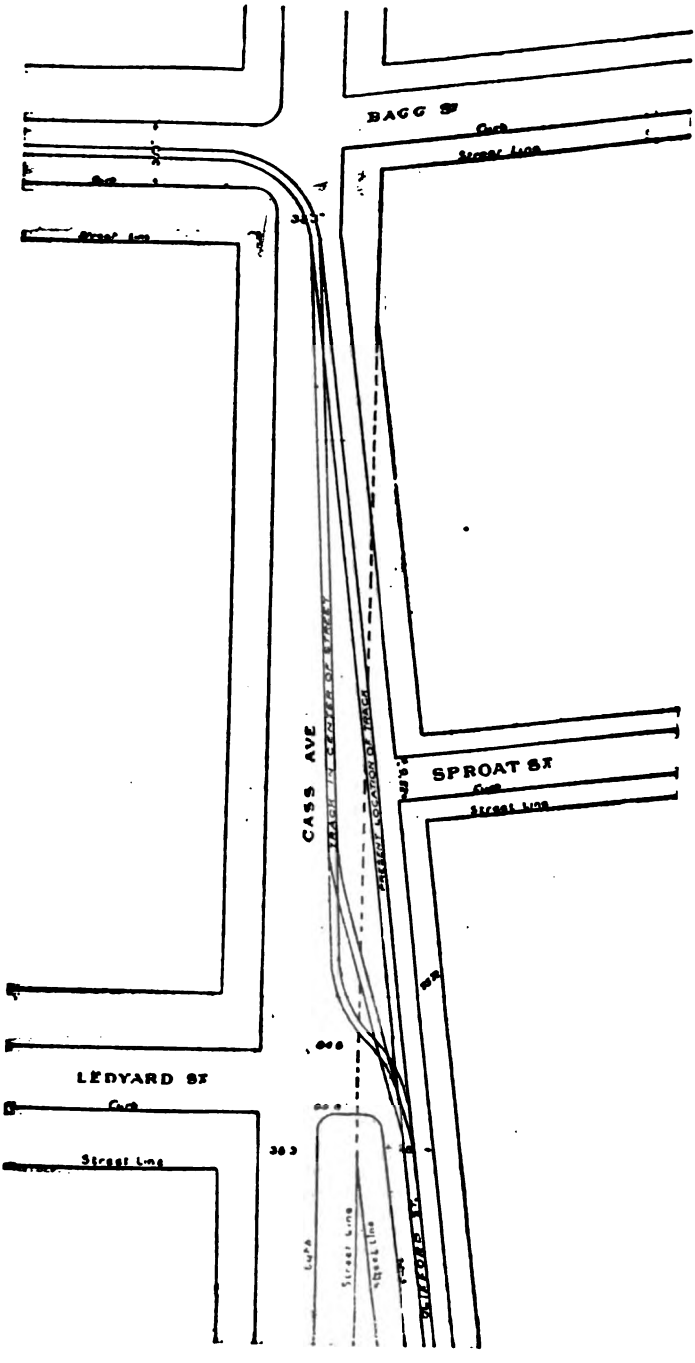
Action by Pemelia Kennedy against the Detroit Railway. There was a decree for defendant, and plaintiff appeals. Reversed.

Henry M. Duffield, for appellant. Charles Flowers and John B. Corliss (H. H. Hatch, of counsel), for appellee.

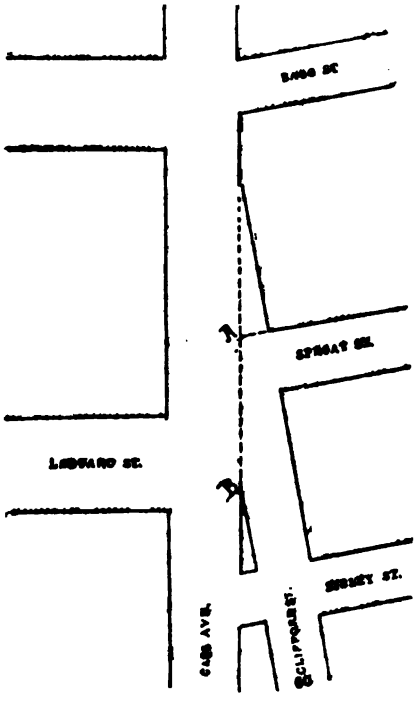
MONTGOMERY, J. The defendant was authorized by an ordinance of the common council of the city of Detroit, approved by the mayor, to construct and operate street railways in the streets of said city of Detroit therein described, among them the following: "A double track in, along, and upon Fourteenth street, from the northerly city limits to Bagg street; thence a single track, in, along, and upon Bagg street, easterly to Cass avenue; thence, in, along and upon Cass avenue, southerly to the head of Clifford street; thence, in, along, and upon Clifford street, to the intersection of Henry street." Henry street is the street next south of Sibley street. The ordinance further provides (section 3): "The railways in said streets shall be laid in the center thereof, if single track, * * * and the gauge of the track shall be 4 feet 8½ inches." The complainant, on the 17th of June, 1895, filed a bill setting up that she was the owner of premises having a frontage on Cass avenue, that the width of Cass avenue opposite complainant's premises was about 82 feet; that it is entirely practicable for defendant to construct its track down Cass avenue to Clifford street, along the middle of Cass avenue, with a single slight curve opposite Ledyard street; that, if constructed on such line, it would be at least 35 feet from the center of the track to the curb; that the company was proceeding to construct its track so that, in front of complainant's property, it would come within 9 feet of the curb. The bill averred that, if so constructed, it would result in great damage to complainant, that the ordinance did not justify such construction, and prayed an injunction. The answer admits that, under the ordinance, it is the duty of defendant to construct its track in the center of streets over which it is to operate its road, but denies that Cass avenue is 82 feet in width in front of complainant's premises, and avers that "that portion of the road which complainant calls Cass avenue is, in effect, a continuation of Clifford street, although for convenience it has been designated as Cass avenue." The answer also denies that it is practicable for defendant to construct its track along Cass avenue to Clifford street in the middle of said avenue by making a curve opposite Ledyard, but

avers that such a construction would require the placing of an additional curve, would be a great interference with travel on said street, and would mar the beauty of said street. The appended map will illustrate the situation, showing the method of constructing a track in the center of the street, and track as constructed by defendant.

The proofs were taken informally, and some question is made whether complainant's title is sufficiently shown; but we think enough appears, particularly as it is manifest that the case turned below entirely upon the questions of the feasibility of the route in the center of the street, and the proper location of the head of Clifford street, within the meaning of the ordinance. We think it is



clearly established that the line in the center of the street is practical, and, this being established, it is the right of abutting owners to insist that that line be adopted. There can be no doubt that, in many instances, a street railway opposite the property of an abutting owner is, in fact, an inconvenience; nor do the cases denying compensation proceed upon the idea that this is not so, but rather rest upon the doctrine that such use is fairly contemplated in the original dedication, and that any injury which results from such use is damnum absque injuria. The important question is whether the street in front of complainant's premises is 82 feet wide. Defendant's contention is that Clifford street really extends to the east end of Sproat street, and that that portion of the open space in front of complainant's premises, equal in width to Clifford street further west, is a distinct street, and that it is a compliance with the terms of the ordinance to place the track in the center of this street. The map given below will aid to an understanding of defendant's contention. It appears from the evidence of the city surveyor that Cass avenue is the eastern limit of Cass Farm, and, as it was dedicated to the public, its eastern limit was indicated by the dotted line given below, and the city engineer draws the conclusion from this that that portion of the thoroughfare north of the southern boundary of Ledyard street which lies east of the dotted line was originally part of Clifford street.



By an ordinance passed in 1876, the common council changed the name of Clifford street, north of Sproat street, to Cass avenue; and defendant's contention is that, now, Clifford street extends to the north line of Sproat, and that it is to be treated as a street 66 feet in width to this point. But we do not discover that any of the part west of the dotted line was ever a part of Clifford street. It would result, then, that the head of Clifford street is to be treated either as the space between the dotted line and the northeast corner of Sproat street, at its intersection with Cass and Clifford, or that the dotted line from the point A to the point B is to be treated as the head. It is quite evident that the common council could not have intended that the track should be laid in the center of the space between point A and the east curb of the street, as this space is so small as to make it impracticable. If the line between A and B is to be considered as the head, it is evident that the line must be placed considerably farther east than its present location; but, as before stated, it is evident, on actual inspection, that there is but one street in front of complainant's premises, and there is strong evidence to show what was meant by the council by the designation of the head of Clifford street. In 1889, the council let a contract for paving Cass avenue from the north curb line of Ledyard street to the south curb line of Warren street, and included in that space was that part east of the dotted line. In 1893 a contract was let for paving Clifford street, and the northern terminus of this pavement was the south line of Ledyard street. In addition to this, it appears that the street in front of complainant's premises is known as "Cass Avenue," and the buildings are numbered as on Cass avenue. We are satisfied that, when the council described the route of defendant's road "along Bagg street easterly to Cass avenue; thence, along Cass avenue, southerly, to the head of Clifford street; and thence, along Clifford street, to the intersection of Henry street," that by the head of Clifford street was intended the point where that street, in its full width, terminated, and where it had been paved to, viz. the south line of Ledyard street.

The complainant moved promptly, and the defendant has persisted in laying its track, notwithstanding complainant's protest and prompt assertion of her rights. The decree will be reversed, and a decree entered in accordance with the prayer of the bill. Complainant will recover costs of both courts. The other justices concurred.

GILLETT et al. v. KNOWLES.

(Supreme Court of Michigan. March 11, 1896.)

PAROL EVIDENCE — SALE OF LAND — ACTION FOR PURCHASE PRICE—SURRENDER OF SECURITIES.

1. Plaintiff sold to defendant a farm which was to be paid for in part by deeding to plaintiff certain land which defendant represented as worth a certain sum, and defendant agreed that, if it was not worth said sum, he would pay the difference between it and its actual value. The

deed to the farm was left with the scrivener, to be held until defendant executed a paper agreeing to make good any such deficiency. Afterwards defendant obtained said deed without leaving the agreement. The land was not of the value represented. *Held*, in an action to recover the unpaid purchase price, that plaintiff could show by parol the agreement to pay said deficiency.

2. One who receives, in part payment of the price of land, a note and mortgage executed by a third person, is not precluded from recovering from the vendee, without surrendering said mortgage, that part of the purchase price represented by said note and mortgage, on proof that the mortgage is worthless and that the mortgagor is insolvent.

Error to circuit court, Hillsdale county; Victor H. Lane, Judge.

Action by Joel H. Gillett and another against Ezra S. Knowles to recover the unpaid portion of the purchase price of certain land. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

F. A. Lyon (Watts, Bean & Smith, of counsel), for appellant. J. R. Sutton, E. J. March, George A. Knickerbocker, and F. H. Stone, for appellees.

MOORE, J. The first count of the declaration filed in this case is in assumpsit, to recover an alleged unpaid portion of the purchase price of certain real estate sold by the plaintiffs to the defendant. The second count is also in assumpsit, and describes the manner in which the consideration for said real estate should be paid, as follows: "A mortgage of $1,300 then upon said land, and the sum of $400 at the date of said conveyance, and the conveyance by said defendant to said plaintiffs of a certain parcel of land situate in the county of Mason, state of Michigan, containing forty acres, for the sum of $500, provided said last-mentioned land was worth that sum, and the said defendant promised and agreed that, if the said last-mentioned land should not be worth $500, the said defendant would make that amount good to said plaintiffs, and pay them the difference between the value of the land and the said $500, and the balance in equal annual payments of $100, with interest at seven per cent. * * * And the said plaintiffs aver that the said land, situated in Mason county, was not worth the sum of $500, but was worth a much less sum, to wit, the sum of $50. And the said defendant has hitherto altogether refused, and still does refuse, to pay to said plaintiffs the difference between $50, the real value of said land, and the sum of $500, the alleged value of said land as above stated, and has refused, and still does refuse, to pay the said money in this count mentioned, or any part thereof, to said plaintiffs." The common counts were added. Plaintiffs' bill of particulars is as follows: October, 1886, for unpaid price of land sold and conveyed by said plaintiffs to said defendant, $2,000; October, 1886, for balance due to plaintiffs for land sold and conveyed to defendant, $1,700. The plea of the defendant was that of the general issue, with notice that the statute of limitations had run. The case was tried by a jury, who rendered a verdict for $1,534.85 in favor of the plaintiffs. Defendant appeals.

The record discloses that in 1886 the plaintiffs, who were old and ignorant people, sold a farm in Jackson county to defendant for $3,000, defendant to pay an incumbrance upon it of $1,300, and to pay $400 down, and the balance in yearly payments of $100, with interest at 7 per cent. After the sale was agreed upon, the defendant proposed to deed to plaintiffs, as a part of the consideration for the farm, a piece of land in Mason county, which neither of them had seen, which defendant represented as worth $500, and, if the land was not worth the $500, he would pay to the plaintiffs the difference between its real value and $500, and the balance should be paid $100 yearly, with interest at 7 per cent. In the afternoon they all went to the office of Justice Riggs, where a deed was executed by the plaintiffs to the defendant of the Jackson county farm. Knowles did not have a description of the Mason county land with him, but it was agreed that he would leave a description with Riggs, so that plaintiff Joel H. Gillett could go and look at the lands; that Knowles was to pay half of his expenses; and that, if the lands were not worth $500, he would make up the deficiency as stated. The deed from the Gilletts to Knowles was to be left with Justice Riggs, not to be delivered until Knowles left a paper agreeing to make good any deficiency in the value of the Mason county lands if they were not worth $500, and a warranty deed of them. Knowles paid $200 down, and afterwards, in the absence of Justice Riggs, left with his wife what purported to be a deed of the Mason county lands, but which contained only a warranty against all lawful claims whatever since the party of the first part came into possession, but did not leave the paper agreeing to make good the deficiency, if there was any, and took away the deed from the Gilletts to him. Gillett afterwards went to look at the Mason county land, and found it nearly, if not quite, a worthless pine barren. On his way home, he found Knowles taking possession of the Jackson county farm, and claims he forbade his doing so; that Knowles told him if he would let him in possession, and would come down to his place, he would fix it up all right. He let Knowles into possession, and afterwards went to Knowles', and threw out to Knowles the deed of the Mason county lands and a slip with a memorandum of his expenses in going to see them, and told him how worthless the lands were. He was informed by Knowles that he would have nothing to do with the northern lands, and Knowles went off, and left Gillett, who then picked up the papers, thinking they would aid him in bringing about a settlement. Instead of giving his note for the balance of the payments he was to make, Knowles first persuaded Gillett to

take what was known as the "Fuller Note," and then arranged to withdraw the Fuller note as a payment, and to turn out to him, instead of Knowles' own notes, an interest, amounting to $956, in a note and mortgage given by one Blanchard, upon which the payments became due, $100 yearly, with interest at 7 per cent. Knowles represented to Gillett that this was a first mortgage, and was first class, and that Knowles' object in asking Gillett to take this mortgage and note was to save the necessity of giving his own obligation. The mortgage was never assigned to Gillett, though the note, which was payable to bearer, was delivered to him, and was in his possession when the suit was brought. This mortgage was a second mortgage. The prior mortgage was foreclosed in 1888, and, in answer to a special interrogatory, the jury found that the land described in this mortgage was not worth any more than the first mortgage at the time that Gillett got such interest as he obtained in the Blanchard mortgage. Defendant, in addition to the $200 first paid, made payments amounting to $115. Defendant claimed these payments were made on the Blanchard mortgage. Plaintiff denied that he had ever received a dollar on the Blanchard mortgage, and the jury evidently found with him. Col. March gave evidence tending to show that Blanchard was entirely irresponsible. It is a somewhat significant fact that Knowles, though present throughout the trial, was not called as a witness.

It is claimed by defendant that there was not as much due at the time verdict was rendered, in any possible view of the case, as the amount of the verdict. We think this is not true if the jury adopted the plaintiffs' theory of the case, which they evidently did.

The admission of any testimony as to the agreement of defendant to make good any deficiency in the value of the Mason county lands is assigned as error, because not in writing, and within the statute of frauds. In support of this contention, the case of Warnes v. Brubaker (Mich.) 65 N. W. 276, is cited. We do not think that case governs this. There the negotiations to trade were finally reduced to writing, which was accepted by the parties. Here one of the parties obtained by misrepresentation the delivery of a deed to him, without leaving at the same time an indemnity paper and a warranty deed, as he had agreed to do; and, when Gillett found what had been done, he repudiated the Mason county deed, and attempted to return it to Knowles. Suppose Knowles had agreed to leave with Justice Riggs $1,000 in money before the Gillett deed was delivered to him, and, representing to Mrs. Riggs that an envelope left with her contained a check for that amount to Mr. Gillett, had succeeded in getting the deed, when in fact the envelope contained nothing; would it be claimed that Mr. Gillett could not sue for the $1,000? We do not think this position is well taken.

It is claimed that there could be no recovery of any portion of the amount represented by the Blanchard note and mortgage, because the Blanchard note had not been returned when suit was brought. This view is sustained by Coolidge v. Brigham, 1 Metc. (Mass.) 547; Estabrook v. Swett, 116 Mass. 303. In Dayton v. Monroe, 47 Mich. 194, 10 N. W. 196, Justice Campbell held: "We do not understand that there is any rule requiring a defrauded party to give up the personal unsecured obligation of those who defraud him, as a condition of suit for the fraud. It is one of the documents which may be necessary, as it was here, to prove the false representations which were indorsed on the note itself. By surrendering this, plaintiff would have lost the most important item of proof which he possessed." This case was followed in Stubly v. Beachboard, 68 Mich. 414, 36 N. W. 192. The authorities are all agreed that, if the note is worthless, it need not be returned before suit is brought. See Estabrook v. Swett, supra.

The security evidenced by the Blanchard mortgage, given to secure this note, had been cut off by the foreclosure of a prior mortgage. Five annual payments on the note were past due, and no payments were made on it. Evidence was given tending to show that Blanchard was insolvent, and had left the state. The learned trial judge instructed the jury that, unless they found the Blanchard note and mortgage were both worthless, then there could be no recovery as to them. In view of this charge, the jury must have found the note and mortgage were both worthless in order to render the verdict they did. The record does not disclose any material error. The judgment is affirmed, with costs. The other justices concurred.

SHICKLE-HARRISON & HOWARD IRON CO. v. CITY OF RAPID CITY et al.

(Supreme Court of South Dakota. March 7, 1896.)

APPEAL — MOTION TO DISMISS — ORDER TO SHOW CAUSE—HEARING.

1. Under rule 23 of this court, a motion to dismiss an appeal can only be made on the motion day of the circuit from which the appeal comes, when the grounds of the motion are that the original papers were not transmitted to this court before the commencement of the term, or that the abstract and brief were not served within the time prescribed by the rules of this court.

2. But the court, by that rule, has reserved to itself the right in special cases to grant an order to show cause, when, in the opinion of the court, the facts stated will authorize such an order; and in such case the same may be heard at a day in the term other than that specified in the rule.

(Syllabus by the Court.)

Appeal from circuit court, Pennington county; William Gardner, Judge.

Action by the Shickle-Harrison & Howard Iron Company against the city of Rapid City and others. Judgment for plaintiff, and defendants appeal. Motion to dismiss. Denied.

Wood & Buell, for appellants. Charles W. Brown (Crawford & De Land, of counsel), for respondent.

CORSON, P. J. This is a motion to dismiss the appeal in this case, and for a modification of the judgment of the circuit court. This motion was made on February 15, 1896. From the affidavit of counsel for respondent it appears that the appeal was taken on July 23, 1895, and that appellants failed and neglected to cause the original papers to be filed in this court prior to the October term, 1895, and that the appellants neglected to serve brief and abstract as required by the rules of this court. Appellant's counsel object to the consideration of the motion, for the reason that the motion was not made either on the first day of the October term or the motion day for the Seventh circuit, as provided by rule 23 of this court, the first clause of which is as follows: "All motions except as hereinafter provided shall be heard upon the motion day of the circuit from which the case comes, in which such motion is made." We think this objection is well taken. The only reason stated by the respondent why this motion was not made at the proper time is that the original papers were not forwarded to this court by appellant, and that the same were forwarded and filed in this court on February 5, 1896, and at the expense of the respondent. But this cannot be regarded as sufficient cause for relieving the respondent from the application of the rule. When the appellant failed to serve its abstract and brief in time, the respondent could have caused the original notice of appeal and undertaking given thereon, or certified copies, to be filed in this court, and made the motion at the proper time. The court, by rule 23, has reserved to itself the right in special cases to grant an order to show cause, when, in the opinion of the court, the facts stated will authorize such an order; and in such case the same may be heard at a day in the term other than that specified in the rule. But such an order to show cause will only be granted when there are special reasons why the motion could not have been made at the proper time. As all the facts now appearing as to the grounds of its motion were known to the respondent in time to have made the motion on the motion day of the Seventh circuit, the motion is made too late for the present term, and it must, therefore, be denied, but without prejudice to another motion, made at the proper time; and it is so ordered.

SPARKS v. STURGIS CREAMERY CO.

(Supreme Court of South Dakota. March 7, 1896.)

Appeal from circuit court, Meade county; A. J. Plowman, Judge.

Action by P. E. Sparks, receiver of the Western Bank & Trust Company, against the Sturgis Creamery Company. Judgment for plaintiff. Defendant appeals. Motion to dismiss denied.

Wesley A. Stuart (Estes & Lambert, of counsel), for appellant; Chas. C. Polk (Horner & Stewart, of counsel), for respondent.

PER CURIAM. This is a motion to dismiss the appeal in this case, and the motion was made on February 18, 1896. The grounds of the motion and the facts connected therewith are similar to those stated in Iron Co. v. City of Rapid City, 66 N. W. 499. The motion not having been made on the motion day for the Eighth circuit, and no good cause having been shown why it was not made at the proper time, the motion must, for the reasons stated in the above case, be denied, without prejudice; and it is so ordered.

HUNTINGTON v. MEYER.

(Supreme Court of Wisconsin. March 10, 1896.)

MORTGAGES—FORECLOSURE—LIS PENDENS—DECREE—COLLATERAL ATTACK—LIEN.

1. A judgment rendered in an action to foreclose a mortgage, in which a lis pendens was not filed within the time required by Sanb. & B. Ann. St. § 3187, though irregular, is good on collateral attack.

2. Sanb. & B. Ann. St. § 2905a, providing that a decree affecting real estate shall be a lien only from the time it is docketed, does not apply to a judgment foreclosing a mortgage, since it does not create a lien, but enforces the lien created by the mortgage.

Appeal from circuit court, Grant county; George Clementson, Judge.

Action of ejectment by Mary Huntington against William Meyer, Sr. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Beebe, for appellant. B. F. Huntington, for respondent.

CASSODAY, C. J. This is an action of ejectment to recover possession of lots 1 and 2, in block K, of Rountree's Eastern addition to Platteville, commenced December 21, 1893. The plaintiff claims title under and by virtue of a judgment of foreclosure and sale of a mortgage covering the lots mentioned and other lands, executed by N. H. Virgin and wife, January 19, 1881, to John Huntington, to secure the payment of $500 and interest, and which mortgage was duly recorded in the register's office about the time it was so given. On the back of that mortgage there was an assignment of that note and mortgage to the plaintiff, executed by the executor of John Huntington, deceased, whose authority to act as such was duly proved. There is no question but what title was shown to be in N. H. Virgin at the time of executing the mortgage. Some time prior to March 2, 1886, the plaintiff commenced an action in the circuit court for Grant county to foreclose that mortgage against N. H. Virgin, Emma V. Laughton, and Jonathan Evans, as assignee of Isaac Hodges. The several defendants each made default, and the cause was referred, to ascertain and report the amount due. The referee reported, and the report was confirmed March 2, 1886,

and thereupon the usual judgment of foreclosure and sale was rendered by the court, and entered of record. The defendants in such foreclosure having failed to redeem, the two lots mentioned were sold to the plaintiff on such foreclosure sale, and such proceedings were had thereon that September 23, 1893, a sheriff's deed, duly executed, was issued thereon to the plaintiff of all the interest which N. H. Virgin and wife had in the two lots mentioned at the time of executing the mortgage, and the sheriff's report of sale was confirmed by the court November 2, 1893. The defendant claims title under and by virtue of a certain attachment commenced by one Isaac Hodges against N. H. and H. H. Virgin, constituting the firm of N. H. Virgin & Son, February 11, 1884. Some time after that action was commenced Hodges made a general assignment for the benefit of his creditors to J. H. Evans, and thereupon Evans, as such assignee, was substituted as plaintiff in the attachment suit. Such attachment suit was before this court in different forms. Evans v. Laughton, 69 Wis. 138, 33 N. W. 573; Evans v. Virgin, 69 Wis. 148, 33 N. W. 585; Id., 69 Wis. 153, 33 N. W. 569; Id., 72 Wis. 423, 39 N. W. 864. Such proceedings were had in the attachment suit that judgment was recovered therein March 2, 1886; that execution was issued thereon, and the two lots in question levied upon and sold thereon to J. B. McCoy, November 5, 1887; that the sheriff's certificate of sale was thereupon issued to McCoy, and a sheriff's deed issued thereon to McCoy, May 1, 1893, and that deed was recorded the next day; that May 9, 1893, McCoy and wife conveyed said lots by quitclaim deed to W. H. Beebe; that August 22, 1893, Beebe and wife conveyed the same by deed to the defendant, who claims the title under such attachment proceedings. At the close of the trial the court found as matters of fact, in effect, that the plaintiff had been the owner in fee and entitled to the possession of the two lots mentioned ever since November 2, 1893, and that ever since that time the defendant had unlawfully withheld the possession, to the plaintiff's damage in the sum of $7.25, and that the allegations of the answer were untrue. As conclusions of law the court found that the plaintiff was entitled to the relief demanded in the complaint, and for judgment establishing her right to the possession, and for damages and costs. From the judgment entered thereon accordingly the defendant brings this appeal. Both parties claim title from N. H. Virgin. It will be observed from the foregoing statement that the plaintiff in the attachment suit under and by virtue of which the defendant claims title was defendant in the foreclosure suit under which the plaintiff claims title. Since the mortgage was executed and recorded a long time prior to the commencement of the attachment suit, there can be no question but what the plaintiff has the paramount title if the foreclosure proceedings were sufficient to vest title in her as against the defendant.

1. The principal objection to such foreclosure proceedings is that no "notice of the pendency of the action" was filed in the register's office as required by the statute. Sanb. & B. Ann. St. § 3187. That statute declares, in effect, that in an action "for the foreclosure of a mortgage, such notice must be filed twenty days before judgment, and must contain the date of the mortgage, the names of the parties thereto, and the time and place of recording the same. * * * From the time of such filing * * * the pendency of such action shall be constructive notice thereof to a purchaser or incumbrancer of the property affected thereby." The failure to file the notice as thus required was undoubtedly an irregularity which would have reversed the judgment had there been an appeal therefrom. Flood v. Isaac, 34 Wis. 423. The manifest object of the statute is to provide constructive notice to any purchaser or incumbrancer of the property affected thereby. Where such purchaser or incumbrancer has actual notice, he cannot be prejudiced by such omission; nevertheless, the omission is an irregularity. Accordingly, it has been held that where a defendant in ejectment conveys the land in controversy, pending the suit, to one having full knowledge thereof, although no notice of lis pendens was filed, such grantee takes subject to the litigation, and can avail himself of no statute of limitations which was not available to such original defendant. Wisconsin Cent. R. Co. v. Wisconsin River Land Co., 71 Wis. 94, 36 N. W. 837. Since the mortgage was recorded long prior to the attachment suit, it is manifest that no one claiming title only under the execution sale could be a bona fide purchaser as against the mortgage, or acquire any right in the land superior or paramount to the mortgage. The only apparent advantage which such bona fide purchaser could obtain by virtue of the omission to file the notice of lis pendens in the foreclosure action was the right to redeem from the mortgage, notwithstanding the foreclosure and sale. But such right to redeem could only be exercised by a bona fide purchaser. To constitute such bona fide purchaser, there must not only be an absence of notice, but also an actual payment of the consideration, or a fixed liability therefor. Nix v. Wiswell, 84 Wis. 343, 54 N. W. 620; Prickett v. Muck, 74 Wis. 206, 42 N. W. 256; and the cases cited in those opinions. It does not appear from the record before us that the defendant, or his grantor, Beebe, or McCoy, was such bona fide purchaser; and, besides, the question of such right to redeem is not here involved. Hodson v. Treat, 7 Wis. 263. True, the statute required the notice of lis pendens in the foreclosure suit to be filed 20 days before the judgment, but that did not prevent the court from taking jurisdiction, either of the parties to that action or the subject-matter of that action; nor did it deprive

the court of jurisdiction to enter judgment in that action. This court has expressly held that a judgment of foreclosure of a mortgage, entered without proof of the filing of such notice, is irregular, but not void; and a motion to vacate it on that ground must be made at the same term. McBride v. Wright, 75 Wis. 306, 43 N. W. 955. Here the attack is entirely collateral to the foreclosure action, and hence could only be successful on the ground that the court was without jurisdiction to render judgment in that action. But the court did have jurisdiction, and hence the judgment, as here presented, cannot be treated as a nullity.

2. Counsel cite the statute which declares that: "A judgment or decree affecting real estate shall only be a lien from the time it is actually docketed." Laws 1885, c. 200, § 2; Sanb. & B. Ann. St. § 2905a. It is only necessary to say that a judgment of foreclosure and sale does not create a lien, but merely enforces a lien previously created by the mortgage itself; and hence the statute cited has no reference to such a judgment, except as to any deficiency. We perceive no error in the record. The judgment of the circuit court is affirmed.

12 Wis 477

MAHLER et al. v. BRUMDER.

(Supreme Court of Wisconsin. March 10, 1896.)

DEDICATION — REVOCATION — CUL DE SAC — EASEMENT—STREETS—ENJOINING OBSTRUCTION.

1. Where the public authorities refuse to approve a plat dedicating a street to public use, or to recognize the street, in the absence of a public user equivalent to an acceptance the intended dedication is revocable, as to any part of such street, at the pleasure of the proprietor and abutting owners.

2. The fact that a way is a cul de sac does not prevent its becoming a public street by user.

3. Under Rev. St. § 2204, providing that no covenant shall be implied in any conveyance of real estate, only such easements pass with a conveyance as are appurtenant to the property conveyed, by being necessarily connected with its use and enjoyment.

4. An owner of land platted it into lots, designating a strip in the center, connecting with a public street at one end, and terminating within his own land at the other, as a street or "Place," and a number of the lots fronted on this place. The city authorities refused to accept his plat or recognize the street, but he improved and graded the same, and sold lots thereon. *Held* that, while the owner of a lot fronting on such place had the right to use it for access to his property from the public street, he had no right in that portion of it beyond his lot, towards the closed end, and no standing to enjoin its inclosure. Winslow and Marshall, JJ., dissenting.

Appeal from circuit court, Milwaukee county; Frank M. Fish, Judge.

Action by Jacob and Hattie Mahler against George Brumder to enjoin the obstruction of an alleged street. Judgment for plaintiffs, and defendant appeals. Reversed.

Howard & Mallory, for appellant. Miller, Noyes, Miller & Wahl, for respondents.

CASSODAY, C. J. Grand avenue runs east and west in Milwaukee. The next street north of it is Wells street, which is parallel with Grand avenue, and 486 feet from it. Washington avenue (now Twenty-Seventh street) runs north and south, and crosses those two streets at right angles. In 1883, Van Valkenburgh became the owner of all the land between Wells street and Grand avenue, from Washington avenue east for a distance of a little more than 385 feet. The land was then open and unplatted. Thereupon Van Valkenburgh platted the same with lots fronting on Grand avenue, Washington avenue, and Wells street. There was also designated upon the plat a street or roadway 46 feet wide, and running east from east line of Washington avenue 300 feet, and named thereon "Washington Place." The north line of "Washington Place," so called, was and is 210 feet south of the south line of Wells street, and the south line of Washington Place was and is 230 feet north of the north line of Grand avenue, and several lots fronted on Washington Place from either side of it; but that plat did not mention nor refer to Twenty-Sixth street, which was not then in existence, and was not established nor laid out until several years afterwards. Van Valkenburgh thereupon submitted such plat to the common council of the city for acceptance, but they declined to accept of the same, and notified him to that effect. Nevertheless, he graded and graveled the street, and put in gutters and wooden curbing and plank sidewalks, and sold lots fronting thereon. April 12, 1894, the plaintiff, Mrs. Mahler, acquired title to one of the lots fronting thereon through several mesne conveyances, the first being a deed from Van Valkenburgh to Murray, June 21, 1884, each and all of which deeds described the land as commencing at a point on the north line of Washington Place, 130 feet east of the east line of Washington avenue; thence east, along said north line of Washington Place, 40 feet, to a point; thence north 105 feet, to a point; thence west 40 feet, to a point; thence south 105 feet, to place of beginning. November 18, 1889, the city resolved to open Twenty-Sixth street, and for that purpose Van Valkenburgh conveyed that portion thereof east of the defendant's premises, hereinafter described, to the city July 12, 1892. Some time prior to the acts complained of, the defendant acquired title derived from Van Valkenburgh, in 1884 and 1886, through several mesne conveyances, to two lots, each fronting on the east 100 feet of Washington Place, and each running back therefrom 105 feet, and also acquired title, derived from Van Valkenburgh, May 23, 1887, through several mesne conveyances, to the east one-third of Washington Place, being that portion of Washington Place between the two lots he acquired as above mentioned, and also a strip 3 feet wide and 256 feet long between said lots and Washington Place on the west, and Twenty-Sixth street on the

east. The plaintiffs concede that, before they obtained their lot in question there was a wire fence entirely across Washington Place, 200 feet east of Washington avenue, and parallel with that avenue, being 30 feet east of the east line of the plaintiffs' lot; that, after they acquired such title as indicated, they tore down that wire fence; that some time afterwards the defendant caused a second fence to be built on the same line where the wire fence had stood, and which last fence was constructed of heavy plank cedar posts and clapboards, which last fence the plaintiffs cut down and removed; that two weeks afterwards the defendant rebuilt the same upon the same line, and of similar materials; that thereupon, and on November 5, 1894, the plaintiffs commenced this action in equity to abate and remove said fence as a nuisance, and to enjoin and restrain the defendant from constructing and maintaining such fence. The defendant answered by way of admissions, denials, and counter allegations to some of the facts as stated and others to be stated. At the close of the trial, the court found, in effect, some of the facts stated, and also, in effect, that Washington Place, and the whole thereof, was a public road or highway, and that such fence was a nuisance therein, and ordered judgment abating the same, and perpetually enjoining the defendant from constructing or maintaining such fence. From the judgment entered thereon accordingly, the defendant brings this appeal.

1. The finding of the trial court to the effect that that portion of Washington Place east of the fence mentioned had been a public road or highway ever since 1883 is contrary to the undisputed evidence. As indicated, the city, in 1883, expressly refused to accept the plat with Washington Place designated thereon as a street. There is no claim or pretense that Washington Place, so designated on that plat, extended east to any street or roadway, public or private. On the contrary, it is undisputed that its east end, as designated on that plat, terminated on lands then owned wholly by Van Valkenburgh, and that his land extended still further east for a distance of more than 85 feet. So it is undisputed that, for nearly seven years prior to the time when the plaintiffs obtained their lot, Van Valkenburgh and his grantees of the land abutting upon that portion of Washington Place east of the line where the fence is so located, by conveyances and otherwise, treated that portion of Washington Place as private property, to which neither the public nor any other parties or persons had any right, title, or interest; and the city not only refused to accept the same as a public road or street, as mentioned, but compelled the owners thereof to pay assessments thereon as private property, for opening, grading, and improving Twenty-Sixth street; and there is no evidence that that portion of Washington Place east of the line of that fence was used by the public during any portion of such seven years as a road or street, public or private. The law is well settled that, to constitute a public street or highway by dedication, there must not only be an absolute dedication,—a setting apart and a surrender to the public use of the land by the proprietors,—but there must be an acceptance and a formal opening thereof by the proper authorities, or a user which is equivalent to such acceptance and opening. Holdane v. Trustees, 21 N. Y. 474; Fonda v. Borst, *41 N. Y. 48; Bridge Co. v. Bachman, 66 N. Y. 261; People v. Underhill, 144 N. Y. 324, 39 N. E. 333; Connehan v. Ford, 9 Wis. 240; Hanson v. Taylor, 23 Wis. 547; Eastland v. Fogo, 66 Wis. 133, 27 N. W. 159, 28 N. W. 143. Obviously, there was no such acceptance or user; and hence it was competent for the proprietors and abutting owners to revoke the same, and they did revoke the same. Holdane v. Trustees, 21 N. Y. 474. We must hold that the portion of Washington Place upon which such fence was located never became a public road or street, nor did any portion thereof east of the line where that fence was located become such public road or street.

2. As to the portion of Washington Place west of the line of that fence, it may be otherwise. It appears that in 1891 and 1892 Van Valkenburgh obtained certain adjudications to the effect that certain tax certificates on that portion of Washington Place west of the fence were void, for the reason that the same was a public road or street, and hence exempt from taxation. Since that portion of Washington Place opened directly upon the public avenue at its west end, it may be that, under the authorities, it was not precluded from being a public street or road by the mere fact that it was and is a cul de sac. Moll v. Benckler, 30 Wis. 584; Schatz v. Pfeil, 56 Wis. 429, 14 N. W. 628; Moore v. Roberts, 64 Wis. 538, 25 N. W. 564; People v. Kingman, 24 N. Y. 559; Elliott, Roads & S. p. 1, and cases there cited. Assuming that that portion of Washington Place west of the fence is a public road or street, yet that would not make the fence a public nuisance; and, even if it were, still that would not give the plaintiffs, as private citizens, a right of action to abate the same, for it is well settled that, to entitle a private party to maintain an action to abate a public nuisance, it must appear that he has suffered some special or peculiar damages, differing, not merely in degree, but in kind, from that which is deemed common to all. Zettel v. West Bend, 79 Wis. 316, 48 N. W. 379; Hay v. Weber, 79 Wis. 591, 48 N. W. 859; Evans v. Railway Co., 86 Wis. 603, 57 N. W. 354. Such being the law, it is obvious that the right of the plaintiffs to maintain this private action is no greater nor less by reason of Washington Place in front of their lot being regarded as a public road or street, or merely as a private road or street. In other

words, the only ground upon which the plaintiffs can expect to maintain this action, if at all, is that, as owners of the lot mentioned, the fence is as to them a private nuisance.

3. It must be admitted that the only rights the plaintiffs have in or upon Washington Place, differing in kind from the rights of the public, they acquired under and by virtue of the deed of the lot which they received April 12, 1894. That deed, like the deed from Van Valkenburgh to Murray of the same lot, 10 years before, and all intervening deeds, described the lot by metes and bounds, and located the south line of the lot as running along and upon the north line of Washington Place; and yet, by reason of Van Valkenburgh's plat, recognized in the deeds, it may be, and for the purposes of this case we assume, what is most favorable to the plaintiffs, that, under the adjudications of this court, their lot extends to the center of Washington Place. Pettibone v. Hamilton, 40 Wis. 402; Norcross v. Griffiths, 65 Wis. 599, 27 N. W. 606. Such rights of the plaintiffs, having been acquired by the deed, are necessarily measured by the language of the deed. Godd. Easem. (Bennett's Ed.) 314; Comstock v. Van Deusen, 5 Pick. 163; Miller v. Washburn, 117 Mass. 371; Fischer v. Laack, 76 Wis. 313, 45 N. W. 104. Since the deed recognizes the plat, it must be construed with reference to the plat. Id. In the case at bar there was no covenant or agreement in any of such deeds, or at all, that Washington Place or any part of it should remain open for the use or benefit of such grantee, or at all; and our statute, unlike the law in some states, expressly declares that "no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not." Section 2204, Rev. St.; Ferguson v. Mason, 60 Wis. 383, 19 N. W. 420. The rights of the plaintiffs are based upon the grant with reference to such plat, and nothing more. "When an incorporeal right of such a nature is created by grant," says a learned author, "the question whether it is or is not appurtenant to land depends upon the nature of the right and the intention of the parties creating it. In order to make such a right appurtenant to land, the right must be in its nature an appropriate and necessary adjunct of the land conveyed, having in view the purposes for which the land is conveyed; and the conveyance must show the parties intended the right to be made appurtenant to the land conveyed." Washb. Easem. (4th Ed.) 8, 9. "Nothing will pass as an easement to a dominant estate, although it may have been used with it, unless a right thus to use it has become consummate, and thereby made appurtenant to the granted premises, or is expressly mentioned in the deed conveying the same as an easement intended to be conveyed thereby." Id. p. 41. Another learned author is equally explicit: "A right of way appurtenant to a dominant tenement can be used only for the purpose of passing to or from that tenement. It cannot be used even by the dominant owner for any purpose unconnected with the enjoyment of the dominant tenement; neither can it be assigned by him to a stranger, and so be made a right in gross; nor can he license a stranger to use the way when he is not coming to or from the dominant tenement." Godd. Easem. 321; Ackroyd v. Smith, 70 E. C. L. 164; Thorpe v. Brumfitt, 8 Ch. App. 650. A right not connected with the enjoyment or use of a parcel of land granted cannot be annexed as an incident to that land, so as to become appurtenant to it. Linthicum v. Ray, 9 Wall. 241. "A thing is appurtenant to something else," said Field, J., "only when it stands in the relation of an incident to a principal, and is necessarily connected with the use and enjoyment of the latter." Humphreys v. McKissock, 140 U. S. 313, 314, 11 Sup. Ct. 779. Upon the principles stated, the plaintiffs, under and by virtue of their deed of the lot mentioned, and as incident to the grant, acquired the right to use Washington Place so far as the same was appurtenant to their lot, and to freely pass over the same to and from their lot and the public avenue on the west; and this right included the right of all persons having occasion to go to or from the premises of the plaintiffs. This is equally true of those owning lots abutting upon Washington Place east of the plaintiffs' lot, as well as such abutting owners south and west of their lot. But, as indicated, such rights of the plaintiffs did not, under the facts and circumstances stated, give them any right to remove the fence mentioned, nor to break into the defendant's premises on land not appurtenant to their lot. Had Washington Place, as originally platted, connected with any public street or roadway on the east, a different question would have been presented. The views expressed are abundantly supported by authority as well as reason. Badeau v. Mead, 14 Barb. 328; Cox v. James, 59 Barb. 144, 157, affirmed 45 N. Y. 557; Speir v. Town of Utrecht, 121 N. Y. 429, 24 N. E. 692; People v. Underhill, 144 N. Y. 316, 39 N. E. 333; Langmaid v. Higgins, 129 Mass. 353; Pearson v. Allen, 151 Mass. 79, 23 N. E. 731.

4. Besides, the case is not one calling for equitable interference. Equity should not be successfully invoked merely to inflict injury or damage to the defendant, without securing any substantial right or benefit to the plaintiff. Attorney General v. Nichol, 16 Ves. 338; Railway Co. v. Ward, 2 Black, 485.

The judgment of the circuit court is reversed, and the cause is remanded, with direction to dismiss the complaint.

WINSLOW, J. (dissenting). There are a few well-established legal principles which seem to me to call for affirmance of this judgment. These principles I shall briefly state: (1) It is now well settled that a cul

de sac may be a highway. Elliott, Roads & S. p. 1, and authorities cited; Bartlett v. City of Bangor, 67 Me. 460; Schatz v. Pfeil, 56 Wis. 429, 14 N. W. 628. (2) When a landowner surveys and plats land and sells lots with reference to such plat (as here), there results an immediate and irrevocable dedication of the streets marked on the plat, which is binding on both vendor and vendee. 2 Dill. Mun. Corp. (3d Ed.) § 640, and authorities cited in note 2; Donohoo v. Murray, 62 Wis. 100, 22 N. W. 167, citing and approving Bartlett v. City of Bangor, supra. (3) The purchaser's right extends to have all the streets remain open which were marked on the plat, and he may enforce such right. 2 Dill. Mun. Corp., supra; Elliott, Roads & S. p. 112, and cases cited in note. (4) This right is based upon the principle of estoppel, and not upon the doctrine of grant or covenant. The grantor is estopped from denying the existence of the indicated ways, because it is presumed that the indicated ways add value to the lots, and that the purchaser paid such added value. Elliott, Roads & S. p. 113. (5) This right extends equally to a way which is a cul de sac. The purchaser has the right to have the entire cul de sac kept open, and not merely that part which is necessary for his use in reaching some other highway. Thomas v. Poole, 7 Gray, 83; Rodgers v. Parker, 9 Gray, 445; Fox v. Sugar Refinery, 109 Mass. 292. (6) The enjoyment of such a right will be protected by injunction. 2 Story, Eq. Jur. (12th Ed.) §§ 926, 927. Believing these propositions to be unassailable, I cannot agree with the conclusion reached on this case.

MARSHALL, J. I concur in the foregoing dissenting opinion by Mr. Justice WINSLOW.

BENTLEY et al. v. ADAMS et al.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

MECHANICS' LIENS—COMPLETION OF CONTRACT—REPEAL BY IMPLICATION—LANDLORD AND TENANT—WHEN RELATION EXISTS.

1. A building contract provided that all payments to the contractor should be made on certified statements of the architects, who were employed to supervise the construction of the building at a compensation of 5 per cent. of its cost, and that final settlement should be made on their certificate, showing completion of the contract according to specifications. *Held* that, as the last act required of the architects was to give a final certificate of satisfactory construction, their time for filing a lien for services did not begin to run until the performance of such act.

2. Rev. St. § 3314, provided that a lien for improvements should attach to the real property of any person on whose premises the improvements were made, etc. Laws 1887, c. 466, declared that the provisions of section 3314 should not be considered as giving a lien where the relation of landlord and tenant existed. Subsequently section 3314 was revised by Laws 1887, c. 442, and Laws 1889, c. 275, and the provisions of chapter 446 were omitted. *Held*, that this did not repeal, by implication, chapter 446, since the latter was an independent act.

3. Laws 1887, c. 466, declaring that Rev. St. § 3314, which provides for a mechanic's lien on the real property of any person on whose premises the improvements are made, shall not give a lien when the relation of landlord and tenant exists, does not apply to a case where landowners contract with a person to construct a building for them on their land, though coupled with an agreement that such person shall occupy the premises as a tenant for a definite term.

Appeal from superior court, Milwaukee county; J. C. Ludwig, Judge.

Consolidated actions by Thomas R. Bentley and others against John Quincy Adams and others to foreclose mechanics' liens. From a judgment for plaintiffs, defendants appeal. Affirmed.

On the 1st day of September, 1890, John Quincy Adams and others, appellants, were the owners in fee, though in trust, of lots 11 and 12, block 17, in the Third ward of the city of Milwaukee, and as such owners, being duly authorized thereto, they entered into a contract with Frederick W. Montgomery, by the terms of which they demised said premises to him for the term of 99 years. By the terms of the contract, Montgomery stipulated and agreed to erect on the premises, according to plans and specifications of Andrews, Jacques & Rantoul, architects, a building, to cost not less than $115,000, completed and ready for occupancy by July 1, 1892, free from all liens; the building to be the property of the appellants. Montgomery further stipulated to pay an annual sum, mentioned, as rent for the use of the premises and improvements. The parties were mentioned in the contract as lessors and lessee. It contained appropriate stipulations and agreements to bind Montgomery to pay and discharge all claims and liens for the construction of the building, and to protect the appellants and save them harmless from the same. It was further stipulated in the contract that Montgomery, after the construction of the building, should have the right to sublet the same. Pursuant to the obligations of the contract, on the 30th day of December, 1891, Montgomery contracted with Thomas R. Bentley, one of the plaintiffs, for the construction of the building mentioned, according to plans and specifications made by Andrews, Jacques & Rantoul; and it was specially provided in such building contract that all payments to the contractor should be made on certified statements of the architects, and that final settlement should be made on the certificate showing completion of the building in all respects according the plans and specifications. The architects were employed to supervise the construction of the building as contemplated by the Bentley contract, and it was agreed that their compensation should be 5 per cent. of the cost of such building. Montgomery failed to pay, in full, the contractor, Bentley, or said architects, and failed to pay several other persons who performed work, labor, and services, and furnished material, in the construction of the building. On the 4th day of May, 1893, Montgomery assigned all his interest in the premises to the defendant Amer-

ican Realty Company, and thereafter said realty company, with Montgomery, incurred some indebtedness, which was not paid, in the completion of the building; and thereafter, on the 23d day of November, said realty company, on notice, and because of failure to pay rent accrued, surrendered the property to appellants, and the Montgomery lease or contract was canceled. About the same time appellants gave to Montgomery an option to acquire the property by purchase. At the time of the surrender to appellants, as above set forth, the several lien claimants, whose claims were adjudged in this action, existed, and the lien petitions were then substantially all on file. Those not then filed were soon afterwards. Two actions were brought to foreclose the liens, and such proceedings were had that all the lien claimants united in this action, and their rights were adjudicated by the court, and the decree entered herein. The court found, among other things, that the architects were entitled to a lien from the time they commenced work on the plans, which was some time before the commencement of the building; also found that the time for filing their lien did not expire till their work was completed by the giving of the final certificate, as provided in the building contract; also found that all of the lien claimants were entitled to liens upon the interest of the appellants, the owners of the fee, as well as upon the interest of the said Montgomery and the said American Realty Company. To each of the findings specially mentioned exceptions were filed. Judgment was rendered in accordance with such findings, from which judgment this appeal was taken.

Winkler, Flanders, Smith, Bottum & Vilas and Nath, Pereles & Sons, for appellants. Miller, Noyes, Miller & Wahl, J. A. Eggen, and A. J. Elmermann, for respondents.

MARSHALL, J. (after stating the facts). It is insisted on the part of the appellants that the claim of the architects was not filed in time, and this turns upon when their work was completed. According to the evidence, the last actual service which they rendered was when they visited the premises the first week in June, 1893. At that time the building was not completed to their satisfaction. They pointed out various defects which they required the contractor to remedy as a condition precedent to their giving him a final certificate, as provided in the contract. The compensation of the architects was fixed at 5 per cent. of the total cost of the building, and the last act required of them was to give a final certificate of satisfactory construction in compliance with the contract. If the time for the filing of their petition commenced to run from the time they last performed actual services in the first week of June, 1893, then such petition was not filed in time. If it did not commence to run till the completion of their contract by final inspection and the giving of the final certificate, then their petition was filed in time. Their contract was entire. They were not entitled to recover their percentage on the cost of the building, except upon a full compliance with its requirements by final inspection, and the giving of the final certificate of satisfactory construction. Therefore, their services continued till the performance of the final act required of them, unless sooner discharged. It follows, therefore, that their lien petition was filed in time.

The trial court, under section 3314, which provides that the lien shall attach to and be a lien on the real property of any person on whose premises such improvements are made, such owner having knowledge thereof and consenting thereto, adjudged all the claims to be liens upon the right, title, and interest of the appellants in the real estate. They had the fee title at the time of the commencement of the building, and the court held that the liens attached to such title. This is claimed to be error, upon the ground that under section 3314, Rev. St., and chapter 466, Laws 1887, the right to a lien on the interest of appellants does not exist, because of the fact, as they allege, that the relation of landlord and tenant existed between them and Montgomery, and, later, between them and the American Realty Company, who incurred the indebtedness. Chapter 466 provides as follows: "Section 1 of chapter 349 of the Laws of 1885 and the act of 1887, amendatory thereof, shall not be considered as giving a lien where the relation of landlord and tenant exists." On the part of respondents, it is claimed that the law of 1887 was repealed by subsequent revisions of section 3314, Rev. St., to wit, by the revisions contained in chapter 442, Laws 1887, and chapter 275, Laws 1889,—this upon the ground that chapter 466 became a part of section 3314, and that when the section was subsequently revised, and the provisions of chapter 446 were omitted, that operated to repeal it. The law is well settled that all provisions of a former section not found in a revised section are repealed. State v. Ingersoll, 17 Wis. 631; Goodno v. City of Oshkosh, 31 Wis. 127; State v. Keaough, 68 Wis. 135, 31 N. W. 723, and other cases cited by counsel. In all these cases the part held to have been repealed formed a part of the section in its original state. The question is clearly presented in State v. Keaough. By chapter 58, Laws 1885, a clause was added to section 997 of the Revised Statutes, in the following language: "Section 997 of the Revised Statutes is hereby amended by adding to the end thereof the following." This section being afterwards revised, and the part added by the law of 1885 omitted, it was held that the part omitted was repealed. The difficulty of applying the rule above stated is that chapter 466 is an independent act. It did not add anything to, or take anything from, section 3314, but provided that the language used therein should not be construed to give a lien where the relation of landlord and

tenant exists. The subsequent revision of the section did not change the language to which chapter 466 referred, and there is nothing to show any legislative intent to repeal such chapter. It by no means necessarily follows that the revision of a section, or the enactment of a new one covering the subject-matter and embracing new provisions, works a repeal by implication of an existing independent act. Whether such revision or new act has that effect depends upon the legislative intent. If it is clear that the purpose of the new act is merely to continue the former, and to have it embrace additional provisions, that will be the effect given to it. Gilkey v. Cook, 60 Wis. 133, 18 N. W. 639. By reference to chapter 442, Laws 1887, we find that the revision of section 3314 then made was merely to extend the privileges of the lien law to architects and surveyors; and by reference to chapter 275, Laws 1889, it will be seen that the only purpose of that revision was to extend the privileges of the lien law so as to cover building as well as repairing fences, and to cover "the making or repairing of any walk or curbing upon land, irrespective of any easement on or over the land." The sole purpose of the two revisions was to make the changes indicated, and to continue the law as before, with such changes, and not to repeal or change any other act on the subject. Hence, the conclusion is reached that chapter 466, Laws 1887, is still in force.

It follows, from the foregoing, that it is essential to determine the scope of chapter 466. The "relation of landlord and tenant" mentioned in the section obviously means such relation, as commonly known and legally recognized. It was not intended to include all cases where the parties may see fit to contract, designating themselves as "lessor" and "lessee." The "relation of landlord and tenant," strictly so called, and in the sense in which the term is used in the statute under consideration, is merely the relation which exists between two parties for the possession of lands or tenements by one in consideration of a certain rent to be paid therefor to the other. Tayl. Landl. & Ten. § 14; Bouv. Law Dict. p. 4. It follows, from the foregoing, that, notwithstanding the contract between appellants and Montgomery is called by the parties a "lease," and they are designated therein, respectively, as "lessors" and "lessee," the relation existing between them was something more than is contemplated by the term "relation of landlord and tenant." It contemplated the construction of a building by the so-called lessee on the land of the so-called lessors, for their benefit. They were to become owners of the property. If an owner can free himself from the operation of the lien law by merely making a contract having some of the elements of a "lease," strictly so called, designating the owner of the land as "lessor" and the contractor who is to build the building as "lessee," a very convenient method would exist by means of which such law can effectually be nullified. Chapter 466 was not intended to apply to a case where a person contracts with another to build a building for such person on his land, though coupled with an agreement that such other shall occupy the premises as tenant of such person. Where persons bear such relation to each other, they are clearly within the meaning of the statute which gives a lien "upon the real estate of any person upon whose premises the improvements are made, such owner having knowledge thereof and consenting thereto." Lumber Co. v. Mosher, 88 Wis. 672, 60 N. W. 264. It follows, from the foregoing, that the part of the judgment of the superior court appealed from must be affirmed. The part of the judgment of the superior court appealed from is affirmed.

BLUM et al. v. VAN VECHTEN.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

GARNISHMENT OF RECEIVER.

A receiver, appointed in an action brought by one partner to wind up and administer the affairs of an insolvent firm, cannot be garnished by a firm creditor without leave of the court which appointed him.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Action by Julius Blum and others against Charles Hochstadter and another, for the recovery of a money demand, and against Peter Van Vechten, garnishee. From an order dismissing the action as to the garnishee, plaintiffs appeal. Affirmed.

On the 24th of December, 1894, Simon Dittenhoefer filed his complaint against Charles Hochstadter in the circuit court for Milwaukee county, setting up that Dittenhoefer, the plaintiff, and the defendant, Hochstadter, were, and for a considerable time had been, copartners in keeping a clothing store or stores, and the selling of ready-made clothing, hats, caps, and furnishing goods, stating the terms of said partnership; that they owned and operated two stores, one at St. Paul, Minn., and one at Milwaukee; that they then had in their possession at said cities a large and valuable stock of goods, and valuable good will and leasehold interests; that no equitable division of said assets, even if there were no debts, could be made without loss to the parties; that the stock in Milwaukee was of a value not exceeding $75,000, and the St. Paul stock of the value at cash prices of $30,000, and the store fixtures and furniture of the value of $1,000. The complaint stated that the firm was indebted in the sum of about $120,000 and was insolvent, and unable to continue its business; that it was necessary to wind up the affairs of the partnership, and dispose of its property, and make an equitable distribution of its assets, and that the said partnership should be dissolved,

neither party desiring to continue it, and the firm assets be used to pay its creditors; that an accounting be had, etc. The prayer was for a dissolution of the partnership, and the appointment of a receiver of its property and effects, with power to dispose of the same, and collect all debts for the benefit of the parties interested; that the partnership debts be paid under the direction of the court, and the residue, if any, be divided according to the rights of the parties; and for general relief. On the same day, the defendant, Hochstadter, by his attorney, appeared and filed a verified answer, admitting all the allegations of the complaint, and thereupon an order of that date was made, reciting that the parties had been heard, appointing one of the defendants in the present action, Peter Van Vechten, receiver of all the copartnership property and assets of said firm, upon his giving a bond in the sum of $50,000, with sureties to be approved by the court; and that, upon the approval and filing of such bond, all the copartnership property, assets, and effects be, and the same were thereby, according to the order, transferred to and vested in said receiver, with full power to demand and receive, collect and sue for the same; and that the parties assign, transfer, and deliver the same to such receiver; and that he have leave to apply to the court for direction in his receivership. On the same day the receiver gave the required bond, which was approved and filed, and he took possession of the assets of said firm under said order, and has been in the constant possession and control of the same ever since. On the 3d day of January, 1895, the plaintiffs in the present action commenced an action in the same court against said copartnership for the recovery of a money demand, and against Peter Van Vechten, as their garnishee, upon a proper affidavit for that purpose, and he was summoned to answer as such garnishee. Upon these facts, and the record and proceedings in both cases, the said receiver, Van Vechten, applied in this action, in which he had been garnished, for an order dismissing the same as to him. In opposition, the plaintiffs read an affidavit, in substance, that it was their intention, as soon as they should recover judgment, to apply to the court in the partnership action to intervene and become parties thereto, in order to contest the validity of the appointment of the receiver therein, and to have the same set aside, so that the lien obtained by virtue of the garnishment of said Van Vechten might be enforced, upon the ground that the court had no jurisdiction to appoint such receiver, that the appointment was contrary to and forbidden by statute, and fraudulent, and the proceedings in said partnership action, and the said appointment of said Van Vechten as receiver, were had and made for the purpose of hindering and delaying the creditors, and the plaintiff in particular. Upon the hearing, the action as to Van Vechten, garnishee and receiver as aforesaid, was dismissed, with $10 costs of motion, and the plaintiffs appealed from the order of dismissal.

Turner, Bloodgood & Kemper, for appellants. Winkler, Flanders, Smith, Bottum & Vilas, for respondent.

PINNEY, J. (after stating the facts). The appellants' counsel concedes that it would be a contempt of the court appointing him to interfere with a receiver's possession of property pertaining to his trust, and received by him in that capacity, and that an actual levy on property, or attachment of the same, could not be made without leave of the court which appointed him. This concession is fatal to the plaintiffs' contention in support of the garnishment of the receiver; for, if the process of garnishment should be effectively prosecuted, it would necessarily result in depriving the receiver of the property rightfully in his possession, without the leave of the court appointing him, in order to satisfy the plaintiffs' demand. The claim that the garnishee action is not against the receiver in his official, but in his personal, capacity, though affecting the title and right of possession of such property, is an evasion of the difficulty, and cannot be maintained. Whether the action affects him in his official capacity, and not the mere manner or style in which he is named in the process, is the true test. The question is not one of mere form, but of substance, and whether the receiver, in his official capacity and rights, is to be affected by the action. High, Rec. §§ 256, 257. The rule is otherwise where the receiver takes possession or holds property which does not pertain to his office, and where he is a mere trespasser (Beach, Rec. § 660); or where he is sued to recover damages as for a tort, and there is no attempt to interfere with the actual possession of the property which he holds under the order of the court appointing him (Kinney v. Crocker, 18 Wis. 74; Wood v. Crocker, Id. 345). The better opinion seems to be that the privilege of the receiver is not personal, but pertains to his trust, and exists for the protection of the rights of those whom he represents, and that, where the prosecution of the action would affect or interfere with the control of the property rightfully in his custody, he cannot waive it without the consent of the court. Otherwise, the protection which the court interposes against unwarranted interference with its own officers, and depredations upon the estate in its charge and custody, would be broken down, and confusing and embarrassing questions in its administration would ensue. Beach, Rec. § 653. There are, however, authorities which hold that the receiver may waive the objection.

The possession of the receiver is the possession of the court appointing him, and the property in his hands as such is not subject to attachment, nor is he subject to garnishment

on account of it, or funds in his hands or subject to his control in that capacity. Where a receiver has been properly appointed of the property and effects of a partnership, he cannot be garnished in an action brought by a creditor of the firm or upon a judgment recovered therein; as a judgment upon the garnishment, if recognized and enforced, would divest and defeat the previously acquired jurisdiction of the court in the equitable action to administer and apply to proper purposes the property and effects of the partnership. The authorities to this effect are too numerous and decisive to admit of question or doubt. High, Rec. §§ 151, 164; Beach, Rec. § 228, and cases cited; 8 Am. & Eng. Enc. Law, 1145, and cases in note; Jackson v. Lahee, 114 Ill. 287, 2 N. E. 172; Book Co. v. De Golyer, 115 Mass. 67; Com. v. Hide & Leather Ins. Co., 119 Mass. 155; Holmes v. McDowell, 15 Hun, 585. In the case last cited, the action was to administer and distribute the assets of an insolvent partnership equally among its creditors, and to adjust its affairs, and a receiver was appointed by stipulation. Subsequently, and during the pendency of the action, certain creditors of the partnership recovered judgments against the firm upon which supplemental proceedings were instituted, in which the same person was appointed receiver as in the partnership action, and such creditors applied in the latter action to have the receiver directed to pay their debts in full; but it was held that the judgments they had recovered, and the proceedings under them, gave them no priority over the other creditors of the firm, and their application was denied. In that case the court held that the owners of the partnership property had, by their voluntary act, placed it in the hands of the court for equal distribution, and that the court had assumed jurisdiction over it for that purpose; that it had not yet made its order of distribution, but, by the appointment of its receiver, it had assured all persons interested that it would make that order in due time, and, until it settled the terms thereof, it would hold it for that purpose; and that the property, or fund from its sale, was in the hands of the court, and any one interested might quicken its action by proper application, and that the court held the property in trust, for the benefit of those who might be entitled to it, and that all might be properly protected; that the property, when once in the hands of the court, was pledged and dedicated to the objects of the proceeding, and in it others became interested, who had a right to invoke the action of the court that had thus assumed control over it; and that the creditors of the firm were the cestuis que trustent of the court, and could not be defrauded, unless the court should lend itself to the fraud. This decision was affirmed in 76 N. Y. 596, on the ground stated in the prevailing opinion. This view is supported by Van Alstyne v. Cook, 25 N. Y. 489; Law v. Ford, 2 Paige, 310; Maynard v. Bond, 67 Mo. 315.

We think these views are eminently practical and sound, and that they are decisive of this case, which is brought to wind up and administer the affairs of an insolvent partnership; and it is not necessary here to consider whether they would be strictly applicable to actions brought by one partner for protection and relief against the wrongful or fraudulent conduct of his copartner, and in which the element of conceded insolvency of the firm does not exist. The equities and rights of partnership creditors against the partnership property are to be worked out through the equity of each of the partners to have the partnership property and effects first applied to the payment of the partnership debts, and there can be no doubt of the right of any creditor of the partnership to intervene, pro interesse suo, for the proper assertion and enforcement of his rights, and to be heard therein in respect to any proceeding in the action to his injury or prejudice, either wrongful or fraudulent. The court, in the partnership action, had jurisdiction of the subject-matter and of the parties; and there is nothing in the case to show that the court, upon the admitted insolvency of the partnership, ought not to have appointed the defendant receiver, in order to wind up and settle its affairs, and apply the firm property equally to the payment of the partnership creditors. Equality is equity, and we fail to perceive any reason for saying that such a proceeding is either fraudulent or void. The plaintiffs in this action, as creditors at large of the partnership, could have successfully intervened in the partnership action to secure their rights, and an equal application of the partnership assets to the payment of their demand with those of other creditors, and there is nothing in the case of Weber v. Weber, 90 Wis. 467, 63 N. W. 757, leading to a contrary conclusion. The statute in relation to voluntary assignments has not taken away the jurisdiction of courts of equity in a case like the present, and it is still competent for either partner to bring such an action; and, if the defendant chooses to admit the equity of the case, there is no reason why the court should not proceed to final adjudication and administration of the partnership assets. The case of Jacobson v. Landolt, 73 Wis. 142, 40 N. W. 636, was relied on, but the question whether property rightfully in the hands of a receiver is subject to attachment does not appear to have been there considered or decided. The case is wholly devoted to the right of one not a party to the action to intervene to assert a lien upon or right to property in the hands of a receiver, and to the method of procedure in such cases. For these reasons the order dismissing the action as to the defendant Van Vechten, the receiver, was rightly made. The order of the circuit court is affirmed.

BURNAM v. MERCHANTS' EXCH. BANK.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

TRANSFER OF COMMERCIAL PAPER—BONA FIDE PURCHASERS.

1. A bank, which had delivered to a trustee, as collateral for a loan, certain notes, whose value greatly exceeded the amount of the loan, delivered to defendant, to whom it was indebted, a written order on the trustee, which gave defendant the option of selecting from the notes, in excess of the amount necessary to satisfy the loan for which they were pledged, such notes as defendant would take in payment of his claim against the bank, he to surrender to the trustee, on making the selection, the evidence of such claim; but the order contained nothing to indicate that any of the notes were to be held as security for or by defendant. Subsequently the bank withdrew from the trustee a note made by one B., and substituted therefor another note, and defendant never exercised the option of selection conferred by the order. *Held*, that such order being void, as an executory sale, for want of mutuality, defendant could have no title to the B. note until it was ascertained to be a part of the surplus, and was selected by him, and hence had no claim to the substituted note.

2. A writing by which a debtor gives his creditor the option of selecting from any notes belonging to the debtor in the hands of his pledgee, which shall remain after payment of the amount for which they were hypothecated, such paper as the creditor is willing to take in payment of his claim, does not make the creditor a purchaser "in the usual course of business" of any particular note in the pledgee's hands.

Appeal from superior court, Milwaukee county; J. C. Ludwig, Judge.

Action by Charles T. Burnam, as trustee of the estate of Clark Shepardson, against the Merchants' Exchange Bank, to recover possession of a note. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action of replevin to recover the possession of a promissory note for $5,000. The note is dated June 12, 1893, and due three months after date. The plaintiff claims the note on the ground that it is a part of a trust estate of which he is the trustee. The defendant claims to own the note by purchase as a bona fide purchaser from a former trustee. It appears that one John B. Koetting was the trustee of the estate of one Clark Shepardson. As such trustee, he held the promissory note which is the subject of the suit. It came to him, indorsed in blank, from a former trustee. Koetting was, at the same time, the cashier of the South Side Savings Bank of Milwaukee. On the 12th day of June, 1893, the South Side Savings Bank borrowed $90,000 of certain associated banks, and, as collateral security for the loan, delivered to one Bigelow, as trustee for the banks, promissory notes of the face value of $153,000. Among these collateral notes was a note signed by one John Barth for $10,000, which was a perfectly good note. On July 14, 1893, the South Side Savings Bank gave to the defendant an order in writing, upon Bigelow, in the words and figures following: "Milwaukee, Wis., July 14th, 1893. F. G. Bigelow, Esq., Trustee, City—Sir: You are hereby authorized and directed to deliver to Merchants' Exchange Bank of Milwaukee, Wis., its successor or assign, all money, notes, and property now or which hereafter may come into your possession or under your control from this bank in excess of what may be necessary to satisfy the present obligation of this bank as security for which such property was placed in your possession and under your control, to the extent of fifty thousand dollars of such excess; said Merchants' Exchange Bank, its successor or assign, to be allowed to select from such excess such property as it will take, and, at the time of making such selection, shall deliver to you the certificates of deposit of this bank, corresponding to the amount and value of property or money so taken from you. And, for a valuable consideration to this bank paid this day by said Merchants' Exchange Bank, all such money, notes, and property are hereby assigned, transferred, and set over to said Merchants' Exchange Bank, its successor or assign, with due and sufficient authority to collect, receive, and receipt for the same. South Side Savings Bank. John B. Koetting, Cashier." Afterwards, two days, the president of the South Side Savings Bank took the note in suit, and another of like amount, both indorsed in blank "John B. Koetting, Cas.," to Bigelow, and substituted them in the place of the aforesaid note made by John Barth, and withdrew the Barth note. Koetting indorsed the note in suit, and delivered it to the president of the bank, for the purpose of having it so substituted. Neither Bigelow nor the defendant knew that the South Side Savings Bank had not the full legal title to the note, and the right to pledge it in that manner. The South Side Savings Bank failed, and went into the hands of a receiver, July 24, 1893. July 14, 1894, the defendant put its claim against the South Side Savings Bank in judgment. It never offered to take any of the notes deposited with Bigelow in payment of any part of such indebtedness. By September, in 1894, Bigelow had made the amount of the $90,000 loan out of the collateral notes, and had notes left, including the note in suit, to the nominal amount of $41,500. About October 1, 1894, Bigelow delivered the note in suit, pursuant to a judgment to which many of the creditors of the South Side Savings Bank, its receiver, and Bigelow, were parties. The trustee of the Shepardson estate was not a party. At this time the note was long since due. The defendant is still a creditor of the South Side Savings Bank. There were a finding and judgment for the plaintiff, from which the defendant appeals.

Quarles, Spence & Quarles, for appellant. George E. Sutherland, for respondent.

NEWMAN, J. (after stating the facts). The plaintiff, as trustee of the estate of Shepardson, the original owner, is now the owner and entitled to the possession of the note in

controversy, unless his title has been divested, and a better title acquired by the defendant, through the transaction by which it was pledged for the debts of the South Side Savings Bank. The defendant has derived no better title unless it is established by the evidence that it is a bona fide purchaser of the note, for none but a bona fide purchaser of commercial paper derives a better title than his vendor had. While the title of the true owner may become divested and transferred to such a purchaser without the consent or fault of the true owner, because such a result may happen, the transaction should show clearly that the purchase is bona fide, within the meaning of the law. It will not be aided by liberality of construction or intendment, but will be scrutinized with considerable strictness, for it is the duty of the court to protect the right of the owner to his property, so far as it can be done consistently with the rules of law. A bona fide purchaser of commercial paper is defined to be one who has obtained it for value given at the time, before maturity, in the usual course of business, and in good faith. 2 Am. & Eng. Enc. Law, 390; Rand. Com. Paper, § 986. It is a good consideration, within the rule, if security for an antecedent debt is taken with some new consideration. But the antecedent debt alone, without some new consideration, is not sufficient. Bowman v. Van Kuren, 29 Wis. 209; Body v. Jewsen, 33 Wis. 402; Black v. Tarbell, 89 Wis. 390, 61 N. W. 1106. It is not claimed that the defendant gave any new consideration whatever for the order of July 14, 1893, through which, if at all, it must deduce its title to the note in suit. Nor is it claimed to have been at any time a bona fide purchaser of any of the paper which was then in pledge with Bigelow for the debt of the savings bank to the associated banks. But the claim is that, by some subtle process, not easily traced or understood, on the exchange between Bigelow and the savings bank of the Barth note for the note in suit, by which the latter note was substituted as security for the Barth note in the hands of Bigelow, the defendant became imbued with the character of a bona fide purchaser for value of the note which was substituted. Evidently, the substitution of the one note for the other could not have that effect, unless the defendant owned the Barth note, or had some title in it, which it lost through the substitution. Whatever right or title it had in the Barth note was derived through the order of July 14, 1893. That note, with others, amounting to a large sum, face value, was then in the hands of Bigelow, as trustee for the associated banks, to be collected and applied to the payment of an indebtedness amounting to the sum of $90,000. It was supposed that the security was ample to pay that indebtedness, and leave a large surplus of notes to be returned to the savings bank. The general property in these notes was in the savings bank. Only a special property was in Bigelow. His right was to collect the notes, and apply the proceeds to the payment of the secured indebtedness, and to return the remainder, after that was paid, to the savings bank. Fraker v. Reeve, 36 Wis. 85; Wheeler v. Newbould, 16 N. Y. 392; 18 Am. & Eng. Enc. Law, 590. The entire legal title to all these notes was in the savings bank and in Bigelow. Whatever interest the defendant at any time acquired or had it derived through the order of July 14, 1893.

The nature of that transaction was this: It was expected that, after the payment of the $90,000 indebtedness to the associated banks, there would be left, of the notes pledged for that payment, more than enough, face value, to pay the indebtedness of the savings bank to the defendant. So the savings bank gave the defendant an option to select such of the remaining notes as it would be willing to take in even exchange and payment of the evidences of indebtedness which it held against the savings bank, up to the amount of its claim. Nothing in the writing suggests even that Bigelow is to hold any of the notes as security for the defendant's claim, but plainly expresses that they are to be taken in payment, and dollar for dollar. This option could not well be exercised until after the debt to the associated banks had been paid, and it was known which of the large amount of notes remained to select from; for it was not contemplated that the defendant should take all that were left, for it was expected that there would be more than enough to pay its debt remaining, and it was to take only such as it was willing to take in payment, dollar for dollar, of its claim, for the savings bank had not yet failed, and there was expectation that it would overcome the difficulties which beset it. So that it could not be foreseen whether the defendant would not prefer to hold its claim against the savings bank, rather than to exchange it, dollar for dollar, for any of this surplus paper; and, as before said, there was no suggestion in the writing that any of these notes were to be held as security either for or by the defendant. And it is plain that it was not intended that the defendant should be bound to take or receive any of this paper in payment of its claim. The writing is entirely innocent of any promise that it will take or select any. It is entirely at its option whether it will take or no. The option is entirely gratuitous, and without consideration. There is no promise by the defendant. There is no mutual obligation. As a contract executory, it is void for want of mutuality. It was not a contract executed. It could not have been intended as an executed sale of all the notes in Bigelow's hands. That is contrary to the whole tenor of the writing. It could not have been intended as an executed sale of a part of the notes, for it cannot be ascertained which specific notes were intended to be conveyed by it. There was no intention to convey, in

present, specified notes. If it was intended as a contract executory, it might operate as a conveyance of specific notes, when they should become ascertained. That is, in effect, what it does provide. But it is void as an executory contract. It was not binding on the defendant, because it did not promise to do anything. It was a mere proposition by the savings bank, which might be withdrawn at any time before it was accepted and acted upon. It could become binding upon the savings bank, and upon the title of the notes, only when the defendant should do or begin to do the things which were the condition upon which the notes were to be delivered and the title was to pass. 1 Pars. Cont. (6th Ed.) 450, 451. This seems to be the understanding which the defendant had of it. At least, it does not appear to have done, or begun to do, any of the things which were of the condition on which the title of some of these notes was to pass to it. It does not appear that it selected any of these notes, nor offered to surrender any of its paper against the savings bank for them, nor recognized any obligation on its part to do any of these things. On the contrary, it brought its action upon the evidence of indebtedness which it held against the savings bank, and put its claim in judgment, before the claim of the associated banks had been paid, and before it could be known which of the pledged notes would be of the surplus, and so subject to its selection and appropriation; and it is said that no part of that judgment has been satisfied. By the terms of the writing itself, the defendant was to have those notes which it selected upon surrender by it of a corresponding amount of this indebtedness. And, in any view, the defendant could have had no title in the Barth note unless and until it became a part of the surplus and should be selected. It cannot be known whether it would have been remaining in Bigelow's hands after the payment to the associated banks was complete. If it were permissible to consider probabilities, it seems more likely that it would have been paid, and the proceeds gone to the associated banks, for this is said to have been a perfectly good note, and would, most likely, have been paid at maturity. So there can be no ground for claiming that the defendant gave the Barth note for the note in controversy. It never had that note, either in possession or control, so as to entitle it to give or to trade it. And this is all the consideration which it claims to have given for the note in controversy. It neither gave nor promised to give any consideration whatever for either the Barth note or for the note in suit. So it is clear that the defendant never purchased the note in controversy, nor acquired any title to it.

But, even if it could be held that at some time some interest in this note passed to the defendant, it could not well be held that it was a bona fide purchaser. To have that character, not only must value be given, but the paper must be obtained in the usual course of business. To pledge commercial paper as security for antecedent debts, or to turn it out in payment of such debts, is recognized as being in due course of business. But it is unusual to make pledges or sales of paper which is unascertained and unidentified, and not delivered. Ordinarily, the particular paper sold or pledged is identified and delivered. While it is not necessary always that there shall be actual delivery, it is believed that there must be an actual transfer of specific and designated paper, and, in the absence of delivery, there must be exceedingly strong proof that a valid transfer was, in fact, made, and that the title had passed (Russell v. Scudder, 42 Barb. 31); for in that case the evidence of title which possession gives is withheld from the purchaser. So, a mere assignment of the note is not equivalent to the indorsement and delivery. Hull v. Swarthout, 29 Mich. 249; Rand. Com. Paper, § 989. Delivery or the want of it is considered a significant fact, for possession of such paper is presumptive evidence of title; and, usually, a sale of commercial paper, or a pledging of it for security, is accompanied by delivery. So, it has been held that a use of commercial paper as security, by the intervention of a trustee, is not in the usual course of business. Roberts v. Hall, 37 Conn. 205. In this case no designated or identified paper was either transferred or delivered to the defendant. It cannot be said to have become the purchaser of any particular or specified paper, in the usual course of business. It did not purchase the note in controversy, in the usual course of business. The judgment of the superior court of Milwaukee county is affirmed.

STATE ex rel. MYLREA, Atty. Gen., v. JANESVILLE WATER-POWER CO. et al.

(Supreme Court of Wisconsin. March 10, 1896.)

QUO WARRANTO—FORFEITURE OF FRANCHISE—ESTOPPEL.

1. On presentation of a petition by the attorney general for permission to bring an action in the name of the state to forfeit the franchises of a corporation, the facts and circumstances of the case and the motives for instituting the proceedings may be considered in determining whether leave should be granted.

2. Unless there is shown to be a clear and willful misuse, abuse, or nonuse of the franchises sought to be forfeited, or a violation of law,—something that strikes at the very groundwork of the contract between the corporation and the sovereign power, amounting to willful abuse of power or violation of law, within the meaning of the statute, whereby the corporation fails to fulfill the very design and purpose of its organization,—leave will not be granted by the court to resort to the extraordinary remedy for forfeiture of its franchise.

3. On such an application counter affidavits may be used, and where material allegations of the petition, on information and belief, are so overcome by positive affidavits and proofs in opposition thereto as to establish the fact involved against the petitioner beyond dispute, such allegations should not be considered.

4. The right to institute an action for the forfeiture of the franchise of a corporation by the state may be waived by delay and conduct inconsistent with the enforcement of such right.

5. Where the state delays in moving for a considerable length of time after the facts relied upon for the forfeiture are known, and, in the meantime, the corporation is required to expend considerable sums of money in carrying out the design and purpose of its creation, such delay, under the circumstances, will operate as a waiver of the right to institute such an action.

Application, on the relation of the attorney general, for leave to bring proceedings against the Janesville Water-Power Company and others, to declare a forfeiture of the franchise of the corporation. Denied.

M. G. Jeffris, John Winans, and W. H. Mylrea, Atty. Gen., for plaintiff. William Ruger, E. M. Hyzer, and W. G. Wheeler, for defendants.

MARSHALL, J. This is an application by the attorney general for leave to file an information in the nature of a quo warranto against the Janesville Water-Power Company and others to forfeit the corporate franchise of such company and other franchises owned by it. The petition states, in substance, that the company was incorporated July 16, 1887, for the sole purpose of constructing, acquiring, and operating a system of waterworks in the city of Janesville, and has ever since existed as such corporation; that during the year 1887 said city, pursuant to chapter 164, Priv. & Loc. Laws 1887, by ordinance, upon terms and conditions therein specified, granted to the firm of Turner, Clarke & Rawson a franchise to establish a system of waterworks, to furnish said city with fire protection, and to supply wholesome water to the inhabitants thereof, for public and domestic use; that such ordinance was duly accepted by said firm; that they thereafter conveyed their rights under the same to said water company; that such company thereafter contracted with a construction company, composed of stockholders and officers of the water company, for the building of such waterworks; that the water plant was duly constructed, satisfactorily to the city, and accepted by it on or before August 6, 1888, and that the water company has since operated the same. The grounds upon which it is claimed the corporate and other franchises should be forfeited are mainly as follows: (1) Violations of the conditions of the ordinance upon which the franchise was granted, in that the said water company has failed to furnish wholesome water as therein provided, has refused to sell water to the inhabitants of the city at meter rates, has neglected to comply with the ordinance in respect to furnishing fire protection, and has neglected to furnish water wholly from artesian wells. (2) Violations of law in respect to the organization and business management of the corporation, in that it has issued bonds in excess of the cost of constructing the waterworks, and has issued stock without the same having been fully paid in money or its equivalent. (3) Violations of the ordinance in respect to keeping accurate books of account of the cost of constructing the works and operating the same, in that it was provided by such ordinance that the city should have the right to acquire the works by purchase at the end of seven years from their acceptance by the city, at a sum sufficient to return to the owners the full cost thereof and seven per cent. annual interest thereon, the same to be ascertained from the books of such owners, together with a sworn statement of the cost of construction, with expenses and earnings, and that the grantees of the franchise, their successors and assigns, should keep accurate books showing such cost, expenses, and earnings, and that a fraudulent failure so to do should vacate and annul the franchise and all privileges granted under it; that the city gave due notice of its election to purchase the works under such reserved right, and required the sworn statement to which it was entitled; that, in response thereto, a fraudulent and false statement was rendered; that it was not taken from books of account accurately kept, as provided in the ordinance, and was known by the officers of the corporation who made it to be false and fraudulent; that there has been a total neglect to keep books of account as required by the ordinance; and that such neglect has been with fraudulent purpose, to practically annul that part of the ordinance giving the city the right to acquire the works by purchase. It is plain from an examination of the petition that the ground of complaint chiefly relied upon is the one mentioned in subdivision 3. The allegations are chiefly on information and belief. All are denied, and those in regard to violations of the ordinance in respect to the operation of the works are met by proofs to the contrary of the most positive and satisfactory character. And it is made to appear that substantially all the facts, particularly in regard to the matters referred to in subdivision 3, were fully known and taken official notice of by the city as early as November, 1894, at which time an action was brought in the circuit court to determine the cost of the water plant, and to forfeit its franchises, which action is still pending; that, since the commencement of such action, the city has recognized the existence of such franchises and the water company's obligations in the premises by requiring it to make large and expensive extensions to the water mains, and put in additional hydrants, necessitating other improvements, including an additional artesian well. And it appears that the alleged violations of the ordinance in respect to keeping accounts of the cost of construction are all denied; and that they took place, if at all, before any of the present stockholders of the corporation were interested in the company; and that they have, at considerable expense, endeavored, in good faith, to supply all the information in that regard required; and that in any event the city could not, at the present time, incur the indebtedness requisite to pur-

chase the works without exceeding its constitutional limit.

The foregoing contains, substantially, a correct statement of the case upon which we are to determine the question of whether the sovereign power of the state ought to interfere to forfeit the franchises of the alleged offending corporation, and to wind up its affairs. The granting or refusing this application rests in the sound discretion of the court. The legislature, in providing that an action may be brought, under section 3241, Rev. St., only by leave of this court, upon cause shown, obviously did so for a purpose. The law requires that the power thus intrusted to the court shall be exercised and leave granted or denied as the public interest appears to demand, upon due consideration of the facts of each particular case. To merely examine the petition, and if, taking all the allegations thereof, whether upon information and belief or otherwise, into consideration as true, it prima facie states a cause of action or facts that might support a judgment, would be a failure to exercise that sound judicial discretion which the law contemplates, amounting to an abuse of judicial duty. While courts differ on this question, the weight of authority is in favor of the rule that the facts and circumstances of each particular case, and even the motives for instituting the proceedings, may be considered. Attorney General v. Sheffield Gas Consumers' Co., 3 De Gex, M. & G. 304; Attorney General v. Cambridge Consumers' Gas Co., 4 Ch. App. 71. And especially in case of a solvent, active corporation, carrying out, at the time of the application, the purposes and designs of its creation, performing duties of a quasi public character, having to do with the daily necessities of a large number of people, and where large sums of money have been invested, and securities therefor are held by innocent parties, whose security depends upon a continuance of the corporation, unless there is a clear, willful misuse, abuse, or nonuse of the franchises sought to be forfeited, or violation of law,—something that strikes at the very groundwork of the contract between the corporation and the sovereign power; something that amounts to a plain, willful abuse of power or violation of law, within the meaning of the statute on the subject, whereby the corporation fails to fulfill the very design and purpose of its organization,—leave will not be granted by the court to resort to the extraordinary remedy for a forfeiture of its franchises. State v. Farmers' College, 32 Ohio St. 487; Attorney General v. Erie & K. R. Co., 55 Mich. 15, 20 N. W. 696; State v. Commercial Bank of Cincinnati, 10 Ohio, 535. Leave will not be granted if to forfeit the franchises, under the circumstances, will be inequitable, or will not have the effect of remedying the grievances complained of, or the proceeding is not in good faith. The counter affidavits used on the application should be considered, and material allegations on information and belief, which are so overcome by positive affidavits and proofs in opposition thereto as to establish the fact involved against the petitioner beyond dispute, should not be considered. Thomp. Corp. § 6786. The rule which generally prevails in this regard is well stated in State v. Commercial Bank of Cincinnati, 10 Ohio, 535, as follows: "The courts proceed with extreme caution in proceedings having for their object the forfeiture of corporate franchises, and such forfeitures are not to be allowed except under express limitations of the charter, or for plain abuse of power, by which the corporation fails to fulfill the design and purpose of its organization;" also, in effect, that the extreme remedy of forfeiture will not be allowed where there are other remedies adequate to redress the grievances complained of; that the remedy of forfeiture is the last resort, certainly not allowed where compensation in damages will substantially remedy the violation. High, Extr. Rem. § 649. Without proceeding further to discuss the principles of law involved and the practice in such cases, we are warranted in saying that the allegations of the petition presented, in respect to violations of the franchises in matters pertaining to the operation of the works and the water service, are so overcome by the affidavits and other proofs that the case in that respect fails to show any warrant for the institution of proceedings to forfeit the franchise of the corporation.

In regard to violations of law alleged in respect to overbonding and issuing corporate stock without payment in money or its equivalent, which happened at or about the time of the organization of the corporation, upward of eight years ago, it is not perceived how, under the facts of this case, the public have a sufficient interest or are sufficiently prejudiced in the matter that, after the lapse of such a period of time, the state should interfere to forfeit the corporate franchises. While such forfeiture might have the effect to punish the corporation itself, to the great and irreparable damage of the present stockholders and the holders of the bonds, it is not perceived how it would have any other effect; and we think, on the whole, the doctrine of estoppel by laches, hereafter referred to, should apply. We suggest in this connection, on a subject of practice, that the water company is the only proper defendant here; that this proceeding is not in the nature of a bill in equity, where all persons may be made defendants who have or claim an interest in the controversy adverse to the plaintiff, or are necessary to a complete determination or settlement of the question involved; it is a proceeding under the statute solely against the alleged offending corporation, and it, only, should have been named as defendant.

As to the neglect to keep accurate books of account of the cost of construction and operating expenses and the earnings, whereby it is alleged that the city is prejudiced in respect to exercising its option to acquire the

works by purchase, it is by no means clear that a failure to observe conditions inserted in the ordinance to aid the city in determining the cost of the works in the event of a desire to purchase constitutes a ground for forfeiture at the suit of the state; but the view we take of the matter renders it unnecessary to decide that question. It is claimed on the part of the defendant company that, in any event, the right of the state to forfeit its franchises has been waived. On the contrary, it is claimed on the part of the petitioners that the state cannot be held to have waived such right by any laches shown or any act on the part of the city. That the forfeiture of the franchises of the corporation may be waived by the state is not seriously denied. Attorney General v. Pittsburg Ry. Co., 6 Ired. 456; People v. Ulster & D. R. Co., 128 N. Y. 240, 28 N. E. 635; People v. Manhattan Co., 9 Wend. 361; State v. Fourth N. H. Turnpike, 15 N. H. 162; 5 Am. Law Reg. (N. S.) 577; Com. v. New York, L. E. & W. Coal Co., 10 Pa. Co. Ct. R. 129; and Foster v. City of Joliet, 27 Fed. 899,—are among the authorities on the subject brought to our attention in the briefs of counsel, to which many more might be added. But it is contended that the state, only, can waive the forfeiture; that acts on the part of the city of Janesville do not affect the matter. It is true that a waiver by the city is not binding upon the state. Nevertheless it would be going too far to say that acts which would estop the city cannot be taken notice of and given effect to on this application. The state may waive the right to bring an action on behalf of the public by mere delay in moving to institute proceedings while the corporation, in carrying out, in good faith, the purposes of the organization, expends large sums of money; so held in Attorney General v. Sheffield Gas Consumers' Co., 3 De Gex, M. & G. 304, a well-considered, leading English case, where Lord Justice Turner uses the following language: "That delay will affect the attorney general as much as a private individual I am not prepared to say; but, in my opinion, it is a circumstance to be considered in determining the question whether the court should interfere, although the application be by the attorney general on behalf of the public." In Com. v. Bala & B. M. Turnpike Co., 153 Pa. St. 47, 25 Atl. 1105, the court goes further, and holds that in case of delay, accompanied by circumstances which would estop individuals, the state is equally estopped. The circumstances there were: A corporation had been allowed to proceed and expend large sums of money, when the facts relied upon in the application for leave to bring the action to forfeit its franchises were notorious. Held, that the delay, under the circumstances, created an estoppel, so as to effectually prevent the institution of such proceedings. The court, in effect, said: If the complainant were a private individual, the court would not hesitate to say that his laches were a bar; and the same rule holds good notwithstanding the application is by the attorney general on behalf of the state. The question involved is not one under the statute of limitations, but one of laches, which may be imputed to the state as well as to an individual. While time does not run against the state, time, together with other elements, may make up a species of fraud, and estop even sovereignty from exercising its legal rights. To the same effect are Wilmott v. Barber, 15 Ch. Div. 105; Attorney General v. Johnson, 2 Wils. Ch. 102; Attorney General v. Delaware & B. B. R. Co., 27 N. J. Eq. 1. The principles here maintained should be quite rigidly applied where, as in this case, the corporation has not merely been allowed, but has been compelled, by those chiefly interested and the real moving parties, to proceed at great expense, under the franchises sought to be annulled, for a considerable period of time, while the facts relied upon as grounds for forfeiture have been all well known.

Without taking further time to discuss the subject, we hold that delay in moving for leave to commence the action, with the other elements referred to, constitutes, on this application for the exercise of the discretionary power of the court, an effectual waiver of the harsh and extraordinary remedy of proceedings under the statute to forfeit the franchises of the company, and that this application should therefore be denied. The application for leave to bring an action against the Janesville Water-Power Company to forfeit its franchises is denied.

NORTHWESTERN IRON CO. et al. v. LEHIGH COAL & IRON CO. et al.

(Supreme Court of Wisconsin. March 10, 1896.)

COURTS — CONFLICTING JURISDICTION — HOW DETERMINED—APPOINTMENT OF RECEIVER.

1. Where a sufficient complaint has been filed and served, asking for the sequestration of the property of a debtor corporation and the appointment of a receiver, and the court has issued an order to show cause why a receiver should not be appointed, and forbidding interference with the assets of the corporation pending the motion, a like court in another county cannot, by declaring the corporation insolvent, and appointing a receiver therefor, acquire superior jurisdiction, where such proceedings are had while the order to show cause and the restraining order are pending in the other court.

2. The orders of the second court are irregular, but not void, and the receiver appointed by it will be deemed a receiver de facto, whose acts and contracts are to be observed, and who is entitled to compensation for his services while acting as such.

Appeal from superior court, Milwaukee county; J. C. Ludwig, Judge.

An action was begun by the Lehigh Coal & Iron Company against the West Superior Iron & Steel Company, in the superior court of Douglas county, for itself and all other creditors of defendant, for a sequestration of property, and appointment of a receiver. Subsequently the defendant was, in the superior court of Milwaukee county, declared

insolvent, and a receiver appointed there took charge of all the assets. From certain orders of the court in Milwaukee county, plaintiff and others appeal. Reversed.

The West Superior Iron & Steel Company is a Minnesota corporation, which owned and operated a large plant for the manufacture of iron and steel, and a large amount of real and personal estate in Douglas county, in this state. In March of the year 1894 it owed a large amount of debts and was insolvent. Creditors were pressing, and its property was being levied on and taken by attachments. The Lehigh Coal & Iron Company was one of its creditors, having two judgments for large amounts, upon which executions issued to Douglas county had been returned wholly unsatisfied. On March 28, 1894, the Lehigh Coal & Iron Company commenced an action, in the superior court of Douglas county, in the nature of a creditors' action, on behalf of itself and all other creditors of the West Superior Iron & Steel Company, against the West Superior Iron & Steel Company; the Land & River Improvement Company, James E. McGrath, as sheriff of Douglas county, the Central Trust Company, and Robert Kelley, creditors of the West Superior Iron & Steel Company; and others, stockholders in that corporation,—asking for a sequestration of the property of the debtor corporation and the appointment of a receiver. On the 29th day of March, 1894, the superior court of Douglas county made an order requiring the said defendants to show cause before that court, on the 23d day of April, 1894, in effect, why the said property should not be sequestrated, and a receiver thereof appointed, and that, in the meantime, the defendants entirely refrain from all manner of interference with the property of the debtor corporation. This order was served upon all the principal defendants, prior to April 1, 1894. On April 18, 1894, the defendants the West Superior Iron & Steel Company, the Land & River Improvement Company, and some others, appeared and demurred to the complaint therein. On April 19, 1894, the Northwestern Iron Company commenced an action, in the superior court of Milwaukee county, against the West Superior Iron & Steel Company, the Land & River Improvement Company, and James E. McGrath. These defendants were also defendants in the earlier action, which was pending in the superior court of Douglas county. On the same day of the service of the summons and complaint in this later action, the defendant the West Superior Iron & Steel Company served its unverified answer, thus waiving delay; and the superior court of Milwaukee county thereupon, on the same day, made an order by which it declared the West Superior Iron & Steel Company to be insolvent, and appointed Robert Kelley receiver of all its effects, both real and personal, and enjoined the Lehigh Coal & Iron Company and all other creditors of the insolvent corporation from taking any further proceedings or bringing any actions against it. Kelley took immediate possession of assets. The appellants had no notice of these proceedings or orders until long afterwards. The proceedings in the Milwaukee superior court were afterwards so amended as to make the appellants the Lehigh Coal & Iron Company and S. T. Norvell, another creditor of the insolvent corporation, defendants therein, and the complaint was so amended as to be in the nature of a creditors' bill in behalf of the Northwestern Iron Company and all other creditors of the West Superior Iron & Steel Company. The appellants answered in that action, setting up, among other things, the pendency of the action in the superior court of Douglas county, and the order made therein, enjoining interference with the property of the debtor, and asking that the action be dismissed, and the receiver discharged, and the property held subject to the jurisdiction of the superior court of Douglas county, all of which was refused. On June 20, 1895, the complaint in this action in the superior court of Milwaukee county was held by this court not to state a cause of action. 90 Wis. 570, 63 N. W. 752, and 64 N. W. 323. The motion pending in the superior court of Douglas county, on the order to show cause, returnable April 23, 1894, had been submitted and held for decision until this time. The superior court, then, on June 21, 1895, made an order by which it appointed Thomas G. Alvord receiver of the property of the West Superior Iron & Steel Company. Alvord qualified by filing an approved bond, and at once took possession of the plant and property of the iron and steel company, in the absence of Robert Kelley, and without resistance by the parties in charge. On the same day he served upon Kelley a copy of his appointment and bond, and notified him that he had taken possession of the property. On June 22, 1895, two orders to show cause why the order which appointed Robert Kelley receiver and enjoined the creditors from further proceedings should not be vacated, issued by the superior court of Milwaukee county, one on the motion of the Lehigh Coal & Iron Company and one on the motion of S. T. Norvell, returnable July 1, 1895, were served. At the same time an order to show cause why Thomas G. Alvord should not be punished for contempt of the court, by his interference with the possession of the receiver Robert Kelley, made by the same court, and returnable on the same date, was served July 1, 1895. The court overruled, in both cases, the motions of the Lehigh Coal & Iron Company and of S. T. Norvell to vacate the order by which Robert Kelley had been appointed receiver. On their motions, the Illinois Steel Company was permitted to intervene, to show that it had made certain important contracts with Mr. Kelley, as receiver, which were not then completely executed, and to urge that the complete execution of these contracts be not disturbed by the vacation of the receivership. In the motion to punish Alvord for contempt, an order

was made which adjudged Alvord to be in contempt and directed a writ of assistance to be issued to restore Mr. Kelley to possession of the plant and property. From each of these three orders an appeal is taken.

Ross, Dwyer & Hanitch and Winkler, Flanders, Smith, Bottum & Vilas, for appellants. J. F. Harper, J. C. Spooner, Miller, Noyes & Miller, and Van Dyke & Van Dyke, for respondents.

NEWMAN, J. (after stating the facts). The rule which governs these appeals is stated as follows: "The settled rule of law, in all cases of conflict of jurisdiction, is that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and, as incidental to that jurisdiction, to take possession of and to control the res, the subject-matter of the dispute, to the exclusion of all interference from other courts of co-ordinate jurisdiction. And the proper application of this rule does not require that the court which first takes jurisdiction of the case shall also first take, by its officers, possession of the thing in controversy, if tangible and susceptible of seizure. For such a rule would lead to unseemly haste on the part of officers to get the manual possession of the property, and, while the court first appealed to was investigating the rights of the respective parties, another court, acting with more haste, might, by a seizure of the property, make the first suit wholly unavailing." Union Trust Co. v. Rockford, R. I. & St. L. R. Co., 6 Biss. 197, Fed. Cas. No. 14,401; Gaylord v. Railroad Co., 6 Biss. 286, Fed. Cas. No. 5,284; 1 Abb. U. S. Prac. § 44; 12 Am. & Eng. Enc. Law, 292, and cases cited in notes. It cannot well be questioned that the proceedings in the superior court of Douglas county amounted to an assumption of jurisdiction of the controversy and of the parties. A sufficient complaint was filed and served. The order to show cause why a receiver should not be appointed, and forbidding interference with the assets of the insolvent corporation pending the motion, was a distinct assertion of jurisdiction of both the parties and the subject of the litigation. Neither the validity nor the regularity of any of those proceedings is questioned. The mere bringing of the suit subjected the property of the insolvent to the jurisdiction of the court, without manual seizure by its officers, and, at least with the order restraining interference with the assets, was an equitable levy, which subjected the property completely and exclusively to the control of that court. Bragg v. Gaynor, 85 Wis. 468, 55 N. W. 919. On April 18, 1894, the principal defendant and others of the defendants appeared in the action, and joined an issue of law therein, thus submitting themselves and the controversy completely to the jurisdiction of that court. Yet, as soon as the next day thereafter, on April 19, 1894, the principal defendant appeared voluntarily in the superior court of Milwaukee county, in an action begun that day, and filed its answer, by which, in effect, it confessed judgment; and, on the same day, the superior court of Milwaukee county, by its order, declared the principal defendant insolvent, and appointed a receiver of its assets, who at once qualified and took possession. All this transpired before the return day of the order to show cause, which was pending in the superior court of Douglas county, and while its restraining order was in force. It was done with the knowledge of at least the principal defendant, and with its active co-operation. Apparently, it was by collusion between the plaintiff and the principal defendant, and perhaps other defendants. It was consummated with marked and unusual haste. It was evidently in pursuance of a scheme to defeat and supplant the jurisdiction of the superior court of Douglas county. If such a scheme could succeed, it would subvert the rule, both in its spirit and purpose. But it cannot succeed. The jurisdiction of the superior court of Douglas county was exclusive of all interference by other courts. When this situation of the litigation became known to the superior court of Milwaukee county, it should have declined further to intermeddle. It should have withdrawn from further control of the controversy in favor of the superior, because earlier, jurisdiction of the superior court of Douglas county. It should have vacated its order whereby it had appointed a receiver of the assets of the principal defendant. It should not have held the receiver appointed by the superior court of Douglas county to be in contempt for attempting to exercise the functions of his office.

In connection with the application of this rule governing cases of conflicting jurisdiction, the term "jurisdiction" is not used in its absolute sense. It is a rule of comity and discretion. It does not operate so radically as to render the orders and proceedings of the superior court of Milwaukee county necessarily mere nullities. Its jurisdiction would have been perfect and unquestioned, but that it was anticipated and prevented by an earlier jurisdiction. It had jurisdiction, in a general sense, both of the parties and subject-matter. Its orders are irregular, because in the circumstances unauthorized,—not void. The receiver should be deemed a receiver de facto at least. His lawful acts and contracts are to be recognized as binding in the further administration of the assets, and he should receive just compensation for his services. The further administration of the assets, and all accounting by the receiver, must be in the superior court of Douglas county. The delay of the superior court of Douglas county in making its jurisdiction effective is attributed to a sense of reluctance to precipitate an unseemly conflict, rather than to willingness to abandon its duty or to waive its jurisdiction. The orders appealed from are each reversed, and the cause is re-

manded, with directions to revoke the order by which it appointed a receiver for the West Superior Iron & Steel Company.

PINNEY, J., took no part.

MELMS et al. v. PABST BREWING CO. et al.

(Supreme Court of Wisconsin. March 10, 1896.)

EXECUTOR — SALE OF DECEDENT'S LAND—VALIDITY — CONSTRUCTION OF STATUTE—NOTICE—LACHES OF HEIRS.

1. Under Rev. St. § 3914, providing that sales of real estate by an executor or administrator, where such representative is interested directly or indirectly in the purchase of the property, shall be void, such a sale is only voidable; the title conveyed, if fair on its face, being subject to attack only by one whose interests were affected by the sale.

2. While a client is chargeable with notice of all facts relating to a transaction in which he employs an attorney that are known to such attorney, and which it is presumed he will communicate to his client, notice of facts which came to the knowledge of the attorney while acting for another, and which he has no right to communicate, or which, from their nature, he would conceal, cannot be imputed to the client.

3. Real estate of a decedent was sold by his executors and bought in at a nominal price, in reality for the benefit of the widow, who was an executrix, and who furnished the consideration. The property was sold and conveyed by the nominal purchaser to third persons having no knowledge of the facts, and from the transaction the widow realized several thousand dollars, from which she supported and educated her children, who were also heirs of the decedent. The estate was insolvent, and, had the property brought its full value, the proceeds would have been insufficient to pay the indebtedness. *Held*, that an action by the children against the purchaser to set aside the sale, begun 20 years thereafter, and some years after the youngest heir reached majority, could not be maintained, the property having increased largely in value, and there appearing no reason why the plaintiffs did not know, or could not have known, all the facts many years before.

Appeal from circuit court, Milwaukee county; Frank M. Fish, Judge.

Action by Franz Melms and others, as heirs at law of Charles T. Melms, deceased, against the Pabst Brewing Company and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

The plaintiffs, the heirs at law of Charles T. Melms, deceased, brought this action against Leopold Melms and Marie Melms, their mother, surviving executor and executrix of the will of the said deceased; Frederick Pabst; Lisette Schandein, executrix of the will of Emil Schandein, deceased; and the Pabst Brewing Company,—to set aside (1) a deed of the Melms Brewery property, exclusive of the homestead, in Milwaukee, of which the testator died seised, dated May 25, 1870, executed by Leopold Melms and William Melms, as executors, and Marie Melms, as executrix, of said Charles T. Melms, deceased, to Jacob Frey for a recited consideration of $379.50, subject to the condition that the grantee should pay off four certain mortgages thereon; (2) also, a certain deed of the same premises from said Frey and Marie Melms to said Pabst and Schandein, dated November 1, 1870, for a recited consideration of $95,000, subject, in like manner, to certain mortgages which the grantees were to pay; (3) also, a certain sheriff's deed of said premises, executed to said Pabst and Schandein, upon a certificate of foreclosure sale thereof, founded on one of said mortgages, and dated July 29, 1871; and (4) a subsequent deed of conveyance of the said premises from Pabst and Schandein to the Phil. Best Brewing Company,—under which said deeds the Pabst Brewing Company claimed title to the premises in dispute,—all upon the ground that said several deeds were fraudulent, and in violation of the rights of the plaintiffs as such heirs at law of Charles T. Melms, deceased. The defendants Frederick Pabst and the Pabst Brewing Company insisted upon the validity of said several conveyances, denied the fraud alleged, and insisted, among other things, that, as the action had not been commenced until October 30, 1890, the plaintiffs were barred of relief by reason of laches. The main facts are stated, for the most part, in the preceding case between the same parties in relation to the title to the homestead of the deceased, to which reference is here made. 66 N. W. 244. Such additional facts and details essential to the merits are, in substance, as follows:

The license of sale, upon which the deed from the executors to Frey was founded, directed the premises to be sold, subject to four mortgages on the whole property, including the homestead, for the payment of $65,000, besides interest and costs, and the right of dower of the widow of said deceased. At the public sale by the executors, one of their attorneys acted as auctioneer, and the premises were struck off to the said Frey, a brother-in-law of Marie Melms, executrix, for the sum of $90,000, subject to said mortgages. It appears that this was done in the expectation that a corporation would be formed, and a large number of the creditors and others were to take stock, and moneys were to be advanced, so as to enable the terms of the sale to be carried out, and Frey was to be manager of the business. The attorney of creditors of the estate to the amount of $80,000 was present at the sale, and he was familiar with the scheme for forming and managing the corporation. This scheme failed, and Frey failed to make good his bid. The sale was not reported to the court, but instead thereof a sale as having been made for only $379.50, subject to the mortgages; and it was confirmed by the court. Marie Melms, the executrix, and the mother of the plaintiffs, paid said sum of $379.50, and the executors' deed was made to Frey, but in fact for her use and benefit. This proceeding, with report of sale and deed, was conducted, and the papers prepared, by the same attorney for the executors. The final account of the executors was filed and settled, pursuant to notice, and the residue in their hands was order-

ed distributed September 29, 1870. In this account they debited themselves with $379.50 for the property in dispute, which this account shows had been appraised at $110,000, exclusive of the homestead. The subsequent sale by Frey and Mrs. Melms to Pabst and Schandein, November 1, 1870, was conducted mainly on their part by one of the executors, Leopold Melms, Marie Melms being present and assenting thereto. The homestead was included in the sale with the brewery property, with the dower right of Mrs. Melms, and all was subject to a mortgage of $30,000 to one Baker, trustee, which the purchasers were to pay; and they executed a mortgage for $40,000 of the purchase money to Leopold Melms, as trustee, to secure coupon bonds issued to him for the benefit of divers persons interested therein, and the remaining $25,000 was agreed to be paid by paying and extinguishing two certificates of sheriff's foreclosure sales on mortgages to that amount upon the whole property, and upon which deeds would be due in June or July of the following year. The vendors were to pay all due on said certificates over $25,000, which Mrs. Melms in fact paid. The other mortgage on the premises was to be paid off by the vendors, exchanging for the same bonds secured by the $40,000 mortgage, or otherwise, as they might elect. This mortgage was afterwards paid by Mrs. Melms with and out of said bonds. Included in the sale of the real estate was the machinery, apparatus, tools, trucks, hooks, casks, and other personal property appertaining to the business of the brewery or malt house, and then on the premises. The conveyance made by Frey and Mrs. Melms to Pabst and Schandein was subject to incumbrances, in substance, as specified in the agreement, which was carried out by the parties in all respects, except that, instead of redeeming the $15,000 certificate of sheriff's foreclosure sale, as they had agreed to do, Pabst and Schandein took an assignment of it from the holder February 21, 1871, and on July 29, 1871, obtained a sheriff's deed thereon, covering the property in question as well as the homestead. The purchasers, Pabst and Schandein, selected one of the attorneys who had acted for the executors in the administration of the estate, and who had acted in making the executors' sale and report, obtaining its confirmation, and in the preparation of the conveyance, under the license of the court, to Frey, to act for them as well in the purchase, preparation of agreement and deed, and examination of title, with the knowledge that he was the attorney for such executors, being assured by one of the latter that such attorney knew all about the business. Accordingly, he acted for both parties, preparing the agreement and other documents, and had the abstract of title produced, continued down until that date, and each party paid one-half of his charges. It was claimed that, at the time Pabst and Schandein agreed to purchase, Leopold Melms and Mrs. Melms disclosed to them that Frey held the title to the brewery premises for her benefit. She was rightfully entitled to dower therein, and to a life estate in the homestead, which were included in the sale. She testified that she said, in their presence, that Frey would give the property back to her; that he had bid it off for $90,000. Leopold Melms testified that Pabst and Schandein were well informed about the matter. They had seen the attorney of the executors. His version of what took place was that he (Melms) explained to them that the property had been transferred to Frey, who held the title; that he was Frey's agent, and that she had a dower interest in the homestead,—in the brewery; that she had paid interest on the incumbrances so as not to lose her dower right in the brewery. Pabst testified that he had no recollection of any such conversation with Melms or Mrs. Melms.

The terms of the agreement were not complied with until about two months after its date. The deed to the purchasers, and their mortgage to Leopold Melms as trustee, were recorded December 30, 1870. The purchasers, Pabst and Schandein, and the Pabst Brewing Company claiming under them, have been in the actual possession of the property ever since the 1st of November, 1870, claiming title thereto under the aforesaid conveyances, and under a lease thereof, executed November 1, 1870, which was vacated, by compliance with the terms of the agreement of sale, December 30, 1870. The entire consideration of the sale to Pabst and Schandein, over and above the $65,000 stipulated to be paid on incumbrances by the vendees, was received by Marie Melms. One of the executors, Leopold Melms, acted for her during the entire period of the administration, she not being familiar with business, and not speaking the English language readily. He was her banker during this period, and kept an account of all his receipts and disbursements, consisting entirely of money which was received from the estate of her husband, for allowances by statute, proceeds of certain sales of her dower interest in other real estate, and insurance on her husband's life, and not a part of his estate, with $30,000 in bonds received on the sale of the brewery and homestead premises; but she had advanced considerable sums on the sale of the brewery premises, to reduce the incumbrances to $65,000, and had more than used up the entire proceeds of the life insurance policies. He delivered to her, about April 15, 1871, an account in detail of all receipts and disbursements of her money, in which he gave her credit for having received on the sale of the brewery, "sold at $95,000, less mortgages, $65,000,—$30,000,"—and debited her, under date of May 25, 1870, with "Cost of brewery, $379.50"; showing a balance in her favor of $26,578.43. She testified that she showed this account to her children, the plaintiffs, and that she believed that they had all seen it when they were at home, and wanted to see it more or less frequently; that it was in the house where they could see it; that some of them were not at home, but those at

home saw it; that she thought they all saw it; and that she did not keep anything secret from her children,—though she subsequently materially qualified these statements. She said it was kept in a secretary in her house, and that she gave it, about 10 years before the trial, to her son-in-law, Mr. Bechtel, husband of her daughter Elise Melms; that she showed the account to the defendant Pabst in 1871, and he read the account over, and did not say whether it was right or wrong, or give her any satisfaction; that, when she received the bonds and the account, Leopold Melms was angry because she wanted them, and they had not been on good terms since. The evidence shows that the estate of Charles T. Melms, at the time of his death and the transfers in question, was hopelessly insolvent; that the creditors, who had proved their claims to the amount of over $100,000, received only about 12 per cent. thereon, after applying all the proceeds of other property exclusive of that in dispute. While there is no satisfactory evidence, aside from its appraisal, showing what the brewery property was really worth, it is entirely clear that it could not have been sold for sufficient to have paid the claims of creditors, but that there would have been, beyond doubt, a large deficiency of assets.

At the time this action was commenced, the ages of the plaintiffs were as follows: Franz Melms, 40 years; Carl J., 39; Johanna, 34; Elsie, 32; Richard, 31; Gustave J., 28; and Hertha, 25. In May and June, 1881, they executed powers of attorney to the said Bechtel, who then resided at Milwaukee, authorizing him to take such steps as he might deem necessary to secure any right or interest they or either of them had or might have in or to the real or personal estate of their deceased father, and to institute actions for the purpose of recovering and securing such interest, authorizing him, in making his investigations, to employ attorneys, and, if he should consider it best, to settle and adjust, with or without litigation, any such interest with any person or persons who might have or hold the same, and, to that end, to execute and deliver deeds, acquittances, etc., and to receive and receipt for any money, property, or estate which might be recovered or obtained or paid in the premises. In 1881, Leopold Melms delivered a copy of the account which he had rendered to Mrs. Melms, with the checks and papers which he had relating to that subject, to said Bechtel, at the request of Mr. Goodwin, an attorney, of the firm of Goodwin & Benedict, who were the attorneys for the Melms heirs, and who instituted a suit for the recovery of some property sold by the executors, as well as the check for $379.50, which had, written across its face, "Check to the account of Marie Melms," and had been given for the consideration named in the executors' deed to Frey. About this time he also wrote to the plaintiff Carl J. Melms, at New York, that he had grounds for a test case, and asked him to come to Milwaukee. It appears that Mr. Miller, who was connected with Goodwin & Benedict, after keeping these papers for a long time, delivered them to Leopold Melms October 1, 1890, about the time of the commencement of the present action. They embraced the original inventory of the estate and the Schandein and Pabst agreement, and he testified that he had made a pretty full examination of the Melms estate, going through all the papers in the probate court, looking up the record and conveyances, and conferred somewhat with Leopold Melms about it; that the interest of the heirs in the estate was put in his hands in 1881, and a suit against one Pfister for the recovery of some of the property sold was commenced in June, 1882, and, after the determination of the suit, the papers had remained in his hands until he had so returned them. After the conveyance to Pabst and Schandein, they and the brewing company made very considerable improvements on the premises, building thereon a bottling house, elevator, coal sheds, ice houses, cleansing room, etc., and seem to have operated the brewery continuously thereafter, and in the meantime the value of the property had very greatly increased. William Melms, one of the executors, Frey, the grantee in the executors' deed, and Schandein died before the action was commenced. The money thus received by Mrs. Melms from the sale of the brewery and her homestead right was used, to a very great extent, in maintaining herself and children, and in their education, and was the only resource she had for that purpose. The only explanation of the long delay of the plaintiffs in asserting their rights was "that, until within a few months before the action, they were all in entire ignorance of the character and record of the conveyances under which Pabst and Schandein and their grantee were in possession of the said premises, and of all the proceedings before the county court, and of the facts set out attending the administration and of said sales"; but they do not state how, or more definitely, when they made any discovery of fraud or improper conduct therein, nor is there anything on this subject in the evidence, save that an attempt was made to show, by Leopold Melms, that in September, 1890, he learned that, under the statute, a sale made either directly or indirectly to an executor or executrix, or for the benefit of such, was void; that he then consulted counsel, and notified the heirs, and the action was commenced, but the court excluded the evidence. The court found, among other things, that Pabst and Schandein were purchasers, bona fide and for a valuable consideration, of the premises, and entered into possession under and by virtue of the deeds executed to them immediately after the dates of the same, and that they and their grantees had so continued up to the commencement of the action, and held that the plaintiffs were not entitled to any relief, and gave judgment

dismissing the complaint with costs, from which the plaintiffs appealed.

Bloodgood, Bloodgood & Kemper, for appellants. Winkler, Flanders, Smith, Bottum & Vilas, for respondents.

PINNEY, J. (after stating the facts). 1. The statute (Rev. St. § 3914) provides that, in sales of real estate made by an executor, administrator, or guardian, the executor, administrator, or guardian making such sale, or guardian of the heir of the deceased, "shall not directly or indirectly purchase, or be interested in the purchase of any part of the real estate so sold. All sales made contrary to the provisions of this section shall be void." The sale to Jacob Frey, reported to the county court, of the premises in dispute, and the executors' deed of the same to him, and which were made for the use and benefit of the executrix, Mrs. Melms, she having paid the entire consideration, fall within the condemnation of this statute. This sale was fraudulent in law, as against the creditors of the estate, and the plaintiffs as heirs at law of Charles T. Melms, deceased. The sale, in the first instance, was to Jacob Frey for $90,000; but he failed to make good his bid, and the sale was reported to the court as made for $379.50, and it was confirmed, and the executors' deed to him was executed accordingly. Whether a deed made upon a sale thus declared void is absolutely void or only voidable, and so would pass the legal title, and whether a bona fide purchaser for value, without notice, from the grantee in such a deed, would take a valid title, is an important question, and, in this state, a new one. In McCrubb v. Bray, 86 Wis. 333, the question was suggested, but the court expressly declined to give any opinion in respect to it. In Forbes v. Halsey, 26 N. Y. 65, and Terwilliger v. Brown, 44 N. Y. 241, under a statute in the same terms, the objection was held fatal to the title as against innocent purchasers for value; but, in Roulston v. Roulston, 64 N. Y. 652, 654, it was said, in substance, that such a sale and purchase were valid as to all except those prejudiced by it, and as to them not void, but voidable. And People v. Stock-Brokers' Bldg. Co., 92 N. Y. 98, is to the same effect. The question is whether the word "void" in the statute may not be fairly held, in the connection in which it is used, to mean "voidable." Such a construction would seem to better accord with sound policy and the purposes of the statute than one which, for a secret defect, would defeat the title of an innocent purchaser for value; and in White v. Iselin, 26 Minn. 487, 5 N. W. 859, upon a statute in the same words, the word "void" was given only the force and effect of "voidable," and this view is sustained in Boyd v. Blankman, 29 Cal. 19. The words "void" and "voidable" are not always used in statutes and reports with entire legal accuracy, and the word "void" is often construed as meaning only voidable. End. Interp. St. 270; Allis v. Billings, 6 Metc. (Mass.) 415; Jackson v. Henry, 10 Johns. 185; Dix v. Van Wyck, 2 Hill, 522; Green v. Kemp, 13 Mass. 515; Town of Reading v. Town of Weston, 7 Conn. 409. If the statute should be so construed as to avoid sales by executors, administrators, and guardians on the ground stated, or for secret frauds, as against innocent purchasers for value, titles founded upon them would be so doubtful and uncertain that few would care to purchase or pay a fair price for them. We think that the word "void" was used in the statute in the sense of "voidable," and that the legal title to the premises passed to Frey by the executors' deed, subject to be questioned or impeached on the ground that his purchase was in trust for the use and benefit of Mrs. Melms, the executrix, and therefore fraudulent as against creditors of the estate whose claims had been proved, then remaining unsatisfied to the amount of not less than $100,000, and as against the plaintiffs as heirs at law.

2. The evidence is wholly insufficient to show that Pabst and Schandein, at the time they purchased the premises from Mrs. Melms and Frey, had notice, in fact, of the fraud and illegality which entered into the executors' sale and deed to the latter, or that they had notice, in fact, that the sale and executors' deed had been made to Frey for the use and benefit of Mrs. Melms, who was the real purchaser. Mrs. Melms was lawfully interested in this sale to the extent of her life estate in the homestead and her dower interest in the brewery property, and as to these subjects, it was, in fact, for her benefit. The purchasers would naturally so understand it. Leopold Melms testifies that he explained to them that Frey held the title, and that he was Frey's agent; that she had a dower interest and homestead right, and had paid the interest on the incumbrances so as not to lose her dower right. But all this had no tendency to show that there was any objection existing to the title they were about to purchase. True, he adds that Pabst and Schandein "were well informed about the matter, and had seen the attorney of the executors"; but this is a matter of conclusion or inference on his part, and he gave no facts of any materiality or significance. It was probably a mere surmise on his part. The fact that Mrs. Melms, as she testifies, said in their presence that Frey would give the property back to her, and he had bid it off for $90,000, was not calculated to excite suspicion, or lead them to doubt Frey's title. Pabst testifies that he does not remember any such conversations. Schandein, who was present, is dead, and the transaction took place more than 23 years before the trial. The actual payment of what was then considered a fair price is cogent evidence of good faith. It is claimed that Pabst and Schandein had notice of the facts from an inspection by Pabst of the account rendered to Mrs. Melms by Leopold Melms, showing that she paid the consideration for

the executors' deed, and received the proceeds of the sale after paying certain sums on the incumbrances; but the evidence leaves it extremely doubtful whether he examined the account with sufficient care to ascertain what it showed in these respects. A conclusive answer to this claim is that the account was not made up, nor was it shown to Pabst, until several months after the sale was completed and the rights of the parties had become fixed. It came too late.

The only other ground for imputing notice to the purchasers, requiring consideration, is that the attorney who had theretofore acted for the executors and executrix and Jacob Frey in making the executors' sale to Frey, reporting it to the court, and getting it confirmed, and in the preparation and execution of the executors' deed, and who was clearly cognizant of the illegality of the same, was chosen by Pabst and Schandein to act for them in the matter of the completion of the sale to them by Mrs. Melms and Frey, and to examine the title to the premises, with the understanding that he was to represent the latter in the same manner. Each party paid one-half of his charges for such services. It is argued that the knowledge which such attorney had acquired of the illegality of the executors' sale and deed to Frey, while he had so acted for the executors and executrix and Frey, is to be imputed to Pabst and Schandein, and rendered them purchasers mala fide. Notice to an agent or attorney is notice to his principal or client in regard to the matter in which he is engaged; and where a purchaser employs the same attorney as the vendor, he will be affected with notice of whatever such attorney acquired notice, in his capacity of attorney for either vendor or purchaser, in the transaction in which he was so employed. Notice to the attorney which will bind the client must be notice in the particular transaction in which the client has employed him. So, where one of two matters transacted by the same attorney, though the former was for another client, follows so soon after the other that it clearly appears that the earlier transaction cannot have been out of the mind of the attorney when engaged in the latter, there is no ground for restricting the notice to the client to the second transaction, but he will be affected with notice of both. The authorities bearing upon this proposition are considered in Brothers v. Bank, 84 Wis. 395, 54 N. W. 786, where it was held that, if an agent acquires his knowledge of a prior transaction so recently as to make it incredible that he has forgotten it, his principal will be affected by it, although not acquired while transacting the business of his principal. In the case of Constant v. University of Rochester, 111 N. Y. 607-611, 19 N. E. 631, the modification of the rule to the effect stated, as recognized in the case of The Distilled Spirits, 11 Wall. 356, was quite fully considered, and it was held that "the furthest that has been gone in the way of holding a principal chargeable with knowledge of facts communicated to his agent, where the notice was not received or the knowledge obtained in the very transaction in question, has been to hold the principal chargeable upon clear proof that the knowledge which the agent once had, and which he had obtained in another transaction, and at another time, and for another principal, was present to his mind at the very time of the transaction in question." Slattery v. Schwannecke, 118 N. Y. 547, 23 N. E. 922; Constant v. University of Rochester, 133 N. Y. 642, 31 N. E. 26. There is very strong reason for holding that, from the facts and circumstances of the case, all the facts within the knowledge of the attorney, acting in the present instance for both parties, and acquired about five months before, while acting as the attorney for the executors and the vendors, in respect to the illegality of the executors' deed, were present to his mind when acting for Pabst and Schandein, though there is no direct evidence on the subject; but the rule under consideration is subject to a most material qualification decisive of the present case. The rule itself is based upon the duty of the attorney or agent to disclose to his client or principal all knowledge and information he possessed at the time, in relation to the subject-matter of the employment or agency, and the presumption is that he communicates it accordingly; but he cannot be expected to communicate what he has forgotten, or what it would be his legal duty to conceal, or information which, from his relation to the subject-matter or his previous conduct, it is certain that he would not disclose. Whatever knowledge the mutual attorney had acquired in respect to the character and validity of the executors' deed and sale five months before was acquired under circumstances which would render it a breach of professional confidence to disclose it to another, or to take advantage of such knowledge to serve or promote the interests of another client; and therefore such second client would not be affected or bound by it. Wade, Notice, § 692; Mechem, Ag. §§ 721, 722. As was said by Mr. Justice Bradley in the case of The Distilled Spirits, 11 Wall. 367: "When it is not the agent's duty to communicate such knowledge, when it would be unlawful for him to do so, as for example, when it has been acquired confidentially as attorney for a former client, the reason of the rule ceases, and in such case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal ought not be bound by his agent's secret and confidential information." Hood v. Fahnestock, 8 Watts, 489; Bracken v. Miller, 4 Watts & S. 111; McCormick v. Wheeler, 36 Ill. 116; Innerarity v. Bank, 139 Mass. 333, 1 N. E. 282; Allen v. Railroad Co., 150 Mass. 205, 206, 22 N. E. 917; Herrington v. McCollum, 73 Ill. 476; Ford v. French, 72 Mo. 250; Martin v. Jackson, 27 Pa. St. 504; Cave

v. Cave, 15 Ch. Div. 639, 644. This limitation of the general rule was declared in Kennedy v. Green, 3 Myine & K. 699, and in Waldy v. Gray, L. R. 20 Eq. 251. Bacon, V. C., said: "I take it to be very well established that, if a person employed as a solicitor has done things which, if disclosed, would prevent the perfection of the security on which he is engaged, which would show that a good title does not exist to that which he is the instrument of conveying to the purchaser, it is not to be expected or inferred that he would communicate what he has done to his client." The whole doctrine of imputed notice to the client or principal rests upon the ground that the attorney or agent has knowledge of something, material to the particular transaction, which it is his duty to communicate to his principal. Wyllie v. Pollen, 3 De Gex, J. & S. 601. And notice of it will not be imputed to the client where it would be a breach of professional confidence to make the communication; and where the interest in, or the relation of the attorney to, the previous transaction is such as would be sufficient to induce him to withhold the information, the presumption of its communication is rebutted. The client will not be charged with notice of a fraud or wrong to which his attorney was a party while employed by another, and which it is quite certain he would conceal. Kettlewell v. Watson, 21 Ch. Div. 707. The object of the executors' sale and deed to Frey for the use and benefit of Mrs. Melms was to secure to her the brewery property or its proceeds as against the rights of creditors and heirs of her deceased husband, and the scheme would have been utterly defeated if, upon the eve of success, the attorney for the vendors had disclosed the real nature of the transaction which he had conducted for the executors and such vendors. To impute to the purchasers, under such circumstances, notice of the real nature of that transaction, through the same attorney then acting for them as well as the vendors, would be gross injustice. We hold, therefore, that Pabst and Schandein were bone fide purchasers for value, without notice of any fraud or illegality in the executors' sale, and that the claim of title of the plaintiffs cannot prevail.

3. We think that, under the facts and circumstances disclosed, the relief sought by the plaintiffs was properly denied, for the reason that they had been guilty of laches in failing to investigate and bring forward their claims within a reasonable time. This property was subject at the time to incumbrances and to the claims of creditors, allowed against their father's estate, amounting, in all, with accrued interest, to not less than $175,000, all of which would have to be paid before they could obtain any part of the estate. Their rights, therefore, as heirs, were technical rather than substantial, and they had no rational hope of realizing anything in due course of administration, because the estate was hopelessly insolvent. While, in contemplation of law, the executors' sale and deed to Frey for the use and benefit of their mother, executrix, etc., was fraudulent and voidable as to them, it is evident that the creditors were the parties intended to be, and who were really, defrauded. The transaction, however, resulted indirectly for the benefit of the plaintiffs, as it was probably intended it should, in securing to their mother, out of the estate, the means to rear, support, and educate her children; and they have thus received from the estate benefits which could not have been secured to them by a legal and complete administration. Although, upon their technical legal title as heirs, they would have been entitled, within the authorities, to a resale of the property at executors' sale, irrespective of the question whether it would have resulted in a price which would have secured to them any really substantial benefit, still these facts are entitled to consideration on the question of acquiescence and laches. The plaintiffs knew that the large and valuable property in dispute, including the homestead, had been sold to Pabst and Schandein, and that they and their grantees had held, used, operated, and improved it to a considerable extent, paying taxes upon and claiming it as their own for a period of nearly 20 years before they brought their action. This, of itself, was notice to them, as heirs of their father's estate, to promptly investigate and ascertain, as soon as they were competent, what right, if any, they had or expected to assert to this property. The purchasers had paid $95,000 for the property, and the almost phenomenal growth and development of the city had largely increased its value. All the facts were known at the time to their mother, and between her and the plaintiffs the most intimate and affectionate relations existed, and remained undisturbed, and the evidence shows that she had no secrets to keep from her children. Their uncle, Leopold Melms, knew all the facts, and had a feeling of friendship and interest in their welfare; and he seems to have been ready and willing to assist them in the recovery of the estate, ever since the question was mooted, in 1881, when the powers of attorney were executed by the plaintiffs to Bechtel for that purpose. At that time, a thorough investigation was had, which resulted in the production of documents which were sufficient to show the real character of their mother's title to the brewery property; certainly sufficient to induce inquiry, which could not have failed to disclose, beyond dispute, the real nature of the transaction. Mrs. Melms had in her possession her account with Leopold Melms, showing that she had bought the brewery property for $379.50, and that the entire consideration received for it, and the homestead, and her dower right, after paying certain sums on incumbrances, was paid to her. It was set down in the account as

"Profit realized on sale of brewery sold at $95,000, less mortgage $65,000,—$30,000." The plaintiffs testified that they did not see this account. It was where they might have seen it at any time, had they wished, though, in their great interest in the litigation, they may not have been able to remember the fact; but the mother did. It was never concealed from them. Their uncle, Leopold Melms, had a copy, which, with the checks and papers relating to it, were put into the hands of the attorneys acting under Bechtel, where they remained until almost the day when the action was commenced. All other facts appeared upon the records of the county court and register of deeds. In brief, the entire case could have been developed by a short and apparently obvious line of investigation. There was no concealment on the part of the purchasers. Indeed, it does not appear to have been understood that there was cause for any concealment. When the investigation was had under Bechtel, all the plaintiffs were of full age except two, aged 19 and 16 years, respectively; and, when the action was commenced, the youngest, who had lived continuously with her mother, was 4 years and 3 months past her majority, and an action at law for the recovery of her interest in the land would have been barred within 9 months thereafter by Rev. St. § 3918. The plaintiffs appear to have been fairly well educated, and all testify that they were ignorant of the facts in the case until about the time the action was brought. Some of them testified, at the trial, that they did not know its real nature, or the ground for it, although the action had been pending 3 years; that they supposed it was brought to get the property back for their mother. One of the sons, the oldest heir, had been absent on long voyages much of the time since his father's death.

Laches and neglect are always discountenanced in equity, which always refuses relief in favor of stale demands. Long delay, and even, sometimes, a delay of less than the period of limitation by statute, will be regarded as laches, and will prevent the intervention of equity; but laches will not be imputed to one while under disability, and there must have been knowledge, actual or imputable, of the facts, which should have prompted investigation and action, and, if there was actual ignorance, that must have been without just excuse. Beach, Eq. §§ 18, 19. This rule applies where the fraud is known or ought to have been known, where the facts and circumstances are such as to have made it the duty of a reasonably prudent person to investigate, and which, if pursued, would have led to a discovery. Pom. Eq. Jur. § 917. The entire subject was fully considered in Rogers v. Van Nortwick, 87 Wis. 414, 58 N. W. 757, where a failure to act with reasonable diligence, upon knowledge of facts and circumstances which would have led to a discovery of the facts, was held to have amounted to laches such as would bar relief. The failure or delay to investigate must have been blamable, and what constitutes a reasonable time within which the action must be brought depends upon the facts and circumstances of each particular case; the court applying the rule of laches according to its own ideas of right and justice. Wood v. Carpenter, 101 U. S. 140, 141; Brown v. Buena Vista Co., 95 U. S. 157, 160; Oil Co. v. Marbury, 91 U. S. 587. It is said in Hammond v. Hopkins, 143 U. S. 224, 250, 12 Sup. Ct. 418: "No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transaction complained of, or of the witness or witnesses, or by reason of the original transactions having become so obscured by time as to render the ascertainment of the exact facts impossible. Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like." Holladay v. Improvement Co., 18 U. S. App. 308, 338, 6 C. C. A. 560, 57 Fed. 774; Marsh v. Whitmore, 21 Wall. 178; Lansdale v. Smith, 106 U. S. 391, 1 Sup. Ct. 350; Norris v. Haggin, 136 U. S. 386, 10 Sup. Ct. 942; Mackall v. Casilear, 137 U. S. 556, 11 Sup. Ct. 178; Hanner v. Moulton, 138 U. S. 486, 11 Sup. Ct. 408. Where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put a man of ordinary prudence upon inquiry. Kennedy v. Green, 3 Mylne & K. 699, 722; Erlanger v. Phosphate Co., 3 App. Cas. 1231, 1280; Carr v. Hilton, 1 Curt. 390, 394, Fed. Cas. No. 2,437; Wood v. Carpenter, 101 U. S. 141; Johnston v. Mining Co., 148 U. S. 370, 13 Sup. Ct. 585. Hence, the party in such case must state in his bill, and prove at the hearing, "the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been made before." Stearns

v. Page, 7 How. 819, 829. "Otherwise," as was held in Badger v. Badger, 2 Wall. 87, 95, "the chancellor may justly refuse to consider the case, on his own showing, without inquiring whether there is a demurrer or former plea of the statute of limitations contained in the answer." Tested by this rule, the complaint and case made by the plaintiffs is radically defective. There is no specific averment or proof of the discovery or time of discovery of any material fact. The courts look with disfavor upon the claims of those who have failed to investigate and act upon sufficient cause, and have waited to decide, after large sums have been invested, when the danger is over that has been at the risk of others, to come in and claim the profit of the event; and so, too, where the delay has been great, and parties to or witnesses familiar with the transaction, as in this case, have died in the meantime. We think that the plaintiffs have been guilty of blamable delay. Knowledge of all the material facts was within their own family from the time of the purchase by Pabst and Schandein, and in 1881 we find, in the hands of the plaintiffs' attorneys, the account between Leopold Melms, one of the executors, and Mrs. Melms, who was executrix, which clearly disclosed facts which, when taken in connection with the record and the proceedings in the county court, made out their entire case. It matters not that their attorneys failed to discover what was really quite plain. The case falls within the principles stated, and we must hold that the plaintiffs have not shown reasonable diligence in investigating their rights and bringing them before the court. For these reasons the judgment of the circuit court must be affirmed. The judgment of the circuit court is affirmed.

BURKHARDT et al. v. ELGEE[1]

(Supreme Court of Wisconsin. March 10, 1896.)

APPEAL—JURISDICTIONAL AMOUNT OF JUDGMENT.

Where it affirmatively appears that the amount involved in a case is but 50 cents, exclusive of costs, though the complaint alleges damages of $100, and there is no certificate to make the judgment rendered therein an exception, it is within Laws 1895, c. 215, providing that no appeal can be taken from a judgment where the amount involved, exclusive of costs, is less than $100, unless the trial judge shall certify that the case involves certain difficult or constitutional questions.

Appeal from circuit court, St. Croix county; E. B. Bundy, Judge.

Action by Christian Burkhardt and others against J. H. Elgee for trespass. From a judgment dismissing the complaint, plaintiffs appeal. Dismissed.

Baker & Helms and C. W. Bunn, for appellants. J. W. Bashford and J. A. Frear, for respondent.

WINSLOW, J. This is an action of trespass for entering the lands of the plaintiffs, and unlawfully, with hook and line, catching from the Willow river, a stream which flows through said land, certain brook trout. The damages were laid at $100 in the complaint, but it appeared on the trial that the damages for the trespass were simply nominal, and that the brook trout caught were of the value of 50 cents only. Trial by jury was waived, and the entry and catching of the fish were admitted. The court found, from the evidence, among other things, that the Willow river, at the place in question, was navigable for the purpose of driving logs, and for small pleasure boats; that it had been stocked by the state, at great expense, and at the place in question, with trout fry, with the consent of the owners of the land in question. The court held that the right to fish in the stream belonged to the public, and that the owners of the land, by consenting to the stocking of the stream, had substantially dedicated the stream and the banks to the public for the purpose of fishing; whereupon the complaint was dismissed, and the plaintiffs appealed.

We are met on the threshold of the case with the fact that this judgment is not appealable. By chapter 215, Laws 1895, no appeal can be taken from a judgment where the amount involved, exclusive of costs, is less than $100, unless the trial judge shall certify that the case involves certain difficult or constitutional questions. It appears by the findings that the amount involved in this case, exclusive of costs, is but 50 cents, and there is no certificate of the trial judge such as the statute requires. It would be frivolous to hold that, because the ad damnum clause of the complaint places the damages at $100, therefore the "amount involved" is $100, when it affirmatively appears, without dispute, that, in fact, the damages were but 50 cents. We cannot, therefore, consider the questions raised, and which were so ably argued upon this appeal. Appeal dismissed.

OSHKOSH MATCH WORKS v. MANCHESTER FIRE ASSUR. CO.

(Supreme Court of Wisconsin. March 10, 1896.)

INSURANCE—CONDITIONS—BREACH—WAIVER.

1. Evidence that the insured, after loss, separated the undamaged from the damaged personal property, and sold the same, without consent of the insurer, before its adjuster had seen it, shows a breach of a policy requiring the insured to separate the damaged and undamaged personal property, and make a complete inventory, and exhibit it when required to the company's adjuster.

2. Parol waiver by a local insurance agent of conditions of the policy is void where the policy requires such waiver to be indorsed on it in writing.

3. The examination of an agent of the insured as to the loss after proofs of loss have been submitted is not a waiver of a breach of the pol-

[1] For opinion on rehearing, see 66 N. W. 1137.

icy by the insured, where it is expressly provided that such an examination shall not be a waiver.

Appeal from circuit court, Winnebago county; N. S. Gilson, Judge.

Action by the Oshkosh Match Works against the Manchester Fire Assurance Company on a fire policy. From a judgment for plaintiff, defendant appeals. Reversed.

Action on a policy of fire insurance issued by the defendant to the plaintiff, to recover the value of 1,247 cases of matches, alleged to have been totally destroyed by fire, and $135.75, for injury caused by the same fire to 908 other cases of matches, all insured by the defendant in the amount of $1,500, except as in the policy provided, which contained the provisions of the "standard fire insurance policy," so-called, under the act of 1891 (chapter 195). The defense was that the plaintiff had not fulfilled and performed the conditions of the policy on its part; that by the terms of the policy, as the fact was, it was stipulated that, if fire occurred, the plaintiff was to protect the property from further damages, forthwith separate the damaged and undamaged personal property, put it in the best possible order, and make a complete inventory of the same, stating the quantity and cost of each article, and the amount claimed thereon, and, as often as required, should exhibit to any person designated by the defendant all that remained of the property therein described. It also contained the usual agreement for appraisal in case of disagreement as to the amount of loss, and that the company should not be held to have waived any provision or condition of the policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination therein provided for; and the loss was not to become payable until 60 days after notice, ascertainment, estimate, and satisfactory proof of the loss had been received, including an award by appraisers when an appraisal had been required; and it was stipulated that no officer, agent, or other representative of the defendant should have the power to waive any provision or condition of the policy, except such as, by its terms, might be the subject of an agreement indorsed thereon or added thereto, and then only when written thereon or attached thereto, and no privilege or permission affecting the insurance under the policy should exist or be claimed by the insured, unless so written or attached. The defendant alleged, and the evidence at the trial was that, immediately after the fire, the plaintiff recased about 908 cases of the insured stock of matches, and shipped them out of the state, without the knowledge or consent of the defendant, and that the remainder of the stock, not actually burned, but damaged, and, as it was claimed by the plaintiff, destroyed, was burned up; and the defendant claimed that this was done with intent to deceive the defendant, and prevent it from ascertaining the amount of the loss or damage by an appraisal, and to defeat its right to take the damaged goods at their appraised value. The evidence was: That the fire occurred October 31, 1893, in the plaintiff's warehouse building, where manufactured matches were stored for shipment. That, as soon as it possibly could, it got the matches not burned put into the factory, and what they could not get into the factory they put into the yard, and threw a shed over them, and put a crew at work on them, as the water on the outside would soak into the cases. Some of the cases were burned up entirely, some of the ends burned off, some not burned a particle, but not any that were not wet. The fire department had played on them for two hours with four or five streams. The cases were opened, as well as the small boxes. If the matches were dry, they were repacked, and put in new cases. Those that were wet, with the old cases and wrappers, were thrown into a barrel, and removed and burned up in the yard. In this manner 908 cases were saved. 600 cases were absolutely destroyed. The other 600 or 700 cases, what remained of those not burned up, were of no marketable value; still, after they had been dried out, they would burn as well as ever. That when matches have been wet, the color runs down the sticks, and they swell up, and get out of shape, and get crooked, and the heads stick together, and the matches are not in this condition marketable, and therefore they were burned up. The 908 cases saved were shipped to Louisville, Ky., five or six days after the fire. The worthless and débris were burned in the yard, because they were dangerous, and would dry, so as to ignite. Many of the cases were so wet that they could not be packed over, and more damage was done by water than by fire. That the wet and damaged matches were considered valueless, were in the way of the company, and it could not take care of them, and they endangered surrounding property. Of these there were about 1,247 cases. Fred. Burgess, the plaintiff's secretary and treasurer, testified, under objection, that the next day after the fire, while they were at work hauling away and burning the remains, he saw McNabb, the defendant's local agent, who had seen the condition of things, and he said to witness: "You are doing all right. Go on as you are doing. Save all you can, and burn up the rubbish if you want to; no use to keep that." The defendant's adjuster arrived seven or eight days after the fire, and made some examinations, but made no objection to what had been done; discussed the amount of the loss; and went away, promising to return in ten days. The plaintiff made the usual proof of loss, and defendant's manager promptly objected to the claim, by reason of the destruction of the property damaged, and the removal, sale, and disposition of the remainder, and that the plaintiff had thus

put it out of the power of the defendant to submit the amount of the loss to appraisers, and obtain an award, according to the policy, and deprived it of the right to take the damaged property at an appraised valuation. The plaintiff asserted, in reply, that it got out of the pile of débris 908 cases of matches, and the balance were destroyed by fire and water, and related the conversation with the agent of the company, insisting that it had acted in good faith. About three weeks thereafter, its adjuster returned, and called for and had an examination of Burgess, the secretary and treasurer, under the policy, in respect to the amount and nature of the loss. At the close of the plaintiff's evidence, the defendant moved for a nonsuit, which was denied. Defendant's counsel admitted that, if the plaintiff was entitled to recover at all, it was entitled to recover $1,500 and interest; and thereupon, and on motion, the court directed a verdict for the plaintiff for $1,577. From a judgment thereon in its favor, the defendant appealed.

Eaton & Weed and Charles Barber, for appellant. Thompson, Harshaw & Davidson, for respondent.

PINNEY, J. (after stating the facts). 1. Under the conceded facts in this case, we think that it is impossible to sustain or justify the direction of a verdict for the plaintiff. It is beyond dispute that there has been a breach of the conditions of the policy upon which the action is founded. The assured did not, as it agreed it would after the fire, "forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same," and did not, "when required, exhibit to the defendant's adjuster all that remained of the property" described in the policy. On the contrary, without any excuse or reason whatever for it, except the desire to fill an order it had received, it sold and shipped to Louisville, Ky., 908 cases of the matches that had been saved by sorting them out of a large number of cases, the contents of which had been more or less injured, and repacking and placing them in new cases. The evidence fails to show that a single case had been saved from the fire in a wholly undamaged condition, but quite the contrary. All the matches not thus saved and repacked, although not useless, were unmarketable, and, with the cases and other débris, were removed and burned up in the plaintiff's yard. About 600 cases were so completely destroyed that nothing whatever was saved from them. It is not necessary to consider whether the matches which were not saved, and which were not wholly destroyed, may or may not fall within the category of damaged property, as contended by the plaintiff, or whether they might be regarded as wholly destroyed, because unmarketable; for, under the conceded facts, the sale and shipment of the 908 cases which had been so sorted out and saved, before the defendant's adjuster arrived upon the scene, was a clear breach of the condition of the policy, which worked an effectual forfeiture of its obligations. It was the duty of the plaintiff, under the policy, after having selected the matches put in these cases from damaged or unmarketable or worthless matches, to have exhibited or had them in readiness to exhibit to any person designated by the company, as all that remained of the property described in the policy. The plaintiff thus disabled itself from performing the plain requirements of the policy before the arrival of the adjuster, and had effectually put it out of the power of the company to take these cases, as it had the right to do, at their appraised value. The defendant, when the proofs of loss were submitted, promptly raised these objections, and has not, we think, in any manner waived them. The conditions referred to are substantial and important, and are designed, among other things, to enable the company to fairly investigate and ascertain the loss, and to detect dishonesty and fraudulent practices. They were conditions for the protection of the company, to be performed after the loss, and until performed, or performance had been duly waived, no recovery could be had on the policy. We must regard these provisions as having been deliberately agreed to, and with the understanding that they were material, and would be performed accordingly; and it is the duty of the court to give full effect to them as written.

2. The evidence as to what took place between the local agent of the defendant, McNabb, and Burgess, the secretary and treasurer of the plaintiff, wholly fails to show a waiver of the conditions. After his connection with the writing of the policy had ceased, McNabb had no authority, as local agent, to waive these conditions. Hankins v. Insurance Co., 70 Wis. 4, 35 N. W. 34; Bosworth v. Insurance Co., 80 Wis. 393, 49 N. W. 750; Stevens v. Insurance Co., 81 Wis. 335, 51 N. W. 555; Bourgeois v. Insurance Co., 86 Wis. 402, 57 N. W. 38. Besides, there is no claim that McNabb ever, in any way, authorized or consented to the disposition and removal of the 908 cases, and the alleged waiver by him as local agent was oral, and not in writing, as required by the terms of the policy. Carey v. Insurance Co., 84 Wis. 88, 54 N. W. 18; Knudson v. Insurance Co., 75 Wis. 198, 43 N. W. 954; Bourgeois v. Insurance Co., 86 Wis. 606, 57 N. W. 347. The defendant, after the proofs of loss had been received, required an examination of Burgess, the plaintiff's secretary and treasurer; and he was examined accordingly, but by the terms of the policy it is provided that no waiver should arise in consequence of such requirement and examination. There is no other ground for imputing any waiver to the defendant, or for holding that it is precluded from insisting on its defense. The circuit court, therefore, erred in refusing to nonsuit the plaintiff, and in

directing a verdict in its favor. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

WELSH et ux. v. BLACKBURN.

(Supreme Court of Wisconsin. March 10, 1896.)

EQUITY—SETTING ASIDE MORTGAGE.

A mortgagor of real estate is not entitled to have it set aside, though not witnessed nor acknowledged, nor to have the foreclosure thereof vacated, though irregular or defective, except upon paying or offering to pay the indebtedness secured thereby.

Appeal from circuit court, Richland county; George Clementson, Judge.

Action by John S. Welsh and Mary Welsh against G. H. Blackburn. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

This was an action in equity to set aside a mortgage and the foreclosure thereof by advertisement, so far as affects the homestead of the plaintiff. The evidence showed that the plaintiffs, who were husband and wife, on the 2d day of January, 1889, for a valuable consideration, executed a mortgage for $467.58, covering 120 acres of land, of which 40 acres was their homestead, to T. J. Shears and O. A. Metscher, who were partners, and received the same as partnership property. The mortgage purported to be properly witnessed and acknowledged, but the plaintiffs introduced evidence tending to show that it was never in fact witnessed nor acknowledged. The mortgage was recorded. Afterwards the firm of Shears & Metscher dissolved, Mr. Metscher retiring, and Mr. Shears taking the assets and assuming the debts of the partnership by oral agreement. After the dissolution, and on May 26, 1891, Shears sold and delivered the notes and mortgage, for a valuable consideration, to the defendant, Blackburn, and executed a written assignment thereof to him, which was witnessed, acknowledged, and recorded. The notes not being paid, Blackburn foreclosed the mortgage by advertisement, under the authority to so foreclose contained in the mortgage, and upon sale the sheriff sold the entire property to the defendant, and executed a certificate of such sale on the 1st day of September, 1891. The court entered findings and judgment as follows: "The defendant, Blackburn, in open court having stated his willingness to take from the plaintiff in this action, or any other interested party, the principal of the mortgage that was given to Shears & Metscher, and thereupon to release said mortgage, and quitclaim all his interest in said land, and the plaintiffs in this action having made no offer, either prior to the commencement of this action or pending, to pay any portion of the mortgage indebtedness in question, and the court, being of the opinion that before the plaintiffs can come into court and ask for the relief they demand they should do equity by paying or offering to pay the indebtedness secured by this mortgage, without the costs of foreclosure by advertisement, therefore finds that unless by the 20th day of May the plaintiffs in this case pay to the defendant, Blackburn, the principal sum secured by said mortgage, and costs of this proceeding incurred by the defendant, to be taxed, that a decree be entered dismissing the plaintiffs' complaint upon the merits, and decreeing that said foreclosure proceedings are valid and absolute. Now, therefore, on motion of Fish and Bancroft, attorneys for defendant, it is hereby ordered, adjudged, and determined by the court that said judgment of foreclosure and sale thereunder is hereby affirmed in all things by the court, and the proceedings therein declared to be regular and according to law. It is further ordered and adjudged that the plaintiffs herein may have restitution of said premises upon payment by them of the amount of the principal in said mortgage, to wit, $467.58, together with the costs of this proceeding, taxed at $68.67, on or before the 20th day of May, 1893; the defendant to thereupon transfer to said plaintiffs all his right, title, and interest, to said plaintiffs or their legal representatives, in and to the premises described in said mortgage. It is further ordered that the defendant recover the costs herein at sixty-eight and sixty-seven-hundredths dollars ($68.67)." From this judgment the plaintiffs have appealed.

Michael Murphy, for appellants. Miner & Miner and Fred S. Fish, for respondent.

WINSLOW, J. (after stating the facts), The mortgage was valid as between the parties, even if it was not witnessed nor acknowledged. Leinenkugel v. Kehl, 73 Wis. 241, 40 N. W. 683. Such being the case, it constituted a valid lien on the land, and, if the foreclosure was irregular or defective, the lien and the debt would still remain. He who asks equity must do equity. If the plaintiffs are entitled to any relief, it could only be by paying the amount honestly due. This they did not even offer to do, and the judgment was right. Judgment affirmed.

SHAKMAN v. UNITED STATES CREDIT SYSTEM CO.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

GUARANTY OF CREDITS — CONTRACT OF INSURANCE — WHAT CONSTITUTES — POWER OF AGENT TO ALTER — CONSTRUCTION — JUDGMENT NUNC PRO TUNC.

1. A corporation which issues a contract whereby it guaranties a merchant against loss from sales on credit resulting from the insolvency of customers, to be determined in a manner specifically described, is an insurance company, within the meaning of Rev. St. §§ 1977, 1978, and the contract is one of insurance.

2. Where such contract provides that the customer must be rated in Dun's, and rated at not less than a sum specified, one who is the agent of such company for the purpose of so-

liciting such insurance, transmitting applications, and collecting premiums, and who receives pay therefor, has power to make an additional agreement providing that, if the customer is not rated in Dun's, and is rated in Bradstreet's, the rating in the latter shall be binding on the company.

3. A contract, dated October, 1889, by a corporation, whereby it guarantied a merchant against loss resulting from the insolvency of customers on conditions specifically described, provided that no credit should be given by such merchant unless the customer was rated in Dun's latest reports, and unless his rating was not less than a sum specified. November 8, 1889, there was delivered, with the contract, a slip containing an additional agreement providing that, should Dun not rate a party, and Bradstreet should, within the system of the company, the latter should be binding on it. November 26th, the company sent the insured a like slip except that it permitted the use of Bradstreet's only after November 13, 1889. The insured kept the latter slip, and made no objections to it. *Held*, that the contract as perfected November 8, 1889, governed the rights of the parties, in the absence of anything to show that the company was influenced in its conduct by assured's silence on receiving the latter slips.

4. The original contract, by its terms, covered the period of one year, commencing on July 1, 1889, and insured against losses accruing for merchandise sold and delivered during such period. *Held*, that the indorsement of November 8th, as well as the original contract, was effective from July 1st, so as to cover losses occurring on sales made between such dates, to customers not rated in Dun's, but rated in Bradstreet's, reports.

5. Such contract provided that, in calculating losses, no credit that may have been given should be included therein, exceeding a credit of 30 per cent. on the lowest capital rating such party or parties were rated at in such mercantile reports. *Held* that, where the insured gave debtors a larger credit than 30 per cent. of their lowest capital rating, the insured was entitled to be allowed 30 per cent. of such rating, and the excess only should be disallowed.

6. In an action on such contract, it appeared that insured gave credit to one whose name appeared in Dun's, with a notation indicating no capital rating, and credit "fair"; that, in Bradstreet's, he appeared rated with a notation indicating $1,000 to $2,000 capital, and credit fair. *Held*, that defendant was liable on the loss sustained by the insolvency of such customer.

7. Where a corporation is dissolved after an action against it is tried and the case has been taken under advisement by the court, it is proper to order the findings to be dated as of a day before the corporation was dissolved, and render judgment nunc pro tunc as of such day.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Action by L. A. Shakman against the United States Credit System Company on a written contract issued by defendant to plaintiff, and called a "certificate of guaranty." From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action upon a written contract issued by defendant to plaintiff, and called a "certificate of guaranty." The plaintiff is a manufacturer of clothing, doing business in Milwaukee, and was such in 1889. The defendant was, at that time, a corporation, incorporated under the laws of the state of New Jersey. It appeared that, about the 23d day of October, 1889, the defendant's agent at Chicago, one Langsdorf, called on the plaintiff, and the plaintiff then made a written application to the defendant company for a certificate of guaranty. This application, so far as necessary to be stated, is as follows: "L. A. Shakman & Co. hereby apply for a guaranty of five thousand dollars of the debts of the persons to whom we may sell goods, according to the system of said company, during the period of one year, commencing on the 1st day of July, 1889, and ending on the 1st day of July, 1890, and for that purpose we hereby make application to purchase of said company a certificate of guaranty, according to its system of credits, under the copyright of said company, for said term, and desire to enter series A of said company, which series is made up of not more than six hundred and fifty certificates, averaging a guaranty of $5,000 for each certificate. This application is made with the understanding that the said company limits its liability to pay excess losses in any one series in accordance with the following table, less the deduction allowed, to be made by said company, as the value of the bad debts sustained by the applicant, which is hereby agreed to be 12½ per cent. of the total amount of losses incurred by reason of bad debts remaining unpaid at the time of proving applicant's losses against said company." Langsdorf forwarded this application to the company, by whom it was accepted and a "Certificate of Guaranty" returned to Langsdorf, who delivered it to Shakman on the 8th day of November, 1889. This certificate reads as follows:

"No. 3452. Incorporated 1888. $5,000.

"United States Credit System Company, of the City of Newark, N. J.

"For and in consideration of the terms and conditions herein named, and of the sum of one hundred and forty-five dollars, paid by L. A. Shakman & Co., hereby grants, bargains, and sells to the said L. A. Shakman & Co. this certificate, issued under its copyrighted system of credits, in series A, class B, for the term of one year, commencing on the 1st day of July, 1889, and ending on the 1st day of July, 1890. And for said consideration the said United States Credit System Company guaranties, covenants, and agrees that if the said L. A. Shakman & Co. should, by reason of the insolvency of any debtor or debtors, who owe such debtor debts for merchandise sold and delivered during said period, under the credit system of said company as hereinafter mentioned, or by reason of any uncollectible judgment or judgments that he or they may have obtained, for the sum or sums of money due for merchandise sold and delivered as aforesaid, have losses in excess of 1¾ per cent. on their total sales made during the above limited period, to pay such excess loss, not exceeding five thousand dollars, less the deductions, and subject to the terms and conditions hereinafter named. It is, however, ex-

pressly agreed and understood that this certificate forms a part of series A, and the company's liability to pay excess losses in any series is limited to the fund or funds provided for said series, as appears more specifically in the application signed by said L. A. Shakman & Co., which application forms a part of this certificate.

"Terms and Conditions.

"(1) That no credit which may have been given to any party or parties shall be included in the calculation of losses, unless he or they were rated in R. G. Dun & Co.'s Mercantile Agency in the latest books or reports issued by it at the time of shipping the goods, and that no special or other report was received by said L. A. Shakman & Co. changing the same. And in case any change has occurred, such sale and shipment shall be considered to have been made in accordance with such change. (2) That, in calculating the losses, no credit that may have been given shall be included therein exceeding credit of 30 per cent. on the lowest capital rating such party or parties were rated in said Mercantile Agency's books or reports. (3) That, in the calculation of losses, no account against any debtor shall be included therein for more than ten thousand dollars. (4) That no credit that may have been given shall be included in the calculation of losses, unless the rating of the party to whom such credit is given was at least two thousand dollars ($2,000) at the time of shipping the goods, and that the credit rating was the best or next to the best for the capital. (5) All losses shall remain the property of said L. A. Shakman & Co., and in consideration thereof it is agreed that 12½ per cent. of the said 1¾ per cent. of the yearly sales, and 12½ per cent. of the losses incurred in excess thereof, not exceeding the amount of this guaranty, shall be deducted from both said sums, and the balance, after the deduction of the amount of said 1¾ per cent. on the said yearly sales, shall be the sum for which said company is liable. (6) That it shall be the duty of the said L. A. Shakman & Co. to notify said company of the insolvency of any of his or their debtors coming within the calculation of losses under this certificate, within ten days after receiving information of the same. Such notice shall state the name of the debtor, the place of business, date of shipment, amount thereof and amount still due. Upon failure to give such notice, such claim shall not be taken into the calculation of losses. (7) That, in presenting proofs of losses to said company, such proofs shall specifically show the facts upon which the guarantor bases the belief that the claims are a loss, a statement of the amount of the gross sales between and including date of beginning and expiration of this certificate, the names of the person or persons to whom the goods were sold, itemized account of the same, date of shipment, amounts paid on account, the discounts the debtor or debtors were entitled to receive; and said proofs of loss must be duly verified. (8) That all proofs of loss must be presented within six months after the expiration of the term mentioned and set forth in this certificate, or else the said claims shall be forever barred, even though the loss occurs on an account falling due after the expiration of said six months: provided, however, where any claim is in litigation, and notice thereof is given to the company, then, in that case, the loss, if any, shall be presented within ten days after the termination of said litigation. (9) It is expressly understood that this certificate is issued under class B of this company, whereby the amount of the yearly sales of said L. A. Shakman & Co. are fixed between the sum of one hundred thousand dollars and two hundred thousand dollars; but, should such sales be of a greater or less sum than above fixed, then any loss sustained by the said L. A. Shakman & Co. would be settled by this company under the terms and conditions of the class to which it belongs, according to the classification system of this company. (10) That this company shall only be liable to the said L. A. Shakman & Co. for goods, wares, and merchandise by him or them owned, shipped, and sold in the usual course of his or their business and trade, and not for goods kept by him or them on consignment, and for which he or they have incurred no liability to pay for; nor shall said company be liable for claims arising from other sources. (11) The company shall pay all losses within sixty days after the proof of loss shall have been made. (12) There shall be no liability on the part of the company unless the said L. A. Shakman & Co. shall have continued his or their said business for the full period of the term herein mentioned and set forth, and should he or they not so continue, fifty (50) per cent. of the guaranty fee received shall be returned in full satisfaction of all claims against this company.

"Special: In condition No. 2, 20 per cent. is changed to 30 per cent. Condition No. 4 is changed so as to include sales to parties whose rating is K 3½ in Dun's Agency Book."

At the time of the delivery of this certificate, and before payment of the consideration or premium, Shakman objected that the policy did not allow the use of Bradstreet's reports of ratings as well as Dun's. There is a conflict in the evidence as to what followed this objection. Shakman's evidence tends to prove that Langsdorf said he would concede this, and that he had authority to do so, and that Langsdorf thereupon wrote, and delivered with the policy, the following slip: "Milwaukee, Nov. 8, 1889. Indorsement to certificate No. 3,452, in favor of L. A. Shakman & Co., to wit: Should any party to whom abovenamed firm may sell goods not be rated within the system of this company at Dun's Mercantile Agency, and Bradstreet's Agency does rate such party, within the system of this

company, then, in such cases, the latter shall be binding upon this company. A. Langsdorf, Genl. Supt." Langsdorf, on the other hand, while admitting that Shakman objected to the policy because it did not allow the use of Bradstreet's ratings as well as Dun's, denies that he gave the indorsement to Shakman as a contract, but says that he told him he would submit the matter to the company for their decision, and that he wrote out the indorsement simply to show Shakman how it would read in case the company approved it. At the same time, and after the delivery of the slip, Shakman paid to Langsdorf the premium of $155. It appeared that one Fishell was the partner of Langsdorf, and that their office was at Chicago, and that they styled it the "Western Department" of the United States Credit Company; Langsdorf calling himself general superintendent, and Fishell general manager. Langsdorf testifies that they assumed these titles without authority of the company, and really only had authority to solicit business and collect premiums. On or about November 26, 1889, the plaintiff received a letter from Fishell as follows: "Inclosed find indorsement slip, as requested, which please attach to the certificate, to take the place of the agreement left with you signed by our Mr. Langsdorf. Very respectfully, Albert Fishell, Mgr." The slip inclosed reads as follows: "Should Dun's Mercantile Agency not rate a party, and Bradstreet's Agency should give such party a rating or report, and such rating or report is sufficient to be covered by the system of this company, then and in that case the said L. A. Shakman & Co. may use Bradstreet's Mercantile Agency as a basis for such party. This special permission to take effect November 13, 1889. [Signed] Fred M. Wheeler, Secretary." The plaintiff read the letter, but not the slip, and paid no attention to it, and did not return it. The action was tried by the court, jury being waived, and the court made findings of fact substantially as above stated. As to the disputed questions with regard to the Langsdorf indorsement, of date November 8th, the court found favorably to the plaintiff's contention, and that it became a part of the contract on that day. The court further found that the plaintiff, during the period covered by the contract, suffered losses within its terms, amounting, in the aggregate, to $6,502.47, and that, after deducting therefrom 12½ per cent. of such total, and 1¾ per cent. of the plaintiff's total sales, the net losses covered by the contract were $2,856.75. Due notice and proof of loss were also found, and the court found, as matter of law, that the defendant is an insurance corporation, and that the contract in question is a contract of insurance. Judgment for the plaintiff for $2,856.75, with interest and costs, was rendered, and the defendant appealed.

Winkler, Flanders, Smith, Bottum & Vilas, for appellant. Turner, Bloodgood & Kemper, for respondent.

WINSLOW, J. (after stating the facts). We regard the contract before us as unquestionably a contract of insurance. An insurance contract is a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril. The peril of loss by the insolvency of customers is just as definite and real a peril to a merchant or manufacturer as the peril of loss by accident, fire, lightning, or tornado, and is, in fact, much more frequent. No reason is perceived why a contract of indemnification against this ever-present peril is not just as legitimately a contract of insurance as a contract which indemnifies against the more familiar, but less frequent, peril by fire. This very contract has been (sub silentio) construed as a policy of insurance by the supreme court of New Jersey. Credit System Co. v. Robertson (N. J. Sup.) 29 Atl. 421. The contract being, then, a contract of insurance, and the defendant's business being the making of such contracts, it follows that the defendant is an insurance corporation, within the meaning of sections 1977 and 1978, Rev. St. Langsdorf was its agent for the purpose of soliciting insurance, transmitting applications, and collecting premiums, and received pay therefor. He was, consequently, under section 1977, supra, its agent for all intents and purposes, and had power to make the additional agreement contained in the indorsement dated November 8th. Renier v. Insurance Co., 74 Wis. 89, 42 N. W. 208. The court has found, on ample evidence, that he did make that agreement, and the fact is therefore settled. It is, then, a fact in the case that a complete contract of insurance was made, on or about November 8th, by the terms of which the plaintiff was to have the right to use the Bradstreet's ratings in case a given customer was given no rating by Dun.

But it is said that the memorandum sent to the plaintiff November 26th, which permitted the use of Bradstreet's reports only after November 13th, 1889, became effective and binding by reason of the plaintiff's receiving it and failing to object thereto. We are unable to agree with this contention. The agreement of November 8th, being perfect, the letter and inclosed memorandum of November 26th could, at the most, amount to nothing more than a proposal to change the terms of the existing contract. This the plaintiff could do or not, as he chose; but it cannot be said that he did so unless he expressly agreed to the change, or unless his silence was legally equivalent to an express consent to the proposed change. There was no express agreement to make the change, nor do we think that the simple failure to answer the proposal should be construed as such an agreement, in the absence of all evidence showing that the defendant was influenced in its conduct by plaintiff's silence. An agreement inferred from silence must, in such case, rest on the principle of estoppel; and one essential element of estoppel

is lacking here, namely, a change of position on the part of the defendant, relying on the plaintiff's silence, which would result in substantial injury to the defendant were it not permitted to rely on the estoppel. The conclusion necessarily is that the contract which became perfected, November 8th, with the Langsdorf indorsement, became the contract governing the rights of the parties.

Another question now arises upon the construction to be given to the Langsdorf indorsement. It will be noticed that the policy, though dated October 23, 1889, in terms covers the period of one year commencing on the 1st of July, 1889, and that it insures against losses accruing for merchandise sold and delivered during that period. Thus, the contract covers several months' business transactions previous to its date. It appears in evidence that a considerable number of the losses for which the plaintiff has recovered judgment were suffered between July 1, 1889, and the delivery of the contract, and that these losses arose from credits given to parties who had no credit rating in Dun's reports, but did have such rating in Bradstreet's reports. It is now contended that the Langsdorf indorsement is purely prospective in its operation, and only insures losses occurring after November 8th; so that, for the losses occurring before that date, covered by Bradstreet's reports only, there can be no recovery. The indorsement reads: "Should any party to whom above-named firm may sell goods not be rated, within the system of this company, at Dun's Mercantile Agency," etc. The argument cannot prevail. This indorsement is part of the whole contract. It must be read in connection with all the other provisions of the contract, and as though it were incorporated in the contract at the proper place. So read, there can be no doubt that the contract refers to all goods sold and credits given between July, 1889, and July, 1890, and that the right to use the Bradstreet ratings in the proper cases was intended to be as broad in its terms as to time as the right to use the Dun ratings.

Subdivision 2 of the terms and conditions of the policy provides that, in calculating "losses, no credit that may have been given shall be included therein, exceeding a credit of 30 per cent. on the lowest capital rating such party or parties were rated at in said mercantile agency's books or reports." In a number of instances of losses the plaintiff had given the insolvent debtors a larger credit than 30 per cent. of their lowest capital rating. The court allowed, in such cases, 30 per cent. of such rating, and disallowed the excess. It is claimed by appellant that the clause means that the entire credit is to be excluded, and not simply the excess above 30 per cent. of the rating. This is purely a matter of construction of language, and our construction agrees with that of the trial court, namely, that it is only that part of the credit exceeding 30 per cent. of the rating which is to be excluded.

It is claimed that a loss of $300 suffered by the failure of one Simansky was improperly allowed. It appears that Simansky's name appears in Dun's reports with the notation "Blank 3"; that is, no capital rating, and credit "fair." In Bradstreet's reports, however, he appears rated "X D," which means $1,000 to $2,000 capital, credit fair. It seems to us that this loss was properly allowed. Simansky had no capital rating in Dun's reports. The system of the defendant required both a capital and a credit rating. This was, therefore, a case clearly within the Langsdorf indorsement, where the party was not "rated within the system of the company" at Dun's Agency, and was so rated in Bradstreet's Agency.

This case was tried and submitted to the court February 20, 1894, and taken under advisement by the court, and held under advisement until October of the same year. The original findings were signed and filed October 2d, and, on motion of defendant, were amended in some particulars on the 27th day of October, on which day the appellant's attorneys made proof to the court that, on the 2d day of October, the court of chancery of New Jersey had by decree declared that the defendant had ceased to be a corporation, and had forfeited franchises and rights under the laws of New Jersey, and appellant's attorneys objected to the entry of judgment for that reason. Thereupon the court ordered the findings to be dated and filed as of March 3d, so as to bring them within the term at which the case was tried, and also rendered judgment nunc pro tunc as of that day. This was right. The action was upon contract. Where such an action has been fully tried and submitted, and taken under advisement by the court, and, pending the decision, a party dies, the court will not allow the action to abate, but will enter judgment as of the time when the action was submitted. The judgment forfeiting the franchises of the corporation could amount to nothing more than the death of an individual. 1 Black, Judgm. § 127; Mitchell v. Overman, 103 U. S. 62. Judgment affirmed.

MURPHEY v. WEIL.

(Supreme Court of Wisconsin. March 10, 1896.)

CONTRACTS—AMBIGUITY—CONSTRUCTION—BREACH.

1. A contract relating to the assignment of certain patents provided that, if the patents applied for on the invention for "thermostat and automatic machine" be disallowed in substance, the sellers would refund to the purchaser $12,500 of the money paid under the contract. *Held* that, as the word "thermostat" has a definite meaning, its use did not render such contract ambiguous, so as to make admissible extrinsic evidence for the purpose of explaining it, and

make the meaning of the words "thermostat and automatic machine," as used in the contract, a question for the jury, and not for the court.

2. In an action for the balance of the purchase money, in which defendant filed a counterclaim to recover back the $12,500 as provided by such contract, it appeared that when the contract was made there were pending six applications for patents for thermostats, or improvements in thermostats, and one application for a clockwork device to be used in connection with a thermostat. *Held*, that the words "automatic machine," in such contract, referred to such clockwork device, and that, a patent on such device being disallowed in substance, defendant was entitled to recover.

3. A contract relating to the assignment of certain patents applied for provided that, if the patents applied for on the invention for thermostat and automatic machine were disallowed in substance, the sellers would refund to the buyer $12,500 of the money paid under the contract. *Held*, that it was not necessary that all the patents applied for be disallowed, to entitle the buyer to the return of the $12,500, but the disallowance of a patent for the automatic machine was sufficient.

4. Where two persons jointly agree to sell corporate stock and to assign certain patents applied for, and that, if the patents applied for be disallowed in substance, the sellers will refund to the buyer a certain portion of the purchase money, and one of the sellers authorizes the buyer to pay the purchase money directly to the corporation, the surviving promisor, on the disallowance of the patents, is liable to the buyer for such portion of the purchase money; and this without a rescission of the contract, or return of the stock.

Appeal from superior court, Milwaukee county; R. D. Marshall, Judge.

Action by Newton S. Murphey against Benjamin M. Weil to recover a certain balance claimed to be due from defendant to plaintiff on the purchase price of certain shares of corporate stock and the assignment of certain patents applied for, in which defendant set up a counterclaim for failure of plaintiff to perform such contract of sale and assignment. From a judgment dismissing plaintiff's cause of action, and in favor of defendant on his counterclaim, plaintiff appeals. Affirmed.

This is an action to recover $12,500, claimed to be due from the defendant to the plaintiff as a balance of the purchase money of certain shares of corporate stock under the terms of the following contract: "Agreement made and entered into this 23rd day of March, 1887, by and between H. E. Jacobs and N. S. Murphey, of the first part, and Benjamin M. Weil, of the second part, all of Milwaukee, Wisconsin: Witnesseth, the parties of the first part agree to sell and deliver to the party of the second part two hundred and fifty shares ($25,000) in full-paid capital stock of the Jacobs Electric Company of Milwaukee, Wisconsin, for the sum of twenty-five thousand dollars ($25,000), to be paid as follows: $13,500 to be paid at this date; $1,000, May 1, 1887; $1,000, June 1, 1887; $3,000, July 1, 1887; and $6,500, October 1, 1887,—without interest; $12,500 of said money to be advanced and loaned to said company by the parties of the first part. It is further agreed that the parties of the first part will, for the same consideration, and at the same time, sell and deliver to the party of the second part two hundred and fifty shares ($25,000) in full-paid stock of the Electric Temperature Controlling Company of Milwaukee. It is further agreed that, if the patents applied for by Jacobs on the invention for thermostat and automatic machine be disallowed in substance, the parties of the first part agree to refund to said Weil $12,500 of the money paid hereunder. Witness our hands and seals this 2nd day of April, 1887. H. E. Jacobs. [Seal.] N. S. Murphey. [Seal.] Benj. M. Weil. [Seal.]" Mr H. E. Jacobs, one of the contracting parties, died before the commencement of this action, and his interest in the contract was assigned to the plaintiff by his administrator. The defendant's answer was quite long, and, so far as necessary to be stated to understand the questions involved in this action, consisted: (1) Of defensive matter, to the effect that the stock sold and delivered to the defendant was not full-paid stock; that the conditions to be performed by the plaintiff on his part had not been performed; and that the patents referred to in the last part of the contract had been disallowed, and, consequently, that the plaintiff cannot recover. (2) A first counterclaim on the ground that the contract was induced by fraudulent representations as to the value of the patents. (3) A second counterclaim for damages on the ground that the stock transferred was not fully paid. (4) A third counterclaim for damages on the ground that the patents named in the last clause of the contract had been disallowed in substance; that the defendant had advanced to the corporation $6,000, which was in fact a part payment of the $12,500 of deferred payments provided for by the contract in question, which said money was, by direction of Murphey and Jacobs, advanced directly to the company, and used in its business, instead of being paid first to Murphey and Jacobs, and by them advanced and loaned to the company, as contemplated in the contract. This sum of money was sought to be recovered under the third counterclaim. It appeared by the evidence that prior to the making of the contract in suit the two corporations named in the contract, viz. the Electric Temperature Controlling Company and the Jacobs Electric Company, had been organized, and that at the time of the making of the contract the plaintiff and Jacobs owned all of the stock of both corporations. The stock of each corporation was originally paid for by the assignment to the Jacobs Electric Company of certain alleged inventions, and the right to the assignment of all future inventions by Jacobs of improvements in thermostats, or devices for regulating temperature in rooms. At the time of the assignment to the corporations of these inventions, present and prospective, of Jacob's, to wit, February 21, 1887, such inventions were described in the assignment as follows: First, an application for letters patent on a device

known as an "Automatic Adjustment of Thermostat"; second, application for letters patent for automatic device to open and close drafts of furnaces and stoves; third, application for letters patent for improvements in thermostats. Prior to the execution of the agreement in suit, other applications for patents in the same general direction had been made by Jacobs, so that at the time of making of such contract, viz. April 2, 1887, application had been made by Jacobs for seven patents, described as follows: Application No. 212,283, for improvement in contact devices for thermostat; application No. 216,409, for improvement in electric temperature controlling device; application No. 365,438, for improvement in thermostats; application No. 363,644, for improvement in electric temperature controlling device; application No. 363,645, for improvement in electric temperature controlling device; application No. 365,600, for improvement in electric temperature controlling device; application No. 214,595, for pole changer for thermostats. It appears that two of these patents (Nos. 216,409 and 212,382) had been allowed in March, 1887, but that no patents had been issued thereon at the time of the making of the contract, because the fees for the issuance of patents had not been paid; and it is claimed that the parties, when they made the contract, did not know of the fact that they had been allowed. All applications except No. 214,595 covered alleged improvements of various kinds in thermostats, either in the thermometric apparatus, or in the apparatus immediately connected with the dampers of the stoves, or both. Application No. 214,595, denominated "Pole Changer for Thermostats," consisted of the combination with a thermostat of a clockwork device, which was to be wound up, and was to adjust and change the temperature at which the thermostat would act upon the dampers at certain predetermined times. This application is referred to in the case as the "Clockwork Device." The evidence showed that all of the applications above named were allowed, but that, though application No. 214,595 was in form allowed, a patent thereon was refused, as the result of interference proceedings brought by the Butz Thermo-Electric Company. At the conclusion of the trial the court directed a verdict by which the jury found in favor of the defendant and against the plaintiff on the cause of action contained in the plaintiff's complaint; second, in favor of the defendant and against the plaintiff for the sum of $5,108 on the cause of action contained in the third counterclaim; third, in favor of the plaintiff and against the defendant on the cause of action contained in the first and second counterclaims. Upon this verdict judgment was entered in favor of the defendant, dismissing plaintiff's cause of action, and for $5,108 and costs upon the cause of action set forth in the third counterclaim. From this judgment the plaintiff appealed.

Quarles, Spence & Quarles and H. J. Killilea, for appellant. Timlin & Glicksman and Winkler, Flanders, Smith, Bottum & Vilas, for respondent.

WINSLOW, J. (after stating the facts). This case was before this court upon a former occasion, and will be found reported in 89 Wis. 146, 61 N. W. 315. The question then before the court was whether the court below erred in granting a new trial on the ground of inconsistency in the findings of a special verdict which had been rendered in the case upon a former trial, and it was held that the new trial was rightly granted. It was held upon that appeal that the patent for the clockwork device, though formally allowed, was disallowed in substance, because never issued, on account of its interference with the Butz patent. The evidence upon this question is the same as upon that trial, and therefore it is settled in the case that the application for a patent on the clockwork device was "disallowed in substance." The contract in question provides that, "if the patents applied for by Jacobs on the invention for thermostat and automatic machine be disallowed in substance, the parties of the first part agree to refund to said Well $12,500 of the money paid hereunder." It is apparent that if the words "automatic machine," in this clause of the contract, must be held to refer to the clockwork device, then the application for a patent for an "automatic machine" has been disallowed in substance. This was the construction placed upon it by the trial judge, and upon this construction he decided the case, and directed a verdict for the amount which it was conceded the defendant had advanced to the business. If he was right in his construction of the contract, the judgment must be affirmed; if wrong, then there should be a new trial. It is claimed by the plaintiff that the court was not justified in construing the words "automatic machine" as referring conclusively to the clockwork device, but that there was evidence in the case which would justify the conclusion that the word "thermostat," as used in the contract, referred to the thermometer and the expanding metal strips upon the wall of the room, and that the words "automatic machine" referred to the electromagnetic apparatus by means of which the dampers of the furnace are opened or closed as the metal strips on the wall open and close an electric circuit. From this premise it is argued that the question as to the meaning of the words "thermostat and automatic machine," as used in the contract, was a question for the jury, and not for the court. "Thermostat" is a word with a definite and certain meaning, both in ordinary parlance, and as used by heating engineers. It means a self-acting apparatus for the regulation of temperature. This is what a thermostat is now, and what it always has been, however simple or however complicated it may

be. It includes the whole apparatus,—as well the expanding strip or strips of metal or other substance upon which the heat first acts as the intermediate wires, magnets, or other apparatus, if any, by which the dampers of the furnace are opened or closed as the strips expand or contract. The word "thermostat" being, then, a word of fixed and definite meaning, that meaning must be attached to it when it is used in a contract. Parties cannot use terms with a fixed and certain meaning, and then disclaim such meaning,—at least, without reformation of the contract, and no reformation is sought or claimed here. Cotton Mills v. Ford, 82 Wis. 416, 52 N. W. 764. There is no ambiguity or uncertainty as to what is meant by the word "thermostat." Therefore its meaning could not be affected by extrinsic evidence. Kirch v. Davies, 55 Wis. 287, 11 N. W. 689.

Starting with this premise, and referring to the evidence, we find that at the time of the execution of the contract in suit there were pending six applications for patents which were for thermostats pure and simple, or improvements in thermostats, and we find one application (No. 214,595) which was an application for a clockwork device to be used in connection with a thermostat. This device was to be wound up with a key, and its object was to automatically change the position of the expanding strips of metal at certain predetermined hours of the day or night, so that for a certain number of hours of the day the thermostat would maintain the heat at a lower degree than during the remaining hours. It was expected, for instance, that by the aid of this clockwork the temperature might be maintained at 70 degrees during the daytime, and at 60 degrees during the night, with no other action on the part of human agencies than the replenishing of the fire and the winding of the clockwork. This was manifestly an "automatic machine." There were therefore six applications for patents upon thermostats, and one application for a patent upon an automatic machine (which was not a thermostat), pending when the contract was made by which it was provided that, "if the patents applied for on the invention for thermostat and automatic machine be disallowed in substance," then the defendant's purchase money was to be refunded. The words are not "thermostat or automatic machine." If so, then it might be reasonably argued that the automatic machine referred to was the thermostat, which is in fact an automatic machine itself. But the words are "thermostat and automatic machine." They are distinct. The automatic machine is in addition to the thermostat. In this state of the evidence, it appearing that there were pending at the time, and included in the negotiations of the parties, six applications for patents on improvements in thermostats, and one application for patent on an automatic machine to be used in connection with a thermostat, there is no room left for construction. The contract becomes absolutely certain, and the automatic machine referred to can be nothing but the clockwork device,—the only automatic machine, aside from a thermostat, for which a patent was applied for at the time of the contract. This being our conclusion as to the construction of the contract, it becomes unnecessary to consider the parol evidence which was introduced on both sides tending to throw light upon the meaning of the words used. Under the view we have taken, it is immaterial. It may be said, however, that such evidence was, in the main, very strongly corroborative of the meaning which we have attributed to the words as matter of law.

The patent for the automatic machine having been disallowed in substance (Murphey v. Weil, 89 Wis. 146, 61 N. W. 315), the question is whether this fact entitles the defendant to a return of his purchase money, when it appears that the six applications for improvements in thermostats were all allowed. Upon this question the trial judge said, in deciding the cause: "I think the language used in the contract, 'That if the patents applied for by said Jacobs on the invention for thermostat and automatic machine be disallowed,' must be construed as covering all the patents. That is, not all the patents must be disallowed, in order that the cause of action might accrue for the recovery of the money, but that, if any one of the patents was disallowed in substance, that the cause of action would accrue. That is my interpretation of that contract. It appears conclusively that one of the patents was disallowed in substance in the patent office. In my judgment, that was sufficient to allow the bringing of the action to recover back the money." We quite agree with this interpretation of the language of the contract, and think it the only reasonable view to take of the provision. Furthermore, the question would hardly seem to be an open one in this case, for the reason that it was held upon the former appeal (Murphey v. Weil, supra) that, if this application (i. e. the application for a patent on the clockwork device) has not been allowed in substance, the defendant is entitled to have the purchase money, to the amount of $12,500, returned. We regard the promise to refund the purchase money to Weil as unquestionably a joint promise. The contract is apparently joint, from start to finish. The complaint alleges that Jacobs and Murphey jointly owned the $12,500 worth of stock in the Jacobs Electric Company when the contract was made. The agreement to sell that stock to Weil is joint in terms. The payments were evidently expected to be made to either, as there is no provision for separate payments. The agreement to advance to the corporation the amounts paid by Weil for the stock is joint. The agreement to deliver the shares in the second corporation is joint. In fact, no separate interest, as between Murphey and Jacobs, is disclosed anywhere; and, in the absence of anything showing severalty of interest, the promise to re-

fund should be construed as a joint promise. Northampton Co. v. Hayden, 119 Mass. 361. The contract being joint, and the evidence showing, without dispute, that one of the joint contractors, Jacobs, authorized Weil to pay his purchase money by advancing it directly to the corporation, there can be no question as to the liability of the surviving joint promisor, on the happening of the contingency which requires repayment of such purchase money. Nor was rescission or return of the stock necessary to entitle Weil to enforce the contract, because the contract does not require it, nor can it be reasonably construed to require it. It seems to have been considered (as the fact apparently is) that, if the patents applied for were not allowed in substance, the stock would be valueless.

It is argued that the judgment is defective because it does not specifically dispose of the issues raised by the first and second counterclaims. The verdict, which is recited in the judgment, disposes of every counterclaim; there has been no withdrawal of any of the counterclaims; and the judgment in favor of defendant upon the third counterclaim alone we regard, under these circumstances, as a complete bar to any future recovery upon the first or second counterclaim. Morgan v. Railway Co., 83 Wis. 348, 53 N. W. 741. Judgment affirmed.

CARTER WHITE-LEAD CO. v. KINLIN.

(Supreme Court of Nebraska. March 4, 1896.)

INSTRUCTIONS—NECESSITY OF REQUESTS—CONTRACT OF EMPLOYMENT—STATUTE OF FRAUDS—CONSIDERATION.

1. In order to present for review the failure of the trial court to instruct the jury upon particular issues or evidence in a case, the party complaining must have requested instructions on the omitted topics.

2. A contract whereby one, in consideration of the release of a claim for damages against him, agrees to employ the claimant at certain wages so long as the works of the first are kept running, or until the other shall see fit to quit, is not void, either for uncertainty, for want of mutuality, or as within the statute of frauds.

3. A contract not to be performed within one year, as meant by the statute of frauds, is one which, by its terms, cannot be performed within one year. A contract is not within the statute merely because it may, or probably will, not be performed within a year.

4. One party to a contract may obligate himself for a definite or an indefinite period, not depending on his own acts, and the other party may at the same time have the option of terminating it at his will. A contract upon sufficient consideration is not void for that reason.

5. In order to sustain a contract which has for its consideration the release of a claim for damages against the promisor, it is not necessary that the claim should be one which, on litigation, would have proved to be valid.

(Syllabus by the Court.)

Error to district court, Douglas county; Davis, Judge.

Action by Peter Kinlin against the Carter White-Lead Company. Judgment for plaintiff. Defendant brings error. Affirmed.

E. J. Cornish and W. T. Nelson, for plaintiff in error. Smith & Sheean, for defendant in error.

IRVINE, C. The assignments of error relied on by the plaintiff in error relate to the giving of instructions and to the sufficiency of the evidence. It is not contended that any of the instructions misstated the law, but the complaint is that they omitted certain features of the case upon which the jury should have been instructed, both in stating the issues and the law applicable thereto. For the most part, these assignments clearly fall within the rule that a failure to fully instruct the jury upon the issues and law of the case is not open to review, unless the party complaining requested instructions on the omitted topics. Barr v. City of Omaha, 42 Neb. 341, 60 N. W. 591; Carleton v. State, 43 Neb. 373, 61 N. W. 699; Post v. Garrow, 18 Neb. 682, 26 N. W. 580. It is, however, claimed that, by two instructions, the court endeavored to cover all the facts essential to a recovery, and that omissions of essential facts in these instructions rendered them erroneous without such request. We do not think that the instructions referred to, severally or jointly, were of the character which renders that rule applicable. The action was by Kinlin again the Carter White-Lead Company, which we shall hereafter term the "Company"; the petition alleging that, on the 23d of November, 1891, a contract had been made between the parties, whereby the company agreed to employ plaintiff, and pay him $2.50 per day while working in the smelting department, and $2.00 per day while elsewhere employed, and to so give him employment as long as the works were kept running, or until the plaintiff saw fit to quit, in consideration whereof Kinlin agreed to so work for the company, and to release a claim for damages against the company which was then in litigation between them. Kinlin, in the first count of his petition, alleged that he had been wrongfully discharged in violation of such contract, and prayed damages therefor. In another count he alleged that the company had not paid him as much as it had agreed during the time he was employed, and judgment was sought for the deficiency. The answer, among other things, denied the material allegations of the petition, alleging that Kinlin's employment had been a hiring at will, at the wages paid other men for similar work. The instructions particularly complained of were as follows: (5) "Before the plaintiff can recover, he must prove, by a preponderance or greater weight of the testimony, that the contract alleged was made; that he and the defendant, by its president, Carter, did agree that defendant would give plaintiff employment, as long as defendant's works were kept running, at the rate of $2.50 per day for work in the smelting department, and $2.00 per day while otherwise employed." (9) "If you believe, from a preponderance of

the evidence, that the contract alleged by plaintiff was made, and that defendant was discharged without adequate and reasonable cause, then he would be entitled to recover for the time he was unable to procure work, as shown by the evidence. If he could procure work, it would be his duty to accept work; and for the time he was able to get work with reasonable diligence he could not recover. For such time as he could not, with reasonable diligence, get work, and was obliged to be idle, he would be entitled to recover at the agreed rate. The amount of plaintiff's claim under this cause of action is $180." As we said, the complaint is that these instructions were not complete. The fifth instruction related solely to the promise on which Kinlin founded his claim, impressing upon the jury that, in order to recover, Kinlin must establish the contract as alleged. The object of the ninth instruction was to state the measure of damages, and especially the law of avoidable consequences. Standing alone, we do not see that either or both could be taken as summarizing all the particular elements essential to a recovery; and taken in connection with the other instructions, each one of which related to a particular issue, it is quite clear that the jury could not have understood them in that sense. So that the first rule stated is applicable to these instructions as well as to the others.

The assignment that the verdict is not sustained by the evidence suggests questions both of law and of fact. So far as the question of fact is concerned, the case is one of those in which counsel very reasonably believe that they have suffered an adverse verdict while the evidence preponderated in their favor, and therefore seek in this court a modification of the rule generally observed in ascertaining the sufficiency of the evidence, in order to correct a verdict which they feel to be wrong. The wisdom of the rule here established, by which this court declines to weigh conflicting evidence in cases within its appellate jurisdiction, is daily justified by experience. On the written transcript, it seems to the writer that the verdict was against the weight of the evidence; but the opportunities of the jury on the trial, and the district judge on the motion for a new trial, for correctly estimating the effect of the evidence, were much better than ours. There is sufficient conflict to prevent our disturbing the verdict, unless, as a matter of law, the contract which the evidence, taken most favorably for the plaintiff, tends to establish is invalid or incapable of enforcement. It is quite evident, from the testimony and the instructions, that the verdict rendered, for $120.07, was based entirely on the first count in the petition,—that for the wrongful discharge of plaintiff. The defendant claims that the contract sued on was invalid, and that therefore the judgment cannot stand. A similar contention was urged in regard to a somewhat similar contract in Railroad Co. v. Cochran, 42 Neb. 531, 60 N. W. 894; but the case was disposed of on grounds which did not call for a decision of the questions here presented. In Hobbs v. Light Co., 75 Mich. 550, 42 N. W. 965, the plaintiff released a claim for damages against the defendant in consideration of defendant's promise to give the plaintiff "steady employment as trimmer." The court held this to be a valid and binding contract, although it will be observed that it was less definite in its terms than that alleged by Kinlin. In Pennsylvania Co. v. Dolan, 6 Ind. App. 109, 32 N. E. 802, the contract was to give Dolan "steady and permanent employment," at the amount he was earning at the time of his injury, in consideration whereof Dolan released the company from liability on account of such injuries. The court pronounced this contract valid, because of the consideration, saying that the words "steady and permanent" were equivalent in meaning to the promise of employment so long as the employé was able, ready, and willing to perform such services as the company might have for him to perform. The construction given these terms was not very different from the actual terms of the contract relied on in this case. Here the duration of the contract was limited either by Kinlin's volition or by the company's continuing to operate its works. We think these cases show that the contract was not void for uncertainty. In the Indiana case it is intimated that it might be within the statute of frauds, and therefore only enforceable for one year. A contract, within the meaning of the statute, which is not to be performed within one year from its date, means a contract which, by its terms, discloses that the parties do not contemplate that it can be performed within that period, as, for instance, a contract to employ a party for one year, beginning at a future day. Railroad Co. v. Conlee, 43 Neb. 121, 61 N. W. 111. Where a contract is of such a character that it may be performed within a year, it is not within the statute merely because it may not be performed within that time. Connolly v. Giddings, 24 Neb. 131, 37 N. W. 939; Kiene v. Shaeffing, 33 Neb. 21, 49 N. W. 773; Live Stock Co. v. Lamb, 38 Neb. 339, 56 N. W. 1019. In this case the company might close its works for an indefinite period within a year, or within that time Kinlin might see fit to quit. In either event, the contract would be performed.

Finally, it is claimed that the contract was void for want of mutuality. This argument is based on the contention that, in order to be mutual, the plaintiff must have been bound to continue work as well as the defendant to employ him; and, second, upon the ground that it was not shown that plaintiff had a valid claim for damages, and that it was not shown that the contract was in consideration of the release of such claim. On the first point, we do not think that a contract lacks mutuality merely because every

obligation of the one party is not met by an equivalent counter obligation of the other. If the consideration existed, the company might well bind itself to furnish the plaintiff employment for a definite period or for an indefinite period, not depending on its own acts, and at the same time give the plaintiff the option of releasing it from that obligation by an earlier determination, if he so desired. On the second point, we think there was some evidence, and sufficient to justify the finding, that the release of the claim for damages was the moving consideration of the contract. It was not necessary that plaintiff should establish a valid claim. In fact, if his claim had been absolutely unquestioned for an amount certain, his release for a less amount might not bind him. Fitzgerald v. Construction Co., 44 Neb. 463, 62 N. W. 899. But a party may buy his peace; and when an action is brought against one who compromises it by the payment of money, he cannot recover the money back on the ground that, had the litigation been pursued, the plaintiff would have failed in his case. This is elementary, and, if true, then it follows that a contract for the compromise of such litigation may be enforced. Judgment affirmed.

CITY OF KEARNEY v. SMITH.

(Supreme Court of Nebraska. March 4, 1896.)

APPEAL—ASSIGNMENTS OF ERROR.

1. Assignments of error relating to the giving and refusal of instructions cannot be considered unless the record discloses that exceptions were taken at the trial.

2. Assignments of error not presented by the briefs or oral argument will be treated as waived.

(Syllabus by the Court.)

Error to district court, Buffalo county; Holcomb, Judge.

Action by Louisa Smith against the city of Kearney. Judgment for plaintiff, and defendant brings error. Affirmed.

W. D. Oldham, for plaintiff in error. J. S. Murphy and F. G. Hamer, for defendant in error.

IRVINE, C. The defendant in error recovered a judgment of $450 against the plaintiff in error for injuries sustained by reason of a fall alleged to have been caused by a defective sidewalk. The city seeks to reverse this judgment. The first, second, third, and fourth assignments of error relate to the giving and refusal of instructions; but, as the record does not disclose that any exceptions were taken to either the giving or refusal of instructions, these assignments are not open to examination.

The only other assignment is that the damages were excessive. Neither by oral argument nor by brief was this assignment called to the attention of the court, and it is therefore treated as waived. Even were it not waived, we could not consider it, because there is no certificate of the clerk of the court authenticating what is filed here as either the original or a copy of the bill of exceptions filed in the case. Judgment affirmed.

WALTER A. WOOD MOWING & REAPING MACH. CO. v. GERHOLD.

(Supreme Court of Nebraska. March 4, 1896.)

BILL OF EXCEPTIONS—AUTHENTICATION—ASSIGNMENTS OF ERROR.

1. A bill of exceptions in a cause tried in the district court must be filed with the clerk of that court, and, if the original bill is to be used in the supreme court, it must be authenticated by the certificate of the clerk of the trial court.

2. Assignments of a petition in error which can be reviewed only in connection with a bill of exceptions will be disregarded where no authentic bill is contained in the record.

3. The petition in error presenting no question of law or fact for review, the judgment is affirmed.

(Syllabus by the Court.)

Error to district court, Platte county; Sullivan, Judge.

Action by the Walter A. Wood Mowing & Reaping Machine Company against William Gerhold. Judgment for defendant. Plaintiff brings error. Affirmed.

McAllister & Cornelius, for plaintiff in error. Higgins & Garlow, for defendant in error.

NORVAL, J. This suit was upon a promissory note executed by the defendant in error as part consideration for one of plaintiff's harvesting machines. The defense interposed was breach of warranty of the machine. From a verdict and judgment thereon in favor of the defendant, the plaintiff prosecutes error. There is attached to the transcript a document purporting to be the bill of exceptions in the case, but it does not appear to have ever been filed with, nor is it in any manner authenticated by, the clerk of the district court; hence it must be disregarded by us. Aultman v. Patterson, 14 Neb. 58, 15 N. W. 350; Hogan v. O'Niel, 17 Neb. 641, 24 N. W. 213; Flynn v. Jordan, 17 Neb. 518, 23 N. W. 519; Wax v. State, 43 Neb. 18, 61 N. W. 117; Romberg v. Fokken, 47 Neb. —, 66 N. W. 282; Railway Co. v. Kinney, 47 Neb. —, 66 N. W. 449.

The petition in error contained six assignments, but two of which—the verdict is contrary to the evidence, errors in the admission of testimony—are argued in the brief. The other assignments are deemed waived. Glaze v. Parcel, 40 Neb. 732, 59 N. W. 382; Erck v. Bank, 43 Neb. 613, 62 N. W. 67; City of Kearney v. Smith, 47 Neb., ubi supra.

Neither of the assignments discussed in the brief can be reviewed, except in connection with a bill of exceptions preserving the evidence adduced, and the rulings of the court below during the trial. As there is no authentic bill of exceptions in this record, the assignment of errors must be overruled, and the judgment affirmed. State Ins. Co. v. Buck-

staff Bros. Manuf'g Co., 47 Neb. 1, 66 N. W. 27; Sweeney v. Ramge, 46 Neb. 919, 66 N. W. 9.

Affirmed.

STATE ex rel. HOCKNELL v. ROPER et al.

(Supreme Court of Nebraska. March 4, 1896.)

COUNTY SEAT ELECTION—REJECTED BALLOTS.

1. Under the provisions of the act for the relocation of county seats, there being no requirement that abortive ballots shall be certified to the county canvassing board, such ballots cannot be counted for the purpose of making up the grand total, of which a place other than the existing county seat must receive three-fifths to be entitled to the relocation of the county seat, merely because, in the certified return of the county election board, such ballots were referred to as "ballots not reported or accounted for," or as "rejected" or "blank" ballots.

2. Where there were cast, upon the question of relocation of the county seat of Red Willow county, 867 votes for Indianola, and for McCook 1,339 votes, and the return of county canvassers showed ballots to have been rejected or not to have been voted or accounted for, *held*, that McCook, having received more than three-fifths of the numbers above given, became the county seat of said county.

State v. Roper, 61 N. W. 753, 46 Neb. 724, is overruled.

Harrison, J., and Ragan, C., dissenting.

(Syllabus by the Court.)

Application by the state, on the relation of George Hocknell, against George W. Roper and others, for mandamus. Petition granted.

A. J. Rittenhouse, W. S. Morlan, and Marquett, Deweese & Hall, for relator. H. W. Keyes, S. R. Smith, W. R. Starr, and Reese & Gilkeson, for respondents.

RYAN, C. This case has twice received the attention of this court. Vide State v. Roper, 46 Neb. 724, 61 N. W. 753, and, under same title, 46 Neb. 739, 65 N. W. 802. By the action of this court above last referred to, there were left to contest the questions presented only such defendants as it is claimed were bound, by reason of being county officers, to remove their respective offices to McCook, the place where, as the relator insists, the county seat of Red Willow county was relocated by a special election held to determine that proposition. By the opinion first above referred to, the mandamus applied for was denied. Afterwards a rehearing of the matters considered in said opinion was granted, and we are now required to pass upon the question therein discussed. Practically, the averments of the petition may be taken as true, for, in support of such as were controverted (and they were of minor importance), there was submitted such evidence as left no room for doubt. If, therefore, a fuller statement of the facts of this case than is herein given shall be deemed desirable, these can be found in the description of the averments of the petition in the opinion first filed. For our present purposes it is sufficient to say that, as to the relocation of the county seat of Red Willow county, the canvassing board's return of the votes cast at said election was, as shown by the totals, as follows:

At Indianola	867
At McCook	1,339
Ballots not reported or accounted for	25
Ballots rejected	1
Blank ballots	3
Ballots written for McCook, and not counted	2
Total vote of precincts	2,237

In the former opinion (46 Neb. 724, 61 N. W. 753) it was said that the question presented was whether or not the petition or application which disclosed the above condition of the return (no other ground of criticism of the petition existing) stated a cause of action, and it was held that the contention in favor of McCook could not be sustained. This contention was that as Indianola and McCook together received 2,206 votes, and as 1,339 for McCook were more than three-fifths, required to locate the county seat at that place, it must thenceforward be held to be the county seat. The case of State v. County Com'rs, 6 Neb. 474, was in said opinion cited to support the holding thereof adverse to McCook; and, as the case cited was correctly epitomized in said former opinion, such part of the language as was therein used for the purpose of making such epitome is quoted, as follows: "Section 5, art. 10, Const., provides that 'the legislature shall provide by general law for township organization under which any county may organize, whenever a majority of the legal voters of such county voting at any general election shall so determine.' A proposition to adopt township organization was submitted to the voters of Lancaster county at the November, 1877, election. At the election held at that time, there were cast 2,451 votes. 952 were cast in favor of, and 601 votes were cast against, the proposition. The county commissioners refused to complete township organization as provided by law, and application was made to this court for a peremptory writ of mandamus to compel the county commissioners of Lancaster county to complete township organization in said county by dividing the county into towns, and appointing the town officers, etc.; and this court, construing the constitutional provision quoted above, held that, in order to adopt township organization, a majority of all the legal voters voting at the election must be recorded in favor of township organization." It is unnecessary to consider other authorities cited in the aforesaid opinion in this case, for they clearly support the same general principle, and that is that, when a proposition of the nature of that under consideration is submitted at a general election, the highest number of votes cast on any proposition or for any candidate is assumed to be the total number of which the requisite majority must be obtained. Our present difficulty is not so much with the correctness of this abstract rule as with its application to the return of the canvassing board.

If the votes cast for Indianola (867) and for McCook (1,339) should alone be considered, clearly McCook has more than three-fifths of the total (2,206) thereby made up.

In the former opinion, however, the requirement of three-fifths of all votes cast was held to assume that in the votes cast should be included 25 ballots "not reported or accounted for," 1 "ballot rejected," 3 "blank ballots," and 2 "ballots written for McCook, and not counted." A re-examination of this question has satisfied us that we were mistaken in construing the requirement of three-fifths of all the votes cast as indicating the necessary proportion of all the above items, aggregating 2,237 ballots. With respect to the principles which should govern in determining questions of the nature of those now presented, a review of the most nearly analogous cases cited by counsel for the parties litigant herein, it is believed, will not be wholly useless.

In Gillespie v. Palmer, 20 Wis. 544, there was under consideration a section of the constitution which contained a proviso which made its adoption dependent upon an approval "by a majority of all the votes cast at such election." In the opinion of the court there was the following language: "What is the meaning of the word 'vote'? It is the expression of the choice of the voter for or against any measure, any law, or the election of any person to office." In State v. Green, 37 Ohio St. 227, the following definition of the word "vote," given by Davis, J., in People v. Pease, 27 N. Y. 45, was approved: "A vote is but the expression of the will of a voter; and, whether the formula to give expression to such will be a ballot or viva voce, the result is the same; either is a vote."

Both parties to this litigation cite the decisions of the supreme court of Missouri, and upon behalf of the plaintiff there is relied upon County of Cass v. Johnston, 95 U. S. 360, based on a Missouri case. These are of little practical value in this state, for the rule of construction therein is radically different from that adopted by this court, as is illustrated by the following quotation from State v. Francis, 95 Mo. 44, 8 S. W. 1: "When, by law, a vote is required or permitted to be taken, and a majority of the legal voters is mentioned in such law as being necessary to carry the proposed measure, such majority must be a majority of all the legal voters entitled to a vote at such election, and not a mere majority of those voting thereat." In Everett v. Smith, 22 Minn. 53, the requirement of "a majority of such electors" was held to refer to those who voted; and in Sanford v. Prentice, 28 Wis. 358, the same construction was given the words "a majority of the legal voters of the said district." In Holcomb v. Davis, 56 Ill. 413, there was under consideration a herd law, which, by its own terms, was declared not to be in force "until it shall be ratified by a majority of the legal voters of the county," etc., and this was held to require only a majority of the voters cast on the proposition submitted. In People v. Wiant, 48 Ill. 263, it was said that, if the return of the various poll books of the county showed a larger number of votes cast for circuit judge or other officer than were cast for and against the removal of the county seat, then that should be taken as the number of voters of the county. In County Seat of Linn County, 15 Kan. 500, it was said: "It is a general rule in respect to elections that where the number of the electoral body is fixed, as in case of the directors or members of a corporation or a legislature, there a majority means a majority of the whole body. But where the electoral body is indefinite in numbers, as in ordinary popular elections, there a majority means a majority of the votes actually cast." With the exception of the case last above cited, those of other states except Missouri simply adhere to the rule adopted in this state. In County Seat of Linn County, there is, however, stated the distinction between corporate or political bodies having a fixed membership, and those wherein the membership is indeterminate with respect to the data from which a majority must be estimated. Where there occur at the same time a general and a special election, there is given an exact basis from which to ascertain the number of electors, and that is the greatest number of votes cast for any candidate or proposition. Where the election is special, and confined to a single proposition, there is no occasion for a resort to this method of finding the total number of electors, and this is especially true when the requisite majority is of the "votes cast." As to the effect to be given to the disclosed fact that others than those counted were present, Oldknow v. Wainwright, 1 W. Bl. 229, is somewhat instructive, as will be seen by the following copy of that case, as reported: "On a special verdict, the question was whether Segrave, the town clerk of Nottingham, was legally elected. There were twenty-one electors present, nine of whom voted for Segrave; eleven protested against him, without voting for any one else; and one other said that he suspended doing anything. It was argued by Mr. Caldecot that this was such a negative upon Segrave that his election was invalid. Sergeant Hewit, contra, in Easter term last; and now, per Tot. Cur.: The election is clearly good. The eleven protestant dissenters, having voted for nobody, could not put a negative upon the only man in nomination. And Wilmot, J., cited Rex v. Withers, Hilary term, 8 Geo. II., Rex v. Boscawen, Pasch term, 13 Anne, and Taylor v. Mayor of Bath, temp. Lee, C. J., to show that where a majority do nothing, but merely dissent, they lose their vote." The proposition in support of which the citations were made by Wilmot, J., was stated and inforced in State v. Green, supra, in Attorney General v. Shepard, 62 N. H. 383, and in Rushville Gas Co. v. City of Rushville, 121 Ind. 206, 23

N. E. 72. In Walker v. Oswald, 68 Md. 146, 11 Atl. 711, it was held that, when an election is held at which a subject-matter is to be determined by a majority of the voters entitled to cast ballots thereat, those absenting themselves, and those who, being present, abstain from voting, are considered as acquiescing in the result declared by a majority of those actually voting, even though, in point of fact, but a minority of those entitled to vote really do vote. In People v. Town of Sausalito (Cal.) 39 Pac. 937, the question was whether or not there was, in fact, a majority of the votes cast "for incorporation." There were seven official ballots without a mark placed on either of them by any one to indicate his wish in any particular, and these were held to be no votes; and, discussing the effect to be given them, the court said they were not to be counted or considered for any purpose.

The respondents specially rely upon State v. Walsh, 62 Conn. 260, 25 Atl. 1. In this opinion were quoted the following provisions of the statute applicable to the election under consideration: "The presiding officer shall, with the certificate upon the result of the electors meeting, which he is required to send by mail to the secretary of the state, send to the secretary his certificate of the whole number of the names on the registry lists, the whole number checked as having voted at said elections, the whole number of names not checked, the number of ballots found in each box, 'general and representative,' and the number of ballots in each box not counted as in the wrong box, and the number not counted for being double, and the number rejected for other causes, which other causes shall be stated specifically in the certificate." It appears from the statutory returns that 11 ballots in one town, and 1 ballot in each of two other towns, had been rejected; but the reason of such rejection neither appeared in returns of the presiding officers nor by the evidence offered in court. In respect to the contention that the rejected votes should not be considered in determining the whole number of votes cast, a majority of the supreme court of errors of Connecticut said: "Under a plurality rule, it is material only to count the votes of the two highest candidates. All scattering votes are practically disregarded. Under the majority rule, all scattering votes are important, and must be counted. If it appeared upon the face of the returns that the ballots were legally rejected, it would have presented a different case. There is a presumption in favor of the legality of a transaction when it appears to have been done in compliance with law; but there is no such presumption when it appears that the law was not complied with, and the courts can make no intendment in favor of its legality. The law requires that the cause for rejecting a ballot 'shall be stated specifically in this certificate.' That duty was wholly omitted. The act of rejection was illegal on its face. There can be no presumption to sustain an illegal act." It was, in accordance with the views of a majority of the above court, held that in ascertaining what candidates had received a majority, as distinguished from a plurality, of all the votes cast, those rejected without a reason being given for such rejection must be reckoned in making up the grand total. If our statute required that the causes for rejecting ballots in county-seat elections should be stated specifically in the certificate of the returns, the case just considered would have tended strongly to sustain the contention of the defendants. In connection with this particular statute, however, no such requirement exists. The rejection of ballots upon the face of the return seems not to have been in violation of the provisions of the statute, or of any law to which our attention has been called. The principle that "there is a presumption in favor of the legality of a transaction when it appears to have been done in compliance with law," therefore, is applicable to the action of the various precinct officers with respect to the rejection of the 25 ballots not reported or accounted for, the 1 ballot rejected, and the 3 blank ballots. Whether or not the same presumption extends to the 2 ballots written for McCook, and not counted, we need not determine; for these should either have been counted for McCook, or, if in that respect rejected, they should have been rejected for all purposes. From the foregoing considerations, it results that McCook, having received three-fifths of all the votes cast, should in this proceeding be held to be the county seat of Red Willow county. A writ will therefore issue as prayed.

HARRISON, J., and RAGAN, C., dissenting.

STATE v. HILL et al.

(Supreme Court of Nebraska. March 5, 1896.)

ACTION ON STATE TREASURER'S BOND — LIABILITIES — QUESTION FOR JURY — PLEADING — SUFFICIENCY OF BOND — PAYMENT TO SUCCESSOR — CERTIFICATES OF DEPOSIT — RATIFICATION BY STATE — APPLICATION OF PAYMENTS — EMBEZZLEMENT BY PUBLIC OFFICER — LOANS — PAYMENT BY CHECKS — SETTLEMENT WITH PREDECESSOR — NOVATION.

1. In an action on a treasurer's bond the breaches specially alleged were that there had been a failure to turn over to his successor a certain sum, which it was alleged the outgoing treasurer had in a certain bank when his term of office expired. By answer it was alleged that the outgoing treasurer had turned over to his successor evidence of indebtedness of the same character as those which had formed the basis of liability of the bank to himself to an amount equal to that for which he was sought to be held. By reply it was, in effect, admitted that the outgoing treasurer had turned over to his successor all choses in action that he had received as treasurer, in like forms of evidences of indebtedness with those which he had received, but it was averred that such payment was ineffectual to release the outgoing treasurer, because, as insisted by the plaintiff, nothing but cash could be treated as payment. *Held* that, under this condition of the issues, and under proofs consistent

with the theory of each contending party, it was a question of fact for the jury to determine how much actual money had been received and paid, and that its verdict, being founded upon sufficient evidence, must stand. Per Ryan, C. Irvine and Ragan, CC., concur.

2. Where the petition alleges the delivery of the official bond declared on, the allegation in the answer of a surety, following an averment therein that he signed upon condition the principal should also sign, that "if it [the bond] was ever delivered, it was done in violation of the express condition aforesaid upon which defendant signed said instrument," must be treated as a substantial admission of the delivery of the bond. Per Norval, J.; all concurring.

3. Whether the sureties in an official bond are liable where the principal therein named has failed to sign it before its acceptance and approval, quære. Per Norval, J.

4. When a state officer elect writes his name in the body of a paper prepared by himself as his official bond, and subscribes his oath of office, indorsed thereon, which instrument is delivered, accepted, and approved as his official bond, the same is valid, and binding upon the principal and his sureties, even though such officer inadvertently omitted to attach his final signature at the bottom of the bond. Per Norval, J.; all concurring.

5. Prior to the taking effect of the legislative enactment providing for the depositing of state and county funds in bank, the payment of money in the hands of a state or county treasurer, at the termination of his term of office, to his successor, could be effectuated alone by the delivery of that which the law of the land recognized as money. The mere delivery and acceptance of certificates of deposit issued by a bank, upon which no money has been realized, is not such a payment as will release the outgoing officer. Cedar Co. v. Jenal, 15 N. W. 369, 14 Neb. 254, adhered to. Per Norval, J.

6. Although a state treasurer has no right to receive in payment of the public revenues anything but money, yet, if he chooses to do so, the state may ratify the act, in which case he and his sureties are chargeable as for money, and must make good the amount. Per Norval, J.

7. The legislature has the power to ratify the act of an outgoing state treasurer in turning over to his successor, as money, certificates of deposit issued by a bank. Per Norval, J.; Harrison, J., concurring.

8. *Held*, that the record discloses such a ratification in this case. Per Norval, J.; Harrison, J., concurring.

9. When partial payments have been made on a running account, the debtor has the right to direct their application; but if he fails to do so the creditor may make the application, and where neither of them have made any appropriation before suit is brought, the law will apply such payments according to their priority of time; that is, the first item on the debit side is discharged or reduced by the first item on the other side of the account. Per Norval, J.

10. A verdict will not be set aside for error in instructions, when it is manifest that no other verdict should have been returned under the evidence. Telegraph Co. v. Lowrey, 49 N. W. 707, 32 Neb. 732, followed. Per Norval, J.; all concurring.

11. It is essential to the crime of embezzlement that the owner be deprived of the property alleged to have been embezzled by an adverse use or holding. Chaplin v. Lee, 25 N. W. 609, 18 Neb. 440. Per Post, C. J.; all concur.

12. So much of section 124, Cr. Code, 1873, defining embezzlement of public funds, as provides that if any officer charged with the collection, safe-keeping, or disbursement of public funds "shall loan, with or without interest, * * * any portion of the public money, * * * every such act shall be deemed * * * embezzlement of so much of the said moneys * * * as shall be thus * * * loaned" (Gen. St. 1873, p. 749, § 124), was intended to prevent the unlawful use by officers, and others with their knowledge and consent, of money committed to their custody, and not as an amendment of existing statutes regulating the means of preserving and accounting for of public funds. Per Post, C. J.; Harrison, J., and Ryan, Ragan, and Irvine, CC., concurring.

13. The term "loan" is there employed in a restricted sense, and includes those transactions only in which the conventional relation of borrower and lender exists, and has no application to the deposit in bank, for safe-keeping, of public funds, by the custodian thereof, who so far retains his control over them that they may be by him at any time reclaimed. Per Post, C. J.; Ryan and Ragan, CC., concurring.

14. In the absence of statutory restriction upon the subject, the method employed in the monetary transactions of the world by which payments are made, and charges and credits adjusted, through the agency of checks, drafts, and certificates of deposit, is so far applicable to custodians of public funds in this state, as to render them liable for remittances by that means made and received, provided such instruments be in good faith tendered and accepted as payment, and not for collection and credit at the debtor's risk. Per Post, C. J.; Ryan, Ragan, and Irvine, CC., concurring.

15. The word "money" is a generic term, and may include not only legal tender coin and currency, but any other circulating medium, instruments, or tokens in general use in the commercial world as the representative of value. State v. McFetridge, 54 N. W. 1, 998, 84 Wis. 473. Per Post, C. J.; Ryan, Ragan, and Irvine, CC., concurring.

16. A state treasurer, who, on taking charge of the office, instead of demanding the funds due from his predecessor in cash, accepts in payment thereof certificates of deposit issued by a bank in which such funds have been deposited for safe-keeping, is chargeable upon his bond for the amount of such payment, and his liability therefor is not affected by the fact that he is unable to realize the money upon such certificates by reason of the subsequent failure of said bank. Per Post, C. J.; Harrison, J., and Ryan, Ragan, and Irvine CC., concurring.

17. Such a transaction, if in good faith by both parties, amounts to a settlement within the meaning of the statute, which will, to the extent of the payment so made, relieve the retiring treasurer, since the state is not entitled to concurrent remedies upon the bonds of successive officers to enforce the same liability, and whatever is in such case sufficient in law to charge the incumbent will operate per se to discharge his predecessor. Per Post, C. J.; Ryan and Ragan, CC., concurring.

18. Where a line of decisions, although erroneous, has become a rule of property, it should be adhered to until changed by statute. But, in the absence of complications resulting from property rights, it is the undoubted privilege, if not, indeed, the duty, of courts to re-examine questions, and modify or overrule previous decisions shown to be fundamentally wrong. Per Post, C. J.; all concur.

19. State v. Keim, 8 Neb. 63; Bank v. Gandy, 9 N. W. 566, 11 Neb. 431; and Cedar Co. v. Jenal, 15 N. W. 369, 14 Neb. 254,—criticised. State v. Hill, 57 N. W. 548, 38 Neb. 698, distinguished.

20. Whether the doctrine of Cedar Co. v. Jenal, 15 N. W. 369, 14 Neb. 254, extends to a case where a treasurer has accepted certificates of deposit from his predecessor, doubted. Per Irvine, C.

21. The deposit by Hill's successor, under the depository law, of the certificates received by him from Hill in the same bank which issued them, the cancellation of the certificates, and the state's accepting a credit on open account for their amount, operated a novation, made the bank the state's debtor, and released Hill from

liability. Per Irvine, C.; Harrison, J., and Ryan and Ragan, CC., concurring.

(Syllabus by the Court.)

Action by the state against John E. Hill and others, on the bond of former state treasurer. Judgment for defendants.

A. S. Churchill, Atty. Gen., E. Wakeley, and G. M. Lambertson, for the State. J. H. Broady, Geo. E. Pritchett, Chas. O. Whedon, Abbott, Selleck & Lane, Griggs, Rinaker & Bibb, T. M. Marquett, J. H. Ames, Cowin & McHugh, and W. Q. Bell, for defendants.

RYAN, C. This action was brought in this court upon the bond of J. E. Hill, formerly treasurer of this state, as it was held in Re Attorney General's Petition, 40 Neb. 402, 58 N. W. 945, might properly be done. The general verdict of the jury was in favor of the defendants, and upon plaintiff's motion for a new trial, and upon defendants' motion for judgment upon a special verdict, also found by the jury, the questions hereinafter considered have been presented in argument. In the consideration of these questions it may be of some use to refer to the case of State v. Hill, 38 Neb. 698, 57 N. W. 548, in which an attempt was made to acquire jurisdiction of such defendants as were nonresidents of Douglas county, by reason of averments in the petition that the defendant Hill had been guilty of breaches of his bond in making deposits of public moneys in certain banks in the city of Omaha. From the petition in this case were omitted this averment, and perhaps such others that it might be unsafe to merely refer to the statement of facts as therein given as furnishing a complete summary of those now to be reviewed.

In the case at bar it was alleged that at the general election held in 1890 John E. Hill was elected treasurer of this state for the two-years term which began on the first Thursday after the first Tuesday in January, 1891. This term, it was alleged, he served as treasurer, the sureties on his bond being his codefendants in this action; and that upon the 14th day of January, 1893, he surrendered said office to his successor, Joseph S. Bartley. It was further averred that when John E. Hill entered upon his duties on January 8, 1891, he had in his possession, as incumbent of the same office for the term immediately preceding, the sum of $1,524,554.74; that upon entering upon his duties under the bond sued on he received from county treasurers of the state the additional sum of $4,200,834.50. The total sum with which it was claimed that the defendant Hill should be chargeable upon his bond sued upon was the aggregate of the above two sums, to wit, the sum of $5,725,389.24. Although, in general terms, the liability of the treasurer was charged as to the immense amounts above set out, the breaches alleged were within the range of comparatively familiar figures. These breaches, two in number, were described in such language as indicated the intention of the pleader to avail himself of the technical rule, justified, to some extent, by the case of Cedar Co. v. Jenal, 14 Neb. 254, 15 N. W. 369. It might happen that an attempt to abbreviate would result in obscuring the theory upon which the petition was drawn, as well as the line of defense adopted by the defendants in their answer, and the emphasis of the theory of the petition found in the reply. At the risk of tediousness, an attempt will therefore be made to illustrate the material issues joined and tried, with quotations made with great freedom from the pleadings, beginning with the petition, in which were the following averments:

"And the plaintiff, for assigning and setting forth a breach and violation of the conditions of the said bond, alleges that the said John E. Hill, in the county of Lancaster, in the state of Nebraska, during his last term of office, did from time to time unlawfully deposit in and loan to the Capital National Bank of Lincoln, a corporation located and doing business in the county and state last aforesaid, divers large sums and portions of the moneys so as aforesaid held by him, and belonging to the state of Nebraska, amounting in all to the sum of $285,357.85, and more; the particular sums so deposited and the particular times when they were so deposited, the plaintiff is unable more definitely to state. A report of the said moneys so unlawfully deposited were, from time to time, during his said last term of office, collected and received from said bank, and paid out and accounted for by the said Hill, as treasurer as aforesaid, for the use and benefit of the state of Nebraska. But on the 14th of January, 1893, and when he surrendered his said office to his said successor, there remained of the said moneys so unlawfully loaned and deposited the sum of $285,357.85, or more, which the said Hill, as such treasurer, had not in any manner used or paid out for the use and benefit of the state of Nebraska, or in any manner accounted for, and which he refused and failed to pay over to his said successor, by reason of which the said John E. Hill converted to his own use the said sum of $285,357.85.

"Second Breach. And the plaintiff, for assigning and setting forth another and second breach and violation of the conditions of said bond, alleges that of the moneys so as aforesaid received and held by said John E. Hill as such state treasurer, and belonging to the state of Nebraska, there still remained, at the end of his said last term of office, the sum of $1,444,556.42, which he had not at any time disbursed upon any warrant or warrants drawn upon the state treasury, according to law, or at any time paid out, disbursed, or disposed of lawfully, or in any authorized manner, or for any lawful, proper, or authorized purpose, or for the use or benefit of the state of Nebraska; and which sum it was his duty to pay over and deliver, at the end of his last term of office, to wit, on the 14th day of January, A. D. 1893, to his said successor in office; but he failed and refused, except as

hereinafter mentioned, to so pay over and deliver to him the said sum, or any part thereof, or at any time or in any manner whatever to account for the same, or any part thereof, to his said successor in office, or otherwise, save that, as the plaintiff is informed and alleges, the said John E. Hill did then pay and turn over to his successor certain small sums of money, the exact amount of which is unknown to the plaintiff, and did assign, transfer, and deliver to his said successor divers and sundry certificates of deposit of certain banks and banking institutions located in the state of Nebraska, and other choses in action, the precise nature of which is not fully known to the plaintiff, and which the said John E. Hill in some manner induced his said successor to receive and accept in the place of and instead of money, among which were, as plaintiff is informed and alleges, certain certificates of deposit issued by the Capital National Bank, of Lincoln, payable to the state treasurer of Nebraska, for certain sums of money therein respectively specified, amounting in the aggregate to the sum of $285,357.85, of which amount, as the plaintiff is informed and believes to be true, the said Joseph S. Bartley, successor in the office of the said John E. Hill, subsequently, and on or before the 21st day of January, A. D. 1893, received from said bank, through or by means of said certificates of deposit, for the use and benefit of the state of Nebraska, divers and sundry sums of money amounting in the aggregate to the sum of $48,993.23, but has never at any time received any further or other sums of money upon, through, or by means of the said last-mentioned certificates of deposit. And, as the plaintiff alleges upon information and belief, the said Capital National Bank was at the time when said John E. Hill, treasurer, so transferred and delivered the said certificates of deposit to his said successor, and ever since has been, wholly insolvent, and from and after the said 21st day of January, A. D. 1893, has at all times failed and refused to pay any sums of money whatsoever upon or toward the amounts payable according to the tenor of the said certificates of deposit. And his successor has since that time, as plaintiff is informed and believes, received upon or from or by means of others of said certificates of deposit or choses in action, and applied for the use and benefit of the state, certain sums of money, the exact amount of which is not known to the plaintiff. But the said John E. Hill failed and refused, and has ever since failed and refused, to lawfully pay over, disburse, or account for or pay over to his successor in office, or otherwise or in any manner whatever to apply for the use or benefit of the state of Nebraska, the sum of $236,364.60, and more, of the moneys so received by him as such state treasurer, and belonging to the state of Nebraska, remaining in his hands at the end of his said last term of office, and in some way converted the same to his own use, and which has not been received by or in any manner applied for the use and benefit of the plaintiff. And by reason of the premises aforesaid the said defendants became and still are indebted to the plaintiff, the state of Nebraska, and the plaintiff has sustained damages, in the sum of $236,364.60, for which sum, with interest thereon from the 14th of January, 1893, the plaintiff demands judgment; and that it may have such further relief in the premises as it may be entitled to."

In the answer filed by John E. Hill it was alleged that his successor's term should have commenced on January 5, 1893, but that, owing to the fact that the legislature had failed seasonably to canvass the vote of such successor, he did not enter upon the duties of his office until January 14, 1893; that the condition of business in the state treasurer's office remained unchanged; and that, when said office, its funds and property were turned over to John E. Hill's successor on January 14, 1893, they were exactly in the same condition as they had been on the 5th day of the same month, when said Hill had submitted to the state auditor his accounts and conduct as such treasurer, and when the same had been by said auditor examined and passed upon, approved, and found correct. In this answer it was also alleged that upon the installation of Joseph S. Bartley as treasurer he examined and passed upon the accounts, papers, certificates of deposit, and other evidences of the funds of the state; that there was so turned over to Joseph S. Bartley as treasurer no cash, except perhaps $500 in amount; that among the things turned over to Hill's successor there was a certificate of deposit of the Capital National Bank, made to the order of the treasurer of the state of Nebraska, for the said sum of $285,357.85, which represented the same amount mentioned in the petition, and that this certificate had been received by Treasurer Bartley and accepted on the same day that the Capital National Bank was designated and became a state depository according to law, and in lieu thereof said Bartley received an open account at said bank, subject to check, and surrendered to said bank its certificate of deposit; that thereafter, on January 16, 1893, the said Joseph S. Bartley, as treasurer, checked out of said bank and received as such over $35,000 of the said money for which he had been given an open account, subject to check; that between the 16th and 20th of January, 1893, said Bartley could have checked out and received from the bank the whole amount of his open account as aforesaid, but refrained from checking out more than $50,000 between said two last-named dates. It was alleged in the answer, in effect, that the Capital National Bank having been designated as a depository bank, and having given bond and duly qualified as such, the opening of an account with it operated to create a credit in favor of the state to the amount of such account, although

such credit was based solely upon a deposit of the bank's own evidence of indebtedness; and that from thenceforth John E. Hill was not in any way a party to or in privity with any party to such open account. Upon information and belief it was alleged in this answer that said bank had closed, and at the time such answer was filed was in the hands of a receiver, and that at such closing there was still a portion of said open account which had not been withdrawn from said bank, and that for this balance, unpaid, Joseph S. Bartley, as treasurer, had filed his claim therefor against said bank, and that said demand had been allowed in favor of the plaintiff.

In reply it was admitted that the defendant Hill undertook and purported to turn over to his successor all, or what he claimed to be all, the money, excepting an amount not exceeding $500, in the form of certificate deposits of or from various banks in the state of Nebraska, or some similar choses in action, but the plaintiff alleged "that all such transactions, excepting the turning over of such sum of actual money, were illegal, unauthorized, and in no wise binding upon the state of Nebraska." There were contained in the reply the following averments of the plaintiff: "It admits, upon information and belief, that the defendant's successor, J. S. Bartley, did receive and purport and pretend to accept as money, and did accept in lieu and instead of money, certain certificates of deposit and other papers purporting to be evidences of funds of the state, and among them three certificates of deposits of the Capital National Bank aforesaid, made to the order of the treasurer of the state of Nebraska, for the aggregate sum of $285,357.85 (but not in one certificate for said sum, as alleged in the answer), one of the said certificates being for the sum of $150,000, one for the sum of $100,000, and the other for the sum of $35,357.85, and was induced and prevailed upon by the said defendant to receive and accept the said certificates of deposit in lieu and instead of money to the amount thereof; all of which transactions the plaintiff alleges and submits to the court were unauthorized, void, and in no wise binding upon the state of Nebraska." In general terms it may be said that in this reply it was admitted that Joseph S. Bartley indorsed the above-described certificates of deposit, and upon surrender of the same received credit in open account with said bank for the aggregate amount of $285,357.85; that between January 16 and January 21, 1893, said Bartley did check out portions of said money aggregating $48,993.23. Following these admissions was the following language: "But the plaintiff specially denies that thereby the amount represented by the said certificates of deposit, or any amount, became the money of the state of Nebraska in the said bank, and alleges and submits to the court that the said transactions were illegal and unauthorized, and in no wise binding upon the state of Nebraska." It was furthermore admitted that the Capital National Bank had been designated as a depository, as alleged in the answer, and that it afterwards closed, and is in the hands of the comptroller of the currency of the United States, and in process of liquidation; and that there purports to remain due from said bank to J. S. Bartley, as treasurer, a balance of the said account; and that as state treasurer he has filed a claim against said bank; but specially denied that plaintiff was responsible for or bound by the filing thereof.

From the above description of the averments of the several pleadings relative to the nature of plaintiff's cause of action and of the defenses thereto presented it is clear beyond question that this suit was brought to recover the exact amount evidenced by the certificates of deposit turned over by Hill to his successor, less such aggregate amounts as had been thereon realized in money; that is, the sum of $236,364.62, being the difference between $285,357.85 and $48,993.23. It is insisted by the defendants that this, in the form of certificates of deposit, was actually turned over to and received by Joseph S. Bartley; also that he, as treasurer, opened an account with the Capital National Bank as a state depository, duly designated and approved as such by the proper officers of the state, and that thereafter defendant Hill was in no wise accountable to the state for this sum. On the other hand, the state insists that under the decisions of this court nothing but cash can operate or be recognized as payment, and that, therefore, as to whatever sums the defendant became liable for as treasurer he could claim an acquittance only by showing payment of actual cash. In line with this theory, the defendants, upon the trial, urged that if only cash could be recognized for one purpose, it was equally unavailable for any other purpose; that, therefore, the defendants could be held liable only for such cash as actually was proven to have come into the hands of State Treasurer Hill. In respect to this branch of the case the evidence was solely that of Mr. Bartlett, Mr. Hill's deputy, who testified as follows: "Q. Can you tell me how much money Mr. Hill had in the treasury on the day—how much in cash he had—when he entered upon his second term, and how much he received from himself as his own successor in actual money? A. I think it was $523. * * * Mr. Bartlett, are you now able to state how much actual money Treasurer Hill deposited in the Capital National Bank during his second term of office? A. Well, I find during Mr. Hill's second term he deposited in actual cash in the Capital National Bank $10,300. Q. How much actual cash did he draw out of that bank during that same period? A. He drew, for the use of the office, from that bank, $17,785. Q. For the use of the office? Just explain what you mean by that. Tell how it was drawn out. A. Paid warrants with it. Q. To whom would the check be drawn? A.

Drawn payable to currency. We would take the check down to the bank, and draw currency, bring it up to the office, and use that to pay warrants." Upon the theory of the plaintiff, the sum for which Mr. Hill was accountable was the amount evidenced by the three certificates of deposit above referred to. There was no conflict in the evidence in regard to these three certificates being made up of other certificates running back through the entire term for which the bond sued upon was given. Whatever of cash was put into the Capital National Bank, and even more, was by the above-quoted evidence shown to have been paid out upon warrants, so that the language used in the petition in a general way, aside from referring to the above three certificates, found nothing in the proofs to justify a recovery.

The theory upon which this action was begun, and indeed was tried, had its origin in Cedar Co. v. Jenal, 14 Neb. 254, 15 N. W. 369. That case was originally brought on behalf of Cedar county to recover from Peter Jenal, who had been treasurer of said county, and the sureties on his official bond, a sum of money which it was claimed he had failed and refused to pay over to L. M. Howard, his successor, at the expiration of his term of office. The defendants, by their answer, admitted that at the expiration of Jenal's term the sum of money demanded was in his hands, belonging to the county, but they alleged in defense full payment "in the manner required by law." The judgment in favor of the defendants was reversed because of the mistaken view of the law embodied in the following instruction, to wit: "Mr. Jenal testifies that he had the amount due from him to the county on deposit in a bank at Yankton; that he requested Mr. Howard, 'his successor,' to go with him to that place, and receive the money; that Mr. Howard refused so to do, but instructed Mr. Jenal to bring him a small portion thereof, and deposit the rest to his credit in the same bank. Now, if you find that these instructions were given, and in pursuance thereof Mr. Jenal did bring so much of the money as directed, and left the rest on deposit in the bank to the credit of Mr. Howard, changing the deposit from his name to that of Mr. Howard, and that this was agreed upon by both Howard and Jenal as a payment; and if you further find that the bank at that time had sufficient funds, and was able to pay the amount of such deposit,—then such transaction would be a payment of such an amount of $3,500 to Mr. Howard, and you would be obliged to find for the defendant." Commenting upon this instruction, Lake, J., who delivered the opinion of this court, said: "Very clearly, to our minds, the transaction referred to in this instruction was not a payment of the public money by Jenal to his successor, nor did it relieve the defendants from liability on their bond." There can be no question that the decision of this case was as it should have been upon the record presented. The bank in which the funds were deposited was in the territory of Dakota, the payment claimed was assumed to be binding upon the county solely because the incoming treasurer had agreed to accept, instead of money, a credit in such bank in favor of himself as treasurer of the county. The first paragraph of the syllabus was sweeping in its enunciation of the general principle involved, and was as follows: "The payment of money in the hands of a county treasurer, at the termination of his office, to his successor, can be effectuated only by the delivery of that which by the law of the land is recognized as money." As applied to the facts involved in the case then under consideration, the above principle was just, and yet it is conceivable that there might be facts to which this principle would equally apply, and yet that thereby a grave injustice would be sanctioned. For instance, under the provisions of our present depository law, it might admit of a grave doubt whether or not the state, having selected a depository, and required deposits of public moneys to be made in depositories only, should not be required to recognize such deposits as the equivalent of actual cash in the hands of the outgoing treasurer, and that, when such credit in a bank had been transferred to his successor, the state should be held bound as though actual cash to the same amount had passed between the two treasurers in making a transfer of the office from one to the other. On the other hand, it might admit of serious question whether or not the incoming treasurer or his sureties should be held as for cash with respect to such amounts as had been credited in his favor by the depository bank, no matter how such credit may have been obtained. These questions are mentioned merely to illustrate the danger of stating a very general proposition as a rule of universal application. Since the unsuccessful party, by its pleadings, as well as throughout the entire trial, and upon presentation of its motion for a new trial, has insisted that the depository law which went into effect at the beginning of Treasurer Bartley's term has no applicability to the facts of this case, it is not necessary to determine the queries above suggested in determining plaintiff's motion for a new trial. The special verdict of the jury was consistent with its general verdict. It is not deemed necessary to set out this special verdict at length in the already extended description of the issues and evidence involved in this case. The facts therein found were that on January 14, 1893, the officers by law required to approve depository bonds, to wit, the governor, secretary of state, and attorney general, did approve the depository bond of the Capital National Bank in the penal sum of $700,000, upon which Charles W. Mosher and R. C. Outcalt were sureties; that the three certificates of deposit described in plaintiff's reply were in-

dorsed by J. E. Hill, as treasurer, to his successor, and by him on January 16, 1893, were surrendered to said bank, being indorsed to its president, C. W. Mosher; and in place of these certificates, Treasurer Bartley, with the amount thereof, opened a current account with said bank, and before January 21, 1893, had withdrawn therefrom $48,996.02, but that, on the date last named said bank was not open for business, and then was, and thenceforward has been, insolvent, and has dishonored certain checks drawn against said account after January 17, 1893; and that on January 22, 1893, said bank and its effects were taken possession of by a bank examiner, and afterwards were, by such examiner, turned over to a receiver. It was further found by said special verdict that on May 11, 1893, J. S. Bartley, purporting to act as treasurer of the state of Nebraska, filed a claim with the said receiver for the unpaid balance of the above account, but that said claim was afterwards returned to him without an allowance therefor being made, and that on September 4, 1895, Treasurer Bartley, by the attorney general of this state, brought suit in the circuit court of the United States for the district of Nebraska, against said receiver, to recover the amount of said balance. The defendants have moved for judgment upon this special verdict. To grant this motion would be to justify the verdict of the jury upon grounds radically different from those chosen by the state, consistently with which grounds the jury were instructed. As we are of the opinion that the motion for a new trial must be overruled, for the reason that there has been suggested or discovered in the record no error prejudicial to plaintiff, it results that upon the general verdict judgment must be rendered for the defendants. It is therefore deemed advisable to make no order upon the motion for judgment on the special verdict, lest hereafter it might be assumed that the questions thereby presented had been passed upon by this court in advance of an existing necessity for such action. The motion for a new trial is overruled, and it is ordered that judgment be rendered in favor of the defendants upon the general verdict. Motion for new trial overruled.

NORVAL, J. This is an original action, brought in this court by the state upon the official bond of John E. Hill as state treasurer for his second term of office. There have been two trials. At the first one the jury failed to agree. The second trial resulted in a general verdict for the defendants, and a special verdict was also returned under the directions of the court. A motion for a new trial has been filed by the state, and a motion by the defendants for judgment upon the special verdict. These motions have been argued and submitted for our consideration.

Before taking up the questions presented by the foregoing motions, we deem it proper to express an opinion upon several important propositions which were controverted, and ably argued by counsel, during the trial. Several defenses were interposed by the sureties in their answers; among others, that the bond sued on was never signed by Hill, the principal named therein; that the sureties signed the same upon the express condition that it should not be delivered until it had been signed by said Hill; and that, if said instrument was ever delivered to or filed with the secretary of state, it was against the defendant's consent and in violation of the condition aforesaid. At both trials one of the objections to the introduction of the bond in evidence urged by the sureties was that the state had failed to show it was ever delivered by Hill to the secretary of state as and for the former's official bond, which objection was overruled. Considerable testimony was adduced for the purpose of establishing the delivery of the instrument, which we do not now deem important to review, or to express an opinion upon its sufficiency, inasmuch as the question of delivery was not an issuable fact in the case. The petition expressly alleges the delivery of the instrument to the proper officer of the state. In the third subdivision of each of the answers of the sureties we find the following language: "This defendant admits that he did sign the instrument in writing mentioned, and by copy attached to the petition, and in the petition designated as the bond of office of the defendant Hill as treasurer of the plaintiff; but this defendant alleges the fact to be that at the time he signed said instrument it was expressly understood and agreed by and between this defendant and the said defendant Hill, and between defendant and others who had signed and who were to sign said instrument, that said Hill should and would, before said instrument should be delivered or be presented to the governor of the state of Nebraska for approval, and before it should be filed or recorded, be signed by said defendant Hill; and this defendant signed said instrument upon the express condition that it should not be delivered until after it had been signed by said defendant Hill. Defendant further says that said Hill never at any time signed said instrument, and, if it was ever delivered, it was done in violation of the express condition aforesaid, upon which defendant signed said instrument." It is obvious that under the rules governing pleadings in the code states the foregoing was insufficient to put in issue the averment in the petition of the delivery of the bond in question. The answer states that "if it [the bond] was ever delivered, it was done in violation of the express condition" under which it was signed. This averment constituted a substantial admission of the delivery of the bond to the proper officer, and the state was, therefore, not required to prove that fact. Dinsmore v. Stimbert, 12 Neb. 433, 11 N. W. 872; Miller v. Hurford, 13 Neb. 22, 12 N. W. 832; School

Dist. v. Holmes, 16 Neb. 488, 20 N. W. 721; Insurance Co. v. Brewster, 43 Neb. 528, 61 N. W. 746.

Another objection urged to the admission of the bond in evidence was that it was never signed or executed by Treasurer Hill. This contention is based upon the fact that Hill did not subscribe his name to the bond at the usual place for signing below the body of the instrument, and preceding the signature of the sureties. The question was ably discussed at the bar and in the briefs filed, as to whether the sureties upon an official bond are bound where the instrument has not been executed by the principal named therein. There is a sharp conflict in the authorities upon this point. The following decisions lend support to the doctrine that the sureties are liable, even though the principal did not execute the bond: State v. Bowman, 10 Ohio, 445; Trustees v. Sheik, 119 Ill. 579, 8 N. E. 189; Loew v. Stocker, 68 Pa. St. 226; Williams v. Marshall, 42 Barb. 524; Parker v. Bradley, 2 Hill, 584; Scott v. Whipple, 5 Greenl. 336; Keyser v. Keen, 17 Pa. St. 327; Johnson v. Weatherwax, 9 Kan. 75; State v. Peck, 53 Me. 284; Tillson v. State, 29 Kan. 452; State v. Peyton, 32 Mo. App. 522. There are other cases which hold that such a bond is imperfect, and no action can be maintained thereon against the sureties. Bean v. Parker, 17 Mass. 603; Russell v. Annable, 109 Mass. 72; Wood v. Washburn, 2 Pick. 24; Vulcanite Co. v. Bacon, 151 Mass. 460, 24 N. E. 404; People v. Hartley, 21 Cal. 585; Bunn v. Jetmore, 70 Mo. 228; Wells v. Dill, 6 Mart. (La.) 665; Johnston v. Township of Kimball, 39 Mich. 187; Hall v. Parker, Id. 287; Sievers v. Wheel Co., 43 Mich. 279, 5 N. W. 311; Board v. Sweeney (S. D.) 48 N. W. 302; City & County of Sacramento v. Dunlap, 14 Cal. 421; Fletcher v. Austin, 11 Vt. 447; State v. Austin, 35 Minn. 51, 26 N. W. 906. Our court, in Gregory v. Cameron, 7 Neb. 414, has held that a bond given to secure a stay of execution signed by the sureties alone is invalid, and in Bollman v. Pasewalk, 22 Neb. 761, 36 N. W. 134, an indemnifying bond, signed by the sureties, and not executed by the principal therein named, was sustained. Thus it will be seen that not only are the adjudications in other states hopelessly irreconcilable upon the point, but this court is apparently upon record on both sides of the question. As we view the case at bar, it is unnecessary that at this time we should determine which line of decisions lays down the true rule, inasmuch as the proofs adduced on the last trial show beyond controversy that Treasurer Hill did in fact execute the instrument declared upon as and for his official bond. In preparing the bond a printed form was used, the most of the blank spaces therein being filled in the handwriting of Mr. Hill. He wrote his own name three times in the body of the bond, besides inserting the amount of the penalty of the bond and the name of the office to which he had been elected, with the intention of making it his bond, and for the purpose of enabling him to qualify as state treasurer. Following the justification of the several sureties attached to the bond, is the following oath of office:

"State of Nebraska, Lancaster County—ss.: I do solemnly swear that I will support the constitution of the United States and the constitution of the state of Nebraska, and will faithfully discharge the duties of state treasurer of the state of Nebraska according to law, to the best of my ability; and that at the election at which I was chosen to fill said office I did not improperly influence in any way the vote of any elector, nor have I accepted, nor will I accept or receive, directly or indirectly, any money or other valuable thing from any corporation, company, or person, or any promise of office for any official act or influence. John E. Hill.

"Subscribed in my presence and sworn to before me this 8th day of January, A. D. 1891. Amasa Cobb, Chief Justice."

It was shown that the signature "John E. Hill," appended to the oath, and the words, "faithfully discharge the duties of state treasurer," set out in the body thereof, were in Mr. Hill's handwriting; that he obtained the signatures of most of the sureties thereon; that the bond was presented to both Governors Thayer and Boyd, and was approved by each of them; that subsequently it was filed and recorded in the office of the secretary of state—the proper custodian thereof; that the failure of Mr. Hill to subscribe the bond at the usual place was a mere unintentional omission on his part; that he did not know of it until about the time this action was instituted, and that he entered upon and discharged the duties of his office for the full term, in the belief that he had qualified as required by law. These facts, under the authorities, constitute a signing and execution of the bond by Hill, and the sureties are as firmly bound as though their principal had signed his name at the usual place at the bottom of the instrument. Gage Co. v. Fulton, 16 Neb. 5, 19 N. W. 781; Taylor v. Dobbins, 1 Strange, 399; Schneider v. Norris, 2 Maule & S. 286; Morison v. Turnour, 18 Ves. 175; Bleakley v. Smith, 34 Eng. Ch. 150; Clason v. Bailey, 14 Johns. 484; Penniman v. Hartshorn, 13 Mass. 87; Schmidt v. Schmaelter, 45 Mo. 502; Fulshear v. Randon, 18 Tex. 275; Wise v. Ray, 3 Greene, 430; McConnell v. Brillhart, 17 Ill. 359; Barry v. Coombe, 1 Pet. 640; Palmer v. Grant, 4 Conn. 389; Quin v. Sterne, 26 Ga. 223; Drury v. Young, 58 Md. 546; Hall v. Lafayette Co., 69 Miss. 529, 13 South. 38; McLeod v. State, 69 Miss. 221, 13 South. 268. The last two cases are directly in point. The last one was an action on the official bond of McLeod as sheriff and tax collector. The instrument was prepared by McLeod, he inserting his name in two places in the body thereof, and in that condition it was presented to and signed by the sureties, they leav-

ing the first line at the end of the bond for McLeod's signature. Through inadvertence he failed to attach his signature there, and the bond was approved. McLeod took and subscribed the oath required, and thereafter entered upon the duties of his office. In an action upon the bond the sureties attempted to show that they signed the instrument on the condition that the principal was also to sign it; but the trial court refused to allow such evidence to be given, and gave a peremptory instruction to find for the plaintiff, and a verdict was returned in accordance therewith. The judgment entered against McLeod and his sureties was affirmed by the supreme court. Cooper, J., in delivering the opinion of the court, observes: "McLeod made the bond, and his name twice appears in the body thereof, written by him. True, he says that he did not intend his name, as written, to be his final signature or subscription thereto; but he testifies that the bond, as it now appears, was delivered by him as his official bond, and accepted as such by the approving authorities. He intended the bond, as written by him, to be operative; and when this appears, and the name appears in the instrument, written by the party, such signature, adopted by the final delivery, intended as such, is such an authenticating signature as discloses the purpose of the obligor." The usual place for signatures to a bond is at the bottom of the instrument, but its validity does not necessarily depend on its being signed there, as the authorities last above cited show. The statute (section 8, c. 10, Comp. St.) relating to bonds of state officers does not require such a bond to be subscribed by the principal therein, but provides that it shall be executed by him, with at least three sureties. It is therefore of no consequence on what part of the bond Hill wrote his name,—whether at the top, in the body, or at the bottom,—so he placed his name thereon with the intention of binding himself. This we think he did, and therefore he duly signed and executed the bond, as fully and completely as if he had attached his signature at the bottom of the instrument. The liability of the defendant sureties is conditional to that of their principal. He being bound, they are also bound. We so held and instructed the jury upon the last trial.

Another defense interposed by the sureties was, as already indicated, that they executed the bond upon the condition that the principal should likewise sign it, and that they did not consent to its delivery without it. Numerous authorities were called to our attention which lay down the rule that an official bond, signed by sureties alone, whose signatures were procured upon the promise of the officer that he would also execute the same before delivery, and without their knowledge and consent it was accepted and approved without the signature of the principal, is invalid, and of no binding force whatever. Had it been established that Treasurer Hill never signed the bond under consideration, the decisions relied upon by the sureties would be in point. It is not alleged in the answers that Hill promised to subscribe the bond by writing his name at the usual place for signatures, but that he agreed to sign the instrument. Inasmuch as Hill did execute the bond, although he failed to sign it at the bottom, the defense interposed, that the bond was delivered in violation of the condition pleaded, has fallen to the ground.

The motion for a new trial contains several assignments, but they need not be stated, nor shall we discuss each assignment separately. We shall direct our attention alone to such questions as were argued upon the presentation of said motion and the motion of the defendants for judgment upon the special verdict. The petition alleges two breaches of the bond, the first being that the defendant Hill, during his second or last term of office, deposited of the moneys held by him and belonging to the state the sum of $285,357.85 in the Capital National Bank of Lincoln; that said sum had not been disbursed or paid out for the use and benefit of the state, or in any manner accounted for, but so remained on deposit in said bank when he surrendered his office to his successor, and that he has failed and refused to pay over the amount thereof to such successor. For a second breach it is averred, in effect, that at the end of Hill's last term of office, in making settlement with Joseph S. Bartley, his successor in office, for the money received and held by him as such state treasurer, and which then remained in his hands undisbursed, said Hill turned over to said Bartley, who received and accepted in lieu of money certain certificates of deposit issued by said Capital National Bank, amounting in the aggregate to the sum of $285,357.85, of which amount said Bartley has subsequently received upon said certificates from said bank certain sums of money, aggregating the sum of $48,993.23, and no more; and that said bank was, at the time said certificates were turned over by Hill, and ever since has been, wholly insolvent, and it has failed and refused to pay any other sum of money upon said certificates of deposit; and that by reason of the premises aforesaid the conditions of said bond are broken and the defendants became indebted to the state in the difference between the amounts of said certificates of deposit and the sums received thereon by said Bartley, to wit, $236,364.62, for which amount, with interest thereon, judgment is prayed. Although two breaches of the bond are alleged, the action is to recover but a single sum, namely, the amount last above stated.

It is conceded by the state that the defendant Hill has fully accounted for all moneys which came into his hands as state treasurer, save and except the sum last aforesaid. It is also established beyond controversy that

only a small portion of the revenues of the state was paid to Hill in actual cash, but that almost the entire bulk thereof was received by him in bank drafts, checks, and certificates of deposit as for and instead of money; that Hill, in settling with his successor, delivered to the latter certificates of deposit and other choses in action of the same character as those which Hill had accepted as treasurer; and that Hill has properly paid out and disbursed, or accounted to his successor in office for all sums received by him in his official capacity in actual cash, as well as for all drafts, checks, certificates of deposit, or other evidences of indebtedness received by him for the use of the state, which the proofs disclose he converted into money during his second term.

The following facts were established upon the trial by uncontradicted testimony, and the jury, by their special verdict, substantially so found: That J. S. Bartley, after his induction into office as state treasurer, received from the defendant Hill, as money, three certificates of deposit aggregating $285,357.85, issued by the Capital National Bank, each payable to the order of state treasurer of Nebraska, each of said certificates being indorsed, "J. E. Hill, State Treasurer"; that subsequently, on January 14, 1893, the Capital National Bank was duly made a state depository; that two days later said Bartley, as state treasurer, indorsed said certificates of deposit, and delivered the same to said bank, and took credit for the aggregate amount of said certificates on open account with said bank in the name of "J. S. Bartley, Treasurer," which certificates were thereafter retained by said bank; that there were drawn by said Bartley, and paid by said bank, checks to the aggregate amount of $48,996.02, there being no deposit other than already stated; that on January 14, 1893, and thenceforth, said bank was insolvent; that on the 21st of said month it ceased to do business, and a receiver was appointed; that nothing further, either by the state or said Bartley, has been realized from said deposit or account; that on September 4, 1895, said Bartley, as state treasurer, by the attorney general as his attorney, brought suit in the circuit court of the United States for the district of Nebraska against the receiver of said bank for the recovery of said unpaid balance.

The state insists that the acceptance by Bartley from Hill, his predecessor in office, of the said certificates of deposit issued by the Capital National Bank, aggregating the sum of $285,357.85, did not constitute a payment, so as to release the outgoing treasurer; in other words, that an outgoing officer can make payment to his successor in nothing but money. This view was adopted by the court upon the trial of the case, and the jury were so instructed in the following language: "(4) You are instructed that the payment of money in the hands of a state or county treasurer, at the termination of his office, to his successor, can be effectuated only by the delivery of that which by the law of the land is recognized as money. The mere delivery of certificates of deposit issued by a bank upon which no money is realized is not a payment." The soundness of this rule is doubted by some of my associates, but it is the doctrine expressly held and applied in Cedar Co. v. Jenal, 14 Neb. 254, 15 N. W. 369. That was an action upon the official bond of Peter Jenal, late county treasurer, to recover moneys which it was claimed he had failed to pay at the expiration of his term to one Howard, his successor The amount sued for was by the answer of the defendants admitted to have been in Jenal's hands at the close of his term, the defense being that he had paid the same to said Howard by depositing the amount, under the express directions of said Howard, in the latter's name, with one Parmer, a banker, receiving therefor certificates of deposit, which Jenal delivered to, and which were accepted by, said Howard as payment of the amount found chargeable against the outgoing treasurer on settlement. There was judgment in the district court for Jenal and his sureties, which was reversed by this court on the ground alone that the facts above stated did not constitute a payment. In the opinion, which was written by Lake, C. J., it is said: "Is the matter pleaded as payment a defense? We think not. The bond given by the defendant, on which the action was brought, required Jenal to 'promptly pay over to the person or officer entitled thereto, all money' which might 'come into his hands by virtue of his said office,' and to 'faithfully account for all balances of money remaining in his hands at the termination of his office.' Section 94 of the revenue act (Gen. St. 930) provides that the 'treasurer, on going out of office, shall deliver to his successor in office all public moneys,' etc., 'in his possession.' And the next section declares that if he 'shall fail * * * to pay over all moneys with which he may stand charged at the time, and in the manner prescribed by law, it shall be the duty of the county clerk, on receiving instructions, * * * to cause suit to be instituted against such treasurer and his sureties, or any of them, in the district court of his county.' Thus we see that it being money that was in Jenal's hands, belonging to the county, both the law and his official bond united in requiring him to hand that over to his successor. The delivery of Parmer's certificates was not payment, for they were mere promises of a stranger to the county to pay money. The payment of money can be effectuated only by the delivery of that which by the law of the land is recognized as money. Even if Howard, the successor in office, did agree to accept these certificates in payment,—which, however, he denies,—no money having been realized from them, it could avail the defendants nothing as against the county. In the collection, care, and disbursement of the revenues in this state such certificates are not recognized at all by the law, and no officer has any right whatever to

deal in them on behalf of the public. If a treasurer invest the public funds in them, he is guilty of a highly penal offense. Crim. Code, § 124. It would, indeed, be a strange system of laws that would permit an act denounced as a felony to be pleaded in bar of an action brought to recover money lost by that act. But such is not the law. The only way in which it was possible for Jenal to have satisfied the law and his bond, and relieved himself and his sureties from responsibility as to this money, was to have handed it over to his successor in office. It being money which he held on the public account, it was money that the law and his bond required him to produce, and hand over. Nothing else could suffice." The foregoing is clear cut. The language has no doubtful meaning, nor was this utterance of the court mere obiter. The question was squarely involved whether an outgoing treasurer can make payment to his successor in anything except money, and the court said, and rightly so, in my judgment, that he could not. To be sure, in that case it appears that Howard, who was Jenal's successor, denied that he agreed to accept the certificates as payment; but, the verdict being for Jenal, we must assume that the evidence was sufficient to establish, and the jury must have found, that Howard received the certificates in lieu of the cash. This decision has never been overruled, but was cited with approval in Wayne Co. v. Bressler, 32 Neb. 818, 49 N. W. 782; and was also cited in State v. Hill, 38 Neb. 608, 57 N. W. 548. In the opinion in the last case, Irvine, C., uses this language: "From the statutes already quoted, and from the decisions of this court (State v. Kelm, 8 Neb. 63; Bank v. Gandy, 11 Neb. 431, 9 N. W. 566; Cedar Co. v. Jenal, 14 Neb. 254, 15 N. W. 369; Wayne Co. v. Bressler, 32 Neb. 818, 49 N. W. 782), it is clear that it is the duty of both state and county treasurers to keep the money coming into their official custody in specie, except where by recent statutes they are permitted to invest or deposit it, and then such investment or deposit must be made only in the manner provided by law. Hill's duty was to keep the money in the treasury at Lincoln. He had no right to invest it in any manner, or to deposit it. * * * When Hill removed the money from the treasurer's office with the intent of depositing it contrary to law, he was guilty of a conversion, and a cause of action accrued." If Hill could not lawfully, and without violating the conditions of his bond, deposit in bank the moneys belonging to the state, we do not understand by what process of reasoning it can be held, where he has made such deposit of public funds and received a certificate of deposit as evidence thereof, and turned the same over to his successor in making settlement with him at the expiration of his term, that it would release the outgoing treasurer and his sureties to the extent of the amount of such certificate. The decision of the Jenal Case was placed upon two grounds: First, that the bond and the statutes of the state alike required the treasurer to make payment to his successor in money; second, that under the Criminal Code it is a crime for a treasurer to loan the public funds or to deposit the same in bank. It may be that the last ground is untenable, yet, nevertheless, the other course of reasoning adopted by the author of the opinion is not only sound, but unanswerable.

The doctrine of the Jenal Case is neither new nor startling. It merely recognized and applied a familiar principle of the law of agency to a public officer. An agent cannot bind his principal by receiving anything but money in discharge of a debt due the principal, unless authorized by the letter so to do. An attorney cannot discharge a judgment in favor of his client, except by the payment of the full amount thereof in money, unless empowered to do otherwise, or there has been a subsequent ratification. Should he accept, in payment of a judgment, a promissory note, the plaintiff would not be bound. In Smith v. Jones, 47 Neb. —, 66 N. W. 19, this court said: "The ordinary powers of an attorney do not authorize him to execute any discharge of a debtor, but upon the actual payment of the full amount of the debt, and that in money only,"—citing Hamrick v. Combs, 14 Neb. 381, 15 N. W. 731; Stoll v. Sheldon, 13 Neb. 207, 13 N. W. 201; Bank v. Green, 8 Neb. 297; Luce v. Foster, 42 Neb. 818, 60 N. W. 1027. As Bartley was merely the agent of the state, he could not bind the public by accepting from his predecessor, Hill, anything which by the law of the land is not regarded as money. Undoubtedly, as between individuals, payment of a debt may be made in any mode which the parties agree shall be treated as the equivalent of a money payment. In such a case it may be by anything of value which is delivered and accepted for the purpose of extinguishing the indebtedness. It may be made in property or in services, or by a certificate of deposit, if the parties so agree. This is, in effect, the holding in Hughes v. Kellogg, 3 Neb. 186. But that decision does not justify the conclusion that a public officer can make payment to his successor by the delivery of certificates of deposit, or anything else than money, so as to bind the public. If these certificates of deposits had been delivered by Hill to Bartley in satisfaction of an individual indebtedness of the former to the latter, then I agree this would have constituted a valid payment, and the case of Hughes v. Kellogg, supra, would be analogous. I suppose it will not be questioned by any one that had Bartley accepted as payment from Hill promissory notes of responsible third parties, or other choses in action, that such payment would have been ineffectual to release these defendants. If such be the law,—and there can be no doubt of it,—then logically it follows that the acceptance by Bartley of

the certificates of deposit upon an insolvent bank did not bind the state,—at least no further than the same may have been by him converted into money,—since certificates of deposit in form like those under consideration are, in substance and legal effect, promissory notes. They are but the mere promises of the Capital National Bank to pay money. Bailey v. Bailey, 25 Mich. 190; Tripp v. Curtenius, 36 Mich. 495; Bank v. Brown, 45 Ohio St. 39, 11 N. E. 799; Howe v. Hartness, 11 Ohio St. 449; Welton v. Adams, 4 Cal. 37; Brummagim v. Tallant, 29 Cal. 503; Payne v. Gardiner, 29 N. Y. 146; Renfro v. Bank, 83 Ala. 425, 3 South. 776; Klauber v. Biggerstaff, 47 Wis. 551, 3 N. W. 357; Curran v. Witter, 68 Wis. 16, 31 N. W. 705. In Bank v. Wakeman, 1 Cow. 46, it was held that an officer cannot lawfully receive a promissory note as payment. In Elliott v. Miller, 8 Mich. 132, it was decided that a township treasurer has no right to receive in payment of taxes a draft or anything which the law has not authorized to be so received. To the same effect is Jones v. Wright, 34 Mich. 371. It was ruled in People v. McKinney, 10 Mich. 54, that the reception by the state treasurer of drafts drawn by a railroad company on a New York bank in payment of taxes did not amount to a payment any further than the money had been received by the treasurer upon such drafts. Campbell, J., in his separate opinion in City of Lansing v. Wood, 57 Mich. 201, 23 N. W. 769, which was an action on the bond of Wood, the treasurer of the city of Lansing, for failure to pay over moneys received by him during his official term, in discussing whether the receipting for certificates of deposit as cash by the incoming treasurer from the outgoing one operated to bind the city, says: "Such a certificate is no payment, unless received as such by one who has power to accept payment in that way. The question is not, perhaps, of any great importance, except in the one point of view, urged on the argument, that Wood had lawfully deposited his official moneys in Angell's bank, and by this process merely shifted the deposit to his successor, who thereby made the same bank his own place of deposit. No authority is found in our Reports, and, so far as we have discovered, none exists anywhere, which favors the idea that a public treasurer may accept from a public debtor payment in anything but money. If he takes anything else, he may make himself liable for any harm that may come from his doing so; but until the money is actually realized the debtor has made no payment which will bind the creditor. If the money is realized, the payment then becomes complete; but not otherwise." We have carefully examined the opinion in State v. McFetridge, 84 Wis. 473, 54 N. W. 1, 998. The sole question there before the court was whether a state treasurer and his sureties on his official bond were liable to the state for interest received by such officer for state funds deposited by him in bank. Such liability was held to exist. Whether an outgoing treasurer could bind the state by the delivery to his successor of certificates of deposit as and for money held by him by virtue of his office was neither involved nor decided in that case. In our investigation of the subject, we have been unable to find a single authority, and none has been cited, which holds that the mere delivery and acceptance of certificates of deposit, upon which no money has been obtained, is such a payment as will discharge the outgoing officer.

The statute (section 2, art. 4, c. 83, Comp. St.) provides that "it shall be the duty of the state treasurer: First—To receive and keep all moneys of the state not expressly required to be received and kept by some other person. Second—To disburse the public money upon warrants drawn upon the state treasury according to law and not otherwise. Third—To keep a just, true and comprehensive account of all moneys received and disbursed. * * * Eighth—He shall account for and pay over all moneys received by him as such treasurer to his successor in office." The foregoing statute defining the duties of the state treasurer requires him to account for and pay over, on the expiration of his term, to his successor all moneys received by him belonging to the state. This he can alone do by delivering the amount in actual cash. In no other way can he satisfy the conditions of his bond to well and truly perform the duties of his office required by law. It is money that he is required to pay over. It is idle to say that a certificate of deposit is money. We know it is not. It is the mere promise of the person or bank issuing it to pay money either on demand or at a fixed time. It is absurd to say that a promise to pay money is money. No person is required to accept such paper in discharge of a debt, and yet it is insisted that the liability of an outgoing officer and his sureties is released by the delivery to and acceptance by his successor of certificates of deposit in settlement, and that the state, whether it will or not, is bound. To such doctrine I cannot yield assent. Both upon principle and authority we are fully satisfied that prior to the taking effect of the legislative enactment providing for the depositing of state and county funds in banks, —which law was not in force when Hill settled with Bartley,—and turning over by a state treasurer to his successor, as moneys received by him during his official term, certificates of deposit issued by a bank, will not alone exonerate such outgoing officer and his sureties from liability.

It is argued that the rule in the Jenal Case cuts both ways; that is, if Hill is not entitled to credit for the certificates of deposits turned over at the end of his term to his successor, then he is only chargeable with the amount

received in cash at the commencement of, and the sums paid in money during, such term, and is not liable as for money for the amounts of any drafts, checks, or certificates of deposits accepted by Hill as so much money due the state. This view was presented to the jury by the sixth instruction. But upon reflection and considerable examination of the subject, I am now convinced that, while Hill had no right to receive anything but money in payment of a demand due to the state, yet, having done so, it does not necessarily follow that he is not liable to the state. Although Hill could not bind the state by accepting certificates of deposits or other choses in action in satisfaction of demands due the state, yet such payment could be subsequently ratified. In case of such ratification, the state is bound, and Hill and his sureties are likewise bound. The state, by instituting this suit, and charging Hill with the amounts received from all sources, whether payments were made in cash or by certificates of deposit or other evidences of indebtedness, ratified Hill's action; and by treating the acceptance by Hill of such certificates of deposits or other evidences of indebtedness as a payment, the state thereby lost its remedy against the party whose indebtedness was extinguished by the delivery to Hill of such certificates of deposit or other choses in action as payment, and Hill and his bondsmen are liable, the same as if the actual cash had been received. Modisett v. Governor, 2 Blackf. 135; Armstrong v. Garron, 6 Cow. 465; Heald v. Bennett, 1 Doug. (Mich.) 513; Welch v. Frost, 1 Mich. 30; Jones v. Wright, 34 Mich. 371. The last case was a proceeding by mandamus to compel the respondent to pay certain school moneys which, as township treasurer, he had collected, and failed to pay over. One of the defenses was that the respondent had accepted various local orders, instead of money, in payment of the taxes levied for school purposes. The court held this defense unavailing. The second subdivision of the syllabus reads thus: "A township treasurer has no right to receive for school moneys anything which the law has not authorized to be so received, and if he chooses to do so, and to receipt for the taxes, he must make good the amount." Although the state had the power to repudiate any payment made to Hill in anything other than money, it was not bound so to do, and there is no claim that it has repudiated any payment so made. It is equally clear that Hill and his sureties are estopped to repudiate any such payment.

The record discloses that of the moneys of the state in Treasurer Hill's hands at the beginning of his last term, $177,489.84 was to his credit upon open account in the Capital National Bank, and the further sum of $90,000 was represented by outstanding certificates of deposits issued by said bank, and held by said Hill as state treasurer; that he deposited divers sums of money in said bank during his last term, and took credit therefor on his open account, and checks for various sums were likewise drawn from time to time by Hill against said account, which were paid by the bank; that a portion of these credits were carried through Hill's second term, and were merged into the certificates of deposit which were turned over by him to Bartley. The case was submitted to the jury upon the theory that defendants were only liable for the amount of money Hill received upon said certificates and open account during his second term. Upon this branch of the case the jury were directed by the seventh instruction as follows: "Should you find that there was any agreement between Hill and the bank with respect to the application of withdrawals by him, such agreement is binding upon the parties to the action. If, however, no such understanding existed, it is the right of the defendant Hill to direct the application to be made of such withdrawals; and it is not within the power of the state to make another or different application thereof." The rule deducible from the authorities in regard to the application of payments may be summarized as follows: A debtor paying money has the right to direct its application, but, if he fails to do so, the creditor may make the application at any time before suit is brought. Robinson v. Doolittle, 12 Vt. 246; Wendt v. Ross, 33 Cal. 650; McCune v. Belt, 45 Mo. 174; U. S. v. Kirpatrick, 9 Wheat. 720. It is equally well settled that where payments are made on an open account, and no appropriation thereof has been made by either party before a controversy has arisen concerning them, the law will apply them in discharge of the earliest items. Lazarus v. Friedheim (Ark.) 11 S. W. 518; Pierce v. Knight, 31 Vt. 701; Milliken v. Tufts, 31 Me. 497; Wendt v. Ross, 33 Cal. 650; Thurlow v. Gilmore, 40 Me. 378; Harrison v. Johnston, 27 Ala. 445; Hersey v. Bennett (Minn.) 9 N. W. 590; U. S. v. Kirpatrick, 9 Wheat. 720; Jones v. U. S., 7 How. 684. In the last case the rule was applied to a running account between the United States and a postmaster. In U. S. v. Kirpatrick, supra, Judge Story, in delivering the opinion of the court, said: "The general doctrine is that the debtor has a right, if he pleases, to make the appropriation of payments. If he omits it, the creditor may make it. If both omit it, the law will apply the payments according to its own notions of justice. It is certainly too late for either party to claim a right to make appropriation after the controversy has arisen, and, a fortiori, at the time of the trial. In cases like the present, of long and running accounts, where debits and credits are perpetually occurring, and no balances are otherwise adjudged than for the mere purpose of making rests, we are of opinion that payments ought to be applied to extinguish the debts according to the priority of time; so that the credits are to be deemed payments pro tanto of the debts antecedently due." The rule respecting the appropriation of payments which was given in the case at bar I am

constrained to hold was erroneous. But the verdict should not be set aside for error in this or any other instruction given to the jury inasmuch as the verdict is the only one which should have been returned under the evidence, as we shall hereafter show. Converse v. Meyer, 14 Neb. 190, 15 N. W. 340; Knowlton v. Mandeville, 20 Neb. 59, 29 N. W. 248; Telegraph Co. v. Lowrey, 32 Neb. 732, 49 N. W. 707.

It remains to be determined whether the facts found by the special verdict, standing alone, or when taken in connection with the other facts, established by uncontradicted proofs, constitute a defense to the action. It is strenuously insisted that the surrender by Bartley of the certificates of deposits which he received from Hill to the Capital National Bank—the institution which had issued them—after it had become a state depository, and taking credit therefor on open account as state treasurer, amounted to a novation, and operated as a release of the defendants from liability on their bond. We shall not, at this time, stop to discuss this line of defense. We are convinced that upon another ground the action must fail. While Bartley had no power to bind the state by accepting these certificates of deposit as payment, yet his action in that regard was subsequently ratified by the state. It is disclosed by this record that after the deposit of said certificates of deposit in the Capital National Bank to the credit of Bartley as state treasurer, he drew checks against said account aggregating $48,996.02, which were paid by said bank before its doors were closed. The state, in its petition herein, gave Hill credit for the same. Furthermore, the legislature, at its last session, in the act making appropriation for the current expenses of the state government for the ensuing years, and to pay the miscellaneous items of indebtedness of the state, made the following appropriation: "For state sinking fund, one hundred eighty thousand and one hundred and one and seventy-five one hundredths ($180,101.75) dollars, to reimburse said fund for the same amount tied up in Capital National Bank." Sess. Laws 1895, p. 404, c. 88. Subsequently, Bartley, as state treasurer, by the attorney general as his attorney, brought suit against the receiver of said bank to recover the unpaid balance of said account. I am convinced upon full consideration of these matters that the state has ratified the act of Bartley in accepting said certificates of deposit from Hill as money, and thereby exonerated him from liability upon his bond. The only funds in the Capital National Bank which the state had, or could claim to have, any interest in, it was shown were those arising from the deposit of the certificates received from Hill. The legislature must have regarded this claim against the bank as belonging to the state, else it would not, in making the appropriation aforesaid to reimburse the sinking fund, which had become impaired by the failure of the bank, have said, "amount tied up in the Capital National Bank." Had the lawmakers desired to repudiate the act of Hill in delivering to his successor said certificates as money in making said appropriation, it is reasonable to suppose they would have stated in the act the impairment of the sinking fund was occasioned by the money belonging thereto being "tied up in Hill's hands," or used some other appropriate designation. There is no room to doubt that the legislature was clothed with ample power to ratify the act of Bartley in receiving the certificates of deposit in settlement with Hill. See City of Lansing v. Wood, 57 Mich. 201; Board v. McLandsborough, 36 Ohio St. 227; Mount v. State, 90 Ind. 29; Nursery Co. v. State (S. D.) 56 N. W. 113. In the last case it was decided that there was a ratification, notwithstanding the governor vetoed the act passed by legislature, relied upon to show such ratification. And in the Michigan case it was held competent to show, in an action upon the bond of a city treasurer, that the city council had ratified and approved the act of the treasurer in turning over to his successor, in lieu of money, certain certificates of deposit issued by a bank that afterwards failed. For the reason given, the motion for a new trial should be overruled, and judgment rendered for the defendants.

POST, C. J. I quite agree with my Brother RYAN that the motion for a new trial should be denied, but, without dissenting from the views expressed by him, I prefer to rest my conclusions upon other, and, as appears to me, more substantial grounds. I was, at the inception of this controversy, in common with my associates, firmly committed to the doctrine that Hill could discharge the obligations of his bond as state treasurer only by the actual payment to his successor, in cash, of the full amount with which he was in law chargeable at the close of his second term. However, the investigation incident to two trials of the cause has led to the conviction that that doctrine is wholly indefensible. There are certain facts clearly established by the proofs, and as to which there is no controversy, viz. that Hill, at the close of his second term, tendered to his successor, Bartley, as representing the funds with which he was chargeable, certain certificates of deposit, including three certificates issued by the Capital National Bank of Lincoln, amounting in the aggregate to $285,357.85; that, Bartley not being satisfied regarding value of the certificates so tendered, a committee of bankers was mutually chosen to pass upon the solvency of the several banks by which they were payable, that upon the recommendation of said committee certain certificates were rejected, and the others, including those of the Capital National Bank, above mentioned, were by Bartley accepted as payment of the full amount of their face value. The result of that transaction was, I conceive, to

render Bartley liable absolutely upon his bond for the amount of money represented by the certificates of deposit so accepted by him, as effectually, for all purposes, as if he, instead thereof, had demanded and received from his predecessor legal tender currency or gold coin of the United States. It follows as the result of that conclusion that the receipt by Bartley of said certificates operated as a discharge pro tanto of the liability of Hill, which is in no wise affected by the subsequent failure of the Capital National Bank, after being charged with the amount of such certificates as a state depository in accordance with the act of 1891. We can imagine cases in which the state or other public body may by the proper action pursue two successive treasurers individually in order to enforce a common liability, although it does not follow that it may have concurrent remedies upon the bonds of successive officers for the same cause of action. Indeed, the converse of that proposition appears to be too clear for argument, for whatever is by law recognized as a sufficient payment of public funds by an officer to his successor, so as to charge the latter upon his official bond, will per se operate to discharge the former. I must not, however, be understood as holding that the power of an officer to bind his sureties or the public in receipting for public moneys is without limitation. It is conceded, by way of illustration, that by no mere barter between Hill and Bartley could the latter have charged his sureties as for money received, or the former have relieved himself from liability upon his bond. Such a transaction is confessedly ultra vires and ineffectual for the purpose of concluding either the state or the sureties of an incoming treasurer. But, in the absence of statutory restriction upon the subject, the system employed in the monetary transactions of the world, by which payments are made and charges and credits adjusted through the agency of checks, drafts and certificates of deposit, is so far applicable to custodians of public money as to render them liable for remittances thus in good faith made and received, provided such instruments be, as in this instance, accepted in payment, and not for collection and credit at the debtor's risk. And it can, on principle, make no difference in the application of that rule, whether such payment be made by the owner of property for taxes assessed against him, or by a treasurer to his successor, of the balance on hand at the close of his term of office. Lest my position may possibly be misunderstood, I repeat that Bartley, having accepted as money the certificates of deposit, is chargeable therewith as money. And the payment thus made being in accordance with the means generally, if not indeed necessarily, employed for the transfer of large balances, is within the scope of the authority of Hill and Bartley in their capacities as retiring and incoming treasurers, and therefore conclusive upon the state to the extent that its remedy is upon the bond of the latter for the funds so transferred. These views are not, I am aware, in accordance with certain expressions of opinion by this court, and for that reason an examination of the cases bearing upon the subject is appropriate in this connection.

State v. Keim, 8 Neb. 63, was an action below to recover the sum of $2,000, deposited by the state treasurer for safe-keeping with the defendants, who were doing business as private bankers. It was held on demurrer to the petition, and also on review by this court, that the depositing in bank of state funds is, in contemplation of law, a loan thereof within the meaning of section 124 of the Criminal Code, that such a transaction is wholly unauthorized by statute, and contrary to the spirit and policy of our laws; and cannot be made the basis of an action by the state in the absence of an express ratification by the legislature. The statutory provision above referred to, so far as material to the present inquiry, is as follows: "Embezzlement of public money. If any officer or other person charged with the collection, receipt, safe keeping, transfer or disbursement of the public money, or any part thereof, belonging to the state or to any county or precinct, organized city or village, or school district in this state, shall convert to his own use or to the use of any other person or persons, body corporate, association or party whatever, in any way whatever, or shall use by way of investment any kind of security, stock, loan, property, land, or merchandise, or in any other manner or form whatever, or shall loan, with or without interest, to any company, corporation, association or individual, any portion of the public money, or any other funds, property, bonds, securities, assets, or effects of any kind, received, controlled, or held by him for safe keeping, transfer, or disbursement, or in any other way or manner, or for any other purpose; or, if any person shall advise, aid, or in any manner participate in such act, every such act shall be deemed and held in law to be an embezzlement of so much of the said moneys or other property, as aforesaid, as shall thus be converted, used, invested, loaned or paid out as aforesaid; which is hereby declared to be a high crime and such officer or person or persons shall be imprisoned in the penitentiary, not less than one year nor more than twenty one years, according to the magnitude of the embezzlement, and, also, pay a fine equal to double the amount of money or other property so embezzled as aforesaid, which fine shall operate as a judgment at law on all of the estate of the party so convicted and sentenced, and shall be enforced to collection by execution or other process, for the use only of the party or parties whose money or other funds, property, bonds, or securities, assets or effects of any kind as aforesaid, has been so embezzled." Cr. Code, § 124. Bank v. Gandy, 11 Neb.

431, 9 N. W. 566, is an exaggerated statement of the same proposition, since it is there held, following State v. Keim, that funds of the county deposited in bank for safe-keeping by the defendant to his account as treasurer, could by means of garnishee process be appropriated in satisfaction of a judgment against him individually. The following extract from the opinion in that case serves to illustrate the process of reasoning which led to the conclusion stated: "It does not lie in the mouth of Mr. Gandy or any of his privies, of which the Farmers' and Merchants' Bank is one, in respect to these funds, to deny that they are the private money of Mr. Gandy, which alone he had a right to deposit in bank, and the bank had a right to receive from him on deposit." Cedar Co. v. Jenal, 14 Neb. 254, 15 N. W. 369, was an action on the bond of a county treasurer, the defense relied upon being the transfer by the defendant to the account of Howard, his successor, of certain funds of the county, then on deposit in bank, and the delivery to the latter of certificates of deposit therefor. It is notable that State v. Keim and Bank v. Gandy, although not mentioned by the court, are cited as authority by counsel for the county, and appear to have had a controlling influence in the decision, judging from the following language of Lake, C. J.: "In the collection, care, and disbursement of the revenues in the state such certificates are not recognized at all by the law, and no officer has any right whatever to deal in them on behalf of the public. If a treasurer invest the public funds in them, he is guilty of a highly penal offense. Cr. Code, § 124. It would, indeed, be a strange system of laws that would permit an act denounced as a felony to be pleaded in bar of an action brought to recover money lost by that act. But such is not the law. The only way in which it was possible for Jenal to have satisfied the law and his bond, and relieved himself and his sureties from responsibility as to this money, was to have handed it over to his successor in office. It being money which he held on the public account, it was money that the law and his bond required him to produce and hand over. Nothing else could suffice." Wayne Co. v. Bressler, 32 Neb. 818, 49 N. W. 782, was an action against a treasurer individually, and not upon his bond, for the recovery of profits realized from the use by him in his private business of the funds of the county. It was held, on the authority of the prior cases above cited, that the action would not lie. In State v. Hill, 38 Neb. 698, 57 N. W. 548, which was an action upon the bond involved in this cause, it was said: "It is the duty of both state and county treasurers to keep the money coming into their official custody in specie, except where, by recent statutes, they are permitted to invest or deposit it. * * * Hill's duty was to keep the money in the treasury at Lincoln. * * * When he [Hill] removed the money from the treasurer's office with the intention of depositing it contrary to law, he was guilty of a conversion, and a cause of action accrued."

It does not require a critical examination to perceive that subsequent cases, so far as they sustain the contention of the plaintiff in the present controversy, all depend for their authority upon State v. Keim. But that case, although in this state accepted as an authoritative statement of the law, appears, from a more careful analysis, to rest upon premises wholly false, while the doctrine therein asserted has been, by a verdict practically unanimous, rejected in other jurisdictions. Reduced to the form of a syllogism, the reasoning there employed may be thus stated: Public money, unlawfully loaned by an officer charged with its collection or safe-keeping, cannot, in the absence of an express ratification, be followed and recovered by the state, county, or other public body. The deposit in bank for safe-keeping, by an officer, of public money in his official custody, is a loan thereof, within the meaning of the Criminal Code. Therefore public money cannot be recovered in an action against the bank in which it is deposited for safe-keeping without an express ratification of such unlawful loan. The subject might, in view of the obvious fallacy of that argument, be dismissed without further comment; but, in view of the importance of the controversy, and the gravity of the question involved, a reference to a few of the many authorities in conflict with the utterances of this court will be here indulged. Mr. Mechem, in a note to section 922 of his valuable work on Public Officers, after a careful review of the authorities, intimated that State v. Keim stands alone in denying to the state the right to recover upon the facts reported, and adds that it "is not consistent with reason or authority, if it was intended to hold that the state could not recover the money at all." And in Wolffe v. State, 79 Ala. 201, Chief Justice Stone, in criticizing that case, declares that it ignores "the principle that an outsider, by aiding in the misapplication of trust funds, knowing them to be such, constitutes himself a trustee, and must account as a trustee." San Diego Co. v. California Nat. Bank, 52 Fed. 59, arose out of a state of acts quite similar to Bank v. Gandy, supra. There one D. made a deposit of money to his account as county treasurer, there being no agreement that the identical money should be returned, and it was in fact mingled with the funds of the bank. It was held, in an elaborate opinion by Judge Ross, that the county could recover, on the ground that the bank was a mere trustee, and was liable as such. And the principle there stated was distinctly recognized by this court in the recent case of Cady v. Bank, 46 Neb. 756, 65 N. W. 906, holding that trust funds do not lose their character as such by being deposited in bank to the trustee's own account, but may be followed through any

number of transformations, and reclaimed by the owner, so long as they can be distinguished in the hands of the trustee or his assignees. So much for the major premise of that argument.

Let us now determine whether there exists for the minor premise a more substantial foundation. Or, in other words, was the deposit by Hill of the state's funds for safe-keeping in the Capital National Bank a loan thereof, within the denunciation of the Criminal Code? By section 18, c. 4, p. 4, Rev. St. 1866, the duties of the territorial treasurer were defined as follows: "First. To receive and keep all moneys of the territory not expressly required to be received and kept by some other person. Second. To disburse the public money upon warrants drawn upon the territorial treasury according to law and not otherwise. Third. To keep a just, true and comprehensive account of all moneys received and disbursed. * * * Sixth. To render a full statement to the auditor of all moneys received by him, from whatever source; if on account of revenue, for what years, of all penalties and interest on delinquent taxes reported to, or accounted for to him, and of all disbursements of public funds, with a list in numerical order of all warrants redeemed, the name of the payee, amount, interest and total amount allowed thereon; with the amount of the balance of the several funds unexpended; which statement shall be made on the first day of December, March, June and September and oftener if required. * * * Ninth. He shall account for, and pay over, all moneys received by him as such treasurer, to his successor in office, and deliver all books, vouchers and effects of office to him and such successor shall receipt therefor." These provisions, amended by the insertion of the word "state" instead of "territory," have been continued in force to this date (see section 2, art. 4, c. 83, Comp. St.), and were, previous to the act of 1891, the only express provision governing the keeping and accounting for of state funds aside from that contained in section 21, c. 10, Comp. St., viz.: "Any officer or other person who is intrusted with funds belonging to the state or any county thereof, which may come into his possession by any appropriation or otherwise, shall be responsible for the same upon his bond." It is not claimed that these provisions even impliedly prohibit the depositing for safe-keeping of the state's money; and it was not claimed at the trial, and could not have been, under the issues, that the deposit was made for any other purpose. And it is for that purpose wholly immaterial whether Hill, in the transaction in question, acted in the capacity of a trustee, so that the legal title to the money deposited remained in the state, or whether his relation to the state was that of a debtor only, since in either case his liability is measured by the conditions of his bond.

This conclusion leads naturally to the next and most important subject of inquiry, viz. the extent to which, if at all, the discretion of public officers in the preservation of money intrusted to them for safe-keeping is restricted or controlled by the prohibition of the Criminal Code above set out. That provision is found in chapter 16 of the act which took effect September 1, 1873, entitled "An act to establish a Criminal Code." Gen. St. 1873, p. 719, c. 58. The power of the legislature, under a title like the above, to create new and distinct offenses, is not doubted. It is also true, as claimed, that where the law denounces as criminal an act,—particularly one which is contrary to public policy, or, as said in State v. Keim, against the spirit and policy of our government,—it will be regarded as if expressly prohibited, and cannot be made the basis of an action at law or in equity. But the application of such a provision, like other acts of the legislature, is always a subject for judicial construction. The evident design of the section under consideration was to prevent the use by the class of officers therein mentioned of the public funds for the purpose of speculation, and not as an amendment of existing laws pertaining to the manner in which such funds were required to be kept and accounted for. It is true that the general deposit of money in bank is, for some purposes, regarded as a loan, since the relation thereby created is that of debtor and creditor. But that the word "loan" has any such comprehensive meaning in the connection in which it is employed in the Criminal Code I cannot admit. In my judgment, the expression, "or shall loan with or without interest, to any company, corporation, association or individual, any portion of the public money" (Cr. Code, § 124), applies to and includes those cases only in which the conventional relation of borrower and lender exists, and can have no reference whatever to a deposit made solely for the purpose of preserving such funds. Before examining that subject in the light of authority, let us see what are the facts disclosed by this record. Practically, the only evidence of Hill's purpose, or the conditions upon which the money was deposited in this instance, is found in the certificates of deposit issued by the bank, which are identical in form, except as to amounts, and of which one is here set out: "Capitol Nation Bank. $35,357.85. Lincoln, Neb., Jany. 6, 1893. State Treasurer of Nebraska has deposited in this bank thirty-five thousant three hundred fifty-seven $^{85}/_{100}$ dollars, payable to the order of himself on return of this certificate, properly indorsed. Not subject to check. C. W. Mosher, President." Law's Estate, 144 Pa. St. 499, 22 Atl. 831, was a proceeding to surcharge the account of a guardian to the amount of certain funds of the ward lost by reason of the failure of a bank, and turned upon the question whether the deposit thereof by the guardian amounted to a loan or investment of such funds. In the opinion of the court, which contains a re-

view of the cases in that state, we observe the following language: "Was this transaction with the Bank of America a deposit of the money, or was it a loan or investment of it? A deposit is where a sum of money is left with a bank for safe-keeping, subject to order, and payable, not in the specific money deposited, but in an equal sum. It may or may not bear interest, according to the agreement. Whilst the relation between the depositor and his banker is that of debtor or creditor simply, the transaction cannot, in any proper sense, be regarded as a loan, unless the money is left, not for safe-keeping, but for a fixed period at interest, in which case the transaction assumes all the characteristics of a loan. * * * In the present case the money was placed in the bank not as an investment for any fixed period, but merely for safe-keeping, and at a small rate of interest, until a suitable investment could be found. * * * It is true that two weeks' notice was to be given of the withdrawal of the deposit, but this was a reasonable provision, and not inconsistent with a bank deposit. * * * A deposit, as we have said, is a temporary disposition of money for safe-keeping; and it is upon this ground alone that the trustee is justified in depositing trust funds in banks, and it is upon the same ground that a deposit is distinguishable from an investment." And the right to deposit trust money, as such, in bank, while awaiting an opportunity for investment, or when, from the necessities of the case, such deposit is required in order to preserve it, is generally, if not universally, recognized. Churchill v. Lady Hobson, 1 P. Wms. 241; Adams v. Claxton, 6 Ves. 226; Fenwick v. Clarke, 31 Law J. Ch. 728; Wilks v. Groom, 3 Drew, 584; Norwood v. Harness, 98 Ind. 134; McCabe v. Fowler, 84 N. Y. 314; In re Hunt, 141 Mass. 515, 6 N. E. 554; 1 Lewin, Trusts, 295, 296; note to Brice v. Stokes, 2 White & T. Lead. Cas. 987.

The question here involved was presented in State v. McFetridge, 84 Wis. 473, 54 N. W. 1, 998, in the construction of a statute authorizing the investment by the treasurer of certain public funds with the consent of the governor, and of other funds by the commissioner of public lands, and expressly prohibiting the investment of any state funds except as therein provided. It was contended that the deposit by the treasurer of state funds in bank without the consent of either of the officers above named was an investment thereof within the meaning of the statute, and accordingly unlawful. But the court, by Lyon, C. J., in disposing of that contention, say: "The distinction between a general deposit of money in a bank, payable at any time on demand, and an investment of such money, is plain and substantial. By such deposit the depositor does not lose control of the money, but may reclaim it at any time. True, he loses control of the specific coin or currency deposited, but not of an equal amount of coin or currency having the same qualities and value." And, after remarking that the treasurer, by an investment under the statute, loses control over the funds, the learned judge continues: "The retention by the treasurer of substantial control over the funds in the one case, and his loss of such control in the other, mark the leading distinction between a mere deposit of the funds and an investment thereof, as those terms are used in the statutes." By reference to the foregoing certificate of deposit it will be perceived that the transaction here involved differs from an ordinary general deposit in one respect only, viz. that the money of the state in the Capital National Bank was payable upon the return of the certificates, and not subject to check. It is therefore directly within the reasoning of the cases cited. But the legislature could not, by the adoption of the Criminal Code, have intended to require the impounding of public funds in specie in the vaults of the treasury for another and sufficient reason, viz. that the state had then, as it has now, no sufficient vault in which to securely keep them. We take notice, too, for it is a matter of common notoriety, that treasurers have never kept the funds of the state in actual cash in the vaults of the treasury, and we may safely assume that they will never be so kept, since no treasurer could give the required bond, who was suspected of an intention to intrust the millions for which he is accountable to the utterly insufficient security provided therefor by the state. A change so radical as to amount almost to a revolution of the financial policy of the state, and which must result in multiplied embarrassments, owing to the inadequate provisions for investment of our rapidly increasing school fund, should not be sanctioned upon any such doubtful ground as an amendment of the Criminal Code, designed to prevent the embezzlement by officers of public funds intrusted to them for safe-keeping. It was said by this court in Chaplin v. Lee, 18 Neb. 440, 25 N. W. 609, that to constitute embezzlement (in that case of public funds) it is essential that the owner be deprived of the property mentioned by an adverse use or holding. According to the settled rule of construction, like terms in penal statutes are presumed to have been used according to their ascertained sense and meaning. End. Interp. St. § 75. And the doctrine that an act of a public officer, not expressly prohibited, or contrary to public policy, done in good faith, to enable him to execute his trust, by preserving the funds committed to his custody, is punishable as an embezzlement in this state, is, it would seem, the reductio ad absurdem of the rule heretofore asserted.

Although this opinion has been protracted much beyond the limit intended, I cannot dismiss the subject without a further reference to State v. McFetridge, supra. It was by statute of Wisconsin in one section made the duty of the state treasurer, under a severe penalty, to pay out or deliver to persons en-

titled thereto the same identical coin and currency paid into the treasury; and, by another section, to keep such coin and currency in the vaults of the treasury until lawfully paid out. By a third section it was made the duty of the governor and attorney general at least once in each quarter to examine and see that all money shown by the treasurer's books to belong to the state was in the vaults of the treasury, and, in case of deficiency, to require the treasurer to immediately supply the amount thereof. The chief justice, after holding that the section first above mentioned was designed, when adopted in 1858, to prevent the payment of state debts in depreciated money, concludes as follows: "The better view is, we think, that if the public creditors receive directly from the hands of the treasurer, or from banks on the treasurer's draft, money having the same value and essential qualities as that paid into the treasury, the treasurer does pay out 'the same moneys received and held by him by virtue of his office,' within the meaning and intention of the statutes." And, referring to the second section, the same judge says: "It is argued that the term * * * 'money' as employed in the statute means the actual coin and currency of the country. This construction is, we think, too narrow, for it ignores the customary and necessary processes universally employed in the conduct of business affairs, and the methods by which the business of the treasurer's office has been conducted from its first organization. * * * The construction of section 159 contended for would require the treasurer to demand that the revenues of the state should be paid to him in lawful money, —that is, legal tender funds,—or else would compel him to collect such checks, drafts, or certificates of deposit in lawful money, and place the proceeds and other money thus received by him in the vault in his office, in order to be prepared for the official inspection of the governor and attorney general. It is impossible to impute any such absurd intention to the legislature. It may be conceded, for the purposes of the case, that such restricted construction of the statute in respect to what is meant by the 'vaults of the treasury' is the correct one; * * * but we cannot agree that the word 'money,' as there employed, means only the actual coin and currency in circulation as money. Such a construction would be extremely technical, and is, we think, uncalled for. 'Money' is a generic term, and may mean not only legal tender coin and currency, but also any other circulating medium, or any instruments or tokens in general use in the commercial world as the representative of value. It includes whatever is lawfully and actually current in commercial transactions as the equivalent of legal tender coin and currency. * * * Certificates of deposit, or other vouchers for money deposited in solvent banks, payable on demand, are a most convenient medium of exchange, and are extensively used in commercial and financial transactions to represent the money thus deposited. * * * Hence the same are 'money,' within the meaning of section 159, and its requirements in that behalf were complied with by the treasurer if * * * there is found in the vaults of the treasury the amount called for by the books of the secretary of state and treasurer, although portions thereof were in such certificates and vouchers." And Cooley, C. J., in discussing the precise question here presented in City of Lansing v. Wood, 57 Mich. 201, uses this language: "If Wood had first drawn the money from the bank, and Edmunds [his successor] had taken and immediately deposited it, the latter unquestionably, if he had a right to the moneys, would have taken upon himself all the risks. What difference it can make that the parties did not count out the money, and then count it in again, I do not perceive. It is manifest that all parties at the time understood that the fund had been transferred to Edmunds, and it is certain that he had all the evidences of right, and the complete and absolute control." The foregoing comprehensive definition of the term "money," as there employed, accords with the views of other writers, and appears to be altogether reasonable. Vide Webst. Dict.; Cent. Dict.; Paul v. Ball, 31 Tex. 10; Kennedy v. Briere, 45 Tex. 305; Taylor v. Robinson, 34 Fed. 678.

It is necessary to here again briefly refer to some of the cases of which mention has been made from this court. In Cedar Co. v. Jenal the decision was apparently right upon the facts, there being evidence tending to prove that the certificates of deposit there involved were accepted, not, as in this case, in payment, but for collection and credit only, by Howard, the defendant's successor in office. In State v. Hill the controlling question was whether the alleged breach of his official bond by the principal defendant occurred in Douglas county or Lancaster county, jurisdiction being claimed in behalf of the district court for the first-named county, by reason of the deposit by Hill, as treasurer, of state funds in certain banks in the city of Omaha. The petition distinctly charged a loan of the money so deposited, and which allegation was, for the purpose of the objection to the jurisdiction of the court, taken as true. And what was in fact decided is that Hill, in withdrawing state funds from the vaults of the treasurer for the purpose of unlawfully loaning the same, as alleged, in the city of Omaha, was thereby eo instanti guilty of conversion, whether in the consummation of his purpose such funds were subsequently loaned in Douglas county or elsewhere. The question here presented was not involved in that case, the language quoted therefrom in apparent conflict with the views here expressed being responsive to the arguments of counsel for the respective parties, and should, as evidently intended, be regarded as obiter only.

I fully appreciate the importance of the doctrine stare decisis, and with what reluctance

courts consent to the reversal of rules established by repeated decisions, although confessedly erroneous, particularly such as have become rules of property. In such cases, according to the dictates of common justice, they should be adhered to until changed by statute. There are, it is true, to be found cases holding that the same principle is applicable to all statutory constructions, whether involving rules of property or mere questions of practice. But such a consecration of the doctrine of stare decisis is opposed to reason and the overwhelming weight of authority. That rule, like all others, is not without its exceptions. And, in the absence of complications resulting from property rights, it is the undoubted privilege, if not, indeed, the duty, of courts to re-examine their decisions whenever satisfied that they are fundamentally wrong. Such decisions ought, in the language of Chancellor Kent, "to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed, by the perpetuity of error." 1 Kent, Comm. *477; 7 Black, Interp. Laws, 403, 404; End. Interp. St. § 363. It is certainly not discrediting the wisdom of our predecessors to hold, as must eventually be done, that the doctrine running through the cases cited is unsound in principle, and unjust alike to the state, to its servants, and to the public at large; for time and experience are, after all, the logic by which to judge rules of law as well as morals, and our fondest hope is that our work may, when tried by that infallible test, be found equal in point of merit to theirs.

To repeat, the motion for a new trial should be denied, and the cases mentioned, so far as they conflict with the rules herein stated, should be overruled.

IRVINE, C. In my opinion, the verdict rendered is the only one which could properly be rendered under the evidence, and it is therefore unnecessary to consider whether or not the instructions given were in all respects technically correct. Brevity, in so far as the importance of the questions presented permits, is imperative; and I shall, therefore, in stating my views, omit references to the numerous authorities which have been consulted upon the consideration of interlocutory applications, and during the two trials of the case. Nor do I feel that I would be warranted in any very extended presentation of the reasons for my own conclusions. The case of the state rests entirely on the generally accepted construction of the case of Cedar Co. v. Jenal, 14 Neb. 254, 15 N. W. 369. That doctrine is that it is the duty of treasurers to keep all funds committed to their custody in specie, and that their obligations can only be satisfied by the payment to their successors of all undisbursed funds by the delivery "of that which by the law of the land is recognized as money." The phrase quoted is certainly somewhat vague, but, according to the state's construction thereof,—and this construction is warranted by the Jenal Case,—checks, certificates of deposit, and instruments of such character do not come within the requirement of the law, although the commercial world may regard them as so far partaking of the characteristics of money that their acceptance in lieu thereof may bind individuals in private transactions. It is, to my mind, somewhat doubtful whether the present case presents a state of facts similar to those before the court in the Jenal Case. In this case there is no doubt that Hill not only tendered to his successor certificates of deposit in lieu of money, but his successor actually accepted those representing the deposit in the Capital National Bank. Two certificates of other banks he refused to accept, whereupon Hill delivered money in lieu of them. In the Jenal Case the plea was that, instead of delivering the money to his successor, Jenal paid it to a foreign banker at his successor's direction, and delivered certificates evidencing such payment to the successor; and that the successor had accepted such acts as payment to him. The report of the case discloses that the successor denied having agreed to accept the certificates. What the evidence was otherwise on this question does not appear. I would have no doubt that nothing short of the actual acceptance of the certificates by the successor would operate as a discharge. Conceding, however, that this case does fall within the principle of the Jenal Case, or rather that the facts of the Jenal Case were broad enough to render the doctrine there announced direct authority as applied to this case, still I think the state has entirely failed to prove the breach of the bond alleged in its petition. If a treasurer is entitled to credit for disbursements of the delivery to his successor only when "that which by the law of the land is recognized as money" has been disbursed or delivered, it would seem to follow necessarily that he is chargeable as for money only when he has received "that which by the law of the land is recognized as money." If Hill is not eititled to credit for the certificates which Bartley accepted from him, how can it be said that Bartley is chargeable with those certificates as money, and how can it be said that Hill is chargeable as for money received with any paper or credits received at the commencement of or during his term of office? The evidence shows that but a very small portion of the deposits made in the Capital National Bank were of money; and there was drawn from the bank in money, and lawfully disbursed by him, more than the money deposits. The balance remaining in the bank at the close of his term was created solely by the deposit of instruments which, under the rule in the Jenal Case, were not money in Hill's hands. If the Jenal Case should be followed at all, it must be followed to its full extent, and be applied on one side of the ac-

count as well as on the other; and this must be true of the receipts and deposits made during Hill's term of office, as well as of the balance received by him from his predecessor. If the rule is to be so applied, not a dollar with which Hill is chargeable as for money was traced into the account, except as it was traced out again under circumstances entitling Hill to credit therefor. The question of the application of the payments by the bank is therefore entirely immaterial. So that I concur with Commissioner RYAN in his opinion that upon the state's own theory of the case it cannot complain of the verdict. On that theory it may be that a treasurer commits a breach of duty when he does not insist on having all payments made to him in money, and that it was a breach of the bond for him to receive from his predecessor, and from debtors of the state during his term, things other than money. But the state did not form its petition on that theory. It charges no such breach. On the contrary, it charges Hill in express language with the receipt of all sums in money. But for my own part I would not be prepared to let the decision rest on so technical a view, especially as I entertain the doubt alluded to as to the real extent of the doctrine of the Jenal Case, and as I entertain a great deal more than a doubt as to the correctness of that doctrine if it goes to the extent which the state must claim for it in order to support its action. In other words, I believe that the incoming treasurer represented the state in accounting with his predecessor; and if he received, as the evidence shows he did, these certificates in satisfaction of so much of the state's claim against Hill, the state was bound by his action. If such action was improper, and the state suffered a loss thereby, the remedy would not be against Mr. Hill. Hill parted with the certificates on the faith of his successor's accepting them. He lost their possession. He lost their legal title. In the week or more which elapsed between the delivery of the certificates to Mr. Bartley and the failure of the bank, Hill had no control over the deposit, and was utterly powerless by any act of his to obtain payment from the bank, and defeat the loss. The state had provided no means whereby the treasurer could safely keep in specie the moneys of the state. Indeed, it has become impossible for the state to conduct its business transactions by barbarous or mediæval methods. Its business is too vast, and too much interwoven with the private business of its citizens, to permit it to entirely ignore the universal usages of commerce. Whether it will or not, it is forced to more or less adapt itself to these usages. I think our statutes relating to the business operations of the state should be construed as having been adopted with reference to the prevailing commercial customs; and the proposition that Hill and his bondsmen should be held liable for the loss in this case, under all its circumstances, must appear to any man at all versed in commercial or financial transactions as harsh, unreasonable, and unjust.

I think there is another reason why this verdict should not be set aside, which is perfectly conclusive. What is known as the "depository law" went into effect at the expiration of Hill's term; that is, not later than January 14, 1893. Under this statute banks may present their bonds to the state for the security of state moneys deposited. These bonds are submitted to a board, consisting of the governor, secretary of state, and attorney general, for approval. Upon the approval of such a bond the bank becomes a recognized state depository. The treasurer is not only permitted, but he is required, to keep all the current funds in his hands on deposit in these designated banks, and he is subject to indictment and punishment if he willfully fails to do so. He is expressly, by the statute, relieved from liability on account of loss of money while so deposited. This was the law when Mr. Bartley's term of office began; and on that day—January 14, 1893—the governor, secretary of state, and attorney general approved such a bond tendered by the Capital National Bank in the sum of $700,000. This must have been one of the first, if not the very first, bond approved; and the treasurer was thereby authorized to deposit in the Capital National Bank $350,000. It is fair to presume that at that time the condition of the treasury was such as technically to require a deposit of that full amount. On the 16th of January, Mr. Bartley indorsed the certificates of deposit received from Hill and caused them to be delivered to the bank, and opened a general account with the bank under the depository law, receiving on behalf of the state credit thereon for the amount of these certificates; which were retained by the bank, and canceled. Between the 16th and the 21st of January about $49,000 was withdrawn by check from this account. There can be no doubt that at that time Mr. Bartley was authorized to deposit that amount of money in the bank. There can be little doubt that the law required him so to do. Whether he was authorized to receive credit in the bank by transfer from Hill or not, he was authorized to receive a credit by deposit thereafter. The state, by this act, became the creditor of the bank to the amount of the certificates; and there can be no doubt that from the moment that deposit was made all remedies upon the certificates were lost. Neither Hill nor Bartley had any longer any right thereto or interest therein. There was a complete novation. The bank discharged its liability to the holder of the certificates by assuming, with the consent of the state, an equivalent liability to the state. To this position the state makes two answers. In the first place, it says that the depository law is unconstitutional. In the second place, it says that the bank was at the time of the deposit in-

solvent; that the certificates were worthless, and therefore did not operate as a valid deposit. In answer to the first contention it may be said that in Hopkins v. Scott, 38 Neb. 661, 57 N. W. 391, a number of constitutional objections to the act were considered, and it was held that it was not bad for any of the reasons there suggested. The state now presents an additional objection, arising out of section 22, art. 3, of the constitution, providing, among other things, that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and on the presentation of a warrant issued by the auditor thereon." It is argued that this law contemplates the withdrawal of money without an appropriation, and without a warrant. The provision quoted, however, manifestly applies to the ultimate disbursement of moneys in payment of claims against the state, and has no reference to any provisions which the legislature might see fit to make in regard to the custody or investment of money while in the treasury awaiting disbursement. The second argument is not, in my opinion, sound. No question is presented of fraud on the part of either Mr. Hill or Mr. Bartley. It is not pretended that either knew the bank was insolvent. The state was willing that its money should be lent to the bank; and the state's officers had approved security offered by the bank as satisfactory. It must be admitted that, had Bartley deposited money to the amount for which he obtained credit at the bank, such a deposit would have been lawful. If he had presented the certificates to the paying teller, had received payment thereof in money, and had immediately redeposited that money with the receiving teller, there could be no doubt of the validity of the deposit. I cannot see that the situation is changed because that process was not adopted. If A. gives to B. his check on a bank in payment of a debt, and B. deposits the check in the bank on which it is drawn, and receives credit on his own account for the amount of the check, the amount being at the same time charged to A. by the bank, is not the debt from A. to B. satisfied, there being no fraud in the transaction, both men believing the bank good, even though it does afterwards develop that the bank was insolvent? In that case it was B. who gave credit to the bank, and who took the risk of its insolvency. He was willing to accept the bank as his debtor. The case is very different from that suggested in argument of the deposit in one bank of a check drawn on another which fails before the check is collected. In the latter case the payee of the check has not accepted the bank on which it was drawn as his general debtor. The payment is, in such case, conditional at best. This case is precisely analogous to that first supposed; and I think that, whatever may have been the law before the depository act took effect, the state is now in the banking business, and in its banking transactions acquires the same rights and subjects itself to the same liabilities as an individual. There is no possible doubt that the state for this money has a remedy upon the depository bond given by the bank. If the sureties on that bond were insufficient, the responsibility certainly does not rest upon Mr. Hill or his sureties. On this aspect of the case, I think the decision of the court and the reasoning of Judge Lake in Hughes v. Kellogg, 3 Neb. 186, is directly in point, and conclusive.

HARRISON, J. I concur in the doctrine announced in the paragraphs 11, 12, 16, 18, of the syllabus to the opinion in this case, written by Chief Justice POST; also in what is stated in paragraphs 2, 4, 7, 8, and 10 of the syllabus of the opinion written by NORVAL, J., of which I call attention to numbers 7 and 8, stating: "(7) The legislature has the power to ratify the act of an outgoing state treasurer in turning over to his successor, as money, certificates of deposit issued by a bank. (8) Held, that the record discloses such ratification in this case." I also agree with Commissioner IRVINE in the statement that "the deposit by Bartley, under the depository law, of the certificates received by him from Hill in the same bank which issued them, the cancellation of the certificates, and the state's accepting a credit on open account, operated a novation, made the bank the state's debtor, and released Hill from liability." And also agree with the conclusion of Commissioner RYAN that under the issues presented in the cause there was sufficient evidence to sustain the verdict rendered, and it must therefore stand.

RAGAN, C. I agree with the conclusion of RYAN, C., that the motion for a new trial must be overruled, and judgment entered for the defendants. I also concur in the views expressed by the CHIEF JUSTICE, and entirely agree with IRVINE, C., that "the deposit by Bartley, under the depository law, of the certificates received by him from Hill, in the same bank which issued them, the cancellation of the certificates, and the state's accepting a credit on open account for their amount, operated a novation, made the bank the state's debtor, and released Hill from liability." I also concur in points number 2 and 4 and 10 of the syllabus of the opinion by NORVAL, J.

PEOPLE v. THACKER.

(Supreme Court of Michigan. March 24, 1896.)

CRIMINAL LAW—MURDER—QUALIFICATION OF JURORS—ASSISTANT PROSECUTOR—RESIDENCE—PHYSICIAN AS EXPERT WITNESS—EVIDENCE OF SIMILAR CRIMES.

1. Under How. St. § 7584, a challenge for cause to a juror who has served on the regular

panel in the same court within a year must be sustained.

2. How. St. §§ 7554, 7555, providing that the panel of jurors shall be drawn from persons whose names appear on the assessment rolls for that year, contemplate that only such persons shall be competent as jurors; and any juror called in a case whose name does not so appear may be challenged for cause.

3. A juror called in the trial of a defendant for murder by poison, who had talked with a number of persons about the case, and, among others, with a member of the coroner's jury, who stated to him that poison was found in the stomach of the woman charged to have been murdered, which statement he believed, and who, from such conversations, had formed an opinion which it would require evidence to remove, was disqualified to act as a juror, although he believed himself able to render an impartial verdict.

4. The discharge of a juror who is called, for reasons personal to himself, and before he is sworn, is not error, though done in the absence of counsel for the defendant.

5. The fact that an attorney is a nonresident of the county does not disqualify him from acting as assistant to the prosecutor in the trial of a defendant for felony.

6. A practicing physician, who is a graduate of a medical college, and who has sufficiently qualified himself to have a definite opinion of his own, may testify as an expert on the subject of poisoning, though it is not shown that he has had any experience in poisoning cases.

7. On the trial of a defendant charged with crime, evidence of the commission by him of another similar crime, or of an attempt to commit another, is not admissible in proof of the substantive act charged; but where there is evidence tending to prove such act, but leaving room for question as to the intent with which it was done, evidence of other similar acts may be admitted to be considered on that issue alone.

Error to circuit court, Benzie county; Fred H. Aldrich, Judge.

William H. Thacker was convicted of the murder of his wife, Anna Thacker, by poisoning, and brings error. Reversed.

Dodge & Covell and Wilson & Bailey, for appellant. Fred H. Maynard, Atty. Gen., and D. G. F. Warner, Pros. Atty. (E. S. Pratt, of counsel), for the People.

MOORE, J. The respondent was informed against in the county of Benzie for the murder of his wife, Anna Thacker. He was convicted, and sentenced to the state's prison for life.

More than 100 errors are assigned. The first group it will be necessary to consider relates to the challenging for cause of jurors. The respondent exhausted his peremptory challenges, and was not satisfied with the jury then obtained.

The juror Krause was challenged on the ground that he had served in the regular panel within a year. How. St. § 7584, reads: "It shall be a good cause of challenge to any juror, in any court of record in this state, in addition to the other challenges allowed by law, that such person has served as a juror upon the regular panel, or as talesman in such court, at any time within one year previous to such challenge." The challenge should have been allowed.

Mr. McNeal was challenged because his name did not appear upon any assessment roll in said county, and because he was not a taxpayer in said county. The statute applicable to this challenge is found in How. St. §§ 7554, 7555. It clearly contemplates that jurors must be selected from persons whose names appear on the assessment roll of the township or ward, and this was so held in Schlacker v. Mining Co., 89 Mich. 253, 50 N. W. 839. See, also, Wise v. Lumber Co., 86 Mich. 40, 48 N. W. 695. The challenge should have been sustained.

The next assignments of error to be considered relate to the ruling of the court in overruling the challenges for cause to jurors, upon the ground that they had read and talked about the case, and had formed an impression as to the guilt or innocence of the accused that would require testimony to remove.

It has been repeatedly held in this state, and may be regarded as the well-settled law, that one is not disqualified from serving as a juror simply because he has heard and read about the case, and has formed an impression based upon what he has heard and read, if the impression is not of that fixed character which repels the presumption of innocence. How. St. § 9564; Holt v. People, 13 Mich. 228; People v. Shufelt, 61 Mich. 237, 28 N. W. 79; People v. Gage, 62 Mich. 271, 28 N. W. 835. In Holt v. People, 13 Mich. 228, it was said: "To require that jurors shall come to the investigation of criminal charges with minds entirely unimpressed with what they may have heard in regard to them, or entirely without information concerning them, would be, in many cases, to exclude every man from the panel who was fit to sit as a juror." This opinion was approved in Stephens v. People, 38 Mich. 739. In People v. Barker, 60 Mich. 287, 27 N. W. 539, it was held "that the opinion entertained by a juror which disqualifies him is an opinion of that fixed character which repels the presumption of innocence in a criminal case, and in whose mind the accused stands condemned already."

In the case at bar, the juror Collier stated that he had heard what purported to be the facts in the case; that, from what he had heard, he had formed a conditional opinion as to the guilt or innocence of the respondent; that he still retained that opinion; that it would take evidence to remove it. "Q. Could you listen to the law and evidence as it would be given in this case in open court, and on that, solely, decide your verdict? A. Yes, sir. Q. Have you talked with Mr. Waterbury about this case? A. I have heard him talk; yes, sir. Q. Did he tell you the circumstances of the case as he understood it? A. Yes, sir. Q. Did what he said lead you to form an opinion as to his guilt or innocence? A. If true, if what he stated is true, I formed an opinion. Mr. Wilson: Mr. Waterbury is on the information as a witness, and I challenge the juror for cause. The Court: Have you an opinion as to whether what he stated is true or not? A. I suppose

he stated according to his ideas. I have heard this thing talked from the time it transpired until the present time, by different ones. Q. From all you have heard, have you formed an opinion? A. No positive opinion; no, sir. Q. You verily believe you could hear the evidence in this case, and sit as a fair and impartial juror until after the hearing of the evidence and charge of the court, and render a fair and impartial verdict, without reference to any opinions you may have in this case? A. That is the opinion I have." The court declined to excuse the juror, and Mr. Wilson then questioned him further: "Q. Have you heard any of the statements made by Waterbury disputed? A. I don't know as I have. Q. If you believed them then, you would believe them now? A. Oh, yes, sir. Q. You say you have talked with a great many persons about this case? A. Yes, sir. Q. Did you ever hear any one state that poison had been found in her stomach? A. Yes, sir. Q. You believed that, did you? A. Yes, sir. Q. You have never heard it disputed? A. No, sir. Q. You knew Mr. Waterbury was one of the jury at the coroner's inquest? A. Yes, sir. Q. You talked with him after the inquest had been held? A. Yes, sir. Q. Did any of this lead you to form an opinion at that time as to the guilt or innocence of the defendant? A. As I said before, no positive opinion. Q. Would you require evidence in the trial of this case to disprove the statements you have heard made about it? A. Certainly; yes, sir. Q. Then you would enter upon the trial of this case at least with some opinion in the matter? A. Why, I suppose so. Q. It would take evidence to remove that opinion? A. Yes, sir." Mr. Wilson renewed his challenge. The juror said: "My verdict would have to be innocent until there was some proof of his guilt." "By the Court: Have you any opinion as to the truthfulness of the various reports and statements you have heard, on the one side or the other of this case? A. I believe them to be true, according to their understanding, of course. Q. Have you any opinion as to whether they were really true or not? A. I am unable to say." The court overruled the challenge, and the defendant excepted.

In the case of People v. Barker, supra, it was held, in addition to what has already been cited, that "the sources of information are important in determining the effect likely to have been produced upon the mind of the juror, and the influence likely to be exerted upon his judgment; but the human mind is so constituted that impressions made upon it which lead to certain conclusions, whether reached or not, will always require other impressions to be made to eradicate the former ones; in other words, will require some evidence to remove them. We are all conscious that notions entertained by us are not all of the same stable character, and range all the way from conviction, which is the ultimate effect of ratiocination, to the passing comment or idle words that leave no permanent impression. The question, therefore, must be always one of degree; and the trior is called to determine whether the opinion entertained by the juror is of that fixed or permanent character which disqualifies him from coming to the case in a fair, candid, and impartial frame of mind, which is unaffected with prejudice or favor to either party." In that case it was held that the juror was disqualified. A like holding was had in the case of Stephens v. People, 38 Mich. 739. In the case at bar the juror had talked with a member of the coroner's jury, who told him the facts as he understood them. He had talked with many other persons, and had been told that poison had been found in the stomach of Mrs. Thacker, and had believed it to be true. This fact, if it was a fact, that poison was found in the stomach of Mrs. Thacker, was one of the most important things in the case for the people to establish. A juror who believes that fact to exist cannot be said to be in a condition to act fairly, candidly, and impartially. The juror Collier should have been excused for cause. Stephens v. People, 38 Mich. 739; Churchill v. Circuit Judge, 56 Mich. 540, 23 N. W. 211; People v. Shufelt, 61 Mich. 237, 28 N. W. 79; People v. Evans, 72 Mich. 367, 40 N. W. 473.

Mr. Smith, a juror, was excused by the court, in the absence of counsel for respondent, because his business would suffer if he was compelled to serve as a juror. This is alleged to be error. The juror may be excused at any time before he is sworn, for any reason personal to himself, which seems sufficient to the judge. People v. Carrier, 46 Mich. 442, 9 N. W. 487. It was not error to excuse this juror.

Mr. Pratt, who assisted the prosecuting attorney, was not a resident of Benzie county. It is claimed that he was disqualified from acting in the capacity of prosecuting officer by reason of his nonresidence. So far as we can find, the question is a new one in this state. How. St. § 560, provides that the prosecuting attorney may, under the direction of the court, procure assistance in the trial of felonies. It has been repeatedly held that this may be done. Meister v. People, 31 Mich. 99; Sneed v. People, 38 Mich. 251; Ulrich v. People, 39 Mich. 245; People v. Bemis, 51 Mich. 422, 16 N. W. 794; Webber v. Barry, 66 Mich. 137, 33 N. W. 289; People v. Fuhrman (Mich.) 61 N. W. 865. In all of these cases great stress is laid upon the fact that the attorney so employed must be impartial and disinterested. To hold that the person so employed must be a resident of the county would have the practical effect, in newer counties, where there are but few attorneys, of depriving the prosecuting officer of any assistance, while there is no limit to the number of able counsel with which the respondent may surround himself if he or his friends are able to employ them. In the absence of any decision to that effect, we are

not inclined to hold Mr. Pratt disqualified because of his nonresidence.

Dr. Dean was a witness for the people. He was graduated from the Michigan College of Medicine and Surgery in March, 1894, since which time he has been in the practice of his profession. He studied medicine for four years before graduation, and spent one year in the practice of medicine in the Hospital in Detroit, under the instruction of the hospital physician. He was called to attend Mrs. Thacker during her last illness. In his testimony he described in detail her condition, appearance, and actions, and his treatment of her. He was asked whether he saw any evidence that led him to suspect that Mrs. Thacker had been poisoned. This was objected to, on the ground that Dr. Dean had not shown himself competent to testify; that it did not appear that he had ever treated a person who had been poisoned, or had ever seen one treated by other physicians. The objection was overruled, and he was allowed to testify. This brings us to the question as to whether a practicing physician, who has read the books and had the benefit of instructors until his mind is so well trained that he is able to take his degree as an M. D., and who is authorized by the law to practice medicine, and to prescribe remedies for persons who have been poisoned, either by accident or design, may express his opinion as to whether a given case is one of poisoning or not, or whether, in addition to the above qualifications, he must have had actual experience in poisoning cases before he can testify. The authorities are conflicting. In Soquet v. State, 72 Wis. 659, 40 N. W. 391, it was held "that on a trial for murder, by poisoning, a medical witness is not qualified to give an opinion that the symptoms of the last sickness of the deceased indicated poisoning by arsenic, when he had never seen a case or had any experience whatever in cases of arsenical poisoning, and all that he knows on the subject is derived from medical or scientific books and medical instruction." In that case, neither of the witnesses called was a graduate of a medical college. The case of Boyle v. State, 57 Wis. 472, 15 N. W. 827, is cited by counsel to the same effect; but all that case holds is that medical books cannot be read in evidence, nor can expert witnesses testify to statements made therein, and it is also inadmissible to permit the reading of such books to the jury. In Rog. Exp. Test. p. 45, it is said: "A witness otherwise qualified may express an opinion on a matter pertaining to his special calling or profession, although his knowledge of that particular matter is derived from study, rather than from actual experience. It is the doctrine of the courts that study of a matter, without practical experience in regard to it, may qualify a witness as an expert." On page 99 of the same authority, it is stated: "The principle is well established that physicians and surgeons of practice and experience are experts in medicine and surgery, and their opinions are admissible in evidence upon questions that are strictly and legitimately in their profession and practice." Many cases are cited. In Siebert v. People, 143 Ill. 571, 32 N. E. 431, it was held that practicing physicians, who are graduates of a medical college, are competent to testify as experts on the subject of arsenical poisoning, although it is not shown that they have had any experience in poisoning cases. See State v. Terrell, 12 Rich. Law, 321; Mitchell v. State, 58 Ala. 417; State v. Wood, 53 N. H. 484. On the subject of opinions based on study, an opinion pronounced by the late Justice Campbell is of interest. "No one has any title to respect as an expert, or has any right to give an opinion upon the stand, unless as his own opinion; and, if he has not given the subject involved such careful and discriminating study as has resulted in the formation of a definite opinion, he has no business to give it. Such an opinion can only safely be made or expressed by persons who have made the scientific questions involved matters of definite and intelligent study, and who have by such application made up their own minds. In doing so, it is their business to resort to such aids of reading and study as they have reason to believe contain the information they need. This will naturally include the literature of the subject. But if they have only taken trouble enough to find, or suppose they find, certain authors say certain things, without further satisfying themselves how reliable such statements are, their own opinions must be of very moderate value, and, whether correct or incorrect, cannot be fortified before a jury by statements of what those authors hold on the subject. The jury are only concerned to know what the witness thinks, and what capacity and judgment he shows to make his opinion worthy of respect. * * * Upon medical questions, while persons may testify whose knowledge is chiefly theoretical, there can be no question of the superior value of practical knowledge combined with the theoretical, especially on such matters as involve the interpretation of symptoms and actions of the sick." People v. Millard, 53 Mich. 63, 18 N. W. 562. Does it not follow, logically, that if the witness has given the subject of poisons such careful and discriminating study, by reading the literature of the subject, and listening to the lectures of instructors who have made a specialty of the subject, so that his study has resulted in the formation of a definite opinion, that he may express it, and that, when expressed, it may be considered by the jury? We think so, and the jury should give the opinion so expressed just such weight as, in view of all the testimony, they think it is entitled to. No error was committed in the admission of the testimony of the medical witness.

A serious question is raised in relation to the testimony of Miss Spencer, and the charge

of the judge in relation to it. Miss Spencer was a sister of Mrs. Thacker, and was an inmate of the Thacker household during the last illness of Mrs. Thacker. It was the claim of the prosecution that the respondent, at the same time he was poisoning his wife, was also poisoning Miss Spencer, and testimony was introduced which it is claimed tended to show this to be true. In discussing the testimony upon this branch of the case, the learned trial judge made use of the following language: "Testimony has been allowed in this case tending to show that poison was found in the food of one Charlotte Spencer, who was an inmate of Mr. Thacker's household, and a sister of his wife; that the powder was found at different times; and that it was put there by design. This testimony, if you find it to be true, can only be considered so far as it may tend to confirm, corroborate, explain, or modify, or otherwise throw light upon, the question of whether the deceased came to her death by poison, and by whom said poison was administered. In other words, even if you should believe from the evidence that poison was found in the food of Miss Spencer, and that the same was placed there by the respondent for the purpose and with the intent to take her life, still you would not be justified in finding the respondent guilty of the offense charged, but you may consider this evidence in determining the facts as to the death of Mrs. Anna Thacker, and as to whether she came to her death by poison, and, if so, by whom the same was prepared or administered." He further charged the jury that, in considering the question as to whether Mrs. Thacker died a natural death or was poisoned, "you may consider the testimony in relation to the powder found in the food and water prepared for Miss Spencer, and whether the same was poisonous, if you should find such powder was found in her food and drink; and if, after a full and careful consideration of the evidence in the case, and all of it, you should find, beyond a reasonable doubt, that Anna Thacker came to her death, or that her death was hastened, by poison, then you can proceed to consider the further question as to the respondent's responsibility in relation thereto." This was only another way of saying to the jury that, if they found the respondent poisoned Miss Spencer, it was probable he poisoned his wife; or, in other words, that evidence of an offense committed by the respondent of which he is not charged in the information may be considered to establish his guilt of the offense which is charged against him in the information.

In support of the admission of the testimony relative to the attempt to poison Miss Spencer and the charge of the judge in relation thereto, we are cited to the recent case of People v. Seaman (Mich.) 65 N. W. 203, where it was held that where a respondent was charged with manslaughter by abortion, and there was evidence that the premature birth resulted from accidental causes, and the evidence of guilt was circumstantial, it was not error to admit evidence that defendant procured other abortions within about a year previous to the one charged. Mr. Justice McGrath wrote a very exhaustive opinion in that case, in which he collated all the authorities bearing upon that subject. It will not be necessary to cite them in detail here, as they are easily accessible by a reference to that case. In deciding the case, the learned judge said: "The general rule is that evidence shall be confined to the issue, and that, on a trial for felony, the prosecution will not generally be permitted to give evidence tending to prove the defendant guilty of another distinct and independent felony. There are, however, exceptions to this rule. The other offense may be a part of the res gestæ, or the proof thereof may be admissible to show motive." Then comes a citation of the cases, and the court adds: "Some of these authorities would seem to be border cases, but they illustrate the tendency of the courts to allow the introduction of this class of testimony to repel the inference that the cause was an accidental one, in cases where such inference might otherwise obtain. Upon principle and authority, it is clear that a felonious intent is an essential ingredient of the crime charged; and when the act done is claimed to have been innocently or accidentally done, or by mistake, or when the result is claimed to have followed an act lawfully done for a legitimate purpose, or where there is room for such an inference, it is proper to characterize the act by proof of other like acts producing the same result, as tending to show guilty knowledge, and the intent or purpose with which the particular act was done, and to rebut the presumption that might otherwise obtain,"—citing many cases. None of these cases go so far as to hold that, to establish the commission of the substantive act charged in the information, you can give testimony of the commission of other offenses. If there was evidence in the case at bar that Mr. Thacker had administered poison to his wife, it would have been competent, as bearing upon his motive or intent in administering the poison, to show that, at about the same time, he was giving poison to the sister of his wife, who was also an inmate of his household. Had the trial judge limited the use of this testimony to that purpose, there would have been no error; but when he went further, and informed the jury that they might consider this testimony for the purpose of establishing whether the respondent in fact administered poison, he went further than any of the cases go, and announced a doctrine that would be exceedingly dangerous to follow.

It is not necessary to consider the other assignments of error. They are not well taken, or are not likely to be repeated. The judgment of the court below is reversed, and a new trial ordered. The other justices concurred.

PEOPLE v. WEAVER.

(Supreme Court of Michigan. March 24, 1896.)

HOMICIDE—DYING DECLARATIONS—INSTRUCTIONS.

1. On a trial for murder by shooting, evidence that deceased, half an hour after being shot, told the doctor that she believed she could not live, and that he then informed her that her case was hopeless, warrants the admission, as dying declarations, of her statements then made to the doctor, and her sworn statement made four hours later, though she did not die till six days later.

2. It is sufficient if requested instructions in criminal cases are substantially given.

Error to circuit court, St. Joseph county; George L. Yaple, Judge.

John W. Weaver was convicted of murder, and brings error. Affirmed.

Newton H. Barnard, for appellant. Fred. A. Maynard, Atty. Gen., and Bishop E. Andrews, Pros. Atty., for the People.

MOORE, J. The respondent was convicted of murder in the second degree. He and one Tempia Ann Cotton, colored people, were living together at Three Rivers, though not married to each other. Two or three days prior to the 13th of December, 1892, she and one Bradford had gone to Cassopolis together. This did not please Weaver. She returned home about 5 o'clock in the afternoon of December 13th. That evening the respondent had his revolver fitted with cartridges. At about 3 or 4 o'clock the next morning, she went into the room where Weaver slept. About 4 o'clock he shot her three times. What occurred before the shooting is disputed. Mrs. Cotton died at 5 o'clock December 19th. Before dying, she made declarations as to the occurrences of the shooting, which were admitted in evidence as dying declarations. This is assigned as error. The shooting was at 4 o'clock. Dr. Scidmore got there not to exceed a half hour later, and found her in her night clothing, lying on a couch, quite bloody. After examining her, he came to the conclusion that at least one of the shots was fatal. The doctor said to Mrs. Cotton that while there was life there was hope. She expressed to him a desire to live, though she did not think she could live. She said she could live but a little bit. The doctor informed her that it was practically a hopeless case. The doctor was then allowed to state what she said about the shooting. Mr. Van Horn, a justice of the peace, also had a conversation with Mrs. Cotton, on the same day, lasting from about 9 o'clock until 12, and took her statement in writing, which was sworn to. Before taking her statement, he asked her whether, from the knowledge of herself and what the doctor had said to her regarding her condition, she believed she would live. She answered that she thought probably she must die, but she hoped for the best. In the writing were these words: "From the doctor's statement and my own feelings, I believe I am liable to die from the wounds; and it is in full view of my probable death that I make these statements under oath." Mr. Van Horn was allowed to testify as to what was stated to him orally by Mrs. Cotton, and the written statement was read in evidence. This was alleged to be error. His testimony as to oral statements was stricken out.

In People v. Simpson, 48 Mich. 477, 12 N. W. 662, it was decided: "It is incumbent upon the prosecution, before offering what is claimed to have been dying declarations, to show that they were made under a sense of impending death. It is not necessary to show that the injured person so stated at or about the time, or that any person in his or her presence or hearing said that death must speedily ensue. The fact may be proved, like any other fact in the case, in the light of surrounding circumstances. * * * In this case there was certainly evidence from which the court below, under the ruling made, must have been satisfied that the deceased was under the impression that death was impending; and the case would require to be a very strong one to justify this court, who did not see the witnesses, in arriving at a different conclusion." The principle under discussion here has been before this court in so many cases, the last one being the case of People v. Beverly (decided this term) 66 N. W. 379, that we do not deem it necessary to review the cases. The court did not err in admitting this testimony.

Complaint is made of the refusal of the trial court to give respondent's requests bearing upon the questions of insanity and a diseased mind. The record discloses no evidence upon which to predicate these requests; but, conceding that the record does not show all the testimony, the learned trial judge carefully and correctly stated the law bearing upon both of these questions. It is not necessary that he adopt the language of counsel, if he does, in fact, state the law correctly as applicable to the facts and the different theories of counsel. The trial court carefully guarded all the legal rights of the respondent. He was legally and properly convicted of an atrocious crime. The case is affirmed. The other justices concurred.

LONGYEAR et al. v. MINNESOTA LUMBER CO.

(Supreme Court of Michigan. March 24, 1896.)

ATTACHMENT—COMPLAINT—AFFIDAVIT—VARIANCE—DEMURRER.

In an action commenced by attachment, that the attachment affidavit alleges a cause of action as for a trespass to land by cutting timber, whereas the complaint is for a conversion of the timber, is not ground for demurrer, but for a summary application to set the declaration aside.

Error to circuit court, Gogebic county; Norman W. Haire, Judge.

Action by John M. Longyear and another

against the Minnesota Lumber Company. A demurrer to the complaint was sustained, and plaintiffs bring error. Reversed.

Francis P. Midlam (Irving D. Hanscom, of counsel), for appellants. Charles E. Miller, for appellee.

MOORE, J. The plaintiffs commenced suit against the defendant, a foreign corporation, by attachment; filing, as a basis for said proceeding, an affidavit in which it is stated that defendant is indebted to plaintiffs in the sum of $1,038; * * * "that it is due * * * for various trespasses done" by said defendant on lands belonging to said plaintiffs, as hereinafter described. "And deponent further says that during the winter of 1892 and 1893 the Minnesota Lumber Company, by divers agents and employés of the said company, entered upon a certain piece of land situated in Michigan, known and described as the 'southeast quarter of the northeast quarter of section thirty-one, town forty-five north, range thirty-eight west,' and cut and felled thereon one white pine tree, and took and carried the same away. Then came, in the affidavit, statements of other acts of entering, upon several other descriptions of land, and cutting and carrying away trees, which acts are described in substantially the same language as that quoted above, and then comes this language: "And deponent further says that by reason of the said several trespasses committed by the said Minnesota Lumber Company, as above described, the said John M. Longyear and the said Frederick Ayer, plaintiffs in the annexed writ of attachment, have been damaged to the extent of $1,038.39, as near as deponent can estimate. And deponent further says that the said Minnesota Lumber Company, defendant in the annexed writ of attachment, is now justly indebted to the said John M. Longyear and the said Frederick Ayer, plaintiffs in the annexed writ of attachment, in the sum of $1,038.39, as near as deponent can estimate the same, over and above all legal set-offs, and that the said sum of money is now due and payable for the various trespasses above set forth. And deponent further says that the said Minnesota Lumber Company is a foreign corporation, existing by virtue of the laws of the state of Minnesota, and that the said Minnesota Lumber Company is now the owner of property within the state of Michigan. And deponent says that the said several causes of action above described, for which the annexed writ of attachment is issued, arose in the state of Michigan, as above set forth, and further deponent says not." Later a declaration was filed, which was demurred to when an amended declaration was filed, which, after the formal commencement, reads as follows: "For that the said plaintiffs on, to wit, the 13th day of December, 1892, at the county of Gogebic, and state of Michigan, were lawfully possessed, as of their own property, of one white pine tree, cut and felled and lying prostrate, of the value of $15, and, being so possessed thereof, the said plaintiffs afterwards, to wit, on the day and place last aforesaid, casually lost the same out of their possession, and the said one white pine tree afterwards, to wit, on the 13th day of December, 1892, at the said county of Gogebic, came into the hands of the defendant by finding; yet said defendant, well knowing the premises, has not, although often requested so to do, delivered the said one white pine tree to the said plaintiffs, but afterwards, to wit, on the 13th day of December, 1892, at the said county of Gogebic, wrongfully converted and disposed of the same to its own use. To the damage of the plaintiffs, fifteen dollars." Two other counts of a similar character were contained in the declaration. Defendant demurred to this declaration, claiming there was a fatal variance between the cause of action stated in it and the cause of action stated in the affidavit for attachment. The circuit judge sustained the demurrer, and the case is brought here for review.

The defendant does not question the validity of the affidavit to base an attachment upon, but it is his contention that, while it may be deemed entirely sufficient for the purpose of allowing the issue of an attachment in an action of trespass to real estate, it is not sufficient to authorize the issuing of an attachment in an action for the conversion of personal property, and that, as it would not authorize the issuing of a writ of attachment for conversion, there was no suit of that character commenced, and the plaintiffs cannot be allowed to declare in an action of trover in this proceeding. It is claimed on the part of the plaintiffs that Act No. 89, Laws 1893, authorizing the commencement of suits by attachment, only requires that the affidavit shall state a cause of action, and that a cause of action is "the union of a right in the plaintiff, and an invasion of such right by the defendant"; citing Post v. Campau, 42 Mich. 96, 3 N. W. 272. The plaintiffs also claim that the statement of facts in the affidavit not only shows a trespass to the realty, but also shows a conversion of the trees and logs after they were separated from the soil, and that there was no variance between the cause of action stated in the declaration and the cause of action as stated in the affidavit. They also claim that, the moment the trees were severed from the soil, they became personal property, and the taking away of them amounted to a conversion; citing Cooley, Torts, p. 449; Final v. Backus, 18 Mich. 218; Wood v. Elliott, 51 Mich. 320, 16 N. W. 666; and a large number of other cases. It is not our opinion that there is a fatal variance between the declaration and the facts stated in the affidavit. In the case of People v. Judge of Wayne Circuit Court, 27 Mich. 86, it was held that a declaration could not be set aside

for a variance from the writ. It is not necessary, however, in the disposition of this case, upon the record as now made, to pass upon either of these contentions. The rule, as stated in Chitty, is: "It is an indispensable requisite of every declaration that it substantially adhere to the form of action stated in the process, and, if it deviates, the defendant may apply to the court or judge to set aside the declaration for irregularity, so that the plaintiff must abandon his first process, and issue a fresh writ, stating the form of action adapted to that in his declaration. The objection is not ground of demurrer to the declaration, but merely a summary application to set aside the declaration for irregularity." 1 Chit. Pl. p. 269; Rogers v. Rogers, 4 Johns. 484. The demurrer should have been overruled. The case is reversed, with costs. The other justices concurred.

LEWIS v. EMERY.

(Supreme Court of Michigan. March 24, 1896.)

EXPERT TESTIMONY—COMPETENCY OF EMPLOYE—DUTY OF MASTER IN SELECTION OF SERVANTS.

1. In an action against a master for injuries alleged to have been caused by his negligence in employing an incompetent person as head sawyer in a sawmill, witnesses who had seen such person engaged in his employment, and who were familiar with the requirements of the place, may testify as to whether he was competent.

2. The master's duty to his servants, in the employment of fellow servants, is to use all ordinary care in the selection and retention of competent men.

Error to circuit court, Iosco county; William H. Simpson, Judge.

Action by Grant Lewis against Temple Emery. There was a judgment for plaintiff, and defendant brings error. Reversed.

Henry & Pugh, for appellant. W. E. Depew, for appellee.

MONTGOMERY, J. The plaintiff was employed in defendant's sawmill as tail sawyer. He received an injury by reason of the carriage getting beyond the control of the head sawyer, one Fred Herrington. The questions open for litigation on the record were whether Herrington was, at the time, a competent sawyer, and, if not, whether the defendant had used due care in employing him in that capacity, or in putting him to that work. It appears that, at this time, Herrington had never been steadily employed as head sawyer; that his usual employment was that of setter; that, from time to time, on the occasion of the absence of the head sawyer, he had acted in that capacity; and that, at the time in question, the head sawyer had been absent on account of sickness for some eight days, and Herrington had taken his place. The defendant and his foreman, who testified that he was authorized to employ the men and judge of their competency, and who set Herrington to work as head sawyer, knew, in a general way, of his qualifications, and that his usual work was that of a setter. The jury found a verdict for the plaintiff, and defendant brings error. The record contains numerous assignments of error, but we pass over those which are not likely to arise on a new trial.

1. Defendant called, as a witness, the foreman of the mill and the head sawyer, with whom Herrington had worked, and asked them to state whether Herrington was a competent head sawyer. This testimony was objected to and excluded. We think this was error. While the opinion of these witnesses would not be conclusive upon the jury, and the jury might find, from the want of experience of Herrington, and the nature of the injury, that he was incompetent, yet the opinions of those who had seen him engaged in this employment, and who are familiar with the requirements of the place, are competent to be received and weighed by the jury. While we are cited to no case in Michigan directly in point, we find that such testimony has been received in other jurisdictions. In Railway Co. v. Patton (Tex. Sup.) 9 S. W. 175, it is deemed competent to inquire of a witness, having a knowledge of the subject, whether an engineer was competent. In Gahagan v. Railroad Co., 1 Allen, 187, defendant's witnesses were permitted to testify that certain servants were careful, temperate, and attentive. In Larose v. Com., 84 Pa. St. 200, a witness, who was a physician, was permitted to testify that another witness, also a physician, sworn in the case, was competent, and qualified to make a certain analysis. The court said: "It is not a question of mere opinion, but of Dr. Green's knowledge, acquired from full opportunity to observe. * * * If I have seen a workman doing his work frequently, and know his capacity myself, surely, if I am a judge of such work, I can testify to his skill." The two witnesses whose testimony was excluded in the present case stood in precisely the same relation to Herrington. Each was familiar with the requirements of the position of sawyer. Each had seen Herrington at his work for some time, and we think it competent for them to testify whether he was skilled in this work or not. The fact that he had not been long employed at that work, and that their opportunities for observation were not as great as though he had been in the service for a longer time, only goes to the weight of the testimony. It appears that the ordinary apprenticeship of a head sawyer is that of a setter. The promotion is from that of tail sawyer to setter, and from setter to head sawyer; and, as before stated, the setter acts as head sawyer, if competent, in the absence of the head sawyer.

2. The court, in charging the jury, left the rule in some obscurity. In the charge, the

court said: "The law imposes upon every man that runs a sawmill the duty to employ and use reasonable appliances, and to employ reasonably skillful employés,"—and in other parts of his charge uses language which might be interpreted by the jury as laying down the rule that, if the defendant employed an incompetent servant, he would be liable to all others employed, even though he used due care in selecting the defaulting servant. In other parts of his charge, on request of defendant, he instructed the jury that, in order to find a verdict for the plaintiff, it must be found, not only that Herrington was incompetent, but that defendant or his foreman knew of Herrington's incompetency, or by reasonable inquiry could have ascertained the fact that Herrington was incompetent. It is improbable that the court intended, in the main charge, to lay down any different rule, and we should hesitate to believe that the jury could have been misled by the instructions, but we refer to the subject in view of a new trial. The rule is that the master does not insure the competency of his servants, but he contracts to use all ordinary care in their selection and retention. 7 Am. & Eng. Enc. Law, 845; Hilts v. Railway Co., 55 Mich. 437, 21 N. W. 878; Davis v. Railroad Co., 20 Mich. 105. The other questions discussed are not likely to arise on a new trial. Judgment reversed, and a new trial ordered. The other justices concurred.

CLARK et al. v. DILLMAN.

(Supreme Court of Michigan. March 24, 1896.)

AGENCY—INSTRUCTIONS—BURDEN OF PROOF—ESTOPPEL.

1. It is error to exclude evidence of an agent's actual authority to make the contract in suit, on the ground that the only issue involved is one of estoppel on the part of the principal to deny the authority assumed, and then leave the question of actual authority to the jury.

2. Where defendant relies on a contract made with plaintiff through a third person, the burden is on him to show such person's authority, or facts estopping plaintiff from denying the same.

3. Merely holding out a person as agent does not estop the alleged principal from denying such person's authority to contract in his behalf, unless the representations were made under such circumstances that the principal should have expected that they would be relied upon, and unless they were actually relied upon in good faith, to the injury of an innocent party.

4. A charge that if, by word or act, plaintiff led defendant to believe that the pretended agent had authority to make the contract in suit, the jury should find for defendant, is erroneous, as leading the jury to understand that reliance on the representation, and action thereon in good faith, by defendant, were not necessary.

Error to circuit court, Wayne county; Robert E. Frazer, Judge.

Replevin by Seward E. Clark and Junius I. Bruce, copartners as S. E. Clark & Co., against Louis F. Dillman. From a judgment for defendant, plaintiffs appeal. Reversed.

George W. Radford, for appellants. Charles Flowers, for appellee.

HOOKER, J. The plaintiffs are copartners engaged in the business of selling musical instruments. They appeal from a judgment against them in an action of replevin brought by them for a piano which at one time belonged to them, but which the defendant claims to have purchased from one Pressburg, claiming that Pressburg was plaintiffs' agent, duly authorized to sell said piano, or at least that the plaintiff held him out as such agent. The undisputed evidence shows that the negotiations for the piano were in part between members of the firm and the defendant's wife, and that Pressburg, who was in plaintiffs' employ, was sent with a contract note, duly filled out, for $675, to obtain the defendant's signature, the instrument being at the time at the defendant's house. Pressburg did not present this instrument to the defendant, but accepted $55 in cash and notes for $400; keeping the cash, and returning the note he had received from the plaintiffs, upon which he forged the name of the defendant. The plaintiffs ascertained in some way that Pressburg had engaged in crooked transactions, and called upon the defendant, and discovered the true situation, and offered to make the defendant whole by paying him $55 and giving a bond of indemnity to secure him against the note or notes signed by him; but the defendant chose to disregard the patent fact that he was profiting through another's fraud, at the expense of the plaintiffs, and insisted upon his technical rights, or, as he expressed it, "to stand pat on the contract as made by Pressburg." Thereupon the plaintiffs replevied the piano.

The case turned upon the right of the defendant to deal with Pressburg as the agent of the plaintiffs; and, while the court seems to have considered the only question in the case to be whether there was a holding out, the charge left to the jury the question of Pressburg's actual authority. This was proper, as there was some testimony tending to show an admission of such authority by the plaintiffs; but, if that question was to be left to the jury, the plaintiffs should have been permitted to show whether Pressburg actually was their agent, authorized to make sales generally, which they offered to do, but the testimony was excluded. At the time this offer was made the court seems to have taken the view that the case should turn upon an estoppel growing out of the holding out as agent, and therefore excluded the testimony upon the subject of agency as immaterial. This was error, unless the jury was to be instructed that Pressburg was not authorized to make this sale. Again, there was no dispute that the plaintiffs were entitled to recover unless the defendant had a right to rely upon the agency of Pressburg. It was necessary for the defendant to show Pressburg's

authority, or facts constituting an estoppel. The court instructed the jury as follows: "You must find for the plaintiffs by a preponderance of proof; that is, the testimony of plaintiffs must satisfy you that Pressburg was not their agent." There was no presumption of authority or estoppel, and the burden of proof, as to these matters, was upon the defendant.

The charge is silent upon another essential. It is undoubtedly the law that a person may be bound by the representation and acts of another, as agent, where there has been such a holding out as to reasonably lead one dealing with him to believe in the existence of such agency. But all of the elements of an estoppel must be present. There must be conduct calculated to mislead, and it must be under circumstances which justify the claim that the alleged principal should have expected that the representations would be relied and acted upon; and, further, it must appear that they were relied and acted upon, in good faith, to the injury of an innocent party. Mechem, Ag. §§ 85, 86; Railroad Co. v. Chappell, 56 Mich. 190, 22 N. W. 278. The rule that estops a party from denying the existence of an agency is a shield, and not a sword; and unless the jury could find from the evidence that the defendant acted in good faith, and in the honest belief that Pressburg had authority to sell this piano for $450, and that he purchased it to his injury, a verdict for the defendant should not have been rendered. There is no allusion in the charge to the other elements essential to an estoppel, and, in the testimony returned, we discover no avowal of belief in, or bona fide reliance upon, the authority of Pressburg, unless the circumstances were sufficient evidence to go to the jury upon this subject. In any event, there was ample opportunity for the jury to find the contrary. Maxwell v. Bridge Co., 41 Mich. 454, 2 N. W. 639; Ferguson v. Millikin, 42 Mich. 443, 4 N. W. 185; Morrill v. Mackman, 24 Mich. 279, note; De Mill v. Moffat, 49 Mich. 125, 131, 13 N. W. 387; Fletcher v. Circuit Judge of Kalkaska, 81 Mich. 193, 45 N. W. 641; Bank v. Todd, 47 Conn. 219. We do not discover that the plaintiffs' counsel asked instruction upon this subject, and he could not complain of the failure to mention it, but for the fact that the charge, as given, was objectionable by reason of the exclusion of these important considerations.

The first request of defendant was given, and included the statement that "if, by word or act, they were led by the plaintiffs to believe he [Pressburg] had authority, the plaintiffs cannot repudiate the contract he made, and your verdict must be for the defendant." The fact that, by word or act, the plaintiffs led the defendant and his wife to believe that Pressburg had authority, did not require a verdict for defendant. This was making the doctrine of estoppel too broad, and, by omitting all of the elements but the representation, the jury may have been led to understand that reliance upon the representation, and action in good faith, were not essential. The judgment is reversed, and a new trial ordered.

LONG, C. J., and GRANT and MOORE, JJ., concurred with HOOKER, J.

MONTGOMERY, J. I concur in the result, but I think the first request of defendant not open to the criticism made by Mr. Justice HOOKER.

ALTON et al. v. MEEUWENBERG.

(Supreme Court of Michigan. March 24, 1896.)

PLEADING—AMENDMENT—REQUESTS TO CHARGE—PRACTICE — HIGHWAY — DEDICATION—INSTRUCTIONS.

1. In an action for trespass against a highway commissioner, it was not error, after the case was certified from a justice to the circuit court, to permit the notice attached to the plea, and alleging that the locus in quo was a highway, "and used as such," to be amended by substituting the words, "and a public highway by dedication and use," particularly as said amendment was not necessary to allow testimony in support of defendant's theory.

2. The trial judge is not bound to follow the exact language of requests to charge, if he properly states the law applicable to the evidence introduced and the several theories of the case.

3. A dedication of land is an appropriation of land to some public use, made by the owner of the fee, and accepted for such use by or in behalf of the public.

4. To constitute a dedication of land for a highway, the owner of the land must set apart for such purpose so much of the land as he intends to be appropriated therefor, and must give it over to the public with the intention that it be used as such, and there must be an acceptance thereof by the public.

5. To constitute a highway by user, there must be a defined line, and the land must be worked upon by the public authorities, and traveled over and used, for 10 consecutive years, and the possession thereof by the public must be open, notorious, and exclusive.

6. Where defendant, in an action for trespass, alleged that the locus in quo was a highway, an instruction that, if statutory labor was performed only upon certain portions of the land set apart by the owner for highway purposes, that portion only would become a highway, and the remainder of it would be simply an offer to dedicate, never accepted by the public authorities, was proper.

Error to circuit court, Newaygo county; John H. Palmer, Judge.

Trespass by Dallas D. Alton and another against John Meeuwenberg. From a judgment for defendant, plaintiffs bring error. Affirmed.

L. A. Miller, for appellants. A. F. Tibbitts and Martin Rozema, for appellee.

MOORE, J. Plaintiffs sued defendant in justice court for an alleged trespass committed by him upon land of which they claimed to be in the exclusive possession. The acts which were claimed to be trespasses were the setting of stakes and the digging of ditches. The defendant pleaded the general issue, and gave notice that the land where the alleged trespass was committed "is, and at the time

the said injuries were supposed to have been committed, was, a public highway, * * * legally laid out, established, and used as such"; that the defendant was commissioner of highways; and that what was done, was done as such commissioner. The defendant also gave a bond, and paid such fees as the law requires, and the justice certified the case to the circuit court for trial. The case was afterwards tried before a jury, who rendered a verdict in favor of the defendant.

No record title was introduced on the part of the plaintiffs. They claimed to be in the actual possession of the premises in question. Their testimony was to the effect that they built a one-story cottage on the premises in 1893, and shortly afterwards inclosed the premises with a fence, a part of which was cut away soon after, and that the present fence was built in the spring of 1894. They claimed to have built a dock along the lake front, to have graded the grounds, and made other improvements; that the trespass complained of consisted of the digging of two parallel ditches, about 2 rods apart, through some boggy, wet land. These ditches were 12 to 16 inches deep, 2 feet wide, and about 10 rods long. It was claimed, on the part of the defendant, that in 1878 one Smallegan was the owner of the land upon which these ditches were dug; that in that year he gave to the public, for the purpose of a highway, a strip of land that would embrace the land in question in this suit; that he built a brush fence along the whole line of said strip, throwing it open to the public, the south end opening into the south line section road, and the north end opening into a piece of new road which the owner of the land on the north (one Jones) had in like manner opened to the public. It was further claimed that, while Smallegan cleared up the rest of the land, he and the subsequent owner never made any improvements on this strip, except for highway purposes, and never claimed any title to it after 1878. At about this time some attempt was made by the authorities to lay out a highway on this line. It was claimed that in 1878 one Waters made a survey of said strip, and placed his notes of that survey on record with the town clerk, and that it was made by the consent and with the assistance of Smallegan and Jones, and other of the adjoining neighbors. It was also claimed by the defendant that, every year since 1878, highway labor had been performed on that strip under the direction of the commissioners and overseers of highways. At about the middle of this strip, about halfway between its ends, is a marshy spot. The defendant also claims that the piece of land opened by Jones, as far south as the eighth line, was a well-traveled road, and that the strip given by Smallegan, as far south as the marshy spot, had been used for travel by the public for several years. It was not claimed by the defendant that the strip of land that was marshy, or that the land south of it to the section line, was generally traveled; but it was claimed that highway labor was expended upon its entire length, and upon every part of it. These various claims of the defendant were disputed by the plaintiffs. In September, 1893, the plaintiffs fenced in the north end of the Smallegan strip; their north fence being on the eighth line, and their east fence on the line of fence placed there by Smallegan in 1878. The east fence runs through to the lake, and takes in about one-half of the marshy spot; the piece of land fenced in by them being about 60 rods. Smallegan and Banega protested against the building of this fence, and tore away at least a part of it. In July, 1893, the defendant was petitioned by seven freeholders to ascertain, describe, and enter of record the center line of this road. He caused a survey to be made, and placed the proceeding upon record with the township clerk. By some error of the angles of that survey, one of them was marked "south" instead of "north" in the field notes, which would make it appear that the road turned off into the lake. The plat attached to the field notes shows this was an error. This was also shown by the surveyor, and it was also shown by him that the line, as actually surveyed in 1893, followed substantially the line run in 1878. It was claimed by the defendant that the plaintiffs occupied their cottage only during the heated season of 1893, and again in 1894, staying there at night and over Sunday, and that they permitted others to occupy it during the season of 1894; that their permanent residence was in Fremont. On August 12, 1894, the defendant went upon the land inclosed by plaintiffs, and, as highway commissioner, let a job of ditching on this marshy spot at the extreme south end of plaintiffs' inclosure, and about 40 rods south of the cottage. Mr. Miller, claiming to represent the plaintiffs, ordered the defendant off the premises. The plaintiffs claimed that the Smallegan strip of land was never dedicated to the public, but that it was fenced in by Smallegan, and used by him as a pasture. Proof was introduced bearing upon the several claims of the parties.

The first 8, and the 10th, 11th, 12th, 14th, 15th, 16th, 17th, and 18th assignments of error relate to the rulings of the trial judge upon the admission of testimony. We think none of them are well taken.

The 9th and 13th assignments of error relate to the ruling of the judge in allowing an amendment to the notice attached to the plea, by substituting for the words, "and used as such," the words, "and a public highway by dedication and use." This was objected to by counsel for plaintiffs, he claiming that it made a new issue, and a different issue from the case certified by the justice, and he cites How. Ann. St. § 6896. In McFarlane v. Ray, 14 Mich. 470, which was a case in trespass, brought originally in justice

court, though the proposed amendment in that case was denied, it was stated: "We have no doubt of the power of the circuit court to allow amendments that do not affect substantial rights." This is the only decision we can find in our own courts where this feature of the statute has been construed. The purpose of the notice attached to the plea in this case was to apprise the plaintiffs that the defendant claimed the disputed land was a public highway, and that what he did was done as a commissioner of highways. The notice, before it was amended, fully accomplished that purpose. It was not necessary to amend it to allow the testimony to be received which was offered in support of defendant's theory. The amendment did not make a new issue, or affect substantial rights, and its allowance was not error.

The only other questions open for discussion relate to the refusal of the circuit judge to give plaintiffs' several requests to charge, and to the charge as given by him. We have repeatedly held that the trial judge is not bound to follow the exact language of the counsel who presents the requests, if he properly states the law as applicable to the evidence introduced, and the several theories of the case presented by counsel. That portion of the charge, not relating to the questions already disposed of in this opinion, so far as it is necessary to give it in this discussion, reads as follows:

"The title to these premises was put in issue by this defendant under his plea. He claims that he is entitled to the possession of the premises because the premises were a public highway, and that involves to some extent the title. There is a statutory mode of creating a highway, called a 'dedication,' 'statutory dedication.' But that mode was not followed in this case. That is an admitted fact upon all sides. But they say it became a highway by user, or by dedication; not under the statute, but by common law. Now, a dedication of land is an appropriation of land to some public use, made by the owner of the fee, and accepted for such use by or in behalf of the public. Now, you will see where the title comes in. To constitute a public highway by dedication, the owner of the fee of the premises must dedicate the land. Now, it is an admitted fact, in this case, that, at the time they claim the land was dedicated and set apart to public use, Mr. Smallegan was the owner of the premises in question. Mr. Smallegan has testified that, so far as he was concerned, he told the public authorities they might pass over a certain portion of the premises, and, at or about that time, he designated that portion of the premises that he donated, or attempted to, by building a fence, a brush and log fence, or something of that character, running parallel, nearly, with the red line indicated upon the map, and the whole length of the line. That, of itself, is not sufficient to constitute a dedication. There are always two parties to a contract, and it was necessary for the public authorities, after that, to accept this dedication, this easement, this right of way over the land. And there was no dedication without the first party, owning the land, dedicated it, and intended to give it over to the use of the public, and an acceptance on the part of the public of that piece of land. That act, as between the owner of the land and the public, would constitute a public highway. Now, there is another material ingredient. The owner of the land must, at the time he dedicates or seeks to set apart for public use for the purpose of a highway,—must have intended, at that time, to appropriate so much of the land as he set apart for purposes of that kind. He must have intended to do so, and the public authorities at that time must have intended to accept so much of that land for purposes of this kind, for purposes of a highway; and the intent of the parties is determined by their acts and by their declarations. Now, one of the acts of the parties, as bearing upon the question of intent, is the use made of the lands. How did this man Smallegan act, at the time and afterwards? What use did he make of the lands, as showing an intent upon his part of dedicating the land? How was the land treated by the public authorities, with reference to its being a highway all along the line? Or what portion of it did they open? Such portions of it as are actually worked by the public authorities would evidence an intent upon their part to accept it for the purposes dedicated by the owner of the land, and only such portions as are actually worked would operate as a dedication. The other would be an offer to dedicate. Where land is dedicated for public uses by the owner, and accepted by the authorities— And I will say right here there was no formal acceptance, as the proof shows, by the authorities, of this particular land; and whether they accepted the land or not, or this highway or easement or not, must necessarily be shown by what they did. If they worked upon the entire line of the highway; if they put statutory labor upon it; if the land was in such condition as to make it capable of being used for a highway; if, by any act, they evidenced an intent upon the part of the public authorities to make that a highway,—the entire line,—and the owner of the land at the time intended to appropriate the entire line for a highway, and such was the intention of the owner, and such the intention of the public authorities, as evidenced by their acts, then the entire line would become a highway. But if, on the contrary, only upon a certain portion of it statutory labor was performed, and only upon a certain portion work was done, that portion only, under this dedication, would become a public highway, and the remainder of it would be simply an offer to dedicate, never accepted by the public authorities. Now, you have the particular place alleged to have been trespassed upon. Did that ever become a pub-

lic highway? Did the public authorities ever accept that certain portion of the premises alleged to have been trespassed upon? They never did accept it formally; and, if they have accepted it, under the evidence in this case, it must be determined by the facts and circumstances surrounding this transaction, as evidenced by what they did upon the land. Did they ever perform any statute labor upon it? Have they, from the time of the dedication, up to and including the time of the alleged trespass, performed statutory labor upon it? And has it ever been in such a condition that the public could use it? Have they ever done any acts towards or with reference to it that would indicate that the public authorities intended to make that portion of the land trespassed upon passable and fit for the purposes of a public highway? These are questions for you to determine, from the evidence in the case; and, unless you believe, from the evidence, that they did, then that certain portion never became a public highway.

"There is another mode of creating a highway, under the statute, in this state, and that is by user. But, to constitute a highway by user, there must be a defined line, and it must be used and worked upon by the public authorities, and traveled over and used, for 10 consecutive years, without interruption. It must be such a road that the public have exclusive possession of, as against the owner of the soil or any other person,—the exclusive right. If it is a public highway, the public authorities have the public use and control of it; if it is not, they have not. And, to constitute a public highway by user, the particular portion of the premises alleged to have been trespassed upon must have been used by the public as a highway for 10 consecutive years, before it would become a highway by user. It must be open. It must be notorious. It must be accepted by the public generally. It must be traveled upon as a public highway, and the possession of the public must be exclusive; so that, if any person entered upon the premises and sought to use it in a manner other than as a public highway, the public authorities would have an action against such person for trespass upon the road. Did this highway, under this rule that I have given you, ever become a highway by user? Did it become a highway in any manner? It is not claimed by this party defendant here that the road was ever legally laid out. There was never any statutory dedication of the road. Now, the testimony is undisputed, as I have before said to you, that the northerly end of this road was opened up, and was used, and was worked upon, and that highway labor was expended upon it every year, and, as to that certain portion of the road, there is no question about its being a public highway. The other end of the road, that next to the section line, as indicated upon the map, —certain highway labor was performed upon that, and a certain portion of that end of the road became a public highway, and the trespass, however, was committed, and the ditch that was dug upon the land, came to within 20 rods of this cottage. In other words, the end of the ditch was 20 rods south, or about that distance, from this cottage. About that point the alleged trespass was committed. Was that ever a public highway by dedication, user, or by any other mode? Was it ever worked upon? Was it ever traveled over? Did it ever become a public highway? Take into consideration the surface of the ground. Was it capable, even, of being traveled over as a public highway, at any time, from 1878 down? If it was not, and there is nothing in the evidence to indicate that the public so regarded it, and so used it, and so traveled it, and so worked it, then it was not a public highway, and these plaintiffs would be entitled to your verdict for six cents. Upon that question of fact, and that alone, depends your verdict in this case; and you must determine that from the evidence alone, uninfluenced by anything that may have been said or done outside of the evidence. Mr. Meeuwenberg, acting in the capacity of a highway commissioner, was the agent of the township. He had charge of the roads, and was acting for the general public with reference to the roads in the township; and if, at the time he entered upon the land in question, at the point which he entered, if that portion of the premises was at that time a public highway, created in any manner, or in the several manners, or in any one of them, that I have called your attention to, then Mr. Meeuwenberg had a right to enter the close, and he had a better right to the possession than these plaintiffs. But, if this certain land, designated by the map, which was inclosed by these defendants, at the very point that Mr. Meeuwenberg entered (if he did, and did this work), if that particular portion of the premises was not, on the 11th day of August, 1894, the day that he says he went upon the land,—if it was not then a public highway, and used by the public as such, or capable of being used by the public as such, then Mr. Meeuwenberg did a wrong, and your verdict should be in favor of the plaintiffs for six cents damages."

The facts that controlled the case were disputed facts; the plaintiffs claiming one thing, and the defendant another. The charge of the trial judge was fully as favorable as the plaintiffs were entitled to have it. It was a fair and full presentation of the law, in all its phases, applicable to this case. We shall not discuss the cases, but content ourselves with citing some of them. People v. Jones, 6 Mich. 176; Baker v. Johnston, 21 Mich. 340; City of Detroit v. Detroit & M. R. Co., 23 Mich. 172, and cases there cited; Village of Grandville v. Jenison, 84 Mich. 66, 47 N. W. 600; Bank v. Stockwell, 84 Mich. 586, 48 N. W. 174; Ruddiman v. Taylor, 95 Mich. 550, 55 N. W. 376. The judgment is affirmed, with costs. The other justices concurred.

TRAVIS v. CULVER.

(Supreme Court of Michigan. March 24, 1896.)

CERTIORARI—FINAL JUDGMENT—NECESSITY.

Certiorari will not lie to review the ruling of the circuit court in overruling objections taken by special appeal, where no final judgment was entered.

Action by Albert Culver against Benjamin Travis. Certiorari to the circuit court of Ionia county (Frank D. M. Davis, J.). Quashed.

Mains & Mains and Frederick Mains, for appellant. B. H. Bartow and McGarry & Nichols, for appellee.

MONTGOMERY, J. This is certiorari to review the ruling of the circuit court in overruling the objections of plaintiff in error taken by special appeal. No final judgment has been rendered. It was intimated on the argument that the writ was improvidently issued. We so hold. See Palms v. Campau, 11 Mich. 109. In Peterson v. Fowler, 76 Mich. 258, 43 N. W. 10, final judgment had been entered. Writ will be quashed, with costs. The other justices concurred.

FOUNTAINE v. LEVEQUE et al.

(Supreme Court of Michigan. March 24, 1896.)

SPECIFIC PERFORMANCE—DAMAGES.

On a bill for specific performance of a contract to convey land, it appeared that, after complainant took possession, he contracted to sell the premises to one D., for an advanced price, defendant consenting to accept from D. the balance then due from complainant, which amounted to $491, with interest at 10 per cent.; that, after D. had paid defendant $100, defendant, intending no wrong, gave him a deed, and received $400 more, which D. raised by mortgaging the land to a third person, who had no knowledge of complainant's rights. *Held*, that in canceling the deed to D., and decreeing specific performance of defendant's contract to convey to complainant, it would be inequitable to make defendant pay the mortgage, as he received no more than he was entitled to, and complainant suffered no substantial loss.

Appeal from circuit court, Houghton county, in chancery; Jay A. Hubbell, Judge.

Bill by Alphonse Fountaine against Prudent Leveque and others for specific performance of a contract to convey real estate, and for other relief. From a decree denying a part of the relief demanded, complainant appeals. Affirmed.

Dunstan & Hanchette, for appellant. Willard E. Gray (Chadbourne & Rees, of counsel), for appellees.

MOORE, J. October 10, 1891, the complainant filed a bill in chancery, alleging: That he (Fountaine) bought from Prudent Leveque and wife 40 acres of land upon contract, for $532.08, payable on or before January 19, 1892, with interest at 10 per cent., and that the complainant went into the possession of the premises, and improved them. That October 6, 1892, Fountaine made a written contract to sell this land, together with the personal property on it, valued at $500, to Jean M. Deslongchamps, for $1,800, —$200 payable on the execution of the contract; $100, January 2, 1893, payable to Leveque; $300 payable to him January 2, 1894, with interest at 10 per cent. per annum; $91.79, January 2, 1895, with interest at 10 per cent.; and the balance of the payments to be made to Fountaine, with interest at 8 per cent. That October 10, 1892, Leveque signed a paper that he was satisfied with the conditions of the last-named contract, "and accepted the said Jean Marie Deslongchamps in payment according to the contract." The bill further charges that Deslongchamps has paid to Leveque all of the $491.79 due from complainant to Leveque; that Fountaine had demanded from Leveque a deed of the premises, which Leveque refused to give him. The bill also alleges that on October 27, 1894, Leveque, Deslongchamps, and Longpre, to defraud complainant, conspired together, and Leveque gave Deslongchamps a deed of the premises, and Deslongchamps gave Longpre a mortgage for $400, and that Longpre knew of the contract between Fountaine and Leveque; that the giving of the deed and the mortgage has deprived complainant of his security for the balance due him from Deslongchamps. The bill prays for a specific performance of the contract from Leveque to Fountaine, that the mortgage be canceled, with a general prayer for relief. Leveque answered this bill, admitting the title and the two contracts, and that he agreed to accept from Deslongchamps the amount complainant had agreed to pay, but avers that he did not intend and did not release his lien on the land for the money due him on the contract. He admits that Deslongchamps has paid him all the money due him on the contracts, but avers that, in order to pay, Deslongchamps had to borrow $400 from Longpre, and gave the latter the mortgage mentioned in the bill of complaint; that to enable him to borrow the money, and with no thought of fraud, he made the deed to Deslongchamps; that Longpre had no knowledge, so far as Leveque knows, but what the title was all right; and that complainant is not entitled to a deed of the premises until he shall pay the money advanced by Longpre to Deslongchamps, because the land was bound for the payment thereof to Leveque. Longpre answered to the bill, and admits the taking of the mortgage, but denies any conspiracy or any knowledge of any different title from what the record disclosed; that Deslongchamps is irresponsible; and that the mortgage is the only security Longpre has for his loan. Defendant Deslongchamps did not appear, and the bill was taken as confessed as to him. The testimony was taken in open court. A decree was entered in favor of Longpre, with costs. Leveque was required

to deed the land to complainant. The mortgage of $400 was allowed to remain a lien upon the land. Costs were decreed in favor of complainant, and against Leveque. From that decree an appeal was taken by the complainant to this court.

The first question is, shall the mortgage of $400 remain a lien upon the land? The learned trial judge found from the evidence that Longpre loaned the money in good faith, and without the knowledge of the contract between Leveque and complainant. We think this finding was entirely warranted by the evidence. It is true that there was testimony showing that one of the witnesses to the land contracts was asked by Longpre, before he took his mortgage, to find out from the office of the register of deeds whether the title to the land was all right. It is urged that this witness must have known of Fountaine's interest in the land, that he was acting for Longpre in making the inquiry at the register's office; and that his knowledge must be presumed to have come to Longpre. The difficulty with that position is it appears affirmatively that, when he was making these inquiries for Longpre, he was employed for a definite purpose, not connected with the land contracts, and did not think anything about them at the time. He reported to Longpre that the title was all right, and at that time he believed this to be true. So far as the record discloses, Longpre had no knowledge to the contrary.

The complainant asks, if this court holds the mortgage to be good, to decree: (1) That the deed from Leveque to Deslongchamps be canceled, and a new warranty deed from Leveque to complainant be made; and that the complainant have compensation enough to discharge the mortgage given by Deslongchamps to Longpre, so that the complainant should own the land free from any lien for purchase money, or otherwise, because the title belonging to the complainant, being held by the creditor, defendant Leveque, as surety for the performance of the contract of the principal debtor, defendant Deslongchamps, was so dealt with by the principal defendant and the creditor, without the consent of the owner of the surety, as to release the surety; or, instead of cancellation of the deed and of the mortgage, the complainant should have compensation for the amount of $732.71, or the value of the surety disposed of by the principal creditor without his consent, the value of the security being based upon the amount due to the complainant upon the contract from Deslongchamps to the complainant, over and above all legal or equitable set-offs. If that to the court is not firmly established, then (2) the court should decree that the deed from Leveque to Deslongchamps should be set aside, and a new warranty deed given from Leveque to complainant; and that defendant Leveque should pay and discharge the mortgage from Deslongchamps to Longpre; and that the complainant should pay to the defendant Leveque the actual balance due upon his contract with Leveque, without interest; and that a commissioner should be appointed to ascertain how much more than the $400 was paid by Deslongchamps to Leveque, when the deed was delivered in October, 1894.

Can either of these positions be maintained in this proceeding? The bill is not filed upon any such theory. Complainant comes into a court of equity, and asks for a specific performance of the contract, and to have the mortgage set aside, upon the ground of conspiracy and fraud. He fails to establish the conspiracy and fraud, and the mortgage is allowed very properly, as we think, to remain a lien upon the land. This part of his case having failed, can he have a specific performance of the contract, and damages for a failure to perform it? If it is conceded that, in some cases, damages may be decreed as well as specific performance, is this a case where it would be equitable to do so? This is an appeal to an equity court. Should not the complainant do equity? The principal parties to this litigation are comparatively ignorant men. The complainant testifies through the medium of an interpreter. Defendant Leveque testifies that he agreed to take Deslongchamps for the payments, and supposed the deed would run to him, as the complainant told him he had sold to Deslongchamps. The trial court had these witnesses before him, and evidently could judge of their candor and truthfulness. The record shows that, when Deslongchamps made the contract with complainant, there was to become due to Leveque $491.79, with interest at 10 per cent. It also shows that all he has received since then is $100, paid in 1893, and the $400 obtained of Longpre. Leveque has had no more pay for the land than he was entitled to. While he had no legal right to make the deed to Deslongchamps, we think the decree of the trial court, in view of the facts disclosed in the record, is an equitable one. The decree is affirmed, with costs. The other justices concurred.

WOLF v. MICHIGAN MASONIC MUT. BEN. ASS'N.

(Supreme Court of Michigan. March 24, 1896.)

MUTUAL BENEFIT INSURANCE—ASSESSMENTS—NOTICE—VALIDITY.

1. Where the board of trustees of a mutual benefit association, when less than a quorum was present, after official notice of the death of members, ordered assessments, the irregularity, if any, was cured by the approval of the minutes of such meeting at a subsequent meeting, when a quorum was present.

2. Articles of a mutual benefit association provided that, when official notice was received of the death of a member, it was the duty of the secretary to notify each member; that each member should, within 15 days after date of such notification, pay to the secretary $1.10; and, in case he should neglect to pay within 15 days, he should be again notified by the secre-

tary; and, if such sum was not then paid within 15 days after the second notification, his name should be erased from the roll of members. *Held*, that the legality of notices was not affected by the fact that the second notice was given a day or two earlier than provided by such articles.

Error to circuit court, Kent county; William E. Grove, Judge.

Action by Gustave A. Wolf, administrator of the estate of Solomon Wolf, deceased, against the Michigan Masonic Mutual Benefit Association. There was a judgment entered on the verdict of a jury, directed by the court in favor of defendant, and plaintiff brings error. Affirmed.

Walker & Wolf, for appellant. Champlin & Stone, for appellee.

LONG, C. J. On November 7, 1878, Solomon Wolf, by a vote of the board of directors of the defendant company, was admitted into said company, and a certificate of membership duly issued to him. He remained a member of the company until February 19, 1880, when, as is claimed by the defendant, he was suspended, and his name stricken from the roll, for the nonpayment of assessments Nos. 20 and 21. He made no application to be restored to membership, and died July 20, 1880. After his name was stricken from the roll, there were three assessments made before his death; but he was not notified or assessed therefor, for the reason, as it is claimed, that he was not regarded by the association as any longer a member. No claim was made against the association until April 5, 1892, when the plaintiff, as administrator, wrote a letter to the defendant company, asserting the claim, and received a reply that, upon investigation, the company found that the plaintiff had no valid claim against it. It was admitted on the trial that Solomon Wolf died July 20, 1880, unmarried, leaving, surviving him, his brother, Jacob Wolf, of Grand Rapids, Mich., and two sisters, Caroline Goetz, who resides at Cincinnati, Ohio, and Johanna Wolf, who then resided at Grünstadt, Germany; that Johanna Wolf died, intestate, in the fall of 1890, at her home in Germany, and was then unmarried; that on May 11, 1892, an assignment of the claim was executed to the administrator by Jacob Wolf; and that he was authorized to execute the same for and in behalf of Caroline Goetz. This action is brought to recover the amount claimed to be due to the legal representatives of Solomon Wolf. On the trial, the court below directed a verdict in favor of the defendant.

The defendant association was organized under "An act to provide for the incorporation of co-operative mutual benefit associations" (1 How. St. c. 118). After its incorporation, it caused to be executed articles of association, which were duly filed, and under which the corporation acted. The articles provide for death claims, as follows: "Upon the death of any member of this association, the sum to be paid the representatives of the deceased, as designated upon the books of this association, shall be one dollar for each member of this association, not in any case to exceed one thousand dollars; and, whenever the amount in the general fund shall exceed the amount necessary for the payment of two death claims, then an assessment shall be passed, and the death claim then due shall be paid from the moneys in the general fund." Article 15. The agreement in the certificate issued to the deceased is as follows: "The said association agreeing to pay to his legal representatives the sum of as many dollars as there are members of this association at his death, but, however, in no case to exceed the sum of one thousand dollars." Prior to the suspension of the deceased, three death claims were presented to the association for payment; the latter one to be paid from the surplus fund, which was apparently on hand at that time. The other two claims were to be paid by two assessments to be made upon the members of the company, one dollar each assessment. The only controversy in the case which we think necessary to discuss grows out of the claim of plaintiff that no proper and legal notice was ever served upon the deceased that these assessments were to be paid, and that consequently the company had no power or authority to suspend him from the benefits to be paid at his death. The court directed the verdict on the ground that the notices of these assessments were sufficient and legally authorized, and in consequence of which the deceased was properly suspended for nonpayment of them, and that, therefore, his legal representatives had no benefits accruing to them under the certificate.

The articles of association affecting this question provide: "The secretary shall keep a record of all meetings of the association and the board of trustees, and of all transactions and business of the association. He shall keep a complete register of the names, ages, and residences of the members, and the names of the lodges to which they belong. He shall receive all moneys required to be paid by its members. * * * He shall prepare all certificates of membership and all notices of deaths and assessments. He shall keep a record of deceased members of the association. * * * He shall make a record in the books of the association of the names of all members who have paid, and of all who have failed to pay, the assessments made upon them. * * * He shall make and serve or publish all notices and notifications required by the association or by the board of trustees. * * *" Article 8, § 4. "The board of trustees shall have a general charge and supervision of the affairs of the association. * * * They shall have power and authority to make such rules and regulations for their government in payment of

claims, reception of proofs of death, and transaction of general business as a majority may see fit. * * *" Article 8, § 6. "A member who has been suspended or expelled from the fraternity * * * shall immediately cease to be a member of this association." Article 12, § 2. "At any meeting a majority of the board shall constitute a quorum for the transaction of business." Article 5, § 4. "The board of trustees, when full, shall consist of nineteen members of this association. * * * Each lodge outside the city of Grand Rapids having twenty members belonging to this association shall be entitled to one trustee, until the number of trustees shall be full. * * *" Article 6, § 1. "When official notice has been received of the death of a member of this association, it shall be the duty of the secretary to notify each member of the same; and, unless the death claim has been provided for by article fifteen of this constitution, each surviving member shall, within fifteen days after the date of such notification, pay to the secretary the sum of one dollar and ten cents; and, in case he shall neglect to pay the same within fifteen days, he shall be again notified by the secretary; and, if said sum shall not be paid within fifteen days after the second notice, his name shall be erased from the roll of members, and he shall forfeit all claims upon the association: provided, however, that the board of trustees shall have power to restore such delinquent member upon his giving a satisfactory excuse for his default, and payment of all assessments which may have accrued up to date of such restoration: provided, also, the board of trustees shall have power to restore to membership any suspended member or removal of such suspension provided said so restored member pay up all dues and claims that would have accrued against him had he not been suspended." Article 16, § 1. "A written or printed, or partly written and partly printed, notice deposited in the post office at Grand Rapids, postage paid, and directed to the member's place of residence as it appears on the books of the association, shall be deemed a sufficient notice." Article 16, § 2. "The notice shall be headed in bold type, 'First Notice,' 'Second Notice,' as the case may be." Article 16, § 3.

It appears that, at the time assessments Nos. 20 and 21 were made, the board consisted of 19 trustees, and therefore 10 trustees were necessary to constitute a quorum. Five only, were present when these assessments were made; and, when the deceased was reported suspended, only seven trustees were present. It is therefore contended by counsel for plaintiff that, for this reason, the notices were invalid, as well as the action of the board in declaring the deceased suspended from the benefits of the association. Although no quorum was present at the time the assessments were made, it will be seen from the articles of association that the board of trustees has no power or discretion in the matter of the amount of the assessment. It is always one dollar upon each member, and, if the amount in the general fund exceeds the amount necessary for the payment of two death claims, there is no assessment. It is shown in the present case, and without contradiction, that there was a sufficient amount in the general fund at the time these assessments were made to pay one death claim, and no more; but there were three death claims to be paid, and it became necessary to meet such payment that the assessment of one dollar per member upon each of the death claims be made. The association had never made any rules or regulations for its government in the payment of claims, reception of proofs of death, or the transaction of its general business; but all matters had been left to be governed and controlled by the articles of association. The articles of association, or the statute under which the association was organized, do not vest in the trustees expressly and solely the power to levy assessments, but provide, by article 16, § 1, that, when official notice has been received of the death of a member of this association, it shall be the duty of the secretary to notify each member of the same, and, unless the death claim "has been provided by article fifteen of this constitution, each surviving member shall, within fifteen days after the date of such notification, pay to the secretary," etc. Official notice had been received that these death claims were to be met; and, under this article, it became the duty of the secretary at once to give the notices of assessment; so that, although there was no quorum present at the time the trustees directed the assessments to be made, yet it is apparent that the secretary had the power to give the notices without the direction of the board at all. But, be this as it may, we think, if there was any irregularity in this respect, that that was cured by the further action of the board at its next meeting, when a quorum was present. At the time these assessments were ordered (December 18, 1879), the proceedings of the board were recorded upon its journal; and on January 15, 1880, a majority of the board being then present, the minutes of the preceding meeting were read and adopted. This action of the board at that time was a ratification of the proceedings of the minority meeting of December 18, 1879. A majority, in the first instance, could have directed the assessment; and the adoption of the act of a minority by the majority of the trustees at a regular meeting of the board made the action of the minority valid and binding as an assessment, as such ratification was retroactive, and took effect from the time the assessment was ordered by the minority. New York Security & Trust Co. v. Saratoga Gas & Electric Light Co. (Sup.) 34 N. Y. Supp. 890; Ellison v. Water Co., 12 Cal. 542. The cases cited by counsel for plaintiff upon this question are not similar in principle to the present, as here the amount

of the assessment was fixed absolutely by the articles of association, and the duty to make the assessment to meet the death losses is clearly defined by the articles, so that the levying of the assessment was a purely ministerial act.

It is further contended by counsel for plaintiff that a sufficient length of time had not elapsed, as required by the articles, between the giving of the first and the second notice. The first notice was mailed on January 1, 1880; the second, January 15, 1880. And counsel contends that full 15 days should have elapsed between the time the first notice was given before the second was mailed. It is evident that it was the design of this provision of the articles of association to give the member full 30 days' notice to pay the assessment. This full 30 days' notice was given, and the mere fact that the second one was given a day too early could not affect any substantial right which a member would have in the payment of his assessment; but from the record it appears that the deceased did not pay his assessment at the end of the 30 days, when, on February 1, 1880, a third notice was given, and it was not until after this third notice that the resolution was passed by the board suspending the deceased from further benefits in the association. Death losses accrued after that time, but no notices were mailed to the deceased, for the reason that he was not regarded thereafter as a member; and although he resided in the same house with his brother, who was also a member of the association, and received notices from the association for death losses, no effort was made, as appears by the record, to have the deceased reinstated. The deceased and his relatives evidently regarded the deceased as suspended, and as having no claim upon the association. After his death, 12 years elapsed before any claim was made upon the company for the payment of the claim. The cause of this delay is alleged to be because the certificate was lost, and was not discovered until about the time the claim was made.

The contention is also made upon the part of the defense that the claim is barred by the statute of limitations; but we think it unnecessary to discuss that question. The court below placed its ruling entirely upon the questions of regularity of the proceedings to suspend the deceased from benefits, and we think properly. The judgment must be affirmed.

MONTGOMERY and HOOKER, JJ., did not sit. The other justices concurred.

BERRY v. TINSMAN, County Drain Commissioner.

(Supreme Court of Michigan. March 24, 1896.)

DRAINAGE — DEEPENING DRAIN — WHEN PROPER.

In proceedings to review the action of a drain commissioner in deepening and widening the B. drain, it appeared that plaintiff's land was assessed for the P. drain, previously established, which has a creek for an outlet, and is crossed by the B. drain; and that the latter is 18 inches deeper, and, if deepened as proposed, will be 28 inches deeper, than the former at the intersection, and 18 inches deeper than the E. drain, which empties into the P. drain below such intersection, and was also established before the B. drain. *Held*, that the action of such commissioner was proper, as against the objection that such deepening and widening will have the effect to destroy the P. and E. drains from the point of intersection by diverting the flow of water.

Error to circuit court, Monroe county; Edward D. Kinne, Judge.

Certiorari proceeding by John W. Berry against Arthur D. Tinsman, county drain commissioner, to review the action of defendant in deepening and widening a certain drain. There was a judgment sustaining the action of the commissioner, and plaintiff brings error. Affirmed.

Elan Willard and C. A. Golden, for appellant. Willis Baldwin and Ira G. Humphrey, for appellee.

MONTGOMERY, J. Plaintiff sued out of the circuit court a writ of certiorari to review the action of the drain commissioner in deepening and widening a certain drain known as the "Babcock and Baker Drain." The circuit court sustained the action of the commissioner, and plaintiff brings error. It appears by the record that the plaintiff is the owner of land assessed for the construction of the Plank Road drain, the southern outlet of which is Swan creek. This drain was laid out in 1872, and in 1874 a drain known as the "Babcock and Egypt Drain" was laid out and established, running east and west, and discharging its waters into the Plank Road drain. In 1875 a third drain was laid out and established, known as the "Babcock and Baker drain," and commencing at a point about a half mile north of the Babcock and Egypt drain, and running thence on a general easterly course, crossing the Plank Road drain. As these drains have been constructed for 10 years, whatever defects existed in the original proceedings are not now open for consideration. This proceeding is for the deepening and widening of the Babcock and Baker drain, and, if deepened and widened as prayed for at the point of intersection with the Plank Road drain, it will be 2 feet 4 inches below the bottom of the latter drain, and 18 inches or more below the bottom of the Babcock and Egypt drain. It appears by the return of the commissioner that the Babcock and Baker drain, when laid out, crossed the Plank Road drain at a grade 18 inches below the bottom of the Plank Road drain, and so existed, and is now below the bottom of the Plank Road drain; and the return further shows that the Babcock and Baker drain does not cross the Babcock and Egypt drain.

The contention of plaintiff is that the deepening and widening of the Babcock and Baker drain will have the effect to destroy the

Babcock and Egypt drain and the Plank Road drain from the point of intersection of these respective drains, by diverting the flow of water. As already stated, the return shows that the Babcock and Baker drain does not cross the Babcock and Egypt drain, and that the bottom of the former drain is below the Plank Road drain; so that the most that can be said is that the diversion of waters in the Plank Road drain would be a difference in degree merely. We are not able to see the force of plaintiff's contention. There is no pretense that those interested in the Plank Road drain are interested in any other way than as the drain operates to drain their lands. How the diversion of some further portion of the water, which would, but for the deepening of the Babcock and Baker drain, flow through the Plank Road drain, would operate to destroy any portion of this drain, is not apparent. If the lands are above the level of the bottom of the Plank Road drain and the Babcock and Egypt drain, it would seem that these drains would still furnish a means of draining plaintiff's lands. The vested rights in those owning land along these two drains are not in any way interfered with. The water courses, so far as they furnish a means of drainage, continue; and, unless the persons abutting the latter portion of the ditch have a right to have the water from above for power, they are in no way damnified by having the Babcock and Baker ditch deepened. We think they have not this right, particularly as the Babcock and Baker ditch, as it was originally constructed and as it now stands, diverts the waters at the point of intersection. The cases cited by plaintiff's counsel—Tomlin v. Newcomb, 70 Mich. 358, 38 N. W. 315; Zabel v. Harshman, 68 Mich. 270, 36 N. W. 71; Id., 68 Mich. 273, 42 N. W. 44—are not in point. In each of these cases an attempt was made by the township drain commissioner to establish a drain on the line of an existing county drain. This it was held he was not authorized to do, unless such existing drain had been previously vacated. It has been determined in the present case that the deepening and widening of this ditch was a necessity, and this by a jury demanded by plaintiff. We think the circuit judge was right in sustaining the action of the drain commissioner. Judgment affirmed, with costs. The other justices concurred.

WEBSTER v. SYMES et al.

(Supreme Court of Michigan. March 24, 1896.)

NEGLIGENCE—FIRE BY MILL—ESCAPING SPARKS—QUESTION FOR JURY—SPARK ARRESTER—DUTY OF OWNER—INSTRUCTION—SUCCESSION OF CAUSES.

1. In an action for causing the destruction of plaintiff's premises by negligently permitting sparks to escape from the smokestack of defendant's mill on a violently windy day, defendant's witness stated that, on said day, the circular doors in the fire box were partly open, and there was other evidence that the drafts were open part of the time on said day, and that cinders were emitted from the stack. Defendant testified that sparks could not have escaped with the drafts closed. *Held*, that there was sufficient evidence to authorize the submission to the jury of the issue as to whether the drafts were open.

2. Where a stationary mill is situated near to wooden buildings, the owner is bound to use such appliances, adapted to the chimney thereof, as will most efficiently arrest the escape of sparks, whether such apparatus has been previously used on that kind of a chimney or not, particularly where he has notice of the danger from such sparks.

3. Negligence is properly defined to be "a failure of duty to observe the degree of care which the law imposes for the protection of interests likely to be affected by a want of it."

4. In an action for causing the destruction of plaintiff's premises by permitting sparks to escape from a mill on a windy day, an instruction that, if the operation of the mill endangered plaintiff's property to the extent that a prudent man would have shut down such mill until the violence of the wind had abated, the failure of defendant to do so was negligence, was not objectionable, in that the use of the word "prudent," without qualification, was understood to mean more than "ordinarily prudent," particularly as the court also charged that persons operating such mill were only required to use ordinary care.

5. In an action for causing the destruction of plaintiff's premises by permitting sparks to escape from a mill, an instruction that, if defendant was guilty of negligence in operating his mill, he is liable for the injury sustained, if it was the result of a continuous succession of events, so linked together as to make a natural whole, and flowed naturally from such negligence, and this even if he could not have foreseen or anticipated such injury, should be construed to mean that, though defendant's negligence did not, in the first instance, cause the destruction of plaintiff's property, yet, if it ultimately did take fire as a result of such negligence, defendant was liable.

Error to circuit court, Missaukee county; Fred H. Aldrich, Judge.

Action by Mary E. Webster against James E. Symes and another for negligently causing the destruction of plaintiff's property by fire. There was a judgment for plaintiff, and defendants bring error. Affirmed.

F. O. Gaffney and M. Brown, for appellants. S. B. Daboll and O. L. Spaulding, for appellee.

MONTGOMERY, J. This is an action for negligently causing the destruction of plaintiff's property by fire. The defendants are the owners of a steam sawmill in the village of McBain, and plaintiff occupied a hotel in the same village. The declaration, in the first count, averred the ownership and occupancy of plaintiff's property, and further averred: "The said defendants were also possessed of lot number nine in the said village of McBain, lying near to, and westerly of, the said premises of the said plaintiff, on which was a sawmill, then and there, by the said defendants, their employés and servants, being operated and run by steam power, generated by fire in a furnace located in or about said mill; and at

the time and place aforesaid the lands, premises, buildings, and other property about said mill and village, and the said hotel and barn of said plaintiff, were dry, and liable to take fire and burn from any fire, sparks, or cinders that might come and lodge thereon; and a strong wind was then blowing from the west towards the east, and towards the said hotel and barn of the said plaintiff, calculated to, and which would, carry fire, sparks, and cinders, coming from said mill, easterly a long distance, along and upon the premises about said mill and village, and the said hotel and barn of the said plaintiff, and thereby set fire thereto, and burn and destroy the same; and by reason thereof the operation and running of the said mill by the said defendants as aforesaid was dangerous and hazardous, and liable to communicate fire therefrom to the premises and buildings about and adjacent to said mill, and to the said hotel and barn and property of the said plaintiff,—of which the said defendants were then and there well knowing. And the said plaintiff avers that it then and there became and was the duty of the said defendants, in the operating and running of the said mill, to use care and caution in and about the running of the same, to prevent the taking and spreading of fire therefrom in and upon the said premises and buildings, and the said hotel and barn and property, of the said plaintiff, and the injury and burning of the same, and to protect and care for the fire in and about said furnace, and the smokestack of said mill, connected therewith, with dampers, screens, spark arresters, or other suitable devices, as to prevent the escape and spreading abroad from the same of fire, sparks, or cinders, and the setting of fire thereby to, and injuring and burning, the said premises and buildings, and the said hotel, barn, and other property of the said plaintiff; and it also became and was the duty of the said defendants, because of the great violence of the wind then blowing as aforesaid, from the west, towards the said premises and buildings, and the said hotel and barn of the said plaintiff, and to prevent injuring and burning the same, to cease operating and running said mill, and to shut down the same, and put out the fires in said furnace during the prevalence of said wind." The defendants did not shut down the mill, "and the said defendants then and there so carelessly, negligently, and improvidently operated and run said mill, and managed, directed, and conducted said fires in said furnace and smokestack, that, by and through the carelessness, negligence, and mismanagement of the said defendants in and about said fire, fire, sparks, and cinders from said furnace and smokestack escaped therefrom, and were carried by the wind, blowing as aforesaid, to and upon lot four of said village, lying east of said mill, and occupied by the said defendants, and into and upon the hay, straw, and litter lying in and about a certain barn thereon, so that the said barn, by reason thereof, took fire therefrom, and was utterly burned, consumed, and destroyed; and it became and was impossible to put out or check said fire, and it then and there spread and extended easterly therefrom to the said hotel and barn of the said plaintiff, standing and being on said lot three of said village." The second count, in addition to the averment as to conditions and surroundings, averred that it was the duty of defendants to provide a spark arrester or other device to prevent the spreading about from the smokestack of cinders, and the setting of fire thereby, and that it was the duty of defendants, because of the violence of the wind so blowing, etc., to cease operating the mill during the prevalence of the wind, and averred that defendants failed of their duty in this regard.

The testimony in most parts was conflicting. The plaintiff offered testimony tending to show that, on a previous occasion of a high wind, in a dry time, defendants had been requested to shut down the mill by the village marshal, and had recognized the propriety of the request, and had done so; that, on the day in question, a live spark had, during the noon hour, been blown into the barn where the fire afterwards originated from (it is claimed) a similar cause; that, during the forenoon of the same day, a stump in the street a little north and east of the barn, but in the same general direction from the mill, caught fire; that, previous to this, a live spark had fallen on the person of one of defendants' employés in the mill yard, about 150 feet from the smokestack, and on other occasions the smokestack had been seen to emit sparks. There is no controversy but that the wind was very high upon the day in question. It is conceded that defendants were running the mill, and were not using spark arresters. There was a dispute as to whether the direction of the wind was such as to carry sparks from the smokestack to the barn in question, but this was a fair question for the jury. It is stated, in defendants' brief, that the evidence was undisputed that the drafts in the furnace were closed, and not open, from some time in the forenoon, before the fire, and that it was also undisputed that the kind of fuel that defendants were using that day was not calculated to communicate fire from the smokestack; but we find that the record hardly sustains this statement, as we find the defendants' witness, in charge of the furnace, testified: "When the draft is entirely open, it would depend something upon the force of the wind whether we got much or little draft. Sometimes, when the wind is blowing hard, we can get as much draft with those little circular doors open as we can with every-

thing open with less wind. On this day the wind was blowing violently, and I had the circle doors partly open, and that constituted the draft. A small opening, with a good wind, may produce as good a draft as a large opening with a light wind." And there was other testimony tending to show that the drafts were open some of the time. Moreover, the very fact that the cinders were emitted, and that this, according to the defendants' testimony, could not have occurred with the drafts closed, might be considered by the jury in determining whether the drafts were closed at the time or not. Cheboygan Lumber Co. v. Delta Transp. Co., 100 Mich. 24, 58 N. W. 630; Alpern v. Churchill, 53 Mich. 613, 19 N. W. 549.

The boiler in which steam was generated was a tubular boiler, arched with brick. The fire box was in the front end of the boiler. Under the boiler was a place for draft to come in from the doors in front. There was a fire or cinder box at the back of the boiler. Fire had to go to the back end of the boiler, and return, through the flumes in the boiler, to the front end of it, where the smokestack was located. The smokestack was 3 feet in diameter and 85 feet high. There was no artificial draft used. Defendants called a number of witnesses, who testified that, when no artificial draft was used, with a mill constructed like this, no spark arrester was used or required; and among the claims made is that, as such spark arresters are not generally employed in such mills, the defendants cannot be charged with want of ordinary care in failing to provide one. Unquestionably, this is, in general, a fair test of common prudence, but conditions differ with different mills. The defendants' witness testified that a spark arrester would lessen the danger of a mill with a natural draft, if it had a tendency to emit sparks. Another of defendants' witnesses gave similar testimony; and, indeed, without the aid of the testimony, we could take judicial notice of the fact. There was not only abundant testimony that this mill did emit sparks, but it further appeared that it was located near wooden structures, liable to take fire from sparks emitted. This was a stationary structure, and its owner must be held to know the conditions and surroundings. The case, in that respect, is almost an exact parallel to Hoyt v. Jeffers, 30 Mich. 181. In that case Justice Christiancy, in speaking for the court, said: "I am entirely satisfied, both upon principle and weight of authority, that when, as in the present case, as the evidence tends to show, the mill was situated in the midst of a city, with numerous dwellings, hotels, shops, and other buildings in close proximity, and mostly of wood, and the mill chimney without any apparatus or appliance for arresting the escape of sparks and fragments of burning material to such an extent as to endanger sundry buildings and property, and actually on many occasions set fire to them, especially when the mill owner or his employés in charge had notice of the danger, it becomes both his moral and legal duty to avail himself of some such opportunity, or other means, if any be known, as experience has shown to be adequate, if not the most effectual, to arrest the escape of such sparks and fire from his chimney, whether such means or apparatus have ever been previously used, or upon that particular kind of chimney, or not, so that they are in their nature susceptible of being applied to that particular kind of chimney, and would operate to prevent or check the escape of sparks and fire if so applied." The only particular in which Hoyt v. Jeffers was a stronger case for the plaintiff than the present case is for this plaintiff, was that in Hoyt's Case fire had previously caught, but in this case no previous actual damages had been done, other than the burning of the clothes of the workman in the yard; but the proof was ample that the mill emitted sparks which were carried considerable distances. What has been said sufficiently answers the objection of defendants' counsel to questions, put on the cross-examination of their witnesses, as to whether a mill with a direct draft might not be so constructed to cause a draft equal to some other mills having artificial drafts, and as to the purpose of putting on spark catchers, and as to whether spark arresters would lessen the chances of fire, and as to whether, in fact, under some conditions, the spark arresters were not used when the draft was a direct one.

Error is assigned on certain instructions given by the court. The definition of negligence given by the court was: "A failure of duty to observe the degree of care which the law imposes for the protection of interests likely to be affected by a want of it." This definition was approved in Kendrick v. Towle, 60 Mich. 367, 27 N. W. 567.

Defendants complain of an instruction as follows: "If the jury find, from the evidence, that, from the violence of the wind then blowing, and the dryness of the atmosphere and of the immediate surroundings of the mill and plaintiff's property, the operating of the mill endangered plaintiff's property, by fire from the mill, to that extent that a prudent man, conversant with the business and the existing conditions, would have shut down said mill until the violence of the wind had abated, the failure of the defendants to do so was negligence. And if, by reason of such negligence, fire was communicated from said mill to the barn, and then to the plaintiff's property, and destroyed it, she is entitled to a verdict, if she did not contribute to the injury. And this would be so, even if defendants made use of fire or spark arresting appliances on their mill. It was the duty of defendants, if, in the operating

of their mill, they thereby endangered plaintiff's property by fire, to use such reasonable means as were known to them, or were in such general use that, by reasonable care and inquiry, they might have known of them, to prevent fire from said mill from spreading to or falling on the plaintiff's property and injuring it; and, if they omitted to use such means, such omission was negligence. And if the jury find, from the evidence, that such negligence directly caused the firing of the barn and the plaintiff's property, and its destruction, she is entitled to a verdict, if she did not contribute to such injury." It is contended that this instruction was erroneous, for the reason that it left it for the jury to determine what a prudent man would have done. It is said that the measure of liability in such cases is the skill and diligence of men of ordinary care, and not the most prudent or careful man. The use of the word "prudent" without qualification would hardly be understood by the jury as meaning more than "ordinarily prudent." If there be any doubt of this, the subject is made clear by a later portion of the charge, in which the court said to the jury: "Persons operating mills propelled by steam power are not insurers of property located about the mill. All they are required to do is to use ordinary care to protect such property from being destroyed or damaged."

Exception is taken to an instruction that, if defendants were guilty of negligence in operating their mill, and the burning of plaintiff's property was occasioned thereby, they are liable to plaintiff, if she was without fault, for the result of the negligence to her, if the injury was the result of a continuous succession of events, so linked together as to make a natural whole, and flowed naturally from such negligence; and this even if they could not have foreseen or anticipated such injury. Defendants' counsel construe this as being equivalent to saying that the defendants might be liable, even if it was impossible for them to have foreseen or anticipated that any injury might have resulted in consequence of their operating the mill in the manner in which they did. We do not so construe the language. It was intended to give the jury to understand that, even though the negligence of defendants did not, in the first instance, cause plaintiff's property to take fire, yet, if it ultimately did take fire as a result of defendants' negligence, she was entitled to recover. The jury could not well have misinterpreted the language, and, in view of other portions of the charge, could not have been misled.

The defendants also assign error on the refusal of certain of their requests. In so far as they are not inconsistent with the views herein expressed, they are fairly covered by the charge of the court as given. The case was carefully tried, and no error was discovered. Judgment affirmed, with costs. The other justices concurred.

ATWELL v. BARNES, County Drain Commissioner, et al.

(Supreme Court of Michigan. March 24, 1896.)

DRAINAGE TAX—ESTOPPEL—ACQUIESCENCE IN WORK.

A party who passively allows the work of extending a drain to go on, with full knowledge that he is to be assessed therefor, and that compensation for the work can be provided in no other way than by an assessment for benefits, is estopped from restraining the collection of the tax.

Appeal from circuit court, Lenawee county, in chancery; Victor H. Lane, Judge.

Bill by Conrad Atwell against Henry F. Barnes, county drain commissioner, and Cornelius B. Exelby, township treasurer, for equitable relief. From a decree in favor of defendants, plaintiff appeals. Affirmed.

A. L. Millard, for appellant. Westerman & Westerman, for appellees.

MONTGOMERY, J. This is a bill filed to set aside proceedings for deepening and widening and extending a drain, and to restrain the collection of a tax levied against the land of the plaintiff to pay for the same. It appears from the complainant's testimony that he appeared before the probate judge, and took part in the selection of commissioners, and subsequently signed bonds on an appeal to the township board taken by one of his neighbors, and that he (complainant) also appeared before the board, and complained of the amount of his assessment, and that the board cut it down somewhat. From this on, complainant did nothing until the work was completed and the benefits to his property had been realized, and then filed the present bill. We think the bill was properly dismissed, under Byram v. Detroit, 50 Mich. 56, 12 N. W. 912, and 14 N. W. 698; Lundbom v. City of Manistee, 93 Mich. 170, 53 N. W. 161; Goodwillie v. City of Detroit, 103 Mich. 283, 61 N. W. 526.

Complainant's counsel contend that the defects in the proceeding are jurisdictional. Where this is the case, no waiver can cut off the right of the party, or interfere with his right to complain. We need not determine what would be the right of complainant at law. The cases above cited do not turn on the principle of waiver, but hold that where a party stands by and sees work of this kind go on, with full knowledge that he is to be assessed therefor, and knowing that those who do the work can be compensated in no other way than by an assessment for benefits, and when, as in the present case, the complaining party actually receives a benefit from such work, equity will not interpose to relieve him.

It is suggested that there is no issue of waiver, but, as before stated, the question is one of remedy, and the answer contains a demurrer clause. Decree affirmed. The other justices concurred.

WALKER v. THOMPSON et al.

(Supreme Court of Michigan. March 24, 1896.)

NONNEGOTIABLE NOTE—AGREEMENT TO PAY TAXES—MAKER AND ASSIGNEE—LIABILITY FOR LOSS.

1. A promissory note containing a stipulation to "pay all taxes assessed against the real estate and the mortgagee's interest therein, described in the mortgage given to secure this note, until it is paid," is not negotiable.

2. In an action to foreclose a mortgage given to secure a nonnegotiable note, brought by the assignee thereof, the mortgagor is not precluded from asserting that said mortgage was given to the payee of said note to raise money to pay a prior mortgage and a debt to said payee, who agreed to discharge the prior mortgage, which, without defendant's knowledge, had been assigned to another, and that it was afterwards discovered that said prior mortgage was never paid, and was still a first lien on the premises.

Appeal from circuit court, Van Buren county, in chancery; George M. Buck, Judge.

Bill by Peter Walker against Jasper L. Thompson and another to foreclose a mortgage. From the judgment rendered, complainant appeals. Affirmed.

E. A. Crane and Alfred J. Mills, for appellant. Spafford Tryon, for appellees.

MOORE, J. The complainant commenced proceedings in the court below to foreclose a mortgage for $800 given by defendants to George E. Breck, dated November 24, 1892, and sold and assigned by Breck to complainant on December 5, 1892, for $802. The mortgage was given to secure the payment of an agreement reading as follows: "$800.00. Paw Paw, Mich., Nov. 24th, A. D. 1892. Five years after date, for value received, I promise to pay to George E. Breck or bearer the principal sum of eight hundred dollars, with interest thereon at the rate of seven per cent. per annum, payable yearly, to wit, on the 24th day of November in each year until due, and at the rate of seven per cent. per annum, payable annually, after due, and to pay all taxes assessed against the real estate and the mortgagee's interest therein, described in the mortgage given to secure this note, until it is paid. The several installments of interest aforesaid, for said period, are further evidenced by five interest notes or coupons, of even date herewith. The payment of this note is secured by mortgage, of even date herewith, on real estate described therein, in Keeler, Van Buren county, Michigan. No. one. Jasper L. Thompson." The defense interposed was that in December, 1889, defendants had made to the same George E. Breck a mortgage for $600, which was assigned by Breck, without the knowledge of defendants, to Mrs. Barnes, and that the mortgage which it is sought to foreclose was given to raise money to pay the first mortgage and a debt defendants owed to Breck, and that Breck agreed to discharge the mortgage of record; that it was discovered on Breck's death that the first mortgage never was paid, and it still remains a first lien on the premises. The circuit judge found the facts as claimed by the defendants, and rendered a decree in favor of the complainant for $187.67. The complainant appeals to this court.

Two important questions in the case are: Was the writing, to secure which the mortgage was made, a negotiable promissory note? Did the complainant, in buying the mortgage, acquire any greater equities than Breck had?

A promissory note is defined by Judge Story to be "a written engagement by one person to pay another person therein named, absolutely and unconditionally, a certain sum of money, on a time specified therein." This definition is quoted with approval in Bank v. Purdy, 56 Mich. 7, 22 N. W. 93, where there is a discussion of what constitutes negotiable paper. Other cases holding the same doctrine: Bullock v. Taylor, 39 Mich. 137; Altman v. Rittershofer, 68 Mich. 287, 36 N. W. 74; Altman v. Fowler, 70 Mich. 57, 37 N. W. 708; Wright v. Traver, 73 Mich. 493, 41 N. W. 517; Bank v. Wheeler, 75 Mich. 546, 42 N. W. 963; Brewing Co. v. McKittrick, 86 Mich. 191, 48 N. W. 1086. We think the instrument in question is not a negotiable note, and that the complainant takes no other or greater equity by his purchase and assignment than Breck, unless other facts are shown by the record which will aid him. Our attention is especially called by counsel for complainant to the case of Englemann v. Reuse, 61 Mich. 395, 28 N. W. 149. The facts disclosed in that case are so different from the facts in the case at issue that it does not aid complainant.

It is urged by complainant that, conceding the note is nonnegotiable, defendants are estopped from making such a defense. Counsel claims "that, where one of two innocent parties must suffer loss from the fraud or conduct of a third, such loss should fall upon the one, if either, whose act has enabled such fraud to be committed;" citing Bloomer v. Henderson, 8 Mich. 395; People v. Wayland Wood Manuf'g Co., 33 Mich. 413; Bates v. Smith, 83 Mich. 347, 47 N. W. 249; Zucker v. Karpeles, 88 Mich. 430, 50 N. W. 373; and other cases. This contention fails, if it is established, as we have already found that the instrument is not a negotiable note. Judge v. Vogel, 38 Mich. 569.

The complainant also urges that if a mortgagor "stands silently by, and permits the assignee in good faith to pay his money and take an assignment for its full value, he cannot afterwards set up his equitable defense against the claim of the assignee for full payment"; citing 2 Story, Eq. Jur. p. 1515. The above is undoubtedly the law, but there is nothing in the record to show that defendants had any knowledge that complainant proposed to buy the mortgage, or did any act, or failed to do any act, that caused complainant to make the purchase. The decree is affirmed, with costs of both courts. The other justices concurred.

FLEUGEL v. LARDS.

(Supreme Court of Michigan. March 24, 1896.)

CITY MARSHAL — RIGHT TO ACT AS CONSTABLE — WRIT OF REPLEVIN—RETURN.

1. Where the city charter provides that the city marshal shall be the chief of police of the city, and that the chief of police may serve any process which by law a constable may serve, the city marshal may serve a writ of replevin issued by a justice of the peace, and required by statute to be served by a constable.

2. Where a city marshal, as ex officio chief of police, is authorized to serve writs of replevin, a return signed by him as city marshal is sufficient.

3. A city marshal, who is authorized, as ex officio chief of police, to serve any process which by law a constable may serve, may serve a writ of replevin anywhere within the county.

4. The failure of the city marshal to append, to his signature to the return on a writ of replevin, issued by a justice of the peace, his official title, does not invalidate the return, as the justice may take judicial notice that he is city marshal.

Error to circuit court, Lenawee county; Victor H. Lane, Judge.

Replevin by Christian Fleugel against Henry C. Lards. From the judgment of the circuit court reversing the judgment of the justice court for plaintiff, he appeals. Reversed.

J. C. Winne, for appellant. Watts, Bean & Smith, for appellee.

HOOKER, J. Almon S. Krapf, being at the time city marshal, and by virtue of his office chief of police, of the city of Adrian, attempted to serve a writ of replevin issued by a justice of the peace of said city, said writ being directed "to any constable of said county," as required by statute. The following is a copy of the return made to the writ. "Lenawee County, ss.: By virtue of the annexed writ, I have, this 28th day of June, 1894, replevied to the plaintiff, therein named, the goods and chattels specified in the said annexed writ, as I am commanded therein, and on the 2d day of July, 1894, I caused the said property, so seized by me, to be appraised by one disinterested person, on oath administered, as above set forth, which oath, after being so administered by me to the said disinterested person, and after he has subscribed and set oath as above, I appraised the same as above set forth. After such appraisement, I duly delivered the same to the said plaintiff, as I am likewise commanded. And I further return that, on the 28th day of June, 1894, the defendant named in the said writ, by delivering to him, the said defendant, personally, a certified copy of said writ. Dated July 7, 1894. Almon S. Krapf, City Marshal." Preceding the return upon the writ was the oath of an appraiser, the jurat to which was signed, "Almon S. Krapf, City Marshal of the City of Adrian, in said County." Upon the return day the defendant appeared specially, by counsel, and moved to quash the proceedings for want of jurisdiction, which motion was denied. After judgment for the plaintiff, the defendant removed the case to the circuit court by special appeal, where it was reversed upon the questions raised by the special appeal, and it is before us upon error.

The grounds of the motion to quash were: (1) Because there was no proper proof of service of the writ. (2) Because the writ was not served by any person authorized to serve the same, nor by any person appointed to serve the same. In support of the second ground, it was urged that the city marshal of Adrian was not authorized to serve a writ directed to "any constable," etc.; that the charter provides for one constable for each ward; that the constable is a constitutional officer; that the number cannot be increased by giving his power to the city marshal; that the authority to serve process is given to him in the capacity of chief of police, and not as city marshal. No authority in point is cited in support of any of these propositions. The statute prescribes the essentials of a justice's writ of replevin, and requires it to be directed to any constable of said county. It is a statutory writ, and departure from the prescribed form would, to say the least, render it of doubtful validity. The statutes require a similar direction to summons and other writs; yet it is provided by law that some of them may be served by sheriffs, and private persons duly authorized. It is not the practice in such cases, nor is it necessary, to change the direction of the writ.

The second point is covered by the case of White v. Supervisors (Mich.) 63 N. W. 653. The charter provides that "the city marshal shall be the chief of police of the city." In another section it says: "The chief of police may serve any other process which by law a constable may serve." As the chief of police and city marshal are one and the same person we think the signature of the return as city marshal admits of no other conclusion than that the writ was served by the chief of police.

The return is attacked upon the grounds: (1) That it does not show any service; (2) that it does not appear to have been served in the city of Adrian; (3) that the marshal did not append his official title to his signature. The return shows an omission of a few words usually found in the return, but it is evidently clerical, and it is evident that the defendant was served in the manner required by law. We think that the marshal might lawfully serve this writ within the county. Counsel for the plaintiff cites a number of cases to the proposition that regularity of official action is to be presumed, among them Bushey v. Raths, 45 Mich. 183, 7 N. W. 181, where it was held that it would be presumed that a writ of attachment was served within the county, the return being silent. The case differs from that of Alverson v. Dennison, 40 Mich. 179, 526, where the marshal's authority was limited to the city, and to particular cases, and was not general. The fact that the marshal failed to append the words "of the city of Adrian" to his signature to the return

is unimportant. It appears twice upon the writ, and the justice might take judicial notice that he was marshal of Adrian. The judgment of the circuit court must therefore be reversed, and the case remanded for further proceedings.

GRANT and MONTGOMERY, JJ., did not sit. The other justices concurred.

COLLINS v. TOWNSHIP OF GRAND RAPIDS.

(Supreme Court of Michigan. March 24, 1896.)

STREET ASSESSMENT — VALIDITY — DECISION OF TOWNSHIP BOARD—CONCLUSIVENESS.

The decision of a township board that a petition for improvement of a street forming the boundary between the township and a city had been signed by a majority of the property owners, as required by law, will not prevent the township from setting up that it had not been so signed, as a defense to an action by the contractor for money due under his contract.

Error to circuit court, Kent county; Allen C. Adsit, Judge.

Action by Hiram Collins against the township of Grand Rapids. Judgment for defendant, and plaintiff appeals. Affirmed.

Kingsley & Kleinhans, for appellant. Turner & Carroll, for appellee.

HOOKER, J. The plaintiff has sued the township of Grand Rapids to recover a balance due upon a contract made and performed by his assignor, whereby he was to make certain street improvements on a street or highway constituting the boundary between said township and Grand Rapids. This contract was made in the course of proceedings taken under certain local statutes authorizing the city of Grand Rapids and adjacent townships to unite in the improvement of highways lying between said city and townships. Act 313, Local Acts 1875; act 353, Local Acts 1877. A special assessment was levied to pay the expense of said improvement, and most of the amount assessed was paid to the township treasurer, and by him applied upon the plaintiff's claim. Some $2,000 or more was not paid, and in a proceeding to collect the same, contested by one Olive B. Fisher, it was held that the assessment was invalid, for the reason that a majority of the resident property holders upon the portion of the street improved had not petitioned for the improvement, and that, therefore, the assessment was void. It was urged on behalf of the auditor general that the determination by the township board that the petition had been signed by a majority of the resident freeholders, which determination was recited in the order of the township board, was an adjudication of the fact, which placed it beyond collateral attack; but the court held otherwise, and said: "The statute does not provide that this determination of the township board shall be conclusive, and, in the absence of such a provision, the rule is well settled that the fact whether or not the requisite number of persons have signed a petition or given assent to pave or improve streets, when the power so to pave or improve them depends upon a given number or proportion of the proprietors to be affected, can be inquired into, and that the nonassent may be shown as a defense to an action to collect the assessment." Auditor General v. Fisher, 84 Mich. 133, 47 N. W. 574. This street improvement was again before us in an action brought by Fisher against the township and the plaintiff's assignor, i. e. the man who made the improvement; and a judgment for a substantial amount, in trespass, for grading down the street, and removing the trees in front of her residence, was affirmed. In that case it was conceded that the proceedings under the statute were void, and the court took that view of the matter.

In the case now before us, the plaintiff makes the same claim that was made in behalf of the auditor general, viz. that the township board had power to pass upon the question of fact, and determined that the petition was signed by a majority of the resident freeholders; that the proceedings show such adjudication; and that the proceedings cannot be attacked by the township, upon that ground, in this case; and it is further said that, while the taxpayer whose land is included in the special assessment may raise the question in his defense against the levy, it cannot be raised by the township officers, in behalf of the taxpayers generally, who, manifestly, must furnish the necessary money to pay plaintiff's claim, if he is allowed to recover. This is placed on the ground of estoppel, it being asserted that the township board represented to the plaintiff's assignor that the petition was signed by the requisite number of freeholders. It seems to us a plain proposition that a proceeding which is void because the necessary steps have not been taken to confer jurisdiction upon a statutory board, whose powers are strictly limited by the statute, cannot be given effect, and practically made valid, by an adjudication by such board that the necessary prerequisites of jurisdiction exist, or that the absolutely void act shall, through the application of the doctrine of estoppel, be made binding in behalf of the contractor who has acted upon the faith of the acts of the board, against the taxpayers of the township at large, who are not benefited by the improvement, while it cannot have that effect against those of the locality who are benefited, and by whom it was contemplated, by all concerned, payment for the improvement should be made. It is the general rule that one who relies upon such proceedings must ascertain that jurisdiction exists, and it would be an anomalous rule if we should hold that the township could be bound by a mere representation of the town board in a matter where the statute required specific

acts to be performed before the township could be affected. The contractor was bound to ascertain whether the township board had jurisdiction, and could not rely upon their opinions or representations as to the fact necessary to confer it. Rens v. City of Grand Rapids, 73 Mich. 247, 41 N. W. 263, and cases cited; Mackey v. Township of Columbus, 71 Mich. 230, 38 N. W. 899; Bogart v. Township of Lamotte, 79 Mich. 299, 44 N. W. 612. The judgment of the circuit court is affirmed.

GRANT and MONTGOMERY, JJ., did not sit. The other justices concurred.

CITY OF DETROIT v. CHAPIN, Judge.

(Supreme Court of Michigan. Dec. 31, 1895.)

LEGISLATURE — ADJOURNMENT — AUTHORITY OF GOVERNOR TO SIGN BILL—PENDING PROCEEDINGS—EFFECT OF STATUTE.

1. Const. art. 4, § 14, provides that, if any bill be not returned by the governor within ten days after it has been presented to him, the same shall become a law in like manner as if he had signed it, unless the legislature, by their adjournment, prevent its return, in which case it shall not become a law; and that the governor may approve and sign, within five days after the adjournment of the legislature, any act passed during the last five days of the session, and the same shall become a law. *Held*, that a bill passed previous to the last five days of the session, and signed by the governor after the adjournment of the legislature, became a law. Grant, J., dissenting.

2. The act approved June 4, 1895, entitled "An act to authorize the city of Detroit to take private property for the use and benefit of the public," was passed without a saving clause, and therefore terminated proceedings commenced after said act was passed, but before it took effect, under a former statute which was repealed by said act.

Original mandamus proceeding, brought by the city of Detroit against William W. Chapin, judge of recorder's court of Detroit, Mich.

John J. Speed and E. F. Sawyer, for relator. John G. Hawley, for respondent. Hanchett & Hanchett and B. F. Graves, for Regents of the University.

HOOKER, J. This case involves the question of the validity of an act of the legislature passed previous to the last five days of the session, and approved by the governor after the adjournment of the legislature. Its determination depends on a construction of section 14, art. 4, of the constitution, which reads as follows: "Every bill and concurrent resolution, except of adjournment, passed by the legislature, shall be presented to the governor before it becomes a law. If he approve, he shall sign it; but if not, he shall return it with his objections to the house in which it originated, which shall enter the objections at large upon their journal, and reconsider it. On such reconsideration, if two-thirds of the members elected agree to pass the bill, it shall be sent with the objections to the other house, by which it shall be reconsidered. If approved by two-thirds of the members elected to that house, it shall become a law. In such case the vote of both houses shall be determined by yeas and nays; and the names of the members voting for and against the bill shall be entered on the journals of each house respectively. If any bill be not returned by the governor within ten days, Sundays excepted, after it has been presented to him, the same shall become a law, in like manner as if he had signed it, unless the legislature, by their adjournment, prevent its return; in which case it shall not become a law. The governor may approve, sign and file in the office of the secretary of state, within five days after the adjournment of the legislature, any act passed during the last five days of the session; and the same shall become a law." This section, with the exception of the five-day provision, was a part of the former constitution.

It is contended on behalf of the respondent that, under the previous constitution, the governor might lawfully sign a bill at any time within 10 days after its passage; that his neglect to return the bill, with reasons for not signing, within 10 days, was equivalent to a signature, unless the legislature, by adjourning, prevented such return, in which case it would not become a law, unless he signed it within 10 days. It will be noticed that the constitution nowhere fixes a time within which the governor shall sign bills, except as it may be inferred to be 10 days, from the provision that an act shall become a law without signature if 10 days after its passage shall expire during the session. If this inference is not a legitimate one, the conclusion is irresistible that, under the former constitution, the governor had unlimited time after adjournment within which to sign bills, or that he must sign during the session. If we were construing the provision of the earlier constitution, we should therefore feel justified in concluding that the governor might sign a bill within 10 days after the passage, though the legislature should have meantime adjourned. We are aware that there are weighty authorities against this construction, notably the carefully considered and elaborately reasoned case of Fowler v. Peirce, 2 Cal. 165, which appears to have been the earliest case involving the question. On the other hand, many cases have taken a different view of the subject. People v. Bowen, 30 Barb. 24, 21 N. Y. 517; Lankford v. Commissioners (Md.) 20 Atl. 1017; State v. Fagan, 22 La. Ann. 545; State v. Supervisors of Coahoma Co., 64 Miss. 365, 1 South. 501; Solomon v. Commissioners, 41 Ga. 157. The Georgia case, however, appears to be based upon the fact of usage. To what extent, if at all,

this provision was given a construction by usage previous to 1850, we are not advised. The signing of bills after adjournment has been practiced since. The constitutional convention which adopted our present constitution added the last provision to the section as it previously stood, and it is contended that this provision indicates a construction of the former provision by that convention in accord with the California decision, though that case had not then been decided. This addition is said to indicate an intention to enlarge the power of the governor, by authorizing the signature, within five days after adjournment, of bills passed during the last five days of the session; and it is forcefully argued that the last words of the sentence, "and the same shall become a law," imply that this provision was necessary to give effect to an act not signed or returned during the session. To the claim that the convention added this provision for the purpose of shortening the period for signature after adjournment to five days, it is answered that no good reason is assigned therefor, and that, had that been the design, unambiguous language could easily have been found to express such idea; and, furthermore, that the addition of the words quoted is entirely without significance if that view is to be taken. If, under the provision as previously existing, a doubt was entertained of the validity of acts signed after adjournment, the convention might well think it best to set the question at rest. In such case it is apparent that members would be likely to entertain different opinions about the power of the governor to sign bills after the adjournment of the legislature, as well as the time to be allowed for that purpose. Some may have thought that the governor's power was unlimited, and that the acts might become laws by virtue of his signature appended at any time after adjournment. Others may have thought the time to be limited to 10 days by the language of the constitution relating to return of bills with reasons. Others still may have taken the ground that bills must be signed before adjournment to give them effect. Apparently, the only light attainable was the common practice. The presidents made a practice of signing during the session, we are told. On the other hand, the decision in Georgia and that in New York show that it was customary for the governors, in those states at least, to sign after adjournment. As our constitution followed that of New York literally so far as this provision was concerned, we may reasonably suppose that the practice under it recognized and followed that common in New York. When the subject arose in convention, all may have admitted the necessity of time for signing bills after adjournment. Some may have thought the power existed, though, in view of the fact that it was questioned, have been willing to let the constitution show it, and to permit a limitation upon what they believed the existing rule, as to the bills passed during the last five days, to set the question at rest. On the other hand, some may have been unwilling to concede anything unless all bills were to be signed within five days after adjournment. We think, therefore, that it is not clear that the convention had settled convictions upon the question of the governor's power, or that the added sentence was necessarily considered an enlargement. Doubtless, it was by some, while others, believing that it was unnecessary as an extension, may have favored the provision as a limitation, or a compromise which should set the whole matter at rest.

We discover no reason based upon public policy for saying that the governor should not be permitted to sign bills after the houses adjourn. The strongest argument against it is found in the California case, and this rests upon the proposition that the governor, when approving an act, exercises a legislative function, which, if necessary, may be admitted without also admitting that he must sign before the two houses adjourn. The practice of the presidents has some force, but it is, at best, only negative proof of a construction, and may have been continued if it did not originate from abundant caution to avoid possible consequences. The fact that President Lincoln departed from it even in one instance is of great weight, as it shows that construction to have been disregarded by a president whose conception of the powers of the different branches of government was as broad, and his observation of them as conscientious, as that of any of his predecessors; and the action of congress in re-enacting the law by way of amendment may have been a precautionary measure, or merely to prevent expensive litigation by eliminating the question. Moreover, the supreme court of the United States, in Seven Hickory v. Ellery, 103 U. S. 423, recognizes the rule as laid down in People v. Bowen; and, while the constitution there under discussion differed somewhat from the constitution of New York and that of the United States, the case was apparently considered to be within the principle of the New York, Maryland, and Georgia cases, which, therefore, may be said to have been approved. Its logical effect is to break the force of the presidential precedent upon which so much reliance is placed. The last provision of the section, if necessary to confer a power to sign after adjournment, applies only to the bills passed within the last five days; but if not necessary to confer a power, because already existing, it must then be a limitation; and the question here is whether there is a necessary implication that the previously existing power was intended to be removed. To an extent, we think, there is. Clearly, it precludes signing bills passed during the last five days of the session, after the expiration of the period of

five days after the adjournment. It is silent about the power as to other bills, because, under existing provisions, the signature was restricted to the same period. No consideration of public policy is urged why the governor should not sign bills after adjournment. The effect of relator's construction would be to give a bill passed the fifth day before adjournment the full period of ten days within which it might be signed, while bills passed one day earlier would have but five. No reason is suggested for such a discrimination, and to our minds it is more reasonable that the convention should have supposed that all bills were to be signed within ten days after passage, except those passed during the last five days, which were to be disposed of within five days after adjournment. "The cardinal rule of construction concerning language is to apply to it that meaning which it would naturally convey to the popular mind in all cases where the propriety of such construction is not negatived by some settled rule of law." People v. Dean, 14 Mich. 406. "Constitutions are to be construed as the people construed them in their adoption, if possible; and the public history of the times should be consulted, and should have weight in arriving at that construction." Bay City v. State Treasurer, 23 Mich. 499. "Constitutions, as well as statutes, are to be construed in the light of previous history and surrounding circumstances. The language is not to be measured by mathematical rules merely, but is subject, in the nature of things, to numerous implied exceptions or qualifications." Kennedy v. Gies, 25 Mich. 83. "Constitutional provisions must be construed with reference to each other when relating to the same subject-matter." Root v. Mayor, etc., 3 Mich. 433; Dullam v. Willson, 53 Mich. 392. "The framers of a constitution are presumed to have a knowledge of existing laws, and to act in reference to that knowledge." People v. May, 3 Mich. 599. We are cited to instances where this construction has been given to this section by the governors, and there are numerous acts whose validity depends on the question involved here. If the question were more doubtful than it is, we might properly consider the force of a practical construction of co-ordinate branches of government, acquiesced in by the general public for a long period. In commenting upon this subject, Mr. Justice Cooley says: "Great deference has been paid in all cases to the action of the executive department, where its officers have been called upon, under the responsibilities of their official oaths, to inaugurate a new system, and where it is to be presumed they have carefully and conscientiously weighed all considerations, and endeavored to keep within the letter and the spirit of the constitution. If the question involved is really one of doubt, the force of their judgment, especially in view of the injurious consequences that may result from disregarding it, is fairly entitled to turn the scale in the judicial mind." Cooley, Const. Lim. pp. 83, 84. He supports it by numerous cases. See Ellis v. Glaser (Mich.) 61 N. W. 652. Hart v. McElroy, 72 Mich. 453, 40 N. W. 750; People v. Maynard, 15 Mich. 470; Hovey v. State (Ind. Sup.) 21 N. E. 890; Biggs v. McBride (Or.) 21 Pac. 878; Castro v. De Uriarte, 16 Fed. 93; Cooley, Const. Lim. (9th Ed.) pp. 84–86, and notes; Stuart v. Laird, 1 Cranch, 299. Our attention is called to instances where the governors of this state have signed bills under similar circumstances, one as early as 1873, and many since.

Another question needs notice, and this calls for a brief statement of facts. The act in question was "An act to authorize the city of Detroit to take private property for the use and benefit of the public," approved June 4, 1895. On August 28, 1895, the proceedings in this case were commenced under a former statute. It is now contended that this act terminated the pending proceedings, and the court so held. This, we think, was right. There was no saving clause, and its effect was to repeal the existing law. See Key v. Goodwin, 4 Moore & P. 341; Stoever v. Immell, 1 Watts, 258; Butler v. Palmer, 1 Hill, 324; Hampton v. Com., 19 Pa. St. 329; Sedg. St. & Const. Law, 112. The act is materially different from the one repealed by it, and therefore does not fall within the decision in Moore v. Township of Kenockee, 75 Mich. 332, 42 N. W. 944, which was exceptional, and in which the rule above stated is recognized. 75 Mich. 340, 42 N. W. 944. These proceedings were not pending when the law was passed, being commenced but three days before it took effect.

We conclude, therefore, that the action of the governor was within his constitutional power, and that the proceedings cannot be prosecuted under the previous statute. The writ is denied.

McGRATH, C. J., and LONG and MONTGOMERY, JJ., concurred with HOOKER, J.

(March 24, 1896.)

GRANT, J. (dissenting). When the decision in this case was handed down, I was unable to concur in either the reasons or conclusions reached by my brethren. I had not then had the time to make the investigation which I desired. A more thorough and careful examination than I had then been able to make has confirmed me in my conclusions.

There was some purpose for adding to this section as it stood in the constitution of 1835 the following clause: "The governor may approve, sign and file in the office of the secretary of state, within five days after the adjournment of the legislature, any act passed during the last five days of the session; and the same shall become a law." Only three possible purposes can be suggested: (1) The limitation of a power already existing; (2)

the removal of any doubt as to the existence of a power; (3) the creation of a power where none before existed, or was believed to exist. In discussing the question the following propositions may be laid down as nearly axiomatic: (1) If the constitution of 1835 conferred the power upon the governor to sign bills after the legislature had adjourned, and it had been so construed by the executive, the legislature, and the people, the amendment to this article in the constitution of 1850 was without reason, because it conferred no right that did not exist before. (2) If there was doubt about this power under that constitution, and in the convention some members denied the power, and others affirmed it, it follows that the sole purpose of the amendment was to put the entire question at rest, and determine just what bills should be signed after adjournment, and fix the time. (3) If the power did not exist under the old constitution, and it had been so interpreted and acted upon by the executive, the legislature, and the people for 15 years, then the sole purpose of the amendment was to extend the power beyond the day of adjournment, and to limit it as therein provided.

We obtain no light from the report of the convention debates of 1850, for there is no record there of any debate upon this provision. It was reported from the committee early in the session, was finally referred to the committee on phraseology, and changed in one or two immaterial matters. Whichever one of the above propositions is accepted as the true one, the same result, in my judgment, conclusively follows, viz. that no power exists to sign bills after the legislature adjourns, except as provided in this clause. No canon of interpretation permits any other conclusion. The rule, "Inclusio unius est exclusio alterius," applies to this case, if to any. I shall, however, I think, be able to demonstrate that the first two propositions are not applicable, and that it must be determined upon the last one.

Prior to 1850, the date of the adoption of the present constitution, no decision upon this point had been rendered by any court in the United States. The earliest case is that of Fowler v. Peirce, 2 Cal. 165, decided in 1852, in which it was held that the constitution of that state, which was in the exact language of the constitution of the United States and that of 1835 in this state, did not empower the executive to sign bills after the legislature had adjourned. It is there said: "A practical exposition, entirely different from such a construction, has always been given by congress, and the legislature of every state having similar constitutional provisions." I have not time or material at my command to demonstrate the truth of this statement, even if it were of importance. The statement, however, does apply to this state, as an examination of the journals of the legislature discloses.

Below is a statement of the number of bills and joint resolutions signed by the governors of this state during the last day of each session from 1835 to 1850: 1835–36, 54; 1837, 32; 1838, 37; 1839, 42; 1840, 34; 1841, 35; 1842, 32; 1843, 27; 1844, 13; 1845, 39; 1846, 16; 1847, 50; 1848, 132; 1849, 55; 1850, 108,—total, 697. Of these, 601 were public acts, and 96 joint resolutions. Many of them, at every session, were passed on the last day. All the governors during the life of that constitution were lawyers. Some were lawyers of eminence, and had been justices of this court. If it had been supposed that any such power existed, it is certainly strange that the governors did not act upon it, and that no debate upon the question is found in the record of the debates of the convention of 1850. During that time there is a solitary instance of an act being signed after the legislature had adjourned. This was an unimportant local act, being Act No. 89 of the Laws of 1842, entitled "An act to amend an act to incorporate the village of Pontiac." The legislature adjourned upon the 17th of February, and the bill was signed the 27th. I find no explanation anywhere for the delay in signing this bill, or to show when it was presented to the governor. There is no record of the bill except its passage, and the fact that it is found in the office of the secretary of state, signed by the governor, under the apparent date of February 27th. That there was some mistake about it, it is reasonable to suppose. In no other way can we account for the fact that all the other bills were signed upon the day of adjournment, and this one omitted. Whether it was acted upon I do not know. It is, however, of but little consequence, in view of the universal custom, both before and after, to sign bills before the legislature adjourned. This provision of the constitution of the United States is in the exact language of that of 1835. Congress and the presidents have always, since the foundation of the government, construed this provision to prohibit the signing of bills after congress has adjourned. It is well known that congress has been in the habit of turning the clocks in the capitol back in order to secure the signing of bills before the hour of final adjournment. This is based upon the well known rule of evidence that the journals of legislatures and congress cannot be impeached, nor can parol evidence be introduced to show a different state of affairs than that which appears upon the face of the record. The president, on the last day of the session, goes, and has always gone, to the executive room in the capitol, in order to sign all bills before the final adjournment. As in our state, so in the United States, there is just one instance of a bill having been signed after congress adjourned. Why it was signed by President Lincoln after adjournment, or why it was not signed before, is unknown so far as my research has extended. This bill conferred direct power upon the executive of

the nation, but he did not dare to, and did not, act upon it. In a note to the lectures of Justice Miller upon the United States constitution, at page 187, appears the following in regard to this act: "Power to approve an act after the adjournment of congress: On the 3d of March, 1863, congress passed 'An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States.' On the 4th of March that congress was adjourned sine die, under the constitution, and that act had not received the signature of the president. On the 12th of the same March (within the ten days), President Lincoln signed it, and it was printed with the other acts of that congress. Under its operation, a large amount of property came into the possession of the executive; but it was not thought wise to attempt to administer upon it in the courts, without a recognition by the lawmaking power, which should practically amount to its reenactment. Accordingly, congress, on the 20th of July, 1864, passed 'An act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary states, and to provide for the collection of captured and abandoned property, and the prevention of frauds in states declared in insurrection.' This statute practically re-enacted the previous act, with amendments, and thus disposed of the difficulty." I cannot concur with my brethren in saying that this is a recognition on the part of President Lincoln of the power here asserted. On the contrary, it is, in my judgment, additional proof that he did not consider the law valid. Had he so believed, he would undoubtedly have acted upon it.

It would not be complimentary to the intelligence of the members of the convention of 1850, many of whom were leading men of the state, and lawyers, and some of whom had been members of congress, to say that they were not familiar with this practical construction placed upon this provision of the constitution by the different legislatures and by the governors of this state, and also of the construction which up to that time had been, without any exception, placed by congress and the presidents, most of whom had been distinguished lawyers, upon the identical article in the constitution of the United States. Can there be, under this state of facts, any other logical conclusion than that the framers of the present constitution understood and believed that no such power existed in the executive; that they recognized the injustice and inconvenience of compelling the executive to sign all bills passed on the closing days of the session, as had been universally done before; and that their sole purpose was to create an authority which did not exist before? Is it not also absurd to say that that convention intended to give a shorter time to examine bills passed during the last five days of the session than those passed within a few days previous?

If I am correct in this conclusion as to the constitution of 1835, then the whole basis of the relator's contention and the opinion of my brethren falls to the ground. The sole basis upon which the relator seeks to establish the power is that it existed under the old constitution. If this were so, he is then driven to the—in my judgment—absurd conclusion that the framers of the constitution intended to confer a less time upon the governor to consider bills passed during the last five days than he did upon those passed a few days previous. Under this contention, it results that the governor may have ten days in which to consider bills passed upon the sixth day before the close of the session, while he would have but five in which to consider those passed upon the last day. I cannot yield my assent to such a conclusion. I see no reason or common sense in it. The learned counsel for the relator entirely overlook the cardinal rule of construction above referred to, viz.: "Inclusio unius est exclusio alterius." The inclusion of the right to sign bills for a certain time after the legislature has adjourned necessarily excludes the right to sign any other bills at any other time. Says Mr. Justice Cooley of this canon of construction: "So the forms prescribed for legislative action are in the nature of limitations upon its authority. The constitutional provisions which establish them are equivalent to a declaration that the legislative power shall be exercised under these forms, and shall not be exercised under any other. A statute which does not observe them will plainly be ineffectual." Cooley, Const. Lim. p. 177.

Four methods are expressly provided for in this constitution by which bills passed by the legislature shall become laws, viz.: (1) By the express approval of the governor, evidenced by his signing bills within 10 days after they are presented to him, the legislature being in session; (2) by his approval implied from his neglect to sign within 10 days, the legislature being in session; (3) by passing the bill over his veto; and (4) by his express approval, evidenced by his signing any bill passed during the last 5 days of the session within 5 days after adjournment. Where an express limited power is conferred by a constitution, it excludes the existence of any greater or unlimited power. For 23 years after the adoption of the present constitution, no governor signed any bill or joint resolution after the legislature had adjourned except those which were passed during the last 5 days. During that period, all governors and legislatures were careful to see that all bills and joint resolutions which were passed before the last 5 days were disposed of, by approval or otherwise, before final adjournment. If we add to this the 15 years of the existence of the constitution of 1835, we have 38 years of compliance with the plain provisions of the constitution to the effect that the governor did not possess the power to sign bills after the legislature adjourned,

except in accordance with the express provision of the constitution of 1850. If this is not a practical construction of this provision, then I am unable to understand what the term means. To refrain for 38 years from exercising a power when the occasions for its exercise were ever present is certainly as effectual and practical a construction as would be the affirmative exercise of power of doubtful constitutional authority extending over the same period. If one is to prevail, so must the other.

It is insisted, however, that the governors have during and since 1873 signed several bills which were passed before the last five days of the session after adjournment, and that this amounts to a practical construction. This might have some force if such usage had commenced immediately after the adoption of the constitution, and continued for a long series of years. It is shorn of its force by the adoption of the contrary usage by the governors, the legislatures, and the people. Neither governors, nor any other officials, nor the legislatures can change the plain provisions of the constitution, or change a practical construction when once it has been adopted by constant usage, extending over a long period. I quote with approval the words of Mr. Justice Cassaday in State v. Cunningham, 82 Wis. 48, 51 N. W. 1133: "It is to be remembered that even praiseworthy objects cannot be rightfully attained by a violation of law. Every effort to fritter away the plain language of the constitution, by way of construction or otherwise, even to secure a desirable end, is nothing less than an insidious attempt to undermine the fundamental law of the state, and hence, to that extent, destructive of good government, besides being vicious in its tendencies." See, also, Oakley v. Aspinwall, 3 N. Y. 568; Cooley, Const. Lim. 73.

Practical construction is not a shuttlecock, to be used to mean one thing to-day and another to-morrow, as expediency may suggest. Where doubt exists, and where practical construction has once been firmly established by usage, it is as binding, lasting, and sacred as though it were incorporated in the constitution in express terms. It hardly needs the citation of authorities to show that this construction, contemporaneous with, and immediately, and for a long series of years, following, the adoption of this constitution, must control. I will, however, refer to one authority, where the question is fully discussed and the authorities cited,—McPherson v. Secretary of State, 92 Mich. 377, 52 N. W. 469; same case in 146 U. S. 3, 13 Sup. Ct. 3. There, as here, it was sought to set aside a construction which had been placed upon a provision of the federal constitution immediately succeeding its adoption by the various states of the Union. It was contended that all the states had for many years prior to 1892 adopted a contrary interpretation by legislative enactments, to the effect that the state shall act as a unit in the choice of presidential electors. We held that there was no force in such contention, and that the construction which the people had first given it must prevail. The decision was affirmed by the supreme court of the United States, and for the same reasons given in this court. In 1873 the governor signed one bill passed before the last five days. So, in 1877, the then governor signed another. We find no explanation why those two bills were thus overlooked. Probably, it occurred from the hurry of the closing days of the session. We are cited to several other similar acts in 1889, and again a few in 1893. So far as most of the acts of 1889 are concerned, it is far more reasonable to suppose that the governor signed them for two other reasons rather than that because he interpreted the constitution to confer a power outside its plain provisions. Most of these bills were presented to him during the last five days of the session. Under a provision of the constitution of Minnesota, identical as to our own except as to the number of days, and a further provision requiring bills to be enrolled and signed by the presiding officers of each house, it was held that the enrollment and presentation to the governor were legislative acts, and that a bill was not passed, within the meaning of the constitution, until the enrollment had taken place. Burns v. Sewell, 48 Minn. 425, 51 N. W. 224. Most of these bills, also, were actually passed within the last five days of the session, if Sunday be excluded. There is certainly much force in saying that the last five days of the session mean the days of actual session, and do not include Sunday, which is not a legislative day. What views the governors who signed these bills may have entertained upon these points we have no means of knowing. From 1835 to 1873 the occasion for the exercise of this power was more imperative than it has been since, for during most of the earlier sessions the legislature passed bills on the very last day; while since 1873, and perhaps for a short time before, it has been the universal custom to do no business during the last three or four days of the session, except the signing of enrolled bills by the president of the senate and the speaker of the house, for the approval of the governor, and the entry of the same upon the journal.

None of the authorities cited in the majority opinion are under a constitution at all similar to our own. The only decision under a similar constitution is in direct conflict with that opinion, as I read it. The provision in the Minnesota constitution reads as follows: "The governor may approve, sign and file in the office of the secretary of state within three days after the adjournment of the legislature any act passed during the last three days of the session, and the same shall become a law." Burns v. Sewell, supra. It is true that this case holds that without this clause the governor had power to approve

bills after adjournment, but it also holds that this clause was "a limitation upon his power, restricting its exercise to the period of three days after the legislature shall have adjourned."

The respondent here contends—and upon that theory alone can his contention be sustained—that the five-day limit has no effect upon or application to bills passed before the last five days of the session. To what extent will the advocates of this rule of construction carry it? Suppose a governor shall in the future, for some reason, sign a bill 15 or 20 days after the legislature adjourns, and other governors subsequently follow his example; will that be another practical construction, and affirm the right of the governors to sign bills at any time they choose? Such was the contention in People v. Bowen, 21 N. Y. 518, the principal case upon which respondent relies. Upon this point the majority opinion says: "It is argued that, upon the construction which I have suggested, no time whatever is fixed within which bills are, in such cases, to be signed; and that, if it can be done after the adjournment, it may be done at any indefinite period thereafter, and that the inconvenience would arise that it might remain a long time uncertain whether a measure which has received the assent of both branches of the legislature should eventually be a law or not. This consequence will certainly follow unless there is an implication arising out of the fixing of a period of 10 days for the consideration of bills presented to the governor while the legislature remain in actual session. It is plain that the authors of the constitution considered that period sufficiently long for the performance of that duty; and I think he would not be justified in acting upon a bill after his 10 days had elapsed, whether the session continued or not." That decision is, in my opinion, an act of judicial ingraftment, based upon a supposed necessity, and not a precedent of construction which ought to be followed.

I deem it unnecessary to discuss the other authorities cited. The case of People v. Bowen was by a divided court. So, also, was the case of Lankford v. Commissioners, 73 Md. 115, 20 Atl. 1017, and 22 Atl. 412. In Solomon v. Commissioners, 41 Ga. 161, the decision was expressly based upon the practice of the executive department, while it, in effect, held that there was no doubt about the construction to be placed upon the constitution, which was similar to that of New York. The other cases arise upon provisions so entirely dissimilar both from our own constitution and from that of New York that they seem to me to have no bearing. The California case is, in my judgment, based upon sound reason, and gives to the clause of the constitution involved in that and the New York case, and the constitution of Michigan for 1835, its plain, logical, and commonsense meaning, viz. that the adjournment of the legislature prohibited every unsigned bill in the hands of the governor at the time of adjournment from becoming a law. The decisions to the contrary are based upon the argument of expediency and public inconvenience, and not upon sound canons of construction. I think the writ should be granted.

FULLER v. LAKE SHORE & M. S. RY. CO.

(Supreme Court of Michigan. March 24, 1896.)

RAILROADS—CATTLE GUARDS—NEGLIGENCE—MASTER AND SERVANT—PERSONAL INJURY—ASSUMED RISK.

1. While not in terms required by statute, it is proper for a railroad company, if not its duty, to construct a cattle guard at a point on its track where station grounds end and from which it is required to fence the track.

2. A railroad company cannot be *held* liable for an injury resulting to a brakeman who, in coupling cars, steps into a cattle guard, in the daytime, and at a place where he is familiar with the track.

3. Cattle guards being required and used on all railroads, the danger of accidents to employés in operating trains over them is one of the assumed risks of the employment.

4. The fact that, at the time of an injury to an employé by stepping into a cattle guard placed at the termination of the railroad fence, where it joined the grounds of a station, such fence was not joined to the guard on one side of the track, does not affect the question of the railroad company's liability for the injury.

Error to circuit court, Lenawee county; Victor H. Lane, Judge.

Action by Lura Fuller, administratrix of the estate of Albert Fuller, against the Lake Shore & Michigan Southern Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Watts, Bean & Smith, for appellant. C. E. Weaver (Geo. C. Greene and O. G. Getzen-Danner, of counsel), for appellee.

HOOKER, J. The plaintiff's intestate was injured, and died, by reason of stepping into a cattle guard while engaged in an attempt to uncouple cars in a train upon which he was brakeman. This action was brought to recover damages, upon the ground that the defendant negligently maintained "a dangerous pitfall, i. e. a culvert 22 inches deep, partly covered with timber, but leaving openings 6 inches wide between said timber upon its track." The circuit judge directed a verdict for the defendant and the plaintiff appealed.

Counsel for the plaintiff concedes that, if the law required the defendant to maintain the pit at that place, the plaintiff should not recover. The pit was a cattle guard. The law requires the railroad company to maintain fences between its right of way and adjoining lands excepting, only, station grounds. It also requires the maintenance of cattle guards at highway crossings. This cattle guard was not placed at a highway crossing, but was 400 or 500 feet south of

Hamilton street, at a point where the ordinary right of way joined the railroad station grounds, which were much wider than the space used for the main track further south. Without such cattle guard there would have been nothing to prevent cattle from straying from the streets upon the station grounds, and thence south upon the track. The defendant was obliged to fence its right of way from the point where this cattle guard was built. To have left it without a cattle guard would have left a narrow pocket, 500 or 600 feet long, into which animals might freely enter, and from which they could not escape at any other point. The obvious intent of the legislature, in providing for fences and cattle guards, is to exclude animals from entering upon the track. The fence keeps them from entering from adjoining premises; the cattle guards, from entering from the highways. But station grounds are exempt, for the general convenience of the company and the public. And, as cattle guards would be useless at streets crossing station grounds, it is the uniform custom, as all know, to locate them upon the boundaries of station grounds instead, as was done in this case; and we think it right and proper that this should be done. Within reasonable bounds, a railroad company may extend its station grounds, and, ordinarily, the limits fixed by the company must govern. In this case they were plainly fixed at this point, and we think it was not negligence to construct a cattle guard there, and there is force in the claim that it was a duty.

Again, the undisputed proof shows that this accident occurred before 5 o'clock on a day in May; that the fireman upon the engine could distinguish the deceased, and see his legs and hand as he walked, while watching to take signals from him. He had walked by this cattle guard, in close proximity to it, three or more times, while engaged in switching that day. He threw the switch which was near to the cattle guard, being only 33 feet distant, that the train might back onto the main track; and, if he did not see the cattle guard, he was heedless in the extreme. It was his duty to take notice of the track upon which he was at work, and we have no doubt that he was aware of the existence of the cattle guard; but, whether he was or not, cattle guards were required by law, and existed at intervals, from one end of the road to the other. They were common incidents and hazards of his employment, and we must hold that he assumed the risks attendant upon them when he entered the service of the defendant. He entered between the cars, a few feet from this cattle guard, while they were in motion. Experiencing difficulty in lifting the pin, he walked along between the cars until his more watchful companions, expecting, momentarily, to see him emerge to avoid the cattle guard, stopped the train, lest he be hurt; but, as it proved, it was a moment too late. This is one of those unfortunate casualties, attendant upon railroading, which, as yet, no adequate means has been found to prevent. The learned circuit judge took this view of the case.

A point is made here upon the fact that there was no fence, extending from the cattle guard to the line fence, upon the east side; but we think it is without force. The fence upon the west side was there, and material was in the yard to rebuild that upon the east side; but we think it is not incumbent to build fences to advise employés of the existence of cattle guards. They have another purpose. The cattle guard was plainly visible, and at a place where the proof, as well as common experience, shows it was to have been expected. The judgment is affirmed. The other justices concurred.

STEBBINS et al. v. JUDGE OF SUPERIOR COURT OF GRAND RAPIDS.

(Supreme Court of Michigan. March 24, 1896.)

CITY ELECTION FOR ISSUANCE OF BONDS—GENERAL OR SPECIAL ELECTION—WHICH GOVERNS.

A city charter provided that bonds for a city market shall not be issued "unless the qualified electors of said city, voting in their respective wards, shall have authorized the issuing of said bonds by a majority of their votes cast at any regular election, or at a special election called for the purpose"; and a provision subsequently added to such charter that no debt should be incurred by the city for an electric plant unless authorized by the qualified electors of said city "voting thereon" shows a legislative intent to provide a different rule in each case. *Held* that, where a proposition for issuance of market bonds was placed on a general election ticket, a majority of all votes cast at the general election controls, and not a majority of those cast on the bonding proposition.

Petition by Charles D. Stebbins and others for a writ of mandamus to compel the judge of the superior court of Grand Rapids to vacate an order granting an injunction. Denied.

By the charter of the city of Grand Rapids, the municipality is authorized to purchase, among other things, a city market, and to issue bonds therefor, under the limitation contained in the following provision: "Nothing in this act contained shall be so construed as to authorize the incurring of any bonded indebtedness against said city of Grand Rapids for any of the purposes above specified, unless the qualified electors of said city, voting in their respective wards, shall have authorized the issuing of said bonds by a majority of their votes cast at any regular election, or at a special election called for the purpose of voting upon such question." The common council, under the authority conferred upon it by the charter, submitted to the electors at the general election held in 1895 the question of bonding the city for $75,000, to purchase a site for a public market, and to erect and maintain market buildings thereon. Only one ballot was used, which contained the names of all the candidates and the bonding proposi-

tion. All the ballots were deposited in one box in each voting precinct. The number of electors voting at this election, as shown by the poll list, was 12,579. The total vote upon the bonding question was 7,024, of which 3,874 were for, and 3,150 against, the proposition. The common council declared the proposition carried, voted to issue the bonds, advertised them for sale, received and approved a bid. Thereupon a taxpayer filed a bill of complaint to restrain the issuing of said bonds, alleging that such issue was unauthorized; and a temporary injunction issued. The relators applied to this court for the writ of mandamus to compel the vacation of this restraining order.

Henry J. Felker (Taggart, Wolcott & Ganson, of counsel), for relators. Thompson & Temple (Taylor & Eddy, of counsel), for respondent.

GRANT, J. (after stating the facts). On account of the public necessity for a speedy determination of the question, we decided to hear it upon this proceeding. It is contended on behalf of the city that a majority of the votes cast upon the question of bonding controls; while on the part of the respondent it is contended that the majority of all the votes cast at the election must control. The authorities are very numerous, and are not in harmony. An examination of them will show that the phraseology of the constitutional and statutory provisions in the various decisions differs, and the courts have had no little trouble to determine the clear legislative intent. The relators cite, as supporting their position, the following authorities: Gillespie v. Palmer, 20 Wis. 572; State v. Grace, 20 Or. 154, 25 Pac. 382; State v. Echols, 41 Kan. 1, 20 Pac. 523; Commissioners v. Winkley, 29 Kan. 36; Walker v. Oswald, 68 Md. 146, 11 Atl. 711; Yesler v. Seattle, 1 Wash. St. 310, 25 Pac. 1014; Sanford v. Prentice, 28 Wis. 361. Dayton v. City of St. Paul, 22 Minn. 400; Metcalfe v. Seattle, 1 Wash. St. 297, 25 Pac. 1010. Gillespie v. Palmer fully sustains the relators' contention, and, if it were accepted as the law, it would control the present case. The soundness of that decision was questioned in Sawyer v. Insurance Co., 37 Wis. 524, in which it was said that it had been subjected to the criticism that the court decided it in accordance with the "logic of the war," rather than by the "logic of the law." In Bound v. Railway Co. 45 Wis. 579, Chief Justice Ryan characterized it as a reproach to the court, and a judgment proceeding upon policy rather than upon principal. It is expressly repudiated in State v. Babcock, 17 Neb. 194, 22 N. W. 372, and State v. Lancaster Co., 6 Neb. 474, and is criticised in other courts. While we have great respect for the supreme court of Wisconsin, we do not think that that decision is supported by reason or authority. In State v. Grace the law provided that, "at the next general election, the question of the location of the county seat shall be submitted to the legal voters of the county, and the place receiving a majority of all the votes cast shall be the permanent seat." The reasoning by which the court reached the conclusion that the majority of the votes cast upon the removal, and not of all the votes cast at the election, should control, is found at pages 161 and 162, 20 Or., and 382, 25 Pac. The conclusion is based largely upon the peculiar phraseology of the statute. In State v. Winkley the statute contained no such limitation as is found in the case now before us. The statute in that case simply provided for submitting the question of a bounty to the electors at a general election. It was there provided that, "if a majority of the votes [cast] are for the bounty," the law shall be declared in force. In State v. Echols the law required the question to be submitted to the voters of the county at a general or special election, and provided that "after said election the ballots on said question shall be canvassed in the same manner as in the election for county officers, and if the majority of all the votes cast shall be in favor of establishing such high school," etc.; and the case is decided to be ruled by State v. Winkley. In Dayton v. City of St. Paul the question arose upon a provision of the constitution relating to alterations of or amendments to it. That provision required a "majority of the voters present and voting." Under this general language, a majority of those voting upon an amendment was held sufficient. It was also held in the same case that a provision similar to the one now involved required a majority of all the electors who voted at the election. The constitution provided for submitting to the electors the question of constitutional conventions, and provided that, "if a majority of all the electors voting at said election shall have voted for a convention, the legislature shall provide for calling it." It was held that the use of language so different showed the intention to provide a different rule in each case. In Walker v. Oswald considerable importance was attached to the provisions of the law for the canvass and return of the votes, as showing the intention to be that a majority of the electors voting upon the proposition should determine. In Metcalfe v. Seattle the provision under which the question arose required "the assent of three-fifths of the voters therein, voting at an election to be held for that purpose." In Yesler v. Seattle the provision read: "If three-fifths of the voters of said city of Seattle shall at said election vote in favor of authorizing," etc. These two cases adopt the definition of "voter" given by the supreme court of the United States in Carroll Co. v. Smith, 111 U. S. 565, 4 Sup. Ct. 539, as follows: "The assent of two-thirds of the qualified voters of the county, at an election lawfully held for that purpose, to a proposed issue of municipal bonds, intended by that instrument, meant the vote of two-thirds of the qualified voters present and voting at such

election in its favor, as determined by the official return of the result. The words 'qualified voters,' as used in the constitution, must be taken to mean, not those qualified and entitled to vote, but those qualified and actually voting. In that connection a voter is one who votes, not one who, although qualified to vote, does not vote." The provision of the constitution of Mississippi there construed reads thus: "The legislature shall not authorize any county, city or town to become a stockholder in, or to lend its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a special election or regular election to be held therein, shall assent thereto."

We must hold that the above authorities are not controlling, and must look elsewhere for authority and reason on which to base our conclusion. The first duty of courts is to examine the statute, and determine whether the intent of the legislature appears clearly therein. If it does, that is the end of the inquiry. Municipal corporations possess only those powers which are expressly conferred or necessarily implied, in consequence of their being essential to the exercise of their proper functions. While the same strictness is not, perhaps, required in construing statutes authorizing the issue of bonds for paving, erection of markets, and the like, as in those authorizing bonds for gifts or grants to railroads and similar purposes, still the general rule is that they must be strictly construed. The charter above quoted in plain terms requires "a majority of the qualified electors of said city voting in their respective wards." Courts are not at liberty to inject words into a statute contrary to its clear meaning, even if absurd results follow. The question of bonding municipalities is an important one, and courts have nothing to do with the reasons or results where the language is unequivocal. To say that the legislature meant that a majority of those voting at the general election on the proposition should control would be to place in the statute words and an intent not found in it. We see nothing absurd, however, in the legislature providing that at a special election a majority of the votes should control, while at a general election a majority of all the votes cast at the election should control. There might have been in the minds of the legislators the very best of reasons for such provisions. Under the sound reason in Dayton v. City of St. Paul, we have in this same charter an evidence of legislative intent which we cannot ignore. Section 29, tit. 3 (page 1392, Local Laws 1893), provides for acquiring, constructing, and maintaining an electric lighting plant, if authorized by the qualified electors of said city voting thereon. Such, also, is the language of our constitution in submitting amendments. It requires only a majority of the voters voting thereon. We think the clear weight of authority under similar provisions to the one now under consideration is in favor of the respondent. State v. Foraker, 46 Ohio St. 678, 23 N. E. 491; Enyart v. Hanover Tp., 25 Ohio St. 618; People v. Brown, 11 Ill. 478; People v. Wiant, 48 Ill. 263; State v. Sutterfield, 54 Mo. 391; Chestnutwood v. Hood, 68 Ill. 132; State v. Mayor of St. Louis, 73 Mo. 435; Cocke v. Gooch, 5 Heisk. 294; State v. Babcock, 17 Neb. 188, 22 N. W. 372.

The rule that electors absenting themselves from the election, and those present, but not voting for some candidate for every office or for every proposition submitted, are held to assent to the action of those who do attend and vote, is not applicable to a case like the present. That rule applies only to those cases where there are no limitations, and the question is left in general terms to the determination of the electors or voters. The injunction was properly granted, and the writ will therefore be denied. The other justices concurred.

COTTRELL v. HATHAWAY, et al.

(Supreme Court of Michigan. March 24, 1896.)

ATTACHMENT—AFFIDAVIT—DISSOLUTION.

1. A petition by one defendant for dissolution of an attachment issued against her and her codefendant, on an affidavit alleging that defendants have disposed and are about to dispose of "their" property with intent to defraud their creditors, stating that petitioner had not disposed of or attempted to dispose of "her" property, or any portion thereof, with intent to defraud her creditors, sufficiently alleges that petitioner has not disposed of nor attempted to dispose of either her individual property or property jointly owned with her codefendant.

2. Under 2 How. Ann. St. § 8015, providing that, when two or more persons are jointly indebted, and an affidavit is made so as to bring one or more of them within the statute authorizing attachment, a writ of attachment shall issue against the property of such as are brought within said statute, to sustain an attachment issued against several joint debtors on an affidavit stating that defendants have disposed or are about to dispose of "their" property with intent to defraud their creditors, plaintiff must show joint action or intended action on the part of defendants to dispose of their joint property.

Certiorari to circuit court, Macomb county; James B. Eldredge, Judge.

Action by William Cottrell against Eveline L. Hathaway and another. From a judgment dissolving an attachment, plaintiff brings certiorari. Affirmed.

James G. Tucker (Byron R. Erskine, of counsel), for appellant. Mark Norris, for appellees.

LONG, C. J. Application for dissolution of attachment. On June 23, 1893, the plaintiff sued out a writ of attachment in the circuit court of Macomb county against the defendants for an indebtedness of $3,607.58, contracted in July and November, 1891. The attachment was levied the same day on the lands of the defendant Eveline L. Hathaway situate in that county. The affidavit upon

which the attachment issued was in the usual form, and alleged that "the plaintiff has good reason to believe, and does believe, that the defendants Gilbert Hathaway and Eveline L. Hathaway have assigned, disposed of, and concealed, and are about to assign, dispose of, and conceal, their property, with intent to defraud their creditors." Eveline L. Hathaway, on November 7, 1893, filed a petition for the dissolution of said attachment with one of the circuit court commissioners of that county. The petition, which was duly verified, alleged, as ground for the dissolution, "that at no time, either prior to the issuing of said writ or subsequent thereto, has this deponent assigned, disposed of, or concealed, and attempted to assign, dispose of, or conceal, her property, or any portion thereof, with intent to defraud her creditors; that the property seized under said writ of attachment is the property of this deponent, and that the said Gilbert Hathaway has no interest therein of any kind; and that no property of said Gilbert Hathaway was seized under said writ of attachment." Upon the filing with the commissioner of said petition, a citation was issued, returnable on November 24th, and an attempt was made to serve the same upon the plaintiff. On the return day the plaintiff did not appear, and the commissioner entered an order in his docket reciting that there had been no legal service of the citation; and thereupon, without further showing, issued another citation, returnable December 5th following. Service of this citation was made on the plaintiff, and, on the return day, he not appearing, the commissioner entered an order dissolving the attachment, with costs. On December 8th following, the plaintiff took a special appeal to the circuit court for said county, from the action of said commissioner, upon several grounds, which we need not here set out. The special appeal was argued at the April term of said court of 1894, and, no error being found by that court, the proceedings before the commissioner were in all things affirmed, and the cause ordered to stand for trial on the merits. At the June term, 1895, the cause was brought on for trial before a jury, and at the conclusion of the testimony the court directed a verdict in favor of the defendant. The court stated its reasons therefor as follows: "In this matter, the burden was upon the plaintiff to establish by proof the existence of the facts alleged in the affidavit for attachment in the cause; that he is required to show that, not only were the defendants Gilbert Hathaway and Eveline L. Hathaway jointly indebted to him, but also that they assigned, disposed of, and concealed their property, with intent to defraud their creditors, or that they were, at the time of making the affidavit, about to do so with that intent. Construing the affidavit, as I feel compelled to do by the law as I understand it, as alleging not only joint indebtedness, but alleging joint action or intended action on the part of both defendants, as to their joint property, with common intent on their part to defraud creditors, and being of the opinion that the plaintiff in the cause has failed to show any joint action or intended action on the part of the defendants towards the assignment or disposal of their joint property with intent to defraud their creditors, I instruct you that your duty is to render a verdict for the defendants, and that the plaintiff has not shown sufficient cause why the attachment issued in this cause should not be dissolved, and that the plaintiff has not a good, legal cause for suing out the writ of attachment." The plaintiff brings the cause to this court by writ of certiorari.

We have examined the case with great care, and are satisfied that the court below was correct in finding that there is no evidence showing or tending to show that the parties jointly had assigned, disposed of, or concealed their property with intent to defraud their creditors, or that they were about to assign, dispose of, or conceal their property with intent to defraud their creditors; and we are also satisfied that there is no evidence showing or tending to show that the defendant Eveline L. Hathaway has assigned or disposed of her property with intent to defraud her creditors, or that she has attempted to do so. But it is contended that the application for the dissolution did not negative these allegations, as it simply set out that Mrs. Hathaway had not assigned, disposed of, or concealed, or attempted to assign, dispose of, or conceal, her property, or any portion thereof, with intent to defraud her creditors. We think this allegation was sufficient to cover any and all property which Mrs. Hathaway had, whether her individual property or that owned jointly with another. If she and Gilbert Hathaway had joint property, whatever interest she had therein would have been a part or portion of her property, and the concealment or disposal of joint property would necessarily include a portion of her property. This question was expressly settled in Sword v. Circuit Judge, 71 Mich. 285, 38 N. W. 870.

We also think the court was not in error in holding that the plaintiff was required to show that the defendants were jointly indebted to him, and also to show joint action or intended action on the part of the defendants. The use of the word "their" has several times been construed by this court to import a joint obligation. Edwards v. Hughes, 20 Mich. 289; Miller v. Circuit Judge, 41 Mich. 326, 2 N. W. 26; Geiges v. Greiner, 68 Mich. 155, 36 N. W. 48; Sword v. Circuit Judge, 71 Mich. 285, 38 N. W. 870. Subdivision 2, § 7987, 2 How. Ann. St., authorizing the issuance of writs of attachment in certain cases, provides, among other causes, "that the defendant has assigned, disposed of or concealed, or is about to assign, dispose of or conceal, his property, with intent to defraud his

creditors." Section 8015 also provides: "When two or more persons are jointly indebted as joint obligors, partners or otherwise, and an affidavit shall be made as provided in section 2 of this chapter, so as to bring one or more of such joint debtors within its provisions and amenable to the process of attachment, then a writ of attachment shall issue against the property and effects of such as are brought within the provisions of said section," etc. In Edwards v. Hughes, supra, the defendants in attachment were partners, and the affidavit was to the effect that the defendants were about to dispose of certain of their property with intent to defraud their creditors. On proceedings for dissolution, it appears that the plaintiff was able to show grounds for the attachment against one of the defendants, but none at all against the others. It was claimed, on the part of the defendants, moving for dissolution, that an attachment which proceeds against three as guilty of a contemplated joint fraud, where two of them are wholly innocent, was unwarranted, and it was so held by this court. In referring to section 8015, above quoted, it was said: "It will be seen, from this section, that when the plaintiff is able to make a case against one of several debtors, whether they are indebted as partners or otherwise, he is not to allege joint wrong by them all, but must set forth his case in the affidavit according to the facts." In Jaffray v. Jennings, 101 Mich. 517, 60 N. W. 52, this court, in discussing the two statutes referred to, in speaking of section 7987, said: "Under the previous statute (section 7987), attachment lay against all joint debtors, whether partners or not, where it could be shown, as matter of law, that all participated in the act constituting a cause. It was also plain that, where one joint debtor only committed such act, his property only was subject to the writ, unless there was a partnership. There was then no necessity for legislation to reach either of these cases; for joint debtors, where not partners, were fully protected, where innocent of wrong, and the creditor had his remedy against both where both participated, and against the offender where only one was guilty. In this condition of affairs, the legislature passed section 8015, thereby giving immunity from attachment to joint debtors, including partners, who were not themselves participants in the wrongful act. It will be seen, therefore, that the construction of the statute has always been that, where a joint act is alleged, a joint act must be proved; and if the plaintiff desires to rely upon several acts, by each of the joint debtors, he must so allege in his affidavit, or fail to maintain his action."

Some complaint is made upon the ruling of the court in admitting and rejecting testimony, but we are not able to find any error in such rulings. We think there is no force in the contention made that the court erred in overruling the questions raised by the special appeal. We have examined the questions, and think the court was not in error in holding against the claims there made. The judgment below will be affirmed. The other justices concurred.

EATON et al. v. GLADWELL.

(Supreme Court of Michigan. March 24, 1896.)

CONTRACTS—ACTIONS—EVIDENCE—CUSTOM.

1. In an action to recover the contract price for the construction of a building, on the theory of a substantial performance, wherein there was no evidence of an acceptance of the building by defendant, evidence of its value was inadmissible.

2. That the owner of a building under construction visited it and called the contractor's attention to certain defects therein, and, on being asked if there was anything else wrong, failed to say anything, does not constitute a waiver on his part of defects consisting of the use of doors of one-eighth of an inch less in thickness than required by the contract, inferior grade of tin and boards for roofing, and other defects not apparent.

3. Where a contract for the construction of a building is not ambiguous, letters between the parties, written prior to its execution, are inadmissible to show that it was the intention of the parties that the building should be cheaply constructed.

4. Where a building contract in express terms calls for doors of a certain thickness, evidence of a custom among carpenters to use doors one-eighth of an inch less in thickness when doors of such thickness were specified, due to the fact that the lumber from which the doors were manufactured lost that much when dressed, is inadmissible to vary the contract, there being no evidence that the custom was general in its application, or that the owner of the building had knowledge of it.

Error to circuit court, Wayne county; Willard M. Lillibridge, Judge.

Action by Joseph W. Eaton and others against Thomas J. Gladwell. There was a judgment for plaintiffs, and defendant brings error. Reversed.

Sylvester Pray (Atkinson & Atkinson, of counsel), for appellant. M. A. Dowling (T. E. Tarsney and W. W. Wicker, of counsel), for appellees.

HOOKER, J. The plaintiffs are builders, and have brought this action to recover for the erection of a building for the defendant. The declaration is upon the common counts, and the record states that, "there being no other or further testimony, the jury were permitted to inspect the building," from which we infer that the substance of all of the testimony is contained in the record. The plaintiffs, in making their case, offered in evidence a written contract under which the work was done, and one of them testified that he "claimed it was completed according to the contract." Testimony was offered showing that it was worth $1,600 to build such a building as that was; but, as the case went to the jury upon a claim that such contract was substantially performed, and there appears to be no evidence that the building was ever ac-

cepted by the defendant, the testimony as to value of services was inadmissible. It is only upon the theory that service and materials had been rendered by the plaintiffs, and the benefit appropriated by the defendant, that a recovery could be had upon the quantum meruit, and until the preliminary proof of appropriation was made, or, at least, some claim that the plaintiffs were relying upon such theory, the testimony of value should not have been admitted. It furnished an opportunity for the thought that the building was worth all that it cost, and a jury would be likely to act upon such argument.

The defendant's claim was that the work and materials did not correspond with those required by the contract, in many particulars. This does not seem to have been seriously disputed, but it was claimed that the defendant waived his right to insist upon compliance. Aside from one or two items, this waiver is based upon a statement that, at one time, when the defendant went through the building, "he called attention to some things, and the plaintiff asked him if there was anything else, and told him, if there was, to say so, and he would fix it, and he did not say anything." It was claimed by the defendant, upon the trial, that the rafters were further apart than the specifications permitted; that the roof boards were not dressed to a uniform thickness, it apparently being conceded that they were not dressed at all; the tin was of an inferior quality; the studding was not as specified, either in quality or quantity; one door was omitted, and all doors were 1⅛ inches thick, instead of 1¼; steps were not built at the doors, as specified; one flue was omitted; and the workmanship was poor. A waiver implies an intention to overlook a deficiency, or forego a right to have the defect remedied, or to have compensation therefor, and necessarily implies knowledge of the defect that is waived, or acquiescence under circumstances reasonably implying unconditional acceptance of the work as a full performance. The defendant was under no obligation to know and point out defects at his peril. He might rely upon his contract, and, by seasonably refusing to accept, avoid liability upon the unperformed contract. Fildew v. Besley, 42 Mich. 100, 3 N. W. 278; Martus v. Houck, 39 Mich. 432. Or, if his necessities required him to occupy the premises, he might do so, and claim damages by way of recoupment, when sued for the price or value of the building. We think the law does not necessarily imply a waiver of all defects from a failure to point out specifically all deficiencies upon demand. Especially is this true as to matters which are concealed, such as roof boards, flues, studs, etc., and one-eighth inch in the thickness of doors, where it is not shown that attention was called to them.

Some letters, written by the defendant to the plaintiffs before the contract was made, were offered in evidence to explain the contract, or perhaps, more accurately speaking, to show the circumstances under which the parties dealt. The object and use made of them was to convince the jury that the building was to be a cheaply constructed one. Conversation to the same effect was also admitted. It seems to us that the contract was the culmination of the negotiations, and that it was not ambiguous, and, therefore, that these letters and conversation were inadmissible. The contract specified the materials, and good and substantial work, and was conclusive of the subject.

Testimony was admitted tending to show that it was a custom among carpenters to furnish doors 1⅛ inches thick when those 1¼ inches thick were specified. It was said that this was because the 1¼-inch lumber, from which they were made, dressed down ⅛ of an inch. There was nothing in the case to show that this was a custom so general in its application and recognition as to make it admissible, nor was there anything tending to show that the defendant knew of it, or could be presumed to have contracted with reference to it. Black v. Ashley, 80 Mich. 90, 44 N. W. 1120; Pennell v. Transportation Co., 94 Mich. 247, 53 N. W. 1049; Lamb v. Henderson, 63 Mich. 305, 29 N. W. 732; Schurr v. Savigny, 85 Mich. 144, 48 N. W. 547. The judgment is reversed, and a new trial directed.

MONTGOMERY, J., did not sit. The other justices concurred.

REYSEN v. ROATE.

(Supreme Court of Wisconsin. March 10, 1896.)

WATER RIGHTS—ICE—RIGHTS OF LESSEE OF MILL.

The lessee of a mill with water power and rights of flowage appurtenant thereto, not being a riparian proprietor upon the millpond, cannot sue for the removal of ice therefrom, his right of flowage or water power not being lessened thereby.

Appeal from circuit court, Sheboygan county; N. S. Gilson, Judge.

Action by J. H. Reysen against Charles G. Roate. There was a judgment for defendant, and plaintiff appeals. Affirmed.

M. C. Mead, for appellant. J. H. James, for respondent.

WINSLOW, J. The plaintiff was the lessee of a mill on the Sheboygan river, and of the water power and the rights of flowage appurtenant thereto, but was not a riparian proprietor on the millpond, nor the owner in fee of the bed of the pond. The defendant entered upon the pond when frozen, and placed timbers thereon, and cut and removed ice therefrom, but did not thereby interfere with the plaintiff's right of flowage, or lessen his water supply. Can the plaintiff maintain trespass? The circuit court held that the action could not be maintained by the plaintiff, and we are satisfied that the judgment is right. It is settled in this state that the

title to the bed of a stream is in the riparian owners, whether the stream be navigable or not. Olson v. Merrill, 42 Wis. 203. Ice which forms on streams or ponds, the bed of which is the subject of private ownership, belongs to the owner of such bed, and such owner may maintain trespass for its removal. Gould, Waters, § 191, and authorities cited; Bigelow v. Shaw, 65 Mich. 341, 32 N. W. 800. The appellant neither owned the bed of the pond, nor did the removal of the ice in any way lessen his water supply, or interfere with his rights of flowage. Therefore it is plain that he had no right of action therefor. Judgment affirmed.

NOVELTY PAPER-BOX & SUPPLY CO. v. STONE.

(Supreme Court of Wisconsin. March 10, 1896.)

SALE—CONSTRUCTION OF CONTRACT.

A sale of stock in a corporation, together with the seller's interest in all manufactured goods "on hand in the factory of said company," did not affect his right to hold manufactured goods which were then in his own store, and which had been transferred or pledged to him for money advanced, under a valid agreement with the corporation to carry on its business.

Appeal from circuit court, Winnebago county; George W. Burnell, Judge.

Action by the Novelty Paper-Box & Supply Company against T. D. Stone. Judgment for plaintiff, and defendant appeals. Reversed.

It appears from the record that January 24, 1893, the Ripon Paper-Box Company was a corporation located and doing business at Ripon; that the defendant and his wife owned three-fourths of the capital stock of the corporation; that, on the date named, the defendant entered into a written agreement with Battis & McCabe, of Oshkosh, whereby the defendant, in effect, agreed to assign to Battis & McCabe his said stock, including all his interest in the stock on hand of manufactured or partly manufactured goods in the factory of the company at Ripon, as well as all his interest in the machinery, tools, utensils, cuts (wood and metal), tables, stoves, desks, and all its paraphernalia then used in the manufacture of paper boxes in the factory at Ripon, and Battis & McCabe thereby agreed to pay to the defendant, Stone, $50 upon signing the agreement, and $2,750 on or before February 1, 1893, such payment to be made in full prior to the removal of any of the machinery in said factory; that it was therein further agreed that the defendant might complete the work then being manufactured in said factory, and to pay Battis & McCabe for the stock used in such manufacture at the market price of such stock; that the book account should belong to the defendant up to the date of said agreement, and that he should pay all debts therein due from the company; that February 1, 1893, the defendant did so assign and transfer his said stock to Battis & McCabe; that for a long time prior to January 24, 1893, the said corporation was without money to conduct its business; that, by an agreement with all the other stockholders and officers, the fendant, who was such stockholder, director, and manager, as mentioned, agreed to furnish money to carry on the business, and, in consideration of the money so advanced, he was to have the goods manufactured, or the proceeds thereof, at least to the extent of reimbursing himself for the money so advanced; that he did so advance $1,660.91, and only received back out of the same $740.20, leaving a balance still due him of $920.71; that, after such assignment and transfer of such stock, the name of the corporation was changed to that of the plaintiff, and its location was changed to Oskosh, where its business was thereafter conducted. January 30, 1894, the plaintiff commenced this action for the wrongful conversion of certain of the goods so manufactured under such arrangement with the defendant and the other officers and stockholders of the company, and demanded judgment for $261.70, with interest from February 1, 1893. The defendant answered by way of admissions, denials, and counter allegations, setting up such agreement and understanding, and claimed the legal right to the goods so alleged to have been unlawfully converted. At the close of the trial, a jury having been waived by the parties in open court, the court found, as matters of fact, the incorporation of the Ripon Paper-Box Company, and the change of its name to the plaintiff company, as stated; that the defendant owned and transferred his stock, as stated; that, at the time of such transfer, the defendant retained in his possession, and converted to his own use, goods, wares, and merchandise, the property of the plaintiff, to the amount and value of $244.21; that the defendant afterwards shipped to M. E. Paige & Co., of Chicago, a part of the goods, amounting to the value of $139.70, to be sold on consignment, which goods yielded the sum of $88.30, which the plaintiff received and retained with full knowledge; that the defendant is indebted to the plaintiff in the sum of $104.44 for said goods so converted; that there is no claim for an accounting in the pleadings, and no issue raised as to the indebtedness of the corporation to the defendant prior to the sale of the defendant's stock. And, as conclusions of law, the court found, in effect, that the plaintiff is estopped from claiming more than the $88.30 on account of the goods so shipped to M. E. Paige & Co.; that the plaintiff is entitled to judgment against the defendant for $104.44, with interest from the commencement of this action; that, no claim for an accounting having been raised by the pleadings, the court cannot consider the same in this action. From the judgment entered thereon accordingly, the defendant brings this appeal.

Thompson, Harshaw & Thompson, for appellant. Eaton & Weed, for respondent.

CASSODAY, C. J. (after stating the facts). It was conceded on the trial, on the part of the plaintiff, that the goods in process of manufacture when the agreement of January 24, 1893, was made, would belong to the defendant upon his paying or accounting for the materials used at the market price. It is undisputed that a portion of the goods, including the goods in question, which had then been manufactured, were then stored in the defendant's storeroom or warehouse; and that they had been so manufactured and stored under the arrangement between the defendant, as the principal stockholder, director, and manager, and all the other stockholders and officers, whereby the defendant was to advance money to carry on the business, and take and dispose of the goods so manufactured, or the proceeds thereof, at least to the extent of reimbursing himself for the moneys so advanced. The plaintiff claims title through Battis & McCabe, as purchasers of the stock of the defendant and his wife, as mentioned. The agreement for such transfer covered "stock on hand, stock of manufactured and partly manufactured goods now on hand, in the factory of said company at Ripon." We do not understand that the defendant thereby intended to surrender, or did surrender, any claim for moneys he had so advanced in the business, nor that he thereby intended to surrender, or did surrender, the goods which he had previously taken, and then had in his own storeroom or warehouse, either as security for, or in payment of, the moneys he had so advanced. It is immaterial whether he held the goods as security and pledgee, or as owner, since the moneys so advanced far exceeded the value of the goods so retained. This is an action at law, and not in equity; and, as we view the case, the question of the validity of the arrangement whereby the defendant so advanced the money and so received the goods is not here involved. The goods were in the possession of the defendant before the purchase of the stock by Battis & McCabe; and there is nothing to indicate that the plaintiff has a superior right to the same. Since the Ripon Paper-Box Company received and had the benefit of the moneys advanced by the defendant, the plaintiff, as its successor, is in no position to repudiate the transaction whereby the company so received the money.

The judgment of the circuit court is reversed, and the cause is remanded, with direction to dismiss the complaint.

PATTEN PAPER CO., Limited, et al. v. GREEN BAY & M. CANAL CO.

(Supreme Court of Wisconsin. March 10, 1896.)

APPEAL—MANDATE AND PROCEEDINGS BELOW.

1. A judgment entered in substantial accordance with the mandate of the supreme court is, in legal effect, the judgment of such court, and an appeal therefrom will be dismissed.

2. Where a cause is remanded, with direction to enter judgment "in accordance with the opinion," the trial court has nothing to do but obey such mandate, and no amendment to pleadings will be allowed.

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by the Patten Paper Company, Limited, against the Kaukauna Water-Power Company and others, in which the Green Bay & Mississippi Canal Company filed a cross complaint. A judgment in favor of cross complainant was reversed on appeal (61 N. W. 1121; 63 N. W. 1019), and from a judgment entered in accordance with the mandate of the supreme court, cross complainant appeals. Dismissed.

B. J. Stevens and E. Mariner, for appellant. Hooper & Hooper, Fish & Cary, and David S. Ordway, for respondents.

CASSODAY, C. J. This case was here upon former appeals. 90 Wis. 370, 61 N. W. 1121, and 63 N. W. 1019. Those appeals were by three of the defendants in the cross bill filed by the canal company from so much and such part of the judgment of the trial court as sustained the paramount right of the canal company to all the water power created by the government dam at Kaukauna, and the exclusive right to use, or authorize others to use, the same, wherever it might be available for water power, and to return the water to the river wherever it should see fit; but the balance of that judgment, relating, as it did, to the partition of the water power between the several riparian owners below the dam, had been entered, by agreement and stipulation between such riparian owners, including the canal company, and from those portions of the judgment there had been no appeal, and hence the same were never before this court for consideration. The portion of the judgment thus appealed from was thoroughly argued by able counsel on all sides, and then, after careful consideration and decision, was again reargued, and again decided, with the following mandate: "The judgment of the superior court of Milwaukee county is reversed, upon each of the three appeals, as to those parts of the judgment which were appealed from, and the cause is remanded with direction to enter judgment in accordance with the opinion." 90 Wis. 404, 61 N. W. 1121, and 63 N. W. 1019. Upon the remittiturs being filed, the canal company asked leave of the trial court to amend its cross bill in certain respects, or to allege the same facts by way of defense and counterclaim to the original complaint for the partition of the water power below the dam. The trial court held that no such amendment was allowable at that stage of the case. Thereupon, on September 27, 1895, the trial court entered final judgment in pursuance of the mandate of this court. The canal company has, in effect, appealed from the parts of that judg-

ment upon the issues formed in the original action in favor of the plaintiffs therein and against the defendants therein, and also that part of the judgment upon the issues in the cross action in favor of the defendants therein who appealed to this court, and also the first, second, and third subdivisions thereof, and especially from such parts of the judgment, if any, as require the canal company to return the water in excess of that required for navigation from the canal to the river, either at the dam or in such place and in such manner as not to deprive the respondents herein, and those claiming under or through them, of its use as it had been accustomed to flow past their banks. The respondents now move to dismiss the appeal, on the ground that the judgment entered is in exact accordance with the mandate of this court.

Counsel for the appellant contend that the judgment is not in exact accordance with the two opinions of this court, and hence not in exact accordance with the mandate. We perceive no inconsistency in the two opinions; but, if there is any, the one on the motions for reargument, being last, would prevail. Mr. Justice Newman wrote both opinions, and in the last he construed the first, and, in effect, said: "This court held that the canal company owned all the water power which was created by the construction and operation of the government dam at Kaukauna; that it had the right to use all the water of the stream, not used for the purposes of navigation, for the purposes of power, wherever it could or chose, so far as it could do so without impairing the just rights of other owners of water powers upon the stream; that it was due to other owners of water powers below the dam that the water, after being used by it, should be returned to the stream at such place and in such manner as it shall flow past the banks of such lower owners in its accustomed channels, and as it was accustomed aforetime to flow. The limit to its right is at the point where it infringes upon the rights of others. It concedes to it all the rights which the state had, or could acquire, as against such lower owners. The place where it may use the water for power is restricted only by its duty to refrain from injuring others. The court is satisfied of the correctness and justice of its judgment." 90 Wis. 403, 61 N. W. 1121, and 63 N. W. 1019. This is the very gist of both the opinions and the decision. It is substantially embraced in the judgment before us. It seems to be as definite and certain as language can make it without fixing the limit by survey and metes and bounds. Certainly, we did something more than determine that the canal company was not entitled to the whole water of the river as contended by counsel. So it is very obvious that counsel is in error in claiming that the right of the "canal company to draw water through the canal as riparian proprietor" had not been considered by this court. This court had no power upon the former appeal, and has no power now, to leave open and undecided matters which were determined in the portions of the first judgment not appealed from. It would be an idle provision to insert in the judgment that the cross bill was dismissed without prejudice as to questions not determined by the trial court or this court in the judgment before us on the former appeal; and it would have been improper to insert therein that the judgment was without prejudice as to questions determined in the first judgment and not appealed from, or determined by this court on such appeal. After careful consideration, we are constrained to hold that the judgment entered is a substantial compliance with the mandate of this court. Certainly, it would have been improper to allow any amendment to pleadings or new litigation. The mandate was, not for a new trial, nor for further proceedings according to law, but "with direction to enter judgment in accordance with the opinion," and the opinion left nothing undetermined. This left nothing for the trial court to do in the case except to enter judgment therein as directed. Rev. St. § 3071; Mowry v. Bank, 66 Wis. 539, 29 N. W. 559; Jones v. Jones, 71 Wis. 513, 38 N. W. 88; Whitney v. Traynor, 76 Wis. 628, 45 N. W. 530; Chouteau v. Allen, 74 Mo. 56; Stump v. Hornback, 109 Mo. 277, 18 S. W. 37; Young v. Thrasher, 123 Mo. 308, 27 S. W. 326. This, we think, it has done.

Such being the record, the question recurs whether this appeal should be entertained or dismissed. We are clearly of the opinion, that a judgment entered, as this was, in substantial accordance with the mandate of this court, is, in legal effect, the judgment of this court. It is just as effectually res adjudicata as in a case where the judgment is affirmed. Reed v. Jones, 8 Wis. 412. In such a case, this court has held that the proper practice is to dismiss the appeal. Kluender v. Fenske, 59 Wis. 35, 17 N. W. 681. We must hold that a judgment, entered in substantial accordance with the mandate of this court upon a previous appeal, must, upon motion of the respondent, be dismissed. Stewart v. Salamon, 97 U. S. 361; Humphrey v. Baker, 103 U. S. 736; Mackall v. Richards, 116 U. S. 45, 6 Sup. Ct. 234; Railway Co. v. Anderson, 149 U. S. 237, 13 Sup. Ct. 843; Smelting Co. v. Billings, 150 U. S. 31, 14 Sup. Ct. 4. It has been held, in the supreme court of the United States, that compliance with a mandate of that court, which left nothing to the judgment or discretion of the trial court, might be enforced by mandamus. Bank v. Hunter, 152 U. S. 512, 14 Sup. Ct. 675. The appeal from the judgment of the superior court for Milwaukee county is dismissed.

BOYD v. CITY OF MILWAUKEE et al.

(Supreme Court of Wisconsin. March 10, 1896.)

CONSTITUTIONAL LAW — SPECIAL LEGISLATION — MUNICIPAL CORPORATIONS—STREET PAVING—CONTRACT—KEEPING PAVEMENT IN REPAIR.

1. Laws 1893, c. 310, providing for assessments of the cost of repaving streets, which is made applicable to all cities having a population of 20,000 inhabitants, is not unconstitutional, as special legislation.

2. A resolution of the common council declaring a street unsafe for public use, and reciting the failure of the abutting property owners to make the street in a safe condition, or petition therefor, sufficiently shows the necessity for proceeding for the paving of the street without a petition therefor on the part of the property owners.

3. A provision in a paving contract requiring the contractor to keep the pavement in good repair for five years, except repairs due to cutting through the pavement for laying pipes, etc., renders the assessment therefor against the property owners invalid, the charter of the city requiring the expenses of repairing streets to be paid from the ward fund.

4. The provision of Laws 1895, c. 302 (which, by its terms, applies only to cities of the first class, and therefore only to Milwaukee), that no assessment for street paving shall be declared invalid on account of the contract therefor containing a provision requiring the contractor to keep the pavement in repair, is unconstitutional, as special legislation, in so far as it includes contracts already performed.

5. A city ordinance was passed, turning over to the park board a strip in the center of a very broad street for a park, and was inclosed and used as such for 10 years. *Held*, that the strip was "public grounds," within the meaning of such words in the city charter, requiring the city to pay the expense of paving the street, opposite its public grounds, to the center of the street.

Appeal from circuit court, Milwaukee county; D. H. Johnson, Judge.

Action by Sarah M. Boyd against the city of Milwaukee and others. There was an order for plaintiff, granting an interlocutory injunction, and defendants appeal. Affirmed.

This is an action to set aside a special assessment against plaintiff's property for the laying of an asphalt pavement in front thereof. The plaintiff owns a piece of land 90 feet in width, fronting on Grand avenue, in the city of Milwaukee; and in the year 1894 the city made a contract with the appellant the Western Paving & Supply Company to lay an asphalt pavement, resting on a concrete foundation, on said Grand avenue, for several blocks, including that part of the avenue in front of plaintiff's property. The pavement was laid, and a portion of the cost assessed against the plaintiff's property, and a certificate issued to the supply company for such assessment. Prior to the sale for taxes this action was brought to perpetually enjoin the sale and set aside the tax, and upon the complaint an order to show cause was issued and served, why there should not be an injunctional order pendente lite. The allegations on which it was claimed on the hearing of this motion that the assessment was illegal and void were, in brief: (1) That, the street having once been paved, there could be no legal assessment for repaving it, but that the cost of repaving must, under the city charter of Milwaukee, be paid out of the ward fund. (2) No petition of property owners was presented to have the street repaved, and no sufficient resolution was ever passed by the council by which such paving could be done without a petition. (3) The contract for paving provides that the contractors will keep the pavement in good order and repair for five years; thus charging property owners with the cost of street repairs, when the charter provides that street repairs shall be paid out of the ward fund. (4) A small park, 42 feet in width and 700 feet in length, exists in the center of Grand avenue, in front of plaintiff's property; and the plaintiff has been assessed for the paving of the whole roadway between the curb and said park, whereas the city charter provides that the expense of paving to the middle of the street, adjacent to public grounds, shall be paid from the ward fund The defendants appeared on the hearing, and filed affidavits in opposition to the motion; but the injunctional order was granted pendente lite, and from this order the defendants have appealed.

F. M. Hoyt and Winkler, Flanders, Smith, Bottum & Vilas, for appellants. Howard & Mallory, for respondent.

WINSLOW, J. (after stating the facts). The objections to the validity of the assessment in question will be taken up in the order indicated in the foregoing statement of facts.

1. It is true that the complaint shows that this street in front of plaintiff's property was, in the year 1876, graded and paved, pursuant to the direction of the city authorities, at the expense of the abutting lot owners. It is also true that the charter of the city (section 2, subc. 7, c. 184, Laws 1874, as amended by section 5, c. 388, Laws 1889) provides that, when a street has been once so graded and paved at the expense of abutting lot owners, the expense of repaving thereof shall be paid out of the ward fund. Had there been no change made in the law, this objection would certainly be fatal. It is provided, however, by chapter 310 of the Laws of 1893, that whenever, in any city having a population of 20,000 inhabitants or more, the grading, paving, or repaving of any street with a permanent paving, having a concrete foundation, shall have been duly authorized, and assessments therefor made, abutting property shall not be exempt from assessment for benefits on account of such paving until such property shall have paid in the aggregate, in assessments for pavements, the sum of three dollars per square yard for all that part of the roadway directly in front of such property, and lying between the curb line and the center of such roadway of said street.

If this is a valid law, it undoubtedly operates to amend the charter of the city of Milwaukee, and to change that provision of the charter which precluded assessments for repaving. We think the law is valid. It is argued that it is not a general law, but is special legislation, and in violation of subdivision 9 of section 31 of article 4 of the constitution, which prohibits special or private legislation for incorporating "any city, town or village, or to amend the charter thereof." Within the rules laid down in Johnson v. City of Milwaukee, 88 Wis. 383, 60 N. W. 270, we think that it is a general law, because it is legislation for a class of cities which may reasonably be said to require legislation peculiar to itself. The classification of cities which was upheld in that case was a classification into two classes, viz. those having a population of 3,000 or more, and those not having such a population. The reasoning upon which the law in that case was sustained applies with equal force in the present case. We construe the law as applying to all cities which shall attain a population of 20,000, as soon as they reach that population. We conclude, therefore, that the law is a general law, and valid so far as the provisions bearing on the controversy in this action is concerned. Being valid, it operates as an amendment of the charter of Milwaukee, so far as to authorize assessments of benefits for repaving to the center of the roadway in front of plaintiff's property.

2. We shall spend but little time on the second objection. It is true that no petition of property owners was ever presented for the laying of the pavement, but it is also true that the charter provides that paving may be done in the absence of a petition, upon the passage of a resolution by the common council declaring why it is necessary to proceed without a petition. Such a resolution was passed, declaring the street to be unsafe for public use, and that it was necessary to proceed without petition, because the property owners had failed to make said street in a safe and suitable condition for the public use, and had failed to present to the council a petition therefor. We regard the reason stated as entirely sufficient.

3. We come now to the most serious question in the case. It appears by the affidavits that the specifications for the paving adopted by the city provide as follows: "Guaranty. The contractor will be required, without additional compensation, to keep in good order and repair all the work done under these specifications and contracts for a period of five years (5) from and after the date of its completion, and to guaranty that during that period neither the municipal authorities or property owners shall be at any expense whatever for any repairs made necessary on account of any defective workmanship or material, or other reason, excepting where the same has been caused by cutting through the pavement for the laying or repairing of sewers, drains, gas, water, or electric service pipe, or other work authorized by the board of public works, and that the pavement shall be in good condition and repair at the end of said period, and there will be retained until the expiration of such time, out of the money payable to the contractor, such per cent. of the amount of this contract as the board of public works may deem proper, not exceeding, however, ten per cent. of the aggregate amount of the contract, as a guaranty that the contractor will conform to the requirements." The contract incorporated these specifications in its terms, and contained the further agreement as follows: "And the said parties of the first and second parts [the contractor and sureties], for themselves, their heirs, executors, and administrators, further covenant and agree that, for the period of five years from the date of the completion of the said work, they will keep in good order and repair all of the said work done under this contract (excepting only such part or parts of said original work as may have been disturbed by cutting through the pavement for the laying or repairing of sewers, drains, gas, water, or electric service pipe, or other work authorized by the board of public works), and that whenever directed by the said board, by a notice served upon them or their agents, they will at once proceed to make the repairs as thus directed, and, in case of failure or neglect on their part to do the work within five days from and after the date of the service of such notice upon them or their agents, then the said board of public works shall have the right to purchase such materials, and to employ such person or persons as it may deem necessary to undertake and complete the said repairs, and charge the expense thereof to the above parties of the first and second parts." The charter of the city of Milwaukee contains no provision for the levying of assessments against abutting property for repairs of a pavement or a street. In fact, it specifically provides that the expense of maintaining and keeping in repair the street and the pavement shall be paid out of the ward fund. Therefore, it was illegal to include in a contract for paving any charge for keeping in repair the pavement for a series of years. Manifestly, such a charge has been included here, and in our judgment it is fatal to the validity of the assessment. Such has been the holding of two courts of last resort upon the identical question here presented. Brown v. Jenks, 98 Cal. 10, 32 Pac. 701; Paving Co. v. Leach (Cal.) 34 Pac. 116; Verdin v. City of St. Louis (Mo. Sup.) 27 S. W. 447. To the same effect is People v. Maher, 56 Hun, 81, 9 N. Y. Supp. 94. There is but one decision to the contrary to which we have been referred, and that is the case of City of Schenectady v. Trustees of Union College, 66 Hun, 179, 21 N. Y. Supp. 147, where a contract somewhat similar in terms,

though not so broad and sweeping as the one before us, was held to be a mere guaranty of quality and workmanship. This case was reversed upon another question in the court of appeals. 39 N. E. 67. It is true that such a contract was held valid in Morse v. City of West-Port, 110 Mo. 502, 19 S. W. 831, but it was so held because the city charter expressly authorized assessments upon adjoining lots for repairing streets. Neither upon principle nor authority can such an assessment be supported where, as here, the corporate charter requires the expense of repairing streets to be paid out of general funds. It will not do to say that these agreements to repair are in effect but guaranties of material and workmanship. Such a contention is made here, and an affidavit was introduced showing that the life of such a pavement, if properly laid, was at least 10 years, and that it would require no repairs at all for 5 years. If the agreements to repair were confined to repairs made necessary by defective workmanship or material, the argument would be entitled to serious consideration. But they go further. They cover, in terms, everything that may happen to the pavement, except the cutting though it for the purpose of laying certain pipes. Just how far these agreements might go in case of damage to the pavement from unusual causes, it is not necessary to consider, nor is the question properly here. It is sufficient to say that it is very evident that no one in possession of good business sense will make such a contract without considering and charging for the very extended liability which he assumes of keeping the pavement in repair for five years, and thus the property owner is compelled to pay for that which the law charges upon the ward in general. We shall not strain the language of the contract or of the law for the sake of holding a special assessment of this nature valid. All such assessments are harsh proceedings, at the best, and it is a salutary rule which holds the authorities making them quite strictly to the terms of the law.

But it is argued that this difficulty has been cured by the provisions of chapter 302, Laws 1895. Milwaukee is one of the cities of the state which is operating under a special charter. By chapter 238 of the Laws of 1895, all cities under special charters were divided into four classes, corresponding in population to the classes of cities acting under the general charter. The classes are: (1) All cities having a population of 150,000 or over; (2) all containing 40,000 to 150,000; (3) all containing 10,000 to 40,000; (4) all containing less than 10,000. Under this classification, Milwaukee is the only city in the state of the first class, and there are none of the second class. Chapter 302 aforesaid is an act providing for legalizing special assessments for street improvements, and providing for reassessment of such special taxes in case they are held void for certain specified reasons. The act applies, in terms, only to cities of the first and second classes; so that in fact, at present, it only applies to Milwaukee. It is also retrospective as well as prospective in its nature. It covers any action "now pending or hereafter brought." The third section was evidently intended to cure the difficulty in this case. It reads as follows: "No special assessment or certificate thereof or tax-sale certificate based thereon shall be held to be invalid for the reason that any contract which has been heretofore or may hereafter be let, contains on the part of the contractor a guaranty or any provision to keep the work done under such contract in good order or repair for a limited number of years when such guaranty or provision was inserted therein for the purpose of insuring the proper performance of such work in the first instance. All such provisions in contracts for doing public work, inserted for the purpose aforesaid, are hereby legalized, and all such provisions shall be deemed prima facie to have been inserted for that purpose, unless the time during which the contractor is required to keep the work in good order or repair shall exceed five years." So far as this act is a curative statute for past irregularities,—that is, so far as it purports to legalize or help out contracts or assessments made before its passage,—we think it manifestly unconstitutional, because it is special legislation. One of the rules laid down in Johnson v. City of Milwaukee, supra, with regard to legislation by classification, is that the classification must not be based on existing circumstances only. The class must not be so constituted as to preclude addition to the numbers included within it. It is very evident that so much of this law as attempts to cure past irregularities is, and must be, always confined to the city of Milwaukee, and it can only apply to an existing state of facts. No other city can ever grow into its class for this purpose, any more than if the act had provided, in terms, that it should apply only to Milwaukee. We say nothing as to those provisions of the law which are prospective in their operation, for they are not before us, and other questions will have to be considered, in case their validity shall be questioned in the future. On this general subject, see State v. Herrmann, 75 Mo. 340, where a similar question was under consideration, and the authorities are reviewed. See, also, the authorities cited in the opinion in Johnson v. City of Milwaukee, 88 Wis. 392, 60 N. W. 270.

4. We deem it proper also to consider the question raised under this head, although the foregoing observations will necessarily result in affirmance of the injunctional order. It appears by the papers used on the motion that Grand avenue, in front of plaintiff's premises, was for many years about 158 feet in width for a little more than two blocks. The street existed and was used at that width for about 30 years prior to the year

1883, when the common council of the city passed an ordinance declaring a strip 42 feet in width and about 700 feet long, in the middle of the avenue, a public park, and turned it over to the board of public works to be improved, ornamented, and maintained as other parks in the city. Thereupon this strip was converted into a small park, inclosed with stone curbing, and grassed and ornamented, and has been so maintained ever since. There was left a street on each side 58 feet in width. The charter provides that the expense of paving, to the middle of the street, opposite the public grounds of the city, shall be paid from the ward fund; but in the present case the plaintiff has been charged with the expense of paving the entire street on her side, from her curb to the park curb. It is claimed by the plaintiff that she cannot, in any event, be charged with the cost of paving more than one-half the roadway on her side of the street. With this contention we agree. It is true, the 42-foot strip was never dedicated or conveyed to the city as a park; but the city has chosen to turn it into a park, to all intents and purposes, and it has been devoted to the use of the general public as a park for more than 10 years. Furthermore, the act of 1893, c. 310, which alone makes any assessment for repaving possible, provides only "for all that part of the roadway directly in front of or abutting such property, and lying between the curb line and the center of such roadway of said street." The assessment is only to be made to the center of the roadway of the street in front of the plaintiff's property. We do not think it would be reasonable to construe this language to mean to the center of the park, or to the curb line of the park. Order affirmed.

CONTINENTAL NAT. BANK OF CHICAGO v. McGEOCH et al.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

COMPOSITION WITH CREDITORS — PREFERENCES — CONSIDERATIONS—DISPOSITION OF COLLATERALS — KNOWLEDGE OF PREFERENCE — EVIDENCE — FRAUD—INSTRUCTIONS.

1. In an action for an alleged balance, it appeared that defendants McG. and W. illegally undertook to corner the lard market; that McG. was a partner in the firm through whom the transactions were carried on, but that W. was not; that the deal ruined the firm, and that the receiver for it undertook to effect a settlement; that defendants were personally liable for a part of the indebtedness by their indorsements on the firm's notes, and that, at the receiver's solicitation, they agreed to contribute a certain sum each, on consideration of a release from all creditors; that the receiver thereupon submitted the firm's proposition to pay 50 per cent. of the indebtedness, in full settlement of all unsecured claims, stating that the affairs of the firm were in great confusion, and that unless the compromise were effected, the matter would "only terminate, after long, vexatious, and fruitless litigation"; that all of the creditors accepted the payment, and signed a release in full. *Held*, that the transaction was a valid compromise. Winslow and Pinney, JJ., dissenting.

2. Plaintiff, one of the creditors, cannot avoid the compromise because a certain creditor had been secured in full, where it had knowledge of this fact before it accepted the money and gave a release.

3. The fact that the validity of the claims was questionable, on account of the illegal character of the deal, was a good consideration for such compromise.

4. The fact that defendants McG. and W. agreed to do something which they were not bound to do by the original contract was a good consideration for such compromise.

5. Where plaintiff had disposed of certain collaterals, and applied the proceeds in determining the balance to be compromised, the time and manner of such disposition were included in the settlement, and are binding on defendants.

6. To prove plaintiff bank's knowledge of a preference, a certain issue of a newspaper of general circulation, which its president and cashier were accustomed to take and read, and which contained, on that date, an article concerning such creditor's security in full, is admissible in evidence.

7. The fact that a majority of plaintiff's directors were members of the board of trade, that its cashier was frequently there, and that the security in full of such creditor became publicly and generally known on the board of trade and in the city, are circumstances admissible to show plaintiff's knowledge.

8. It is proper to charge, on the subject of notice of the preference, that the plaintiff was not chargeable with the knowledge of its directors acting individually, or of its officers having nothing to do with the compromise, but that the jury would consider these circumstances as tending to prove plaintiff's knowledge.

9. The fact that defendant W., on the day of the failure, gave certain collaterals on a debt for which he was personally liable, and that that creditor thereafter voluntarily entered into the agreement with the receiver, did not invalidate the compromise.

10. Where, on the issue of a fraudulent preference of a creditor, the verdict and findings cover all the material, controverted, and issuable facts, a party cannot urge, on appeal, certain transactions in evidence from which a preference might have been found, where there was no request for the trial court to submit them to the jury for determination.

Appeal from circuit court, Milwaukee county: D. H. Johnson, Judge.

Action by the Continental National Bank of Chicago against Arthur N. McGeoch, Clara McGeoch, and John W. Flint, executors of the estate of Peter McGeoch, deceased, and Daniel Wells, to recover an alleged balance on promissory notes. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

This action was commenced, June 19, 1888, by the service of the summons and complaint upon Daniel Wells and Peter McGeoch personally, but the other defendants were not served, and did not appear in the case. Peter McGeoch died pending this appeal, and his executors are substituted as defendants in his place. The amended complaint alleged, in effect, that, during the times mentioned, the plaintiff was incorporated and doing a banking business in Chicago; that McGeoch, Everingham & Co. were copartners and brokers at Chicago; that the defendants McGeoch and Wells were copartners, engaged in buying and selling lard and other commodities on their joint account, at Chicago, through the firm of

McGeoch, Everingham & Co., as their brokers and agents,—and then alleged four separate causes of action, in which the plaintiff claims an alleged balance of $25,916.97, due on four promissory notes, made, indorsed, and delivered to the plaintiff, in Chicago, as follows: (1) On note, dated May 10, 1883, with McGeoch, Everingham & Co., as makers, and Wells as indorser, due August 10, 1883, for $150,000, and upon which $149,412.47 had been paid on and prior to August 20, 1883, leaving unpaid thereon $587.53, and reciting therein that certain warehouse receipts for lard were held by the plaintiff as collateral security; (2) on note, dated May 10, 1883, with J. H. Peacock, one of the firm of McGeoch, Everingham & Co., as maker, and Wells and McGeoch, Everingham & Co. as indorsers, due August 10, 1883, for $100,000, and upon which had been paid $89,750.80 on and prior to August 20, 1883, leaving unpaid thereon $10,249.20, with a similar recital; (3) on note, dated June 1, 1883, with the defendant Peter McGeoch as maker, and Wells and McGeoch, Everingham & Co. as indorsers, due August 1, 1883, for $150,000, and upon which had been paid $143,900.86 on and prior to August 20, 1883, leaving unpaid thereon $6,099.14, with a similar recital; (4) on note, dated June 1, 1883, with Wells as maker, and McGeoch, Everingham & Co. as indorsers, due August 1, 1883, for $100,000, and upon which had been paid, on and prior to August 20, 1883, $91,981.09, leaving unpaid thereon $8,981.09, with a similar recital,—and also alleged that said notes were severally given for money borrowed of the plaintiff for the benefit of Wells and McGeoch in their said business in Chicago, and that, after applying all payments, and the avails of all collaterals, there remained due to the plaintiff, on said notes, $25,916.97, with interest from August 20, 1883; and prayed judgment for that amount. The defendants Daniel Wells, Jr., and Peter McGeoch separately answered, to the effect that Wells and McGeoch were accommodation makers or guarantors; that Wells and McGeoch made large purchases of lard, through McGeoch, Everingham & Co. as their agents, and raised money for that purpose by discounting the notes in suit; that McGeoch, Everingham & Co. failed June 16, 1883, and a receiver of their property was then appointed; that the indebtedness of the said McGeoch, Everingham & Co. arose in an illegal attempt to corner the market on lard, contrary to the laws of Illinois; that, at the request of said receiver, Peter McGeoch and Wells respectively elected to waive defenses of illegality, and each to contribute $225,000 to effect a compromise and full settlement, on condition of obtaining full discharge and release from each and all of said notes and all claims of the plaintiff, as well as other claims; that all creditors, knowing all the facts, and that McGeoch and Wells were the firm's principal debtors, accepted such compromise and settlement; that Peter McGeoch and Wells each advanced and paid $225,000 to and through said receiver to obtain such compromise and settlement, and all creditors released Wells and McGeoch, personally, as well as the firm of McGeoch, Everingham & Co.; that the plaintiff elected to treat McGeoch, Everingham & Co. as debtors, knowing that Wells and McGeoch were purchasing their release from the firm; and Wells and McGeoch, relying thereon, contributed to the compromise and settlement the amount of the respective sums stated. Each answer also set up an equitable counterclaim for accounting in respect to lard so held and sold by the plaintiff as collateral. Wells, also, in effect, alleged payment; that the plaintiff was estopped from opening or seting aside said compromise and settlement; that the money was knowingly advanced by the plaintiff on said notes to assist in running an illegal corner. He claims application of the proceeds of the collaterals to the notes signed by him as maker, and that the plaintiff failed to sell the collaterals as requested. McGeoch's answer contained a counterclaim for the wrongful conversion of the lard. The plaintiff replied, and put in issue the several allegations contained in the respective counterclaims.

At the close of the trial the jury returned a special verdict to the effect (1) that the plaintiff, at and before the time of discounting the notes mentioned, did know that the firm of McGeoch, Everingham & Co. were engaged in an attempt to corner the Chicago lard market, (2) but did not then know that the loan of $500,000, evidenced by said notes, was needed and procured by said McGeoch, Everingham & Co. for the purposes of carrying on said undertaking to corner said lard market; (3) that there was no agreement or understanding between the plaintiff and McGeoch, Everingham & Co. that said loan, or any specified part thereof, should be used for the specific purposes of carrying on said corner, and that there is no evidence in the case tending to show such agreement or understanding; (4) that the plaintiff did sign and deliver said composition agreement, upon the understanding and condition that the Union National Bank should sign the same, and that said bank and all creditors should accept 50 cents on the dollar; (5) that the plaintiff, before it accepted the 50 per cent. secured to it by said composition, and before signing the release of August 25, 1883, did know that said Union National Bank had been paid or secured its claim in full by the committee of creditors who circulated said composition for signature; (6) that Peter McGeoch did not, before said composition was signed by William Young & Co., promise to pay that firm in full; (7) that the plaintiff did not dispose of the lard pledged to it as collateral security for the notes in suit in good faith, (8) nor in the exercise of ordinary care and prudence; (9) that the plaintiff did realize and credit upon said notes, on account of said collaterals, a sum

considerably less than could have been realized by disposing of said collaterals in good faith and in the exercise of ordinary care.

Thereupon the court found, as matters of fact, the following, in effect, to wit: The first, second, third, fourth, and fifth findings are sufficiently stated in the opinion. (6) That afterwards the said receiver of said firm called a meeting of all of the creditors of said firm who were members of said Board of Trade, and on July 2, 1883, a meeting of such creditors of said firm was held, and said receiver submitted to such creditors, on behalf of said firm a proposition of settlement in words and figures following, to wit: "Chicago, Ill., July 2nd, 1883. To the Creditors of the Firm of McGeoch, Everingham & Co., Represented upon the Board of Trade of the City of Chicago: We submit the following proposition of compromise, to be received by each creditor in full settlement and liquidation of all unsecured claims, and the deficiencies upon all secured claims after applying the margins and collaterals up as security therefor: Provided, this proposition shall not be binding upon us until each and all of said creditors have signified their acceptance hereof by signing the acceptance hereunder written. 'Proposition: We will pay 50 cents upon the dollar in cash within 10 days from the date of the said acceptance hereof. The amount of each claim to be settled and adjusted by John R. Bensley, receiver: Provided, that if said Bensley and any creditor cannot agree as to the amount of any claim, then, and in every such case, the amount of such claim shall be determined by the board of arbitrators of said Board of Trade in the mode prescribed by the rules of said board. Respectfully submitted, McGeoch, Everingham & Co.' 'We, the undersigned, creditors of the firm of McGeoch, Everingham & Co., in consideration of the prompt settlement above proposed, and to avoid litigation, hereby accept the above settlement as aforesaid' [Signed by the plaintiff July 20, 1883]." Which said contract of compromise was signed by all of said creditors, including said plaintiff. (7) That afterwards, and on August 25, 1883, the plaintiff executed and delivered to said receiver an instrument in writing, in the words and figures as follows, to wit: "No. 183. Chicago, Ill., Aug. 25th, 1883. Peter McGeoch, George S. Everingham, Frank A. Crittenden, John H. Peacock, and William R. Harvey, comprising the firm of McGeoch, Everingham & Co., being in failing circumstances, and unable to pay their debts in full: Now, in consideration thereof, and of the receipt of the sum of money hereinafter named, the undersigned creditors, Continental National Bank of Chicago, hereby acknowledges receipt from them, by the hand of John R. Bensley, receiver in chancery of their estate and effects, of the sum of $25,916.97, as a full compromise and adjustment of the validity, and in final settlement, satisfaction, and discharge, of all claims and demands of the undersigned against said firm and individuals. $25,916.97. John C. Black, Cashier, Creditor." (8) That said receiver paid the creditors of said firm, including the plaintiff, said 50 cents upon the dollar of their respective claims, and procured from all of them, including said plaintiff, a release of the debt of said firm and its individuals, and a dismissal and discontinuance of various suits and various garnishee attachment proceedings which certain of the creditors had brought against said firm and said Wells. (9) That the first above mentioned agreement was circulated, and signatures thereto procured, by a committee of creditors appointed at the aforesaid meeting of the creditors, held July 2, 1883, and that, at the time of and prior to the execution of the aforesaid agreement of composition, and the aforesaid release, the said receiver, Bensley, made no false or fraudulent statements or representations in respect to the assets or liabilities of the financial condition of said firm or of said Wells. The tenth and eleventh findings are substantially the same as the fourth and fifth findings of the jury. (12) That Peter McGeoch did not, at any time between July 2, 1883, and the signing of the composition by William Young & Co., promise to pay said firm of William Young & Co. in full. (13) That the giving by said Wells of a mortgage to the National Bank of America upon his individual property, prior to July 2, 1883, as additional security for his liability upon the indebtedness of McGeoch, Everingham & Co. to said bank, constituted no fraud upon the plaintiff or the other creditors of said firm of McGeoch, Everingham & Co. in the procurement of its and their signatures to either said composition agreement or said contract of release. That neither said McGeoch, Everingham & Co. nor said Wells requested said Bank of North America to sign said composition agreement, but said bank voluntarily signed the same, and received the 50 per cent. provided for in the compromise, from the receiver of said firm, before resorting to or realizing upon the said mortgage, given by said Wells as additional security for the indebtedness of said firm. (14) That no fraud was used in the procurement of the signatures of said plaintiff to said composition agreement, and that there was no fraud in the procurement of the contract of settlement and release dated August 25, 1883. (15) That the plaintiff did not dispose of the lard, pledged to it as collateral security for the notes in suit, in good faith, nor did the bank dispose of said lard in the exercise of ordinary care and prudence. (16) That the plaintiff realized, and credited upon the notes in suit, on account of said collaterals, a sum considerably less than could have been realized, had it disposed of said collaterals in good faith and in the exercise of

ordinary care, and that, if said bank had disposed of said collaterals in good faith, and in the exercise of ordinary care, it would have realized, with what was received from the receiver, more than enough to have paid in full the said indebtedness of McGeoch, Everingham & Co. (17) That the claims set up in the equitable counterclaim of Peter McGeoch and Daniel Wells, respectively, arose out of the transaction set out in the complaint, and are connected with the subject of this action, and that all such claims were by the parties to this action, on August 25, 1883, fully and fairly compromised and adjusted, and that a final settlement and satisfaction thereof was had, and that said defendants are not entitled to recover, upon the said equitable counterclaim, any judgment for money against said plaintiff, and that said compromise and adjustment cannot be avoided in this action. (18) That the creditors of said McGeoch, Everingham & Co., including the plaintiff, knew that said defendant Wells had agreed to furnish $225,000 out of his own funds for the purpose of effecting said compromise with said firm, which sum said Wells did so furnish, and the same was used as a part of the moneys disbursed by said receiver in the payment of 50 per cent. of the indebtedness of said firm, and thereby said plaintiff is estopped from questioning said composition, or disputing its validity; and that the equitable estoppel pleaded by said Wells is well established and sustained by the evidence as to each cause of action set forth in the complaint. (19) That said Wells was not guilty of any fraud, which, it is claimed, invalidated the composition. (20) That the debt upon which this action was brought was fully and fairly compromised and released by virtue of the composition of July 2, 1883, and the contract of release of August 25, 1883, which was signed by said plaintiff.

And, as conclusions of law the court found, in effect: (1) That the composition agreement of July 2, 1883, and the release executed by the plaintiff, August 25, 1883, above set forth, fully released and discharged the plaintiff's entire claim, and that there was no fraud in the making or procurement of either of the same. (2) That the defendants Peter McGeoch and Daniel Wells are not entitled to recover, on the equitable counterclaim set forth in their respective answers, any judgment for money against the plaintiff. (3) That said plaintiff is estopped from questioning the validity of said composition agreement and said contract of release, above set forth, as against said Wells, and that said Wells is entitled to judgment against said plaintiff, upon this defense, dismissing said action as to said Wells. (4) That judgment be entered in favor of the defendants, dismissing the plaintiff's complaint, and for their respective costs of this action, to be taxed. From the judgment entered thereon accordingly, the plaintiff brings this appeal.

Van Dyke & Van Dyke, for appellant. Miller, Noyes & Miller, Wells, Brigham & Upham, and John T. Fish, for respondents.

CASSODAY, C. J. (after stating the facts). For years prior to June 16, 1883, the firm of McGeoch, Everingham & Co. conducted an extensive business as brokers and commission men on the Board of Trade in Chicago, and had a paid-in capital of $150,000, of which the senior member, Peter McGeoch, had contributed one half, and the other four members of the firm, who are named as defendants herein, but none of whom were served with the summons or appeared in this action, contributed the other half. During the time mentioned, Peter McGeoch resided in Milwaukee, and conducted business there on his own account. For some time prior to the lard deal in question, Peter McGeoch and the defendant Wells had jointly conducted wheat and other deals, through the firm of McGeoch, Everingham & Co. as their brokers and commission men, on the Board of Trade in Chicago, and, as a result of such deals, Peter McGeoch and Wells each had a large balance to his personal credit with the firm of McGeoch, Everingham & Co., the amount so to the credit of Wells being upward of $200,000. While things were in such condition, and about February, 1883, Peter McGeoch and Wells conceived the project of creating a corner in the Chicago market on lard, and for that purpose they jointly, through the firm of McGeoch, Everingham & Co., commenced and continued buying up the entire lard product of the Chicago market, and a great deal more, and in doing so entered into numerous contracts for the delivery of lard in June and July, 1883. The extent of such purchases, according to the testimony of McGeoch, exceeded 200,000 tierces, and the liabilities thereby incurred were several millions of dollars. None of such purchases or contracts were made in the name of McGeoch and Wells, but in the name of McGeoch, Everingham & Co., and appeared in their books under an account known as "41"; and all warehouse receipts were taken in the name of McGeoch, Everingham & Co. In making such purchases, McGeoch, Everingham & Co. had borrowed from several banks, including the plaintiff bank, $3,900,000, and had secured the payment thereof to the respective banks by depositing, as collateral security therefor, warehouse receipts so taken by them. The loans so made by that firm from the plaintiff bank, and by it placed to the credit of that firm, aggregated $500,000, and the warehouse receipts so deposited by them with the plaintiff, as collateral security therefor, were for 15,000 tierces of cash lard; but, as indicated in the foregoing statement, each of the four notes held by the plaintiff were indorsed or

signed by Wells and Peter McGeoch, respectively, so as to make them each personally liable to the plaintiff, under the law of Illinois, as makers or guarantors. Unable to borrow more money or longer conduct their business, the firm of McGeoch, Everingham & Co. failed, June 16, 1883.

Prior to such failure, and pending the lard deal, and for the purpose of continuing the same, McGeoch and Wells had borrowed from banks, on their own account, and sent to McGeoch, Everingham & Co., $950,000, of which amount Wells had contributed $675,000, and Peter McGeoch had personally contributed the balance. Thereupon, and on the same day, Henry Botsford, a creditor of McGeoch, Everingham & Co., and one of the directors of the plaintiff bank, commenced a suit in equity in the superior court of Cook county, Ill.; and such proceedings were had therein that one John R. Bensley was appointed a receiver of all the property and assets of that firm. June 18, 1883, Bensley qualified as such receiver, and it appears: That he at once took possession of such property and assets, and the office of McGeogh, Everingham & Co., and at once commenced investigating the affairs of the firm, and continued such investigation about a week, before he could approximately ascertain the probable amount of the property and assets upon which he, as such receiver, could realize. That, after he had so ascertained, and consulted his attorney, he appears to have concluded, of his own volition, to interview the parties, with the view of obtaining a settlement. That, through the intervention of a Chicago member of the firm of McGeoch, Everingham & Co., he obtained an interview with Peter McGeoch and Wells at Milwaukee about June 25, 1883. That such meeting was not solicited by either McGeoch or Wells. That he proposed that McGeoch and Wells should raise half a million dollars, and, if they would do so, he would undertake to clear the wreck, and, if possible, settle with the parties at 50 cents on the dollar. That finally he agreed that, if McGeoch and Wells would promise to raise $450,000 in money, promptly, he would undertake to effect a settlement and procure releases from all the creditors. That neither Wells nor McGeoch submitted any proposition, and that neither authorized him to make any statement on their behalf with respect to their financial condition. That he thereupon returned to Chicago and commenced getting the data for a statement to be made to the creditors. That he caused it to be announced upon the Board of Trade that there would be a meeting of the creditors of McGeoch, Everingham & Co. held in the call board of the Board of Trade on the afternoon of July 2, 1883. That he attended and presided at that meeting. That he read to the meeting a written statement he had previously prepared, to the effect that the affairs of the firm were in great confusion; "that the amount due the trade at the time of the failure was $1,803,384.58, deducting margins surrendered and to be surrendered to the members of the board, $1,194,911.21; * * * that the notes of the firm at the various banking institutions amount to $3,950,000, secured by the deposit of lard as collateral;" that as near as he could estimate, the net proceeds of the lard would be $3,800,000, "leaving a net deficit due the banks of $150,000, which, added to the amount to the members of the board, leaves their unsecured liabilities $1,344,911.21;" that he had not taken the country accounts into consideration, as he assumed that the amount due from the country would provide for the indebtedness to the country; that he had in his possession cash and cash assets aggregating a trifle over $200,000 in value; that he had an interview with McGeoch, his friends, and attorney, at Milwaukee; that he had finally, and after much hesitation on the part of McGeoch's friends, received his promise that, if an entire settlement of the indebtedness of the firm could be made, he would "raise $450,000 in cash immediately upon the acceptation of the compromise"; that that would give him $650,000, or nearly 50 cents on the dollar of the entire unsecured indebtedness; that the firm therewith submitted a proposition to pay 50 per cent. in cash if all the creditors would sign the agreement; that such settlement would involve the necessity of dismissing all suits, attachments, and injunctions, in order to raise the money upon the property, but that the attachments on the real estate need not be released until they were ready to exchange the papers for the money; that he had secured the best proposition possible; that he was fully satisfied that, if the proposition was not accepted promptly, the creditors would never receive anything like the amount thus offered; that no compromise would be entered into that did not involve the acceptance by all the creditors; that Wells did not appear as a partner in the firm, and that his name did not appear upon the books, but it was conceded that he had some undefined interest with McGeoch, personally, in lard through the house; that Wells was reputed to be wealthy, but that he was 75 years old, and had heavy liabilities, then due or about to become due, to which he had pledged nearly all his available property; that he therewith submitted to them "the proposition of McGeoch, Everingham & Co. in the above compromise" for their signature (which proposition is set out in full in the sixth finding of fact in the foregoing statement); that, when all had signed, he would use every possible effort to obtain the money promptly, and make immediate distribution of the same; that, "should the proposition fail of being accepted," it was his "candid judgment that the $450,000 promised" would "never be realized"; and that the matter would "only terminate after long, vexatious, and fruitless litigation." That thereupon Alexander Geddes,

C. D. Hammel, and C. J. Zinger were nominated by persons in the crowd to act as a committee on behalf of the creditors for the purpose of securing the signatures of the creditors of McGeoch, Everingham & Co. That he put the motion, and it was carried, and that committee circulated such proposition of compromise. That the same had been signed by nearly all the creditors of the firm represented on the Board of Trade on and prior to July 16, 1883. That, about that time, McGeoch paid to the receiver $225.000, as promised, and about July 19, 1883, Wells paid the $225,000, as promised, and he and McGeoch, in consideration thereof, received from McGeoch, Everingham & Co. a full release and discharge from any and all liabilities. That, up to that time, the receiver realized from the assets of McGeoch, Everingham & Co. about $300,000. That the plaintiff signed the proposition of compromise July 20, 1883, and appears to have been the last creditor to sign. That, from the time of such failure to the time of signing such compromise, five of the nine directors of the plaintiff bank were members of the Board of Trade, and the plaintiff's cashier was on the Board nearly every day. That the great bulk of the creditors were paid by the receiver, and were given their release and discharge, on or about July 21, 1883. That, July 28, 1883, the plaintiff's board of directors passed a resolution to accept the 50 cents on the dollar, and release the firm of McGeoch, Everingham & Co. That August 25, 1883, the plaintiff sent to the receiver a statement purporting to give the amount it had realized on the sale of the lard held by it as collateral, from which it appeared that there was still due the plaintiff $51,833.94, and thereupon the receiver, in pursuance and in accordance with such proposition of compromise, paid to the plaintiff $25,916.97, and at the same time took and received from the plaintiff the receipt, satisfaction, and discharge set forth in full in the seventh finding of fact contained in the foregoing statement. That said receiver proceedings were thereupon terminated, and the receiver discharged.

Ignoring such settlement, and nearly five years after it had been made, the plaintiff commenced this action to recover the other 50 cents on the dollar of such alleged balance. McGeoch and Wells separately answered, setting up such compromise, satisfaction, and discharge in bar of the action, and also alleged, by way of equitable counterclaim, unnecessary delay and bad faith and want of ordinary care in the disposition of the lard held by the plaintiff as collateral security, and claiming that the notes sued upon were fully paid, and asking for an accounting. Under our statute, the defensive portion of the answer pleading such discharge was deemed controverted by the plaintiff, as upon a direct denial or avoidance, as the case might require. Section 2667; Leslie v. Keepers, 68 Wis. 123, 31 N. W. 486. The result was that, upon the trial, the plaintiff sought to avoid such discharge by claiming that its signature to the compromise and settlement, and to the receipt, satisfaction, and discharge, had been procured by fraud, without alleging any specific acts of fraud. The contention of the respective parties on the trial, as to such frauds, may be inferred from the nine questions submitted to the jury by the special verdict, especially as neither party requested the submission of any additional questions. One of the principal claims of fraud is the paying of the Union National Bank more than 50 cents on the dollar. By the fourth and fifth findings of the jury, it was, in effect, found that the plaintiff so signed on condition that the Union National Bank should sign, and that that bank and all creditors should accept 50 cents on the dollar; but they also found that, before the plaintiff accepted the money and gave the release, it knew that the Union National Bank had been paid or secured in full by the committee named. This finding is challenged, but we all think it is sustained by the evidence.

Error is assigned because the court admitted in evidence a copy of the Chicago Tribune of Sunday, July 27, 1883, giving an account of the payment of the Union National Bank's claim having been secured in full by the committee mentioned giving their personal bond for the same. It is admitted that both the president and cashier of the plaintiff bank were accustomed to take and read the Chicago Tribune at that time, but there is no evidence that either of them read or received that particular Sunday issue. Under the repeated rulings of this court, we must hold that the article was admissible. Young v. Tibbitts, 32 Wis. 79; Gilchrist v. Brande, 58 Wis. 200, 15 N. W. 817. The fact that a majority of the plaintiff's directors were members of the Board of Trade, that its cashier was frequently there, and the fact that such security in full of the Union National Bank became publicly and generally known on the Board of Trade and in the city, were circumstances admissible in evidence. 1 Greenl. Ev. § 138; Lovejoy v. Spafford, 93 U. S. 430. Thus, it is established, as a verity, in the case, that the plaintiff, with full knowledge that payment to the Union National Bank had been secured in full by the committee, accepted the $25,916.97 as a settlement, and executed and delivered the discharge in question, notwithstanding the condition it had exacted when it signed the consent to settle, as indicated. Nor do we think there was any error in charging the jury on the subject of notice, as to such preference, or as to the corner on lard. They were expressly told that the plaintiff was not chargeable with the knowledge of its directors, acting as individuals, nor with the knowledge of the plaintiff's officers having nothing to do with the compromise and settlement. The court merely allowed the jury

to take into consideration the circumstances tending to prove knowledge on the part of the plaintiff, including the matters mentioned.

2. Another specific claim of fraud litigated before the jury was whether William Young & Co. were induced to sign the consent to settle by the promise of Peter McGeoch to pay them in full; but the jury found against the plaintiff by their sixth finding, as indicated, and the court, by its twelfth finding, found, in effect, that no such promise was made.

3. The mere fact that Wells, on the day of the failure, June 16, 1883, gave to the National Bank of America certain collaterals to an indebtedness upon which he was personally liable, and that that bank thereafter voluntarily signed the consent to settle, and settled for 50 cents on the dollar, as found in the thirteenth finding, furnishes no ground for invalidating the settlement and discharge in question.

4. By the ninth, fourteenth, nineteenth, and twentieth findings, the court, among other things, found, in effect, that the receiver, Bensley, made no false or fraudulent statements or representations in respect to the assets or liabilities, or the financial condition of said firm or of said Wells; that no fraud was used in the procurement of the signatures of the plaintiff to the composition agreement; that there was no fraud in the procurement from the plaintiff of the contract of settlement and release, dated August 25, 1883; that Wells was not guilty of any fraud which, it is claimed, invalidated the composition; that the debt upon which this action was brought was fully and fairly compromised and released by the composition of July 2, 1883, and the contract of release of August 25, 1883, signed by the plaintiff. Certainly, as indicated, the statements made by Bensley to the Board of Trade were, in the main, general and not specific, and, from his known limited acquaintance with the affairs of the firm, must have been made and understood as a mere estimate or opinion,—especially as he had premised his statements with observations to the effect that he found the affairs of the firm in great confusion; that, as close as might then be estimated, he found things so and so; that the country accounts were not yet fully ascertained, but were assumed to be so and so; and other expressions. Mosher v. Post, 89 Wis. 602, 62 N. W. 516.

5. Such are all the claims of fraud, bearing upon the validity of the compromise and settlement, submitted to or determined by the trial court or jury. Nevertheless, it is strenuously contended that such compromise and settlement should be declared void, and no bar to this action, by reason of evidence in the case to the effect that, July 19, 1883, Bensley, as receiver, gave a check payable to the order of Flower, Remy & Gregory, attorneys for George C. Eldridge & Co., for $46,671.84, being one-half of the indebtedness due them, and the same was placed to the credit of such attorneys in the First National Bank; that, on the same day, he gave another check payable to the order of Pool, Kent & Co. for $42,653.12, being one-half of the indebtedness due them; that, five or six days afterwards, Bensley, as such receiver, gave a check, payable to George C. Eldridge & Co., or order, for $3,500, and another check, payable to Pool, Kent & Co.. for $3,500; that "the checks, representing $3,500 each, were given to these firms in payment for attorneys' fees, which they claimed to have incurred in the attachment suits that had been commenced, and which they released upon condition"; that he "paid the $3,500 to each firm because" he "thought it was just and equitable, and that they should be recompensed for the expense already incurred, and, in general, to get along with the composition"; that he paid such attorneys' fees on his own judgment, and not by the authority or direction of either Wells or McGeoch. It will be observed that, in submitting the proposition of McGeoch, Everingham & Co. to the Board of Trade, July 2, 1883, Bensley stated: "This will involve the necessity of the dismissal of all suits, attachments, and injunctions, in order that the money can be raised upon the property. The attachments on the real estate will not, necessarily, have to be released until we are ready to exchange the papers for the money," and the written "proposition of compromise" of the firm, so submitted and signed by the creditors, was expressly "in full settlement and liquidation of all unsecured claims, and the deficiencies upon all secured claims, after applying the margins and collaterals up as security therefor." Accordingly, the plaintiff received 100 cents on a dollar of its claims, to the amount of nearly $450,000, by virtue of the land it held as collateral. But it is contended that it does not appear, from competent evidence, that the $3,500 so paid, in each of the two cases mentioned, was received by the attorneys of said firm, respectively, as and for attorneys' fees, or to relieve any of the property of McGeoch, Everingham & Co. from such attachments; but, as indicated, the plaintiff proved that it was paid for that purpose, and there is no evidence to the contrary, nor that George C. Eldridge & Co. or Pool, Kent & Co. received any more than 50 cents on the dollar. Besides, it does affirmatively appear that the attorneys of George C. Eldridge & Co. actually received, and placed to their credit in the bank, the whole amount intended for their client. A month after these transactions, as we have already seen, the plaintiff, with full knowledge that payment had been secured in full to the Union National Bank, accepted payment, and gave the discharge, in accordance with the compromise, and thus, in the most emphatic way, condoned the supposed fraud. The discharge should not be set aside by reason of the payment of such attorney's fees. Cleveland v. Richardson, 132 U. S. 318, 10 Sup. Ct. 100; Bank v. Blake, 142 N. Y. 404, 37 N. E. 519; Way v. Langley, 15 Ohio St. 392.

It is to be remembered that the burden of proving any and all fraudulent preferences was upon the plaintiff; that, if it relied upon those transactions, or either of them, or any other transaction, not named, to establish such preferences, fairness required that it should have apprised the defendants of the facts upon the trial, by at least requesting the court to submit the question of such preference to the jury, especially as the plaintiff's pleadings fail to allege any fraud. For this court, in a complicated case like this, to review every claim of fraudulent preference, though not specifically presented to nor determined by the trial court or jury, would be to inaugurate a new departure in practice, which would not only be embarrassing and misleading to the bench and bar, but tend to defeat the ends of justice. And certainly such practice should not prevail, where, as here, there are general findings of the trial court, covering all similar questions, against the party asking for such review. This court has frequently held that the failure to request the submission of particular questions was a waiver of any objection on the ground of such failure. Schultz v. Railway, 48 Wis. 375, 4 N. W. 399; Hrouska v. Janke, 66 Wis. 252, 28 N. W. 166; Kenyon v. Kenyon, 72 Wis. 234, 39 N. W. 361; Wright v. Mulvaney, 78 Wis. 89, 46 N. W. 1045. There is no pretense that the verdict and findings do not cover all the material, controverted, and issuable facts; but the claim is to the effect that, although the jury and court found there was no fraudulent preference, as to any of the specific transactions determined, yet that there were other transactions from which such preference might have been found, had the same been submitted and determined.

6. We find no evidence in the record that Wells or McGeoch, before or at the time of the settlement and discharge in question, had any knowledge or information that Bensley, or the committee, or anyone, gave or agreed, or promised to give, any more than 50 cents on the dollar on any unsecured indebtedness in favor of creditors represented upon the Board of Trade of the city of Chicago; much less, that they authorized or consented to such preference. But it is vigorously contended, by the able counsel for the plaintiff, that such authority, consent, or knowledge is unnecessary in order to avoid the settlement and discharge. This is put upon the broad ground that the transaction in question was, in legal contemplation, a composition with creditors, pure and simple. If such was the true nature of the transaction, then there is much force in the argument of counsel based upon such assumption. This makes it necessary to consider what is meant by such composition, and the elements entering into the same, and the principle upon which such composition is binding. A composition is defined to be "an agreement, made upon a sufficient consideration, between an insolvent or embarrassed debtor and his creditors, whereby the latter, for the sake of immediate payment, agree to accept a dividend less than the whole amount of their claims, to be distributed pro rata, in discharge and satisfaction of the whole." Black, Law Dict. See 3 Am & Eng. Enc. Law, 385. It is well settled, as stated by counsel for the plaintiff, that the payment of a part of an undisputed, liquidated debt does not discharge the debt altogether, even where it is expressly received in satisfaction of it. Otto v. Klauber, 23 Wis. 471; Lathrop v. Knapp, 27 Wis. 225; Davenport v. Society, 33 Wis. 391; Lerdall v. Insurance Co., 51 Wis. 429, 8 N. W. 280. The reason for this rule is that the payment of a part of an admitted debt, which the debtor is bound to pay, is no consideration for relinquishing the balance of the debt, nor can it be a satisfaction to such creditor for the whole debt. Id.; Bish. Insolv. p. 589, § 480, and cases there cited. It follows that there can be no binding composition of such a debt by such a debtor and a single creditor. Such is declared to be the general rule by the author last cited. "An apparent exception to the general rule of law stated," says the same learned author, "is found in the case of a composition by a debtor with several or all of his creditors, by which they agree to accept less than their entire demand. Such an agreement, if entered into with the debtor by a number of creditors, each acting on the faith of the engagement of the others, will be binding upon them; for each, in that case, has the undertakings of the rest as a consideration for his own undertaking." Bish. Insolv. p. 591, § 481. To the same effect, 3 Am. & Eng. Enc. Law, 386. This proposition is abundantly supported by cases there cited. Such a composition in such a case may be binding, even though resting in parol. Mellen v. Goldsmith, 47 Wis. 573, 3 N. W. 592; Good v. Cheeseman, 2 Barn. & Adol. 328; Boyd v. Hind, 1 Hurl. & N. 947. These authorities are to the effect that the only consideration to make such a composition, in such a case, binding upon each creditor, is the undertaking of the other compounding creditors to give up a part of their claim. This court has frequently recognized the same principle. Lathrop v. Knapp, supra; Davenport v. Society, supra; Mellen v. Goldsmith, 47 Wis. 573, 3 N. W. 592. Since, in such composition, the only beneficial consideration to any creditor to thus agree to give up and discharge a portion of his claim, is a corresponding agreement on the part of the other creditors to give up and discharge a like proportion of their respective claims, it follows that any secret agreement by the debtor to pay some of such creditors more than others is a fraud upon such others, which enters into and forms a part of the only consideration upon which such composition is based, and, hence, necessarily avoids the same. But see Bank v. Blake, 142 N. Y. 404, 37 N. E. 519; Way v. Langley, 15 Ohio St. 392; Cleveland v. Richardson, 132 U. S. 318, 10 Sup. Ct. 100. While it is true, as indicated, that a debtor cannot, for want of consideration, make a binding composition with a single creditor of an undisputed and liquidated debt, yet it does not follow that such composi-

tion must necessarily be made with all the creditors. "An agreement, entered into between a debtor and any number of his creditors less than the whole number, to take a composition for their debts, is binding upon those who enter into the agreement; but such an agreement, entered into between a debtor and a single creditor, is void for want of consideration." 3 Am. & Eng. Enc. Law, 389, and cases there cited. "It seems to be fully settled by the authorities," says Mr. Bishop, "that a composition agreement between a debtor and a portion of his creditors is valid and binding. The consideration of the relinquishment of a part of their claim by the others is sufficient to make the promise and discharge of each of those who join obligatory." Bish. Insolv. p. 594, § 484, and cases there cited. The agreement in question, therefore, even if we assume it to be nothing more than a composition, was not void merely because it was not signed by all the creditors. The proposition was only addressed, "To the Creditors of the Firm of McGeoch, Everingham & Co., Represented upon the Board of Trade of the City of Chicago," and it only purports to be an agreement between such of said creditors as were unsecured.

7. Before determining the precise nature of the agreement, it may be well to consider what additional fact or consideration is essential to convert what would otherwise be a mere composition, as indicated, into a compromise, settlement, or accord and satisfaction. These terms are well understood by the profession. A compromise is defined to be: "A settlement of differences by mutual concessions." Cent. Dict. "A mutual yielding of opposing claims; the surrender of some right or claimed right in consideration of a like surrender of some counterclaim." And. Law Dict. The dispute or opposing claims may arise from some uncertainty in regard to the facts or the law and the facts together. Black, Law Dict. A settlement may be made in the same way; and, even where there is no dispute or controversy, as by accounting together, and striking a balance, or agreeing upon the amount to be paid upon an unliquidated claim. Id. "Accord and satisfaction is the substitution of another agreement between the parties in satisfaction of the former one, and an execution of the latter agreement," and "forms a complete bar to any further action on the original claim." 1 Am. & Eng. Enc. Law, 94. A settlement by the parties of their mutual accounts or dealings is conclusive, unless impeached for mutual mistake or the fraud of one of the parties; and proof of such mistake or fraud must be clear and convincing. Martin v. Beckwith, 4 Wis. 219; Wilson v. Runkel, 38 Wis. 532; Klauber v. Wright, 52 Wis. 313, 8 N. W. 893; Hoyt v. McLaughlin, 52 Wis. 280, 8 N. W. 889; Case v. Fish, 58 Wis. 108, 15 N. Y. 808; Hawley v. Harran, 79 Wis. 381, 48 N. W. 676. "An adjustment and compromise of a bona fide controversy as to matters which are fairly the subject of debate between the parties at the time of such compromise, each party acting with full knowledge of the facts, and no element of fraud, or of serious or injurious mistake, intervening, will always be upheld by the courts." Kercheval v. Doty, 51 Wis. 476; Van Trott v. Wiese, 36 Wis. 439; Zimmer v. Becker, 66 Wis. 527, 29 N. W. 228; Woodford v. Marshall, 72 Wis. 132, 39 N. W. 376; Hennessy v. Bacon, 137 U. S. 78, 11 Sup. Ct. 17. In the first of the cases here cited, Dixon, C. J., on page 487, quotes approvingly from standard authors, to the effect that a compromise of a doubtful right will not be opened or rescinded, even when unequal or harsh in its operation, nor where the only consideration for the relinquishment of a valid claim on the one side is the abandonment of an invalid claim on the other side; that "if it were necessary, in order to sustain an adjustment of conflicting claims, to determine their relative validity and value, no compromise would be possible, and the uncertainty, delay, and scandal would be incurred which such arrangements are usually designed to avoid"; that "compromises are to be favored, irrespective of the nature of the controversy compromised; and that they cannot be set aside, because the event shows all the gain to have been on one side and all the sacrifice on the other, if the parties have acted in good faith and with a belief of the actual existence of the rights which they have respectively waived or abandoned. Hence, when a compromise has been fairly effected, its validity will be independent of the merits of the controversy on which it is founded, and it cannot be reopened for the purpose or with the effect of reviving the dispute which it was meant to terminate." A compromise of a doubtful claim is a good consideration for a promise to pay money, and it is no answer to an action brought upon such promise to show that the claim was invalid. Griswold v. Wright, 61 Wis. 197, 21 N. W. 44, and cases there cited; Hewett v. Currier, 63 Wis. 394, 23 N. W. 884; Saxton v. McNair, 71 Wis. 459, 37 N. W. 439; Hennessy v. Bacon, 137 U. S. 78, 11 Sup. Ct. 17. "The payment of a less sum than the demand is a satisfaction when the debt is unliquidated." Bish. Insolv. p. 590, § 480, and numerous cases there cited. "An agreement by a creditor, with a third person, to accept from him less than the demand against the debtor, in satisfaction of it, is valid, and may be enforced," and "so the acceptance of a note of a third person for a less sum than the debt due, in full payment, is a bar to an action to recover any portion of the debt beyond the sum secured by the note." Id. See, also, Brooks v. White, 2 Metc. (Mass.) 283; Guild v. Butler, 127 Mass. 386; Clark v. Abbott, 53 Minn. 88, 55 N. W. 542. It may be said, in a general way, that, where there is some new or independent consideration, or the creditor receives some additional benefit,

or legal possibility of benefit or advantage, to which he would not have been entitled except for the new agreement, then the acceptance of a lesser sum in full payment of an admitted, liquidated debt, will operate as an accord and satisfaction; and hence, in the absence of fraud or mutual mistake, the same is conclusive upon the parties: Bish. Insolv. p. 591, § 480: Jaffray v. Davis, 124 N. Y. 164, 26 N. E. 351; Allison v. Abendroth, 108 N. Y. 472, 15 N. E. 606. In this last case, Andrews, J., in effect, said that, when the debtor enters into a new agreement with the creditor to do something which he was not bound to do by the original contract, the new agreement is a good accord and satisfaction, if so agreed; and, hence, that the acceptance of the sole liability of one of two joint debtors or copartners in satisfaction of the joint or partnership debt is binding upon the parties. So it seems that, where the mode or time of part payment is different than that provided for in the original contract, whereby a new benefit is or may be conferred, or a burden imposed, a new consideration arises out of the transaction, which gives validity to the agreement of the creditor. Rose v. Hall, 26 Conn. 392; Jaffray v. Davis, 124 N. Y. 169, 26 N. E. 351; Schweider v. Lang, 29 Minn. 254, 13 N. W. 33; Boyd v. Moats, 75 Iowa. 151, 39 N. W. 237; Jaffray v. Crane, 50 Wis. 349, 7 N. W. 300.

8. The case at bar is complicated, but we are constrained to hold that the transaction in question was something more than a mere composition among creditors, and that it was, in legal effect, a compromise, settlement, and accord and satisfaction, within the principles stated, especially so far as Wells and Peter McGeoch are concerned. As already indicated, the immense indebtedness of McGeoch, Everingham & Co. was largely incurred by the attempt of Wells and Peter McGeoch, through them, to corner the Chicago market in lard, and only failed for want of funds. This is, in effect, found by the trial court. The jury found that, at the time of discounting the notes in suit, the plaintiff knew that McGeoch, Everingham & Co. were so engaged in attempting to corner the Chicago lard market, but did not know that the loan made was needed and procured by them for that purpose. The illegality of such attempt to corner the market seems to be conceded, and in the records of this court in one case was fully demonstrated. Wells v. McGeoch, 71 Wis. 196, 35 N. W. 769. Such want of knowledge on the part of the plaintiff seems to have been regarded as essential to bar the defense of illegality upon the merits. To support the compromise, settlement, or accord and satisfaction,—whatever it may be called,- it was only essential that there was ground for claiming in good faith that the transaction was illegal; not that it was in fact illegal. The proposition was submitted to the creditors as a compromise and settlement, and the creditors were at the same time told by Bensley that, if they failed to accept of the proposition of Wells and McGeoch to compromise and settle upon their contributing $450,000, then, in his judgment, they would never realize as much, and that the matter would "only terminate after long, vexatious, and fruitless litigation." Such statement manifestly referred to the validity of the claims of the respective creditors so represented on the Board of Trade. Of course, such creditors must have had some knowledge or belief as to the validity of their respective claims, and hence the advisability of agreeing to such compromise. Since the validity of such claims was, at least, questionable, it constituted a good consideration for the accord and satisfaction or settlement. There are other phases of this case which, of themselves, constitute such consideration. The compromise agreed to contemplated the doing something by Wells and Peter McGeoch which they were not bound to do by the original contract, and hence the new agreement, when executed, constituted a binding accord and satisfaction, under the authorities cited. True, McGeoch was a member of the firm of McGeoch, Everingham & Co., the ostensible principal debtors as to all liabilities covered by the compromise; but there is no pretense that Wells was a member of that firm, or that he had any connection with them other than as indicated. He, manifestly, occupied the position of a third party to the transaction, and so did McGeoch, in the sense that a member of a firm does when he uses his own money or property by way of accord and satisfaction of his firm's debts. True, Wells and McGeoch were, in one form or another, personally liable to the amount of several hundred thousand dollars (including the plaintiff's claims) of the indebtedness of McGeoch, Everingham & Co. covered by the compromise; but it is also true that such compromise covered other debts of that firm to the amount of nearly $400,000 for which McGeoch was only liable as a member of that firm, and for which Wells was not liable in any way. Thus, it appears that more than one-quarter of the $450,000 which Wells and Peter McGeoch personally contributed, in equal amounts, to effect that compromise was intended to be used, and was used, in settling claims for which McGeoch was only liable as a member of the firm of McGeoch, Everingham & Co. and for which Wells was not liable at all. Certainly, a compromise thus induced and secured should not be regarded void as against Wells and Peter McGeoch, who furnished most of the money to effect the same, and in the absence of any fraud or deceit on the part of either of them, and especially in a suit commenced nearly five years after the compromise.

9. The written proposition, acceptance, and discharge must be taken together in considering the true nature of the transaction. The proposition was for a "compromise, to be received by each creditor in full settlement and

liquidation of all unsecured claims," owned by those represented upon the Board of Trade in Chicago. The amount of each claim was to be "settled and adjusted" by the receiver or arbitrators. The acceptance in writing of such proposition was on the same paper, and immediately below the same, and was signed by the plaintiff and other creditors, and recited that they, as "creditors of the firm of McGeoch, Everingham & Co., in consideration of the prompt settlement above proposed, and to avoid litigation, hereby [thereby] accept the above settlement as aforesaid." The discharge signed by the plaintiff acknowledges the receipt of $25,916.97 "as a full compromise and adjustment of the validity, and in final settlement, satisfaction, and discharge, of all claims and demands of the undersigned against said firm and individuals." These same writings have once been construed by this court in harmony with the construction now put upon them. Ball v. McGeoch, 81 Wis. 172, 173, 51 N. W. 443. We must hold that they constitute something more than a mere agreement among creditors to accept 50 per cent. of their respective, admitted, and liquidated claims, and that they are just what they purport to be; and upon this record they must be regarded as conclusive evidence of a compromise, settlement, and accord and satisfaction.

10. There is another feature of this case calling for brief consideration. The plaintiff disposed of the land held by it as collateral, and stated to the receiver that the net proceeds thereof were $448,166.06. The compromise and settlement were for the balance, after applying such net proceeds. The jury found that the plaintiff did not dispose of the land in good faith, nor in the exercise of ordinary care, and that, in consequence thereof, considerably less was realized upon such collaterals; and the court found that, if the plaintiff had disposed of the land in good faith and in the exercise of ordinary care, it would have realized enough to have fully paid all of its claims. Whatever may be the merits or demerits of such findings, we are clearly of the opinion that the time and manner of disposing of such collaterals and the amount of the net proceeds realized thereon were covered by and included in the settlement, and the same is binding upon the defendants. The judgment of the circuit court is affirmed.

WINSLOW and PINNEY, JJ., dissent.

EVERETT v. GORES.

(Supreme Court of Wisconsin. March 10, 1896.)

CUTTING TIMBER — DAMAGES — INTEREST — CORRECTION OF APPELLATE DECISION — MANDATE ON APPEAL — CONSTRUCTION.

1. Under Sanb. & B. Ann. St. § 4269, allowing plaintiff to recover the highest market value of the manufactured product of timber wrongfully cut from his land, unless defendant files an affidavit that the cutting was done by mistake, it is error to allow interest on such value. Smith v. Morgan, 41 N. W. 532, 73 Wis. 375, followed.

2. Such rule was not intended to be changed by the former opinion in this case (62 N. W. 82, 89 Wis. 421); the words "with interest" being inserted inadvertently.

3. An erroneous decision of the supreme court cannot be corrected after the term at which it was rendered, but must stand as the law of the case.

4. Where the judgment in an action for the wrongful cutting of timber was for a certain sum, "with interest from the time of the cutting," a mandate on appeal, which directs that judgment be entered for a larger sum "with interest," must be understood to mean interest from the same date as allowed by the trial court.

Appeal from Winnebago county court; C. D. Cleveland, Judge.

Action by J. B. Everett against John B. Gores for the wrongful cutting of timber. Plaintiff appealed from the judgment, and the cause was remanded (62 N. W. 82, 89 Wis. 421), with directions to enter judgment for plaintiff as indicated in the opinion; and from the judgment so entered defendant appeals. Affirmed.

John W. Hume, for appellant. B. E. Van Keuren, for respondent.

WINSLOW, J. This was an action for the wrongful cutting of pine timber. It was tried, and the respondent recovered judgment for the stumpage value thereof, viz. $3 per 1,000 feet, with interest from the time of the cutting. From this judgment the present respondent appealed to this court, and the case will be found reported in 89 Wis. 421, 62 N. W. 82. It was there held that, because the defendant had not filed an affidavit that the cutting was done by mistake, as provided by section 4269, Sanb. & B. Ann. St., the judgment should have been for the highest market value of the manufactured product of the timber cut, which had been found by the court to be $10 per 1,000. The opinion then proceeds: "The claim for the largest amount found by the court, with interest, should have been allowed." The case was remanded to the trial court, with directions to enter judgment in favor of the plaintiff as indicated in the opinion. The case having been remitted, the trial court entered judgment for $10 per 1,000, and interest from the time of the cutting. From this judgment the defendant has now appealed, claiming that no interest should have been allowed, and citing Smith v. Morgan, 73 Wis. 375, 41 N. W. 532. When this case was here upon the former appeal, it was not intended to change the rule laid down in Smith v. Morgan as to the recovery of interest. Nor is it now our intention to do so. The words "with interest" were inadvertently inserted in the opinion. But that decision was rendered at the last term of this court, and it cannot be corrected after that term has passed. Though erroneous, it must stand as the law of this case. The only question before us on this appeal is whether the judgment is in accordance

with the mandate on that appeal. Unquestionably it is. The first judgment was for a certain sum, "with interest from the time of the cutting." This was reversed, and the court was directed to enter judgment for a larger sum, "with interest." The only reasonable construction which can be placed on the expression "with interest" under such circumstances is that interest is to be allowed from the same date as allowed by the trial court in the original judgment. This is the judgment rendered, and it must be affirmed. Judgment affirmed.

VAN BLARCOM v. ISAAC et al.

(Supreme Court of Wisconsin. March 10, 1896.)

JUDGMENT—ACTION TO SET ASIDE CONVEYANCE—PERSONAL JUDGMENT.

In an action by a receiver, appointed in proceedings supplemental to execution, against the judgment defendant and his grantee, to set aside a conveyance as fraudulent, the court has no power to render a personal judgment against the defendants.

Appeal from circuit court, Fond du Lac county; N. S. Gilson, Judge.

Action by P. G. Van Blarcom, as receiver, against F. J. Isaac and Joseph Isaac. Judgment for plaintiff, and defendants appeal. Modified.

De W. C. Priest, for appellants. Phelps & Watson, for respondent.

CASSODAY, C. J. It appears from the record that July 26, 1893, the Columbian Publishing Company recovered judgment against the defendant F. J. Isaac for $32.98; that a transcript thereof was filed and docketed in the circuit court July 31, 1893; that execution was issued thereon, and returned wholly unsatisfied; that supplementary proceedings were thereupon had, and the plaintiff duly appointed a receiver, and qualified as such; that the plaintiff, as such receiver, thereupon commenced this action to set aside a conveyance of the land described, from the defendant F. J. Isaac, to his son, the defendant Joseph Isaac, made two days after the commencement of the action before the justice, on the ground that such conveyance was made without consideration, and to defraud the creditors of the said F. J. Isaac; that, upon issue being joined and trial had, the court found, in effect, the facts stated, and also that such conveyance was without any valuable or adequate consideration, and made for the purpose of defrauding the creditors, and especially the Columbian Publishing Company; that Joseph took the deed with full knowledge of the facts stated; that the property conveyed was not exempt from execution; that all the allegations of the complaint were true. And, as conclusions of law, the court found, in effect, that the plaintiff was entitled to judgment against the defendants for a sum not named; and that the deed from F. J. Isaac to Joseph Isaac be, and the same was thereby, set aside as to the plaintiff, as such receiver; and that the judgment of the Columbian Company was thereby made a lien upon said premises therein described. From a judgment entered thereon accordingly, the defendants bring this appeal.

We are constrained to hold that the findings of fact are supported by the evidence. The only error in the judgment is that it contains a personal judgment against both defendants for the amount of the judgment recovered before the justice, together with the costs thereon. For that error, that portion of the judgment against the defendants personally is reversed, and the balance thereof is affirmed. No costs are allowed to either party on this appeal, except the plaintiff must pay the fees of the clerk of this court.

BARNUM v. STATE.

(Supreme Court of Wisconsin. March 10, 1896.)

LIBEL—INDICTMENT.

An indictment for libel, alleging that defendant did "publish, and did cause to be published in a certain newspaper called Torch of Liberty in a certain part of which newspaper so published as aforesaid there were and are contained the false, scandalous, and malicious libel," etc., when attacked after verdict, will be *held* to sufficiently allege the publication of the libel.

Error to circuit court, Richland county; Robert G. Siebecker, Judge

Mark H. Barnum was convicted of a crime, and brings error. Affirmed

The defendant was convicted of the publication of a criminal libel, and brings error. The contention is now made that the information is insufficient to sustain the conviction, because it does not charge a publication of anything. That part of the information necessary to be considered upon this contention reads as follows: "On the 8th day of March, A. D. 1894, in the city of Richland Center, in said county of Richland and state of Wisconsin, the said Mark H. Barnum did then and there unlawfully and maliciously publish, and did cause and procure to be published in a certain newspaper called Torch of Liberty in a certain part of which newspaper so published as aforesaid there were and are contained the false, scandalous, and malicious libel of and concerning the said E. M., which said false, scandalous, and malicious libel is in the words and figures following, to wit: [Here follows the libel, in words and figures at length.]"

L. H. Bancroft, for plaintiff in error. J. L. Erdalf, Asst. Atty. Gen., for the State.

WINSLOW, J. (after stating the facts). The objection to the sufficiency of the information was made for the first time after verdict. It is too late to make an objection of this nature after verdict, if the difficulty could have been obviated by amendment had the objection been made before trial. Rev.

St. § 4706; State v. Whitton, 72 Wis. 18, 38 N. W. 331; Sires v. State, 73 Wis. 251, 41 N. W. 81. The difficulty here consists in an apparent lack of an object to the verb "publish." It is very evident that the pleader intended to charge that the defendant published the libel which is set out, but, by an unfortunate arrangement of words, under strict rules of grammatical construction, it does not seem to be charged that he published anything. There are no punctuation marks in this part of the sentence. It is quite evident that, if one phrase of the sentence could be read parenthetically, or rejected as surplusage, there would be a perfectly good allegation of publication. The phrase referred to is, "In a certain part of which newspaper so published as aforesaid there were and are contained." We think, had the objection been made before trial, the court would have been entirely justified in ordering an amendment of the information by placing this part of the sentence in parenthesis, or dashes, or other marks which would clearly indicate its parenthetical character, and thus make sense of that which was obscure. Many cases have held that words, and even sentences, which obstruct the sense in an information, may be rejected, if thereby it is made sensible. Rex v. Morris, 1 Leach, 109; Com. v. Randall, 4 Gray, 36; Bish. New Cr. Proc. § 481, and cases cited. It is not necessary to reject anything in this case. It is only necessary to read the clause in question parenthetically, and the meaning is perfect. Doubtless, this was the view which the trial court took of the matter, and we entirely approve it. There are no other questions raised which require discussion. Judgment affirmed.

REGIER v. SHRECK et al.

(Supreme Court of Nebraska. March 18, 1896.)

APPEAL—AFFIRMANCE ON CONDITION—EVIDENCE—BEST AND SECONDARY—TRIAL PRACTICE—INSTRUCTIONS.

1. Where the only reversible error in the record is that the amount of the recovery is excessive, this court will affirm the judgment upon the excess being remitted, if the evidence will support the remainder of the finding.

2. The law requires the production of the best evidence obtainable; and, if the primary evidence is lost, then secondary evidence satisfies the rule.

3. Where the files of a case have been lost (such as papers in an attachment proceeding), that such papers existed, and their contents, may be proved by parol; the proper foundation having been laid for the introduction of secondary evidence.

4. The practice of introducing in evidence, in a case on trial, the papers and files belonging to another case, or the original records of an office, is not to be commended. If such files or records are needed as evidence, certified copies should be procured for that purpose.

5. Certain instructions of the trial court set out in the opinion, and approved.

(Syllabus by the Court.)

Error to district court, York county; Bates, Judge.

Replevin by John Regier against George W. Shreck and another. There was a judgment for defendants, and plaintiff brings error. Affirmed on condition.

George B. France, for plaintiff in error. Harlan & Harlan and C. P. Halligan, for defendants in error.

RAGAN, C. This is an action in replevin, brought to the district court of York county, by John Regier against George W. Shreck and James Powers, the sheriff and a constable of said county. Shreck and Powers had a verdict and judgment, and Regier brings the case here for review.

1. The first assignment of error is that the judgment is excessive. The jury found the value of the interest of the defendants in error in the property to be $975. The court ordered a remittitur of $100, and rendered judgment against the plaintiff in error for $875. The interest of the defendants in error in the property arose from certain executions and orders of attachment which they had levied upon it at the suits of certain creditors of one Gerhard Regier, of whom John Regier claimed to have purchased the property. An examination of the record leads us to the conclusion that the amount of the liens which the defendants in error had against this property at the time the judgment was rendered was $833 only, and that the judgment is $42 too large. Counsel for the plaintiff in error insists that this error alone should work an absolute reversal of the judgment; but the doctrine and practice of this court are contrary to the contention of counsel. See Railroad Co. v. Finlayson, 16 Neb. 578, 20 N. W. 860; Tea Co. v. Brubaker, 26 Neb. 409, 42 N. W. 399; Meharry v. Halligan, 29 Neb. 565, 45 N. W. 927; Railroad Co. v. Brady, 39 Neb. 27, 57 N. W. 767; City of Friend v. Ingersoll, 39 Neb. 717, 58 N. W. 281; St. John v. Swanback, 39 Neb. 841, 58 N. W. 288; Railroad Co. v. Ryburn, 40 Neb. 87, 58 N. W. 541; Railroad Co. v. Leslie, 41 Neb. 159, 59 N. W. 559; Gordon v. Little, 41 Neb. 250, 59 N. W. 783; Water Power Co. v. Wildman, 45 Neb. 663, 63 N. W. 947; Railroad Co. v. Archer, 46 Neb. 907, 65 N. W. 1043. In all of these cases the judgments were affirmed upon condition that the defendants in error file remittiturs. These are not all the cases in which this practice has been followed, but they are sufficient to show what the practice of the court is; and they establish the rule that, where the only reversible error in a record is that the amount of the recovery is excessive, this court will affirm the judgment upon the excess being remitted, if the evidence will support the remainder of the finding.

2. The second assignment of error is in the following language: "The court erred in admitting in evidence the several judgments recovered against Gerhard Regier before Justice Fay." At least some of the judgments intro

duced in evidence were properly admitted, and, as the assignment is that the court erred in admitting all the judgments, the assignment, without further examination, will be overruled.

3. The third assignment of error is in the following language: "The court erred in admitting in evidence before the jury the testimony of the witness Halligan, in reference to the affidavits, orders of attachment, and attachment proceedings had before Justice Fay." As already stated, the defendants in error had seized the property replevied on certain executions and orders of attachment against Gerhard Regier. It appears, also, that this case was twice tried in the district court of York county; and, on the second trial, the various orders of attachment issued by the justice, and the other papers in the attachment proceedings, could not be found; and the court, after the proper foundation was laid, permitted the attorney who prepared the attachment papers to testify as to their contents. We do not think the court erred in doing this. The law only requires the production of the best evidence obtainable; and, if the primary evidence in a case is lost, then secondary evidence satisfied the rule. In Keller v. Amos, 31 Neb. 438, 48 N. W. 59, it was held: "Where papers in a case have been lost, as the license to sell real estate, proof that such license or other papers actually existed at the time of the sale may be shown by parol or other secondary evidence." The practice often indulged in of introducing in evidence in a case on trial the papers and files belonging to another case, or the original records from an office, is not to be commended. The records of a public office belong in that office, and should never be taken therefrom except in case of emergency. If parties desire to introduce in evidence the record of a mortgage or a deed, they should procure from the officer having the custody of the record a certified copy of the instrument which they wish to introduce; and, if parties desire to introduce in evidence an order of attachment or any other process or pleading belonging to another case, they should not use the original files, but certified copies.

4. The fourth assignment of error is that the verdict is not sustained by sufficient evidence. Without quoting the evidence or any part of it, we have no hesitancy in saying that it supports the verdict.

5. The fifth assignment of error is "errors of law occurring at the trial, and duly excepted to." This assignment is sufficient, in a motion for a new trial, to challenge the attention of the trial court to any error it may have committed in the admission or rejection of evidence, but it is too indefinite in a petition in error to enable the supreme court to review anything.

6. The sixth assignment of error is that the court erred in giving instruction No. 3, on motion of the defendants in error. The instruction is as follows: "To constitute a bona fide purchaser, such purchaser must have parted with something that is valuable upon the faith of his purchase, before he had knowledge or notice of any prior right or equity." This is the precise language of this court in Gregory v. Whedon, 8 Neb. 373, 1 N. W. 309; and the instruction is also supported by the decision of this court in Savage v. Hazard, 11 Neb. 323, 9 N. W. 83. The instruction was correct.

7. The seventh assignment relates to an instruction given by the court in the following language: "You are further instructed that if you find from all the circumstances and facts, taken together, that Gerhard Regier executed and delivered a bill of sale of the property in question to the plaintiff, for the purpose of and with the intent of hindering, delaying, and defrauding the creditors of the said Gerhard Regier; and if you further find that the plaintiff had knowledge or notice of such fraudulent intent or design on the part of the said Gerhard Regier, or had knowledge of such facts or circumstances as would have aroused the suspicions, and put an ordinary prudent man upon inquiry, which inquiry, if pursued, would have led to a knowledge or notice of such fraudulent intent on the part of the said Gerhard Regier, then your verdict should be for the defendants, even though you should find that the plaintiff paid a full, adequate consideration for said property." Under the evidence in this case, we think this instruction was proper.

8. The eighth assignment of error relates to instruction No. 10, given by the court upon its own motion. The substance of this instruction was that, if the jury should find for the defendants in error, the measure of their damages would be the aggregate amounts due on the several executions and orders of attachment under which they held possession of the property, not to exceed, however, the value of the property. This was correct. The defendants in error will have leave to remit $42 from the judgment rendered, as of the date of the judgment, within 40 days from this date; and, if they do so, the judgment of the district court will be affirmed; otherwise, it will stand reversed. Judgment accordingly.

STATE BANK OF LUSHTON v. O. S. KELLEY CO.

(Supreme Court of Nebraska. March 18, 1896.)

PARTNERSHIP—WHEN EXISTS—CHATTEL MORTGAGE—BONA FIDE MORTGAGEE.

1. Evidence that two farmers, purchasing a threshing machine, paid for the same with their joint and several notes, secured by a chattel mortgage on the machine purchased, and jointly took possession of and used the machine in threshing grain for others, will not support a finding that the threshing machine was partnership property, nor that a copartnership relation existed between the farmers. Such evidence warrants, rather, the conclusion that the farmers were joint owners, or tenants in common, of the machine.

2. In such case the machine company neg-

lected to file its mortgage, or a copy thereof, in the county where the farmers resided. Subsequently one of the farmers mortgaged the machine to a bank to secure a pre-existing debt which he owed it. The bank had no knowledge of the mortgage of the machine company, took possession of the machine under its chattel mortgage, and the machine company replevied it. *Held*, (1) that the mortgage made by the farmer invested the bank with a lien on whatever interest he had in the machine; (2) that the bank was a mortgagee in good faith, within the meaning of section 14, c. 32, Comp. St.

3. A mortgagee in good faith, within the meaning of section 14, c. 32, Comp. St., is one who takes his mortgage to secure a debt actually and justly owing to him, without notice, actual or constructive, of other existing claims against the mortgaged property.

(Syllabus by the Court.)

Error to district court, York county; Bates, Judge.

Replevin by the O. S. Kelley Company against the State Bank of Lushton. There was a judgment for plaintiff, and defendant brings error. Reversed.

George B. France, for plaintiff in error. Sedgwick & Power, for defendant in error.

RAGAN, C. On the 8th day of May, 1891, Peter Peters and John Peters, by their order or contract in writing, purchased a threshing machine of the O. S. Kelley Company. The machine was to be delivered to them not later than the 20th of July of that year, and they were to pay for the same $585. Part of this payment was to be made in cash, on delivery of the machine, and the remainder to be evidenced by their notes secured by a chattel mortgage on the machine. The machine was delivered on the 23d of July, cash payment made, and John and Peter executed their joint and several promissory notes to the Kelley Company for the remainder of the purchase price of the machine, and at the same time executed to the Kelley Company a chattel mortgage on the machine to secure the payment of their notes. By mistake this mortgage was filed in the office of the county clerk of York county, although the mortgagors resided in Hamilton county. On the 13th day of October, 1801, Peter Peters mortgaged the threshing machine to the State Bank of Lushton to secure a debt which he then, and had for some time, owed the bank. The bank subsequently took possession of the threshing machine under its chattel mortgage, and was proceeding to foreclose the same when the Kelley Company, by this action, replevied the threshing machine from the bank. The action was tried to a jury in the district court of York county, a verdict and judgment rendered for the Kelley Company, and the bank prosecutes to this court a petition in error.

1. On the trial the district court, at the request of the Kelley Company, instructed the jury as follows: "The jury are instructed that the law is that partnership effects cannot be released from liability for the unpaid debts of the partnership without the consent of every member of the firm. The corpus of partnership effects is joint property, and neither partner separately has anything in that corpus, but the interest of each is only his share of what remains after the partnership accounts are taken. In this case, if you believe from the evidence that Peter Peters and John Peters purchased of the plaintiff in this case the power and separator described in the plaintiff's petition, in partnership, to be used and operated by them in threshing, and as a part of the transaction the said Peter Peters and John Peters executed and delivered to the plaintiff the notes and mortgage described in the petition and put in evidence by the plaintiff in this case, to secure the payment of the purchase price of the said outfit, then the plaintiff in this case would have the first lien upon the property in question to the amount unpaid upon said mortgage, and the said Peter Peters would have no right to execute a mortgage upon the said threshing outfit to secure his individual indebtedness, to the prejudice of the plaintiff in this case; and any mortgage so given by the said Peter Peters to secure his individual indebtedness would be subject to the mortgage of this plaintiff, regardless of whether plaintiff's mortgage was ever filed in the office of the clerk of the county or not." The first assignment of error argued is directed to the giving of this instruction. The evidence shows that John and Peter Peters were farmers and brothers, residing in Hamilton county, at the time they purchased the threshing machine and executed the notes and mortgage to the Kelley Company; that Peter Peters and a son of John Peters accompanied the machine from place to place, and used it in threshing grain. Whatever may be said of this instruction as an abstract proposition of law, we think it had no place in this case. It submitted to the jury the question as to whether John and Peter were copartners, and there is no evidence whatever in the record which would justify the jury in making such a finding. Counsel for the defendant in error assume that, because John and Peter jointly purchased and jointly owned this property, therefore a partnership relation existed between them; but such a result by no means follows. They were rather joint owners, or tenants in common, so far as the record shows, of the property. In Waggoner v. Bank, 43 Neb. 84, 61 N. W. 112, it was held (following the definition given by Chancellor Kent) that "Partnership is a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions." 3 Comm. 24. And in Iliff v. Brazill, 27 Iowa, 131, it was held that "where two farmers buy in common a threshing machine, which they use and operate together, and for which they execute to the vendor a note signed by both individually, they are to be treated as joint owners, and not as partners." In Quackenbush v. Sawyer, 54 Cal. 439, it was held that "a mere joint ownership in personal property does not constitute a partnership."

To the same effect see Wheeler v. Farmer, 38 Cal. 203; Hawes v. Tillinghast, 1 Gray, 289; Goell v. Morse, 126 Mass. 480; Moore v. Curry, 106 Mass. 409; Vose v. Singer, 4 Allen, 226; Donnan v. Gross, 3 Ill. App. 409; Sargent v. Downey, 45 Wis. 498; Cinnamond v. Greenlee, 10 Mo. 578; Ward v. Bodeman, 1 Mo. App. 272; Runnels v. Moffat (Mich.) 41 N. W. 224. We do not say that John and Peter were not partners, nor that the threshing machine was not partnership property; but what we do decide is that the mere fact that they jointly purchased, owned, and operated the threshing machine does not establish that a copartnership existed between the joint owners, nor that the threshing machine was copartnership property. So far as the record before us goes, John and Peter were joint owners—tenants in common—of the threshing machine, and the bank acquired a lien upon the interest of Peter Peters in the threshing machine, by virtue of the mortgage he made thereon.

2. The court, on its own motion, also instructed the jury as follows: "If you find from the evidence that the cashier or assistant cashier of the defendant, the State Bank of Lushton, had actual notice or knowledge of plaintiff's mortgage upon the threshing machine and power in controversy at the time, or prior thereto, of taking the mortgage of Peter Peters, in favor of such bank, upon such machinery, then such bank is not a mortgagee in good faith, and your verdict should be for the plaintiff." The second assignment of error argued is directed to the giving of this instruction. Counsel for plaintiff in error say, and correctly say, that the instruction was wrong because there was no evidence in the record which justified its being given. The only evidence in the record which tends to show—if that does—that the bank officers had any knowledge or notice of the mortgage held by the Kelley Company is this: The bank was a subscriber for a "bulletin" issued by some one in York county, which bulletin gave the names of parties making mortgages filed in York county, and a description of the mortgaged property. It was shown that a bulletin which came to the bank soon after July 23, 1891, recited that John and Peter Peters had executed a chattel mortgage to the Kelley Company on a threshing machine such as the one in controversy, and that this mortgage had been filed in the clerk's office of York county, but there is no evidence in the record that any officer or agent of the bank ever read this bulletin. If the jury had specially found that the officers of the bank had actual knowledge or notice of the mortgage of the Kelley Company, the evidence would not have supported the finding, and the court therefore erred in giving the instruction.

But it is insisted by the defendant in error that the judgment rendered was the only one which could have been correctly rendered, under the facts in evidence in the case, and that, therefore, all errors in the record are without prejudice to the plaintiff in error. This contention rests upon the fact that the undisputed evidence shows that the mortgage made to the bank by Peter Peters on the threshing machine was made to secure a then pre-existing debt, and that, therefore, the bank is not a mortgagee in good faith, within the meaning of section 14, c. 32, Comp. St. which declares that "every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditor of the mortgager and as against subsequent purchasers and mortgagers in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the county clerk of the county where the mortgager executing the same resides. * * *" It is not pretended but that John and Peter Peters retained possession of the threshing machine after they mortgaged it to the Kelley Company, nor that this mortgage, or any copy of it, was ever filed in the office of the county clerk of Hamilton county, where the mortgagors resided, nor that Peter Peters was not justly indebted to the bank. The sole contention is that a mortgagee of chattels to secure a pre-existing debt is not a mortgagee in good faith. To sustain this contention, counsel cite us to Tootle v. Bank, 34 Neb. 803, 52 N. W. 396. In that case it was correctly held that, "when goods obtained by fraud have been mortgaged by the fraudulent vendee solely to secure a pre-existing debt due from him to the mortgagee, the latter cannot claim the protection which the law affords an innocent and bona fide purchaser of property from a fraudulent vendee." But in that case the mortgagor had obtained possession of the property which he mortgaged by fraud. The title, as between him and his vendor, had never passed. By making the mortgage to the Chadron Bank, the bank acquired only a lien upon such interest as its mortgagor had; and that interest was nothing, and therefore the bank acquired nothing. In the case at bar, however, the title and possession of the threshing machine, without fraud, passed and vested in John and Peter, and the bank acquired by the latter's mortgage a lien on whatever interest Peter had in the threshing machine. A mortgagee in good faith, within the meaning of the statute quoted, is one who takes his mortgage to secure a debt actually and justly owing to him, without any notice, actual or constructive, of other existing claims against the mortgaged property. The case cited to sustain the argument of counsel for the plaintiff in error is not in point. The judgment of the district court is reversed, and the cause remanded. Reversed and remanded.

POST, C. J., not sitting.

MATHEWS et al. v. JONES.

(Supreme Court of Nebraska. March 18, 1896.)

MORTGAGES — MERGER — BONA FIDE PURCHASER.

1. Whenever a person acquires a greater and a lesser estate in the same property, and there is no intervening estate, the lesser does not further exist as a separate estate, but is destroyed by, or is considered in law as merged in, the greater; but when, in such a case, an intention that the estates remain separate and distinct is expressed, or may be implied or inferred, no merger can ensue, but the intention will prevail.

2. A mortgagee acquired the title to the mortgaged property, and, in the deed by which it was conveyed to him, it was stated that the title was passed "subject to a mortgage of three hundred dollars, which grantee hereby assumes and agrees to pay." *Held*, that it was evident from this that the intention was to continue the life of the lien of the mortgage, and no merger ensued as between the parties, or against a bona fide purchaser of the notes secured by the mortgage; and the deed, if recorded, was notice of the fact of such intention to parties who subsequently purchased the premises, and also afforded such notice to parties to whom it was exhibited, so as to bring to their knowledge the existence of the clause in the deed, and who afterwards bought the property.

3. Where parties, before buying real estate, examine the records, and find the property to be incumbered by a mortgage, and apply to the mortgagee for information, and are by him told that he has received a conveyance of the title, and a deed from the mortgagor to the mortgagee conveying the property is exhibited to them, and such deed contains a clause by which the grantee assumes and agrees to pay the indebtedness secured by the mortgage, and they subsequently buy the property, at a time when, to their knowledge, the mortgage debt had not matured, they are chargeable with such notice as required them to make further inquiry, and are not innocent purchasers; and a bona fide purchaser of the mortgage notes, at a date prior to the time of the purchase of the property by such parties, may enforce the mortgage as against their rights, and this notwithstanding, at the time they purchased the premises, the mortgagee released the lien of the mortgage of record.

(Syllabus by the Court.)

Error to district court, Dodge county; Marshall, Judge.

Action by Sarah M. Jones against W. D. Mathews and others. There was a decree for plaintiff, and defendants bring error. Affirmed.

H. M. Uttley, for plaintiffs in error. Loomis & Abbott, for defendant in error.

HARRISON, J. It appears from the pleadings and evidence in this case that lot 3, in block 17, Nye-Hawthorne addition to the city of Fremont, was conveyed by C. H. Toncray to R. H. Taylor, by warranty deed; the deed, according to its recitations, being executed October, 1888. Neither the statement in regard to time of the signature nor the acknowledgment named the day of the month of October on which the act was done. The consideration expressed in the deed was $600. On October 1, 1888, a promissory note in the sum of $300, due October 1, 1891, also notes evidencing the amounts of semiannual interest to be paid on the sum stated in the principal note, from its date until maturity, were executed and delivered by R. H. Taylor to Toncray, and these notes all secured by a mortgage on the lot hereinbefore described, and conveyed by Toncray to Taylor. The mortgage was signed by Taylor and wife, of date October 1, 1888, and acknowledged October 12, 1888. Both deed and mortgage were filed for record October 18, 1888. Of date October 5, 1888, a warranty deed for the same premises was executed and acknowledged by Taylor and wife, and delivered to Toncray. This deed was not placed on the record until August 27, 1890. At some time during the month of June, 1890 (the exact date does not appear), one W. D. Mathews purchased or bargained with Toncray for the property, and on August 27, 1890, was given a deed for it, which was recorded on the same day. On the day prior (August 26, 1890), Mathews and wife had made and delivered a deed conveying the premises to Charles A. Manville, which was filed for record August 27, 1890; and on this same day Toncray released, by entry on the margin of the record, the mortgage which he had received from Taylor. Long prior to this time, or in October, 1888 (the date was not definitely shown), Toncray assigned the notes secured by the mortgage to the defendant in error herein. There was a failure to pay the principal note and some of the interest notes, and defendant in error instituted this action to enforce collection by foreclosure of the mortgage; and, seeking a reversal of the decree in her favor rendered in the district court, the case was brought to this court by error proceedings.

The plaintiffs in error admitted in the district court, both in pleading and as a matter of evidence, the execution and existence of the mortgage in suit, and the notes secured thereby; denied the transfer of the notes to defendant in error, or sufficiently so to demand proof thereof; and Mathews asserted that in June, 1890, when he was bargaining with Toncray, having in view the purchase of the lot, he examined the records of Dodge county, the county wherein the real estate was situate, and discovered the title, as shown by the record, to be in R. H. Taylor, incumbered by the mortgage in suit, and, upon inquiry made to Toncray in regard to it, was by him shown the deed from the Taylors to Toncray, and was informed by Toncray that its not having been recorded was because of neglect, inattention, or forgetfulness on his part, that he would have it made of record at any time desired, and would also execute a release of the mortgage. Manville, who claims to have purchased of Mathews, also pleads that he examined the records in reference to this property August 26, 1890, the date of his purchase, or of the deed by which the property was conveyed to him; that the record disclosed the title to be in Taylor, incumbered by the mortgage to Toncray; that he applied to Toncray for further information, and was shown the con-

veyance from Taylor to Toncray, and was told that, because of neglect on Toncray's part, it had not been presented for record, and that he would attend to it any time, and would also discharge the mortgage of record. Plaintiffs in error each claim to have placed reliance, in purchasing the lot, upon the record, combined with the examination of the deed exhibited by Toncray, and his statements and agreements, and the subsequent recording of the deed and release of the mortgage, and the apparent condition of its title as so shown and established; and, further, being without any knowledge or notice of the transfer of the notes secured by the mortgage to defendant in error, and her consequent ownership of the lien, that they were innocent purchasers, and are entitled to protection as such; that, as against them and their rights, the lien should not and will not be enforced; that conceding to defendant in error the purchase in good faith of the notes, and her resulting ownership of the mortgage, and right to its due enforcement, yet, as she failed to take an assignment of it in writing, and to have the same recorded, she put it in the power of Toncray, the mortgagee, to harm or wrong plaintiffs in error, and the mortgage must be held to be of no force as against the rights they acquired by the conveyances to them, respectively. They further assert that, when Toncray received from Taylor and wife a deed conveying to him the title to the lot, there was vested in him both title and lien; they were united in one party, or there was a merger, and the mortgage lien was discharged or extinguished. The plaintiffs in error agree in the statement that, when the deed from Taylor to Toncray was made, it contained the following recital: "Subject to a mortgage of three hundred dollars, which grantee hereby assumes and agrees to pay;" and that they noticed it when the deed was exhibited to them by Toncray. It must further be borne in mind that the transactions by which Mathews, and finally Manville, became owners of the lot, were of time several months prior to the maturity of the principal note secured by the mortgage.

It is argued in the briefs filed for plaintiffs in error that the deed from Taylor to Toncray, being executed on October 5, 1888, and the mortgage, although dated and presumably signed on October 1, 1888, were not acknowledged until October 12, 1888, could not have been delivered to take effect until after its acknowledgment, and consequently the title was not in Taylor when he executed the mortgage, but had been conveyed to Toncray; hence the mortgage could not and never did have any real existence. It must be remembered that Toncray conveyed this lot to Taylor, and that the consideration expressed in such conveyance was $600. This deed was made in October, 1888, and it and the mortgage in suit were both filed for record on the same day (October 18, 1888). The mortgage was for $300, the one-half of the apparent purchase price of the property. From these facts, it is quite evident that the mortgage was given to secure a portion of the purchase price of the lot. The conveyance by Toncray to Taylor and mortgage from Taylor to Toncray were but parts of the one transaction, and the mortgage intended to create a lien on the property, and that by it the intention was fully met and accomplished. The plaintiffs in error, and each of them, scanned the records before purchasing, and by it were informed of the existence of this mortgage as a subsisting lien on the premises. And when Toncray exhibited to them the deed to him from Taylor, of date October 5, 1888, they obtained the information that the mortgage was a lien on the lot; that Toncray, the immediate source of the title to Mathews, recognized it as such, and not only this, but he assumed and agreed to pay it. Surely, they are in no position to ask, nor is there any valid reason to be urged in their behalf, to induce us to alter the relations and conditions established by these different conveyances as intended and recognized by the original parties to them. Further, on this point, during the trial, it was admitted as evidential matter as follows: "It is admitted by all the parties appearing to this suit that the time R. H. Taylor and wife made the notes and mortgage set out in plaintiff's petition, that the said R. H. Taylor was the owner in fee simple of the real estate described in the said mortgage." This, it seems, must have been meant to apply to, and put at rest, the subject or question of the apparent conflict in this particular, disclosed by an inspection of the dates of the several conveyances executed by the parties, and involved by this question.

It is contended that when Toncray, the mortgagee, received the title to the lot by conveyance from Taylor, all the interests vested in him, and were united; that there was a merger, and it operated an extinguishment of the lien of the mortgage. On the subject of merger, in the opinion in the case of Miller v. Finn, 1 Neb. 254, written by Mason, C. J., it was said: "It is said the general rule is that whenever a greater estate and a less coincide, and meet in one and the same person, without any intermediate estate, the less is immediately annihilated, or, in the law phrase, is said to be 'merged'; that is, sank or drowned in the greater. James v. Morey, 2 Cow. 284; 2 Bl. Comm. 177. * * * In Co. Litt. 388, it is said: 'Mergers were not favored in courts of law, and still less in courts of equity.' They are never allowed unless for special reasons, and then only to preserve the intention of the parties. Philips v. Philips, 1 P. Wms. 41. When there is a union of rights, equity will preserve them distinct, if the intention so to do is either express or implied." And it was held: "There can be no merger when the intention to keep the estates distinct may be inferred or has been expressed." See, also, Insurance Co. v.

Corn, 89 Ill. 170; Shaver v. Williams, 87 Ill. 469; Richardson v. Hockenhull, 85 Ill. 124; Bank v. Cheeney, 87 Ill. 602. In the case at bar, the mortgagee transferred the notes to the defendant in error, and the ownership of the mortgage followed them; and in the deed from Taylor to Toncray, by which the latter took the title, the existence of the mortgage as an incumbrance on the title was set forth, and he assumed and agreed to pay it. We think the intention that no merger or extinguishment of the mortgage lien was to be effected clearly appeared or was to be inferred, and sufficiently so to charge the purchaser cognizant of the facts, as were the plaintiffs in error with knowledge or notice of it. Insurance Co. v. Corn, 89 Ill. 170; 1 Jones, Mortg. §§ 870, 872.

It is strenuously insisted that it was negligence on the part of defendant in error not to obtain a written assignment, and have it recorded; that lack of such action placed in the hands of Toncray the power, by releasing the mortgage of record, to commit a fraud; and that it calls for the application of the rule that, where one of two innocent parties must suffer loss, it must be borne by the one who, by negligence, placed it in the power of another to perpetrate the fraud; and that, under its application to the facts as developed in this case and its enforcement, defendant in error must bear the loss, and should not have been granted a decree of foreclosure. This view is as earnestly combated in argument by counsel for defendant in error. The direct and main question involved was discussed in an opinion written by Norval, C. J., in the case of Whipple v. Fowler, 41 Neb. 675, 60 N. W. 15, and it was held: "A satisfaction entered on the record by a mortgagee, after he has sold and delivered the notes secured by the mortgage to a third party, will protect a subsequent mortgagee in good faith, or bona fide purchaser of the mortgaged premises, in case he had no notice, at the date of the purchase or the payment of the consideration, that the debt was assigned or was unpaid, or that the release was unauthorized, but as to all other persons the lien of the mortgage will not be impaired." But, as we view the facts and circumstances of the case at bar, a discussion or re-examination of this subject, even if it was deemed best to be made, is not necessary to a determination of the question which we think a controlling one in this branch of the case, in respect to the relative rights of the parties. This is, were Mathews and Manville bona fide purchasers of the property? If they were, then the other and further question which counsel have argued would arise and call for an answer. If not, it is not necessarily involved or to be decided. They examined the record, and it disclosed the incumbrance or mortgage in suit in favor of Toncray. On application to the mortgagee, they were shown a deed from the mortgagor to him, unrecorded, which contained a statement that the title was conveyed to him subject to the incumbrance, and also that he assumed and agreed to pay it; and, further, at the time these matters occurred, and the property was conveyed to them, respectively, the principal note secured by the incumbrance was not due. It was more than a year before its maturity. A knowledge of these facts was sufficient to make it their duty, before purchasing, to ascertain the whereabouts and ownership of the notes and mortgage, to put them upon inquiry; and having such notice, and failing in the ensuing duty, they cannot now claim and be accorded the privileges and rights of bona fide purchasers. Purdy v. Huntingdon, 42 N. Y. 334. It follows that the judgment of the district court must be affirmed. Affirmed.

CHICAGO, B. & Q. R. CO. v. STATE ex rel. CITY OF OMAHA.

(Supreme Court of Nebraska. March 18, 1896.)

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — POLICE POWER—EXERCISE—DELEGATION—MUNICIPAL ORDINANCE—MANDAMUS—RAILROAD COMPANIES—VIADUCTS.

1. The essential quality of the police power, as a governmental agency, is that it imposes upon persons and property burdens designed to promote the safety and welfare of the public at large.

2. The legislature cannot, under the guise of police regulations, arbitrarily invade personal rights or private property. There must be some obvious and real connection between the actual provisions of such measures and their assumed purpose.

3. "Due process of law," as the term is used in the state and federal constitutions, does not necessarily imply a hearing, by one whose property is taken or damaged for public use, according to the established practice in courts of common law or equity, but is satisfied whenever an opportunity is afforded to invoke the equal protection of the law by judicial proceedings appropriate for the purpose, and adequate to secure the end and object sought to be attained.

4. The power of the legislature to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety is inherent in the sovereignty of the state, and cannot be bartered away by contract or otherwise.

5. Such power may be asserted directly by the legislature, or may, in the absence of constitutional restrictions upon the subject, be delegated to the several municipal corporations or other agencies provided for its exercise.

6. The power of the legislature over private property is not absolute. But while it cannot, at will, impose upon property burdens so excessive and unreasonable as to work a practical confiscation thereof, the courts will never interfere to prevent the enforcement of statutes on account of any mere difference of opinion between them and the lawmaking power of the government respecting the wisdom or necessity of particular measures.

7. The provision of the charter of the city of Omaha (section 48, c. 12a, Comp. St.) authorizing said city, by ordinance, to require railroad companies to construct and keep in repair viaducts over streets therein crossed by their tracks, is a valid exercise of the police power of the state.

8. Ordinance requiring the reconstruction by two railroad companies of specific portions of a viaduct previously erected by them jointly with

the city *held* not to violate prior contract obligations.

9. Nor is such ordinance void, as against the railroad companies therein named as the owners of said roads, for the failure of the city to proceed against other companies engaged in operating one or more of said tracks as lessees of the owners, the charter obligation being imposed upon railroad companies owning or operating separate lines of track.

10. The duty of railroad companies to construct or repair viaducts within the city of Omaha may be enforced by writ of mandamus.

(Syllabus by the Court.)

Error to district court, Douglas county; Ambrose, Judge.

Mandamus on the relation of the city of Omaha against the Chicago, Burlington & Quincy Railroad Company. There was a judgment for relator, and respondent brings error. Affirmed.

Chas. J. Greene, Greene & Breckenridge, and J. W. Deweese, for plaintiff in error.
W. J. Connell, for defendant in error.

POST, C. J. This was a proceeding, on the relation of the city of Omaha, to require the Chicago, Burlington & Quincy Railroad Company (hereafter referred to as the "respondent") to repair the south one-third of the so-called "Eleventh Street Viaduct," in said city. There was a trial upon issues joined in the district court for Douglas county, resulting in a finding and judgment in accordance with the prayer of the relator, and which has, by appropriate proceedings, been removed into this court for review. It is essential to a perfect understanding of the questions discussed to refer in detail to the legislation of the state and the city, so far as it relates to the subject of the controversy; and, in so doing, we will follow the order in which they are presented in the valuable brief submitted in behalf of the respondent.

In the year 1869 the Omaha & Southwestern Railroad Company was organized under the General Statutes of this state, and immediately thereafter constructed a line of road from the city of Omaha, in a southwesterly direction, to a point on the Platte river, in Sarpy county, and which it continued to operate until the year 1871, when it transferred all of its property and franchises to the Burlington & Missouri River Railroad Company, also a Nebraska corporation, by lease for 999 years. Said road was by the last-named company operated until 1880, in which year it was, together with all the property and franchises of the original corporation, transferred to the respondent company, a corporation of the state of Illinois. Section 83, c. 25, Rev. St. 1866, under which the Omaha & Southwestern Company was organized, contained, among other provisions, the following:

"Sec. 83. If it shall be necessary in the location of any part of any railroad to occupy any road, street, alley or public way or ground of any kind or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authority owning or having charge thereof and the railroad company to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied."

In the year 1884 application was by the last-named company made to the city for permission to lay its tracks over and across certain streets therein, including Eleventh street; and in response to that request an ordinance (No. 729) was enacted and approved, in the following language:

"Said Omaha & Southwestern Railroad Company shall have the right to construct, maintain and operate a line of railroad along, upon, through and across said portion of said streets and alleys as a part of its line; provided that said railroad track and tracks are constructed so as to conform to the grade of said streets as near as may be, and so as to interfere as little as possible with the travel along and upon said streets; and, provided, that nothing herein contained shall be construed as interfering with the right of any property owner to recover from said company any damages resulting to private property by reason of the construction of said railroad, and nothing herein granted shall authorize any interference with the tracks of the Union Pacific Railway Company, now laid and operated by said Union Pacific Railway Company in any portion of the streets and alleys herein named and enumerated."

Pursuant to said ordinance the respondent soon thereafter constructed a track from Tenth street across Eleventh street, and thence, in a southwesterly direction, to the city limits. Long previous to the last-mentioned date the Union Pacific Railroad Company had, with the consent of the city, constructed 21 or more tracks across Eleventh street, which have ever since been in continual operation for general traffic and for switching purposes, so that the additional tracks therein of the respondent did not materially increase the inconvenience or danger of the public in the use of said street. By sections 1, 2, and 4 of an act entitled "An act to provide for viaducts, bridges and tunnels in certain cases in cities of the first class," approved March 4, 1885 (Sess. Laws 1885, p. 109, c. 12), it was declared:

"Section 1. That the mayor and city council in any city of the first class shall have power, whenever they deem any improvement, herein provided for, necessary for the safety and convenience of the public, to engage and aid in the construction of any viaduct, or bridge over, or tunnel under any railroad track or tracks, switch or switches in such cities, when such track or switches cross or occupy any street, alley or highway thereof, in the manner and to the extent hereinafter provided.

"Sec. 2. Whenever any such viaduct, bridge or tunnel shall be deemed necessary, as provided in the preceding section, the mayor and

city council shall have the power to secure and adopt plans and specifications therefor, together with the estimated cost of the work, and thereupon, if the railroad company or companies, across whose tracks or switches the work is proposed to be built, will assume three-fifths (3/5) of the entire cost thereof, and three-fifths (3/5) of all damages to abutting property on account of construction of said viaduct, bridge or tunnel, and secure to the city the payment of the necessary funds to meet it as the work progresses, in such manner and with such security as the mayor and city council shall require, and when the payment of the further sum of one-fifth (1/5) of the money required for said improvement is arranged for in manner satisfactory to said mayor and council, either by private donation or by execution of good and sufficient bond as will protect said city from the payment of said one-fifth (1/5) then the said mayor and council may proceed to contract with the necessary party or parties for the construction of such viaduct, bridge or tunnel, under the supervision of the board of public works of such city, and to provide for the payment of one-fifth (1/5) of the cost thereof by the city, by special tax on all taxable property in such city, and one-fifth (1/5) by special tax to property benefitted, as provided in the following section, if not otherwise provided for."

"Sec. 4. The city, with the assent of the railroad company or companies aiding in the construction of any such viaduct, bridge or tunnel as herein provided, may permit any street railway company to build its street railway track and operate its railway upon or through the same, upon such terms and conditions and for such compensation as shall be agreed upon between the city and the street railway company. And the compensation paid for such use shall be set apart and used towards the maintenance of such viaduct, bridge or tunnel."

In virtue of the foregoing provisions the city, the Union Pacific Company, and the respondent, in the year 1886, entered into an agreement in writing, the essential part of which is as follows:

"* * * Witnesseth, that the said parties of the second part, in pursuance of the provisions of an act of the legislature of the state of Nebraska entitled, 'An act to provide for viaducts, bridges and tunnels in certain cases in cities of the first class,' do hereby assume and agree to pay, as may be required by the mayor and city council of said city, three-fifths of the entire cost of constructing a viaduct along Eleventh street, in said city, over the railroad tracks of said parties of the second part, and three-fifths of the damages to abutting property on account of the construction of such viaduct, not otherwise provided for by waivers or private contributions; such entire cost and damages not to exceed the sum of ninety thousand dollars ($90,000); the amount so assumed and agreed to be paid being three-fifths of the entire cost and damages, to be proportioned between said parties of the second part as follows: Three-fourths thereof to be paid by said Union Pacific Railway Company, and one-fourth thereof to be paid by said Omaha & Southwestern Railroad Company. * * * The plans and specifications for said viaducts, before contracts for the construction thereof are entered into, shall be submitted to and approved by said parties of the second part; and should plans and specifications be adopted by said party of the first part, and approved by said party of the second part, which shall increase the said cost and damages beyond the amounts herein limited, then the said parties of the second part are to pay their respective proportions of such increased cost and damages in the same manner, and according to the same division, as hereinbefore agreed. * * *"

Pursuant to that agreement the viaduct in question was constructed, and dedicated to the use of the public early in the year 1887. In the year last named a new charter was provided for the city by an act entitled "An act incorporating metropolitan cities and defining and prescribing their duties, powers and government" (Sess. Laws 1887, p. 105, c. 10), section 48 of which, as amended in 1893, reads as follows:

"Sec. 48. The mayor and council shall have power to require any railway company or companies owning or operating any railway track or tracks upon or across any public street or streets of the city, to erect, construct, re-construct, complete and keep in repair any viaduct or viaducts upon or along such street or streets and over or under such track or tracks, including the approaches to such viaduct or viaducts, as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. * * * When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the proportion thereof, and of the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council. It shall be the duty of any railroad company or companies upon being required as herein provided to erect, construct, re-construct, or repair any viaduct, to proceed within the time and in the manner required by the mayor and council, to erect, construct, re-construct or repair the same, and it shall be a misdemeanor for any railroad company or companies to fail, neglect or refuse to perform such duty, and upon conviction any such company or companies shall be fined one hundred dollars ($100) and each day any such company or companies shall fail, neglect or refuse to perform such duty shall be deemed and held to be a separate and distinct offense, and in addition to the penalty herein provided any such company or companies shall be compelled by mandamus or other appropriate proceedings

to erect, construct, re-construct or repair any viaduct as may be required by ordinance as herein provided. The mayor and council shall also have power whenever any railroad company or companies shall fail, neglect or refuse to erect, construct, re-construct or repair any viaduct or viaducts after having been required so to do as herein provided, to proceed with the erection, construction, reconstruction or repair of such viaduct or viaducts by contract or in such other manner as may be provided by ordinance, and assess the costs of the erection, construction, reconstruction or repair of such viaduct or viaducts against the property of the railroad company or companies required to erect, construct, re-construct or repair the same, and such cost shall be a valid and subsisting lien against such property and shall also be a legal indebtedness of said company or companies in favor of such city, and may be enforced and collected by suit in the proper court." Sess. Laws 1893, p. 70, c. 3, § 7.

In the month of January, 1894, the relator—having determined from the report of the city engineer, the board of public works, and other competent evidence, that extensive repairs were required upon said viaduct, by reason of structural weakness thereof, and other causes—enacted an ordinance approving the plans and specifications therefor previously submitted by the city engineer, sections 2 and 3 of which read as follows:

"Sec. 2. That the Union Pacific Railway Company be and is hereby ordered, directed and required to repair that portion of said Eleventh Street Viaduct from the north end of said viaduct south for a distance of two-thirds of the entire length of said viaduct and the Chicago, Burlington & Quincy Railroad Company, grantee and successor to the Burlington & Missouri River Railroad Company in Nebraska and the Omaha & Southwestern Railroad Company, be and is hereby ordered, directed and required to repair that portion of said Eleventh Street Viaduct commencing at the south end thereof, and extending northward a distance of one-third of the entire length of said viaduct; the said repairs to be made in accordance with said plans and specifications and to be done under the supervision of the city engineer; the said repairs to be commenced without unnecessary delay and fully completed as herein required within ninety days from the passage and approval of this ordinance.

"Sec. 3. That the city clerk be and is hereby directed to furnish to said Union Pacific Railway Company and to said Chicago, Burlington & Quincy Railroad Company owning or operating railroad tracks upon and across said Eleventh street under said Eleventh Street Viaduct, a duly certified copy of this ordinance without unnecessary delay, and that the city engineer is hereby directed to furnish to each of said railroad companies a copy of said plans and specifications, and to superintend the work of making said repairs."

Notice of the foregoing order was, in due form, served upon the respondent, as well as upon the Union Pacific Railroad Company; and, upon the refusal of the former to comply with the terms of the ordinance, this proceeding was instituted, with the result stated.

The first proposition asserted by the respondent is that section 48, above set out, has a prospective operation only, and does not, in terms or by implication, apply to viaducts in existence at the time it took effect. We are, however, unable to accept counsel's definition of a "retrospective law." A statute does not operate retroactively from the mere fact that it relates to antecedent events. A "retrospective law" has been defined as one intended to affect transactions which occurred or rights which accrued before it became operative as such, and which ascribes to them effects not inherent in their nature, in view of the law in force at the time of their occurrence. Bish. Writ. Law, § 83; Black, Interp. Laws, p. 247. The language employed in the statute is "any viaduct or viaducts," and must, when read in the light of the authorities cited, be held to include such as were then in existence, as well as those subsequently constructed. The essential quality of the police power, as a governmental agency, is that it imposes upon persons and property burdens designed to promote the safety and welfare of the general public. It is one of the powers which has been reserved by the people of the state, and which cannot be surrendered, to require persons and corporations to so exercise and enjoy their rights as not unnecessarily to injure others. That the principle stated is especially applicable to existing rights, without regard to the time of their acquirement, or to the source from whence they are derived, appears to us a self-evident proposition, not requiring argument, and the subject will not thereafter be further pursued in this connection.

The next and most important subject of inquiry is presented by respondent's contention that the ordinance under which the city proceeded in ordering the repairs in question contemplates the taking of its property without due process of law, within the meaning of the state and federal constitutions, and also impairs the obligation of the contract under which its track was laid, and under which said viaduct was constructed. The difficulty attending a solution of the questions presented by this assignment is augmented from the fact that courts have not always observed the distinction between the different reserved powers of the state, and have cited indiscriminately cases involving the police power, the taxing power, and the power of eminent domain. Nor is the confusion on that account at all strange, when we remember that those powers all depend for their vitality upon a common principle, viz. the subordination of private rights to the public welfare,—of the individual to the community. Of the cases

frequently cited to illustrate that principle, many involve an application of two or more of the powers enumerated, while in others the line of distinction is by no means clearly apparent. Many attempts at defining the "police power" have been made, but in none has the limit of its exercise been defined with precision. It is, in the language of Chief Justice Shaw in Com. v. Alger, 7 Cush. 53, "much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise." Doubtless, the safe course to pursue in attaining the desired result is that which is characterized by Mr. Justice Miller, in Davidson v. New Orleans, 96 U. S. 97, as "the gradual process of judicial inclusion and exclusion." We held in Smiley v. MacDonald, 42 Neb. 5, 60 N. W. 355, that the legislature cannot, under the guise of a police regulation, arbitrarily invade private property or personal rights, but that the court must be able to perceive some clear and real connection between the assumed purpose of the law and its actual provisions. The obvious purpose of the legislation in this case, both state and municipal, is to promote the convenience and safety of the public at a grade crossing, which is judicially recognized as a place of danger. It is, in short, the exercise of the governmental power and duty to secure a safe and necessary highway, and must be upheld, if at all, as a legitimate exercise of the police power of the state. The authorities which fully sustain this proposition will be noticed in the course of our further examination of this case, and need not be here cited. The questions presented by this assignment are, in principle, nearly allied, covering substantially the same field of inquiry, and will, for convenience, be considered together.

The proceeding by the mayor and council is, it is claimed, essentially judicial in character; and, to use the language of the respondent, "Such a proceeding, without notice to those concerned, and without giving them an opportunity to be heard, violates every maxim and principle of constitutional government." The term "due process of law" is, like the "police power of the state," not susceptible of a precise definition. However, that of Judge Cooley appears to have proved the most acceptable to the courts of this country, viz.: "'Due process of law,' in each particular case, means an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs." In Board v. Collins, 46 Neb. 411, 64 N. W. 1086, we held, in effect, that the constitutional requirement with respect to that subject does not imply a hearing according to the established practice in courts of common law or equity, but that it is satisfied whenever the citizen whose property is taken or damaged for public use is afforded an adequate remedy therefor in a court of competent jurisdiction. And the doctrine is now firmly established, although after some diversity of opinion, that previous notice, and an opportunity to be heard, by persons thereby affected, is not indispensable to a valid exercise of the police power, or the power to levy and collect taxes, whether ad valorem, by the ordinary means, or such as are denominated "special assessments," and chargeable against particular property. In McMillen v. Anderson, 95 U. S. 37, Mr. Justice Miller, in holding that the courts of the United States could not be invoked to prevent the collection of an alleged illegal license tax levied by the state of Louisiana, on the ground that the effect thereof was to take the petitioner's property without due process of law, said: "It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal, when it was assessed. But this is not, and has never been, considered necessary to the validity of a tax. * * * Nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that state, as in others, if compelled to pay the tax by a levy upon his property, he can sue the proper party, and recover back the money as paid under duress if the tax was illegal." True, it was said in Barker v. Omaha, 16 Neb. 269, 20 N. W. 382, that "notice in some form must be given a property owner, before a special assessment upon his property becomes fixed and irrevocable." But the learned author of that opinion did not say or imply that the means of redress afforded in other cases against illegal assessment fails to satisfy the constitutional inhibition against the taking of property without due process of law. What is meant—and what is the doctrine of the authorities there cited—is that a property owner shall, before being required to pay, have an opportunity to be heard in the courts, in a proceeding instituted by himself, or by the municipality to which the taxing power of the state has been by law intrusted. Although there are many cases in the state and federal courts in harmony with the opinion of Justice Miller, from which the foregoing is quoted, and fully sustaining the proposition here asserted, we prefer to confine our examination of such as involve an exercise of the police power, rather than the power of taxation.

In Woodruff v. Catlin, 54 Conn. 295, 6 Atl. 849, it is said: "The legislature having determined that the intersection of two railways in a highway in the city of Hartford, at grade, is a nuisance, dangerous to life, in the absence on the part either of the city or of the railroads, may compel them severally to become the owners of the right to lay out new highways and new railways over such land, and in such manner as will separate the grade of the railways from that of

the highway at intersections; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone, or in part by both. * * * And it has the power to do all this for the specified purpose, and to do it through the instrumentality of a commission" appointed for the purpose.

Appeal of New York & N. E. R. Co., 58 Conn. 532, 20 Atl. 670, involved the constitutionality of an act of the legislature limiting the amount chargeable to a town or village, on the separation of the grade of a highway from that of a railway track situated therein, to one-fourth of the whole cost of such improvement. Such a limitation, it was argued, authorized the taking of the appellant's property without due process of law, inasmuch as it prevented the commissioner to whom the discretion was intrusted from apportioning to the city a just and equitable share of the burden imposed by the act. But the court held otherwise. Carpenter, J., speaking for the court, after remarking that the policy of the law was to abolish grade crossings, said: "Legislation on this subject assumes that each party, in the discharge of its duty, is concerned in creating the danger, and that each may justly be required to contribute to the expense of its removal, or that either may be required to pay the whole, and, if each contributes, that the proportion which each shall pay may be determined by the legislature in each case as it arises, or by general rule by itself, or by a delegation of its power to the railroad commissioners. This exercise of power is justifiable on the ground that government itself, in the discharge of its governmental duties, undertakes to remove the danger, and does it in the same manner and through the same instrumentalities that it provides and maintains highways through, and at the expense of, the towns and other corporations. So far as towns are concerned, it is a duty that has ever devolved upon them to keep the highways reasonably safe. They are compelled to act without compensation or pecuniary profit. Their sole motive is the public welfare. Railroad companies, in some sense, are but the agents of the government in affording to the public a more expeditious and vastly-improved method of travel. * * * Unlike towns, they do not act upon compulsion, but by choice. Their motive is private gain. Public benefit is incidental. * * * They contribute largely to the danger, and the state may well require them to contribute largely to its removal. * * * Requiring the railroad company to pay three-fourths of the expense, however just it might be to require the town to pay more than one-fourth, is not a matter of which the railroad company can legally complain." That doctrine was reasserted by the same court in Appeal of New York & N. E. R. Co., 62 Conn. 527, 26 Atl. 122, which was, upon proceedings in error to the supreme court of the United States, affirmed, and the validity of the act in question expressly upheld. See 151 U. S. 556, 14 Sup. Ct. 437. In the opinion last referred to this language was used by Chief Justice Fuller: "Nor is there necessarily such denial, nor an infringement of the obligation of contracts, in the imposition upon them [railway companies], in particular instances, of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion. Nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a state, that in such particulars a law enacted in the exercise of the police power of the state is valid, will not be reversed by this court on the ground of an infraction of the constitution of the United States." And substantially similar views are expressed by that court in Missouri Pac. Ry. Co. v. Humes, 115 U. S. 512, 6 Sup. Ct. 110, and Eldridge v. Frezevant, 16 Sup. Ct. 345.

In Train v. Boston Disinfecting Co., 144 Mass. 529, 11 N. E. 929, a regulation of the board of health for the disinfecting of certain vessels and goods imported therein, at the owner's expense, was assailed on the ground that no provision was by law made for a hearing, or for review by appeal or otherwise. But the court pronounced the regulation a reasonable one, and defensible as an exercise of the police power of the state.

In Com. v. Roberts, 155 Mass. 281, 29 N. E. 522, an act required all buildings used for a designated purpose to be supplied with sufficient water-closet connections. It was held, although there was no provision for notice or hearing, that said act was a valid exercise of the police power, and applicable to buildings erected before its enactment as well as to those subsequently constructed.

In People v. Boston & A. R. Co., 70 N. Y. 569, the appellant company was required to construct a bridge over a turnpike road, on the ground that the state may, under the powers reserved to the legislature, impose upon railroad corporations such additional burdens as are essential to the public welfare.

In State v. Railway Co., 33 Kan. 176, 5 Pac. 772, the power of the city of Atchison to compel the respondents to construct viaducts was sustained under legislation substantially like that here involved. Referring to the subject of notice, the court, by Valentine, J., observed: "We might, however, say that we do not think it is necessary that the city should have given the railroad company notice before passing the ordinance requiring them [respondents] to construct the viaduct. Notice afterwards, with an opportunity on the part of the railroad companies to

contest the validity of the ordinance, and the right of the city to compel them to construct the viaduct, is sufficient."

But the clearest and most satisfactory exposition of the subject is found in Health Department of New York v. Rector of Trinity Church, 145 N. Y. 32, 39 N. E. 833, which was an action to recover a penalty under a statute requiring all tenement houses to be supplied with water on each floor occupied, or intended to be occupied, by one or more families, whenever so directed by the board of health. The statute made no provision for notice to property owners, and none was in fact given, while it was admitted that it would cost the respondent a considerable sum of money to comply with the order of the board. In the opinion of Peckham, J., it is said: "The legislature has power, and has exercised it in countless instances, to enact general laws upon the subject of the public health or safety, without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect in any particular case. * * * The fact that the legislature has chosen to delegate a certain portion of its power to the board of health * * * would not alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order." And in answer to the argument that the effect of the act was to impair contract obligations the same learned judge said: "Laws and regulations of a police nature, although they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbance. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffer injury, it is either damnum absque injuria, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure." See, also, 1 Dill. Mun. Corp. (4th Ed.) § 141, and note; Com. v. Alger, 7 Cush. 83; Baker v. City of Boston, 12 Pick. 184; Thorpe v. Railroad Co., 27 Vt. 140; Tied. Lim. § 124; Prent. Police Powers, pp. 67, 58. And the principle which underlies all of the cases cited was distinctly recognized by this court in State v. Railroad Co., 29 Neb. 412, 45 N. W. 469.

It will not, of course, be contended that the power of the legislature is in that respect absolute, or that it may at will impose upon property burdens so unreasonable as to work a practical confiscation. There is, as all admit, a limit beyond which it cannot go, and within which it will be confined by the judicial power of the state. Prent. Police Powers, p. 31; Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. 862. But it is unnecessary, if it were possible, to point out the boundary line between reasonable and unreasonable exactions. It is enough that the courts will not interfere to prevent the enforcement of statutes on account of any mere difference of opinion between them and the lawmaking branch of the government respecting the wisdom or necessity of particular measures.

To summarize briefly, we conclude from the foregoing authorities, and many others examined, that the legislation assailed in this cause is a valid exercise of the police power of the state over the subject to which it applies; that it does not authorize the appropriation of the respondent's property without due process of law, in a constitutional sense, since the latter is able to invoke the equal protection of the law by any appropriate proceeding, and because it did in fact put in issue, by the answer, both the validity of the ordinance, and the reasonableness of the amount apportioned to it for the repair of the viaduct in question. Nor is such legislation violative of any contract obligation, since the power to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety cannot be bartered away by contract or otherwise. Such power is inherent in the sovereignty of the state, and may be asserted directly by the legislature, or may, in the absence of constitutional restriction upon the subject, be delegated to the several municipal corporations or other agencies provided for its exercise. The single purpose of the legislation, whether contemplating the erection or reconstruction of the viaduct, is to reduce to a minimum the danger to life and limb for which the railroad companies are chiefly responsible, and it is not unreasonable to require the parties to maintain the street in a condition of safety, for whose benefit and convenience it was originally rendered unsafe.

The argument assailing the ordinance on the ground that it requires the respondent to repair the south one-third of the viaduct, instead of contributing a designated part of the entire cost, is, we think, without merit. Section 48, above set out, confers upon the mayor and council of the city plenary powers with respect to the subject. They may, by ordinance, determine the proportion of the viaduct and approaches to be constructed by two or more railroad companies owning or operating separate lines of track to be crossed thereby, or may determine the cost thereof to be borne by each. The ordinance, if not within the letter of the city's charter, is clearly within its declared scope and purpose. But, in the absence of any statute regulating the manner of apportioning the cost of such repairs, it cannot be said that the plan adopted is either so inequitable or unreasonable as to amount to an abuse of the discretion conferred upon the officers of the city. Equally groundless is the contention that the city was required to proceed against the Chicago, Rock Island & Pacific and the Chicago, Milwaukee & St.

Paul Railroad Companies, then engaged in operating, jointly with the Union Pacific Company, certain tracks belonging to the latter, across Eleventh street, and under said viaduct. The statute, as we have seen, authorizes the city to require two or more railroad companies owning or operating separate lines of track to erect, construct, reconstruct, or repair viaducts. If we admit the companies named, as lessees of the Union Pacific Company, to be within the terms of the act, it does not follow that they are in any sense necessary parties to the proceeding, since the city might still have proceeded against the owners of the tracks operated by them. Such is the plain and necessary inference from the language of the statute.

Lastly, it is argued that, conceding the respondent's duty to repair the viaduct as commanded by the ordinance, such duty is not one which will be enforced by means of the writ of mandamus. By reference to section 48 of the city's charter, it will be observed that authority to proceed by mandamus, or other appropriate proceedings, is therein expressly conferred. But, independent of that provision, mandamus has long been recognized as an appropriate remedy, if not the only adequate remedy, in cases of like character. Indeed, so firmly is that rule established by the decisions of this court as not to admit of a doubt at this time. See State v. Railroad Co., 17 Neb. 647, 24 N. W. 329; Id. 18 Neb. 512, 26 N. W. 205; State v. Railroad Co., 27 Neb. 694, 43 N. W. 419; State v. Railroad Co., 29 Neb. 412, 45 N. W. 469. We discover no error in the record, and the judgment of the district court is affirmed. Affirmed.

CARTER v. GIBSON.

(Supreme Court of Nebraska. March 18, 1896.)

JUDGMENT IRRESPONSIVE TO ISSUES.

A judgment foreign to the issues joined, and for which there was no prayer by the party in whose favor it was rendered, must, upon appeal, be reversed in the supreme court.

(Syllabus by the Court.)

Appeal from district court, Cass county; Chapman, Judge.

Action by John M. Carter against Benjamin A. Gibson. From the judgment, plaintiff appeals. Reversed.

H. D. Travis and A. M. Russell, for appellant. Wooley & Gibson, for appellee.

RYAN, C. The issues presented in this case were fully described in Carter v. Gibson, 29 Neb. 324, 45 N. W. 634. After the case had been remanded, there was a trial in the district court; and, upon findings of fact, there was a decree which plaintiff seeks to review by this his appeal. The action was brought by John M. Carter, as cestui que trust, against Benjamin A. Gibson, as trustee, to compel an accounting by the latter with respect to lands by the cestui que trust intrusted to the trustee to sell for the payment of certain enumerated debts owing by Carter to different parties, among whom was B. A. Gibson. The prayer of plaintiff's petition was for an accounting of the moneys, notes, and securities received by B. A. Gibson in consideration of the sale of any of said land, with interest thereon; that said Gibson be required to account for the actual value of such land as had been sold to Francis N. Gibson; that, of the proceeds of the sales made by him, B. A. Gibson be required to apply on the indebtedness of Carter a sufficient amount to extinguish it; that B. A. Gibson be required to pay the balance of such proceeds to plaintiff, and cancel the liens named in the contract between plaintiff and defendant; that B. A. Gibson be enjoined from disposing of any more of said land; "that he may do all things as agreed; and that plaintiff may have such other and further relief as justice and equity may require." By his answer, B. A. Gibson described the particular debts with respect to the payment of which Carter had caused to be conveyed the real property in trust, and described various transactions which he alleged entitled him to credits on such amounts as he had realized from sales of portions of said lands, and finally denied that defendant was in any manner liable to account to plaintiff, under the agreement set forth in plaintiff's petition, or under any other agreement, for any lots or land sold by defendant. Following this averment there was this prayer: "Hence the defendant asks that the plaintiff's bill filed in this action be dismissed at his costs, and that this defendant may be accorded such further relief as may be just and equitable." There was a reply, which requires no special notice in this connection.

The portion of the decree from which, specially, Carter prosecutes this appeal, was in the following language: "It is hereby ordered, adjudged, and decreed that there is due the defendant, Gibson, from the plaintiff, John M. Carter, the sum of $3,754.21, which is made a lien on the lands hereinafter described." In connection with the facts pursuant to which the above figures were reached, there was filed a paper, of which the heading was, "Computation by the Court." The first item of this computation was a charge of "Carter's indebtedness," drawing interest at 10 per cent. per annum, $2,658.73. The next item was interest thereon to August 1, 1887, $22.15, making a total of $2,680.88. From this were deducted proceeds of sales, $1,581.95, leaving a balance of $1,098.93. There were then alternate additions of interest and credits of sales until the balance due was $127.43 on December 1, 1887. To the amount last named there was added indebtedness of note due F. N. Gibson, principal and interest at 9 per cent. to December 1, 1887, $1,981.75. The sum of $127.43 and the sum of $1,981.75 were added together, and upon this total there

were credited proceeds of sale for November, 1887, $212.95. By reason of interest accrued and credits for sales, this amount was reduced to $145.88 on May 1, 1888. This balance, to constitute a new principal, was added to $5,914.52, described as "amount due on claim Con. River Savings Bank, July 1st, 1887." To this was added interest on the last-named amount to May 1, 1888, $443.50. The grand total thus made up was then credited with sales to May 1, 1888, $1,050, and thereafter were additions of accruing interest, and reductions by amount of sales, alternately, until on December 15, 1892, there still remained a balance of $3,209.21. To this was added the commission allowed the trustee for his services, of the sum of $545. In this way there was ascertained, as expressed in the above-mentioned computation, the "total amount due, which is a lien on the real estate held by the trustee, $3,754.21." It has already been stated that by the court it was "ordered, adjudged, and decreed that there is due the defendant, Gibson, from the plaintiff, John M. Carter, the sum of $3,754.21." This was, in terms, made a lien on the lands in the aforesaid decree described as still remaining unsold. As the finding of facts was referred to in the judgment entry as constituting a part thereof, there is no impropriety in making reference to it for the purpose of rendering clear the matters hereinafter to be discussed.

From the brief description of the pleadings hereinbefore given, it is very clear that there was no prayer for judgment against Mr. Carter. In his answer, B. A. Gibson alleged that there was due from Carter to the Connecticut River Savings Bank about $4,200, and to Francis N. Gibson about $1,700, and to B. A. Gibson, himself, about $3,800. The computation by the court, above referred to, took up each of these three items in the inverse order of their being named herein, and first extinguished the claim due B. A. Gibson, then likewise treated that of F. N. Gibson. To the claim of the savings bank of $5,914.52 due July 1, 1887, was added interest thereon till May 1, 1888, and the sum of these two items was added to the balance of $145.88 still unpaid to F. N. Gibson, and the grand total, with interest on it up to December 15, 1892, was reduced to $3,209.21. This last balance was by the computation recognized as being due to the Connecticut River Savings Bank. B. A. Gibson, so far as the record shows, had nothing to do with it, except that he held, as trustee, certain real property, to be by him sold, and with the proceeds of which sales he was, by contract, charged with the duty of making payments to said savings bank. The contract by virtue of which he became such trustee was made between himself and John M. Carter. The privity was between Gibson and Carter. There was none between Gibson and the savings bank. It was therefore erroneous to render a judgment in favor of B. A. Gibson against Mr. Carter. Even if there had been such a relation between B. A. Gibson and John M. Carter that the former might be entitled to relief against the latter, such relief could not be granted upon the issues actually joined, for such relief was not therein sought. The action was brought by Carter to compel Gibson to account as trustee. It resulted in a judgment in favor of the latter against the former for an amount by all parties confessedly due to a bank which was not a party to the action. It is not necessary to review the processes, step by step, by which the court reached the conclusion that there was due from Carter to Gibson the exact amount stated in its decree; for, as we have already clearly shown, whatever this balance was, it was due a bank not a party to this action, and the decree entered was foreign to the issues presented for determination. Whether or not the amount allowed for the services of B. A. Gibson can be created a lien upon the lands intrusted to him for sale will not be determined in this action. Such real property as remained unsold at the time the judgment appealed from was rendered, and has not since been properly disposed of, should be required to be sold in such manner as shall be deemed by the court to be advisable, and thereupon a final accounting should be had between the parties to this action. The judgment of the district court is reversed, and cause remanded. Reversed and remanded.

BULL v. MITCHELL et al.

(Supreme Court of Nebraska. March 18, 1896.)

MORTGAGE—ASSIGNMENT—PAYMENT TO MORTGAGEE.

1. Where a mortgage was made to secure payment of a negotiable promissory note, the parties making such note and mortgage are not necessarily entitled to protection as to payments to the mortgagee, made solely on the assumption that the original payee of the note still remained the holder thereof. Eggert v. Beyer, 62 N. W. 57, 43 Neb 711; Stark v. Olsen, 63 N. W. 37, 44 Neb. 646, followed.

2. Where payment of a negotiable note secured by mortgage was made to an investment company of which the mortgagee was manager, and such payment was never forwarded to the party to whom such note had been transferred, *held*, that the mere fact that antecedent payments, made in like manner, had been made to be forwarded to the transferee of such note, and had been so forwarded, did not bind the holder of the note as to the final payment not forwarded, it being shown by the evidence that such holder had never in any way held out or recognized the mortgagee as his agent.

(Syllabus by the Court.)

Appeal from district court, Colfax county; Marshall, Judge.

Action by George Bull against Rudolph Mitchell and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Grimison & Thomas, for appellants. Phelps & Sabin and C. C. Flansburg, for appellee.

RYAN, C. There was a decree in favor of George A. Bull, in the district court of Colfax county, whereby was foreclosed a mort-

gage securing payment of a promissory note for the sum of $1,000. Both the note and the mortgage bore date December 31, 1885. The maturity of the note was January 1, 1891, the makers were Anna Schuldt and John Schuldt, and the note, negotiable by its terms, was payable to the order of C. H. Toncray, and Toncray was likewise the mortgagee. Before this loan matured, the mortgaged premises were conveyed to Rudolph Mitchell, who, with his wife, was therefore made a defendant. The interest was evidenced by 10 coupons, each of which was for the sum of $37.50. On the original note and each coupon was indorsed these words: "Pay to order of ——, without recourse. C. H. Toncray." The Nebraska Mortgage & Investment Company was organized at Fremont in the early part of the year 1888. Of this company C. H. Toncray was the vice president and manager until January 14, 1891, and its office was in the building in which the Farmers' & Merchants' National Bank transacted its business. Of this bank C. H. Toncray was cashier until January 1, 1889, and G. W. E. Dorsey was its president until October, 1891. Previous to the organization of the Nebraska Mortgage & Investment Company, Mr. Dorsey and Mr. Toncray were making farm loans in Nebraska, and selling in the eastern states the notes in this manner obtained. When Mr. Toncray had received the note which gave rise to this suit, with its coupons and mortgage, he sent them to Alfred Walker to be sold. Alfred Walker, at this time, was engaged in selling farm loans. Afterwards, in October, 1888, he caused to be organized, to carry on the same business, the partnership firm of Alfred Walker & Co., which, on February 1, 1890, was succeeded by a corporation under the name of the Alfred Walker Company. While there were the changes indicated, the line of business remained the same, and it was transacted at New Haven, Conn. There seems to have been no special arrangement between the brokerage concerns, of which Alfred Walker constituted the whole or only a part, on the one hand, and the party or parties who sent notes for sale on the other, further than that sales of the same nature as that above indicated were made. In respect to the subsequent transactions in relation to the note and its security under consideration, further statements will be given hereafter. The confidential clerk, who testified as to the transactions of the above-mentioned brokerage with reference to the particular loan with which we are now concerned, said that this note, coupons, and accompanying security were sent to Alfred Walker by the Farmers' & Merchants' National Bank of Fremont, Neb., to be sold in Connecticut, and on this point there was no other direct evidence. It is very difficult to ascertain the facts with relation to the Nebraska part of the history of this entire transaction. It seems, however, that Anna Schuldt and John Schuldt lived in Colfax county, and that it was customary with them to send to C. H. Toncray, at Fremont, in Dodge county, the amount of each coupon as it matured. This was done by sending by some person, or, perhaps, by the use of a draft of a bank near them. Within about a month after each amount had been sent, their coupon would be returned to them from Fremont, marked "Paid." This notation of payment was always made at Fremont. After Mr. Mitchell became the owner of the mortgaged property, he, on December 30, 1890, purchased from Mr. Folda, a banker, a draft for $1,000, drawn on the First National Bank of Omaha, in favor of the Nebraska Mortgage & Investment Company. This draft, in compliance with the request of Mr. Mitchell, was sent, for Mr. Mitchell, by Folda, to Mr. Toncray, at Fremont, to take up the note of Anna and John Schuldt which matured January 1, 1891. From the testimony of Charles Collins we learn that, in December, 1891, he was appointed receiver of the Nebraska Mortgage & Investment Company. With the testimony of this witness there was submitted a page of the loan register used by the Farmers' & Merchants' National Bank of Fremont, and a page of the ledger of the Nebraska Mortgage & Investment Company. Upon the bank's loan register, with respect to the loan made by C. H. Toncray to Anna and John Schuldt, appears the following entry: "Paid in full, Jany. 5/91. Pd. by R. Folda for Rudolph Mitchell, Schuyler, Nebr." On the page of the ledger of the Nebraska Mortgage & Investment Company there appear the following entries:

1891	Alfred Walker & Company, Cash.	Cr.
Jany. 5th.	A. Schuldt	$1,000 00
1890		
Dec. 30.	Anna Schuldt	$ 37 50

It is unfortunate that Mr. Toncray did not give his testimony to assist in unraveling this affair, but, as he did not, we must now consider who must suffer for his misconduct in the light of such evidence as is available for that purpose. It is very clear that Mr. Schuldt and Mr. Mitchell assumed that they could safely make payments to Mr. Toncray, and acted accordingly. The note upon which these payments were made was negotiable, and therefore it was not sufficient, to entitle to protection, for them to pay to the original mortgagee as such. Eggert v. Beyer, 43 Neb. 711, 62 N. W. 57; Stark v. Olsen, 44 Neb. 646, 63 N. W. 37. Another principle which operates to the disadvantage of these parties in respect to the payments made by them is thus stated in Bank v. Chilson, 45 Neb. 257, 63 N. W. 362: "One paying money to another, to be applied on a note which such person has not in his possession, assumes the burden to show the authority of the person to whom payment is made to receive the money. Lumber Co. v. Littlejohn, 31 Neb. 606, 48 N. W. 476." Even

if there had been introduced no other evidence, it is extremely doubtful whether that submitted by appellants to show payment was sufficient for that purpose. The payments of interest in each instance were sent to Toncray. He, for several years, was acting as cashier of a bank, and was manager of a mortgage and investment company. During this time, there is no evidence that, individually, he was transacting any business. About a month after each payment of a coupon was made, it was returned to the makers bearing an indorsement showing that Mr. Toncray had probably parted with all interest in it. It does not appear that there was ever any inquiry excited by this fact. Neither are we informed that, between Toncray and the mortgagors, there was ever any inquiry made or instructions given upon any subject. The reliance of the mortgagors, evidently, was upon the fact that, in the first instance, they had borrowed of Mr. Toncray, and had executed to him their note and mortgage. Even if this showing, standing alone, was sufficient to raise a presumption of payment to a purchaser of the note, this doubt would be dispelled by the rebutting evidence furnished by Mr. Walker and Mr. Bull, by which it was made clear that Mr. Bull purchased the note from Mr. Walker, who was acting, not as a general agent for Mr. Toncray, but as a broker, generally, for the sale of such evidences of indebtedness, and that, thereafter, Mr. Bull only presented the coupons to Mr. Walker for payment as they matured, and never constituted Mr. Walker his agent for any purpose, except, on one occasion, to have the note registered by state authority to exempt it from taxation. Such interest as was paid was remitted from Nebraska to Mr. Walker, or one of the companies which succeeded him, by whom it was paid to Mr. Bull, and the coupon in each instance paid was, without being canceled, sent to Fremont. Both Mr. Bull and Mr. Walker testified that Mr. Walker was never employed to act for Mr. Bull; and, from Mr. Walker's evidence, it is clear that he received no compensation for receiving or remitting payment of the coupons. His services in this regard seem to have been donated in consideration of the commission which he had originally received from the seller of the note for making the sale. We cannot see how Mr. Bull could do less than he did to encourage the mortgagors in making their payments as they were made; and, most certainly, the exercise of such care as knowledge that the note was negotiable, and the means of knowing it had probably been negotiated, would have called for, was wanting on the part of the mortgagors. Where one of two innocent persons must suffer through the misfeasance of the agent of one, that one must suffer who has placed the agent in a position to perpetrate the fraud complained of. Bank v. Thomas, 46 Neb. 861, 65 N. W. 895; Scroggin v. Johnston, 45 Neb. 714, 64 N. W. 236. Mr. Mitchell predicates his right to protection in paying the principal sum upon the course of dealing to which the mortgagors had been parties. The failure of this to protect these mortgagors in like degree operated against Mr. Mitchell, even if he was in a position to avail himself of it,—a question rendered somewhat doubtful by the fact that he caused the final remittance to be made to the Nebraska Mortgage & Investment Company, and not to C. H. Toncray, as had his predecessors in liability. The judgment of the district court is affirmed. Affirmed.

KINSELLA v. SHARP.

(Supreme Court of Nebraska. March 18, 1896.)

REAL PARTY IN INTEREST—CONVERSION—EVIDENCE.

1. The real party in interest, under section 29 of the Code of Civil Procedure, is the person entitled to the avails of the suit.

2. Except as against his creditors, one may sell his property for a nominal consideration, or give it away; and, if he does either, his vendee or donee is the real party in interest, in a suit for the conversion of such property.

3. Evidence examined, and *held* wholly insufficient to sustain the verdict of the jury.

(Syllabus by the Court.)

Error to district court, Douglas county; Scott, Judge.

Action by William Kinsella against John F. Boyd, sheriff of Douglas county, Neb. On the death of defendant the action was revived against Julie C. Sharp, as administrator. Judgment for defendant, and plaintiff brings error. Reversed.

E. C. Page, for plaintiff in error. J. W. West and Hall & McCulloch, for defendant in error.

RAGAN, C. In July, 1890, one Herman Deiss brought an action to the district court of Douglas county against the Western Dry-House & Construction Company, and caused an attachment to be issued and levied upon certain personal property, as the property of the construction company. Subsequently William Kinsella brought this action in replevin for the attached property, against the sheriff of Douglas county. But, failing to give the bond required by statute, the property was returned to the sheriff, and by him disposed of to satisfy the judgment rendered in the attachment suit of Deiss. Kinsella's action proceeded against the sheriff as one for damages. The sheriff died pending the action, and it was revived against Sharp, his administrator, who had a verdict and judgment, to reverse which Kinsella prosecutes to this court a petition in error.

The first assignment of error argued is that the verdict is not supported by sufficient evidence. After as patient and careful an examination of the record as we are capable of making, we have reached the conclusion that

this assignment of error must be sustained. There is absolutely no evidence in the record that will support this verdict. One point insisted on before the jury by defendant in error, and submitted to them, was that Kinsella was not the real party in interest; and counsel for the defendant in error now insists that the general finding of the jury includes a finding that Kinsella was not the real party in interest, and that such finding is sustained by sufficient evidence. If the jury reached the conclusion it did by finding that Kinsella was not the real party in interest, the verdict still lacks evidence to support it. The undisputed evidence in this record is that at the time Deiss attached the property in controversy, and long prior to that time, one George Hinchliff was the owner of, and in the possession of, the property attached. After the attachment suit was brought, Hinchliff sold this property to Kinsella. Both Hinchliff and Kinsella testified as to the sale made by the former to the latter of the property in controversy, and the consideration paid for it, and their evidence is uncontradicted.

Counsel for the defendant in error contends that the jury was justified in believing that Kinsella did not pay Hinchliff any consideration for the property, notwithstanding the evidence. We do not think the jury would have been justified in any such course, as the evidence stood undisputed; but the sheriff in this action occupies precisely the position that Deiss himself would occupy had he been sued for the conversion of this property; and, since Deiss was not a creditor of Hinchliff's, it is no concern of the sheriff whether Kinsella paid a valuable consideration to Hinchliff for the property or not. As the property attached was Hinchliff's property, he had a right, except as against his creditors, to sell the property for a nominal consideration to Kinsella, or to give it to him; and, if he did either, Kinsella was the real party in interest. The real party in interest, under section 29 of the Code of Civil Procedure, is the person entitled to the avails of the suit. Hoagland v. Van Etten, 22 Neb. 681, 35 N. W. 869. The judgment of the district court is reversed, and the cause remanded. Reversed and remanded.

McCALL v. STATE.

(Supreme Court of Nebraska. March 18, 1896.)

CRIMINAL LAW—APPEAL—ASSIGNMENTS OF ERROR—RECORD.

When the grounds of complaint of a plaintiff in error depend upon the existence of certain facts, in respect to which there is no recitation or evidence in the record, such assignments of error must be disregarded in the supreme court.

(Syllabus by the Court.)

Error to district court, Dawes county; Kinkaid, Judge.

George A. McCall was convicted of assault, and brings error. Affirmed.

Allen G. Fisher, for plaintiff in error. A. S. Churchill, Atty. Gen., and Geo. A. Day, Dep. Atty. Gen., for the State.

RYAN, C. In the district court of Dawes county, plaintiff in error was convicted of carnally knowing and abusing, with her consent, a female child of the age of 13 years.

It is first insisted in his behalf that, while the information before the examining magistrate charged the same offense as that charged in the district court, the evidence tended to show that there had been committed a rape, by the use of violence. As there is no bill of exceptions, this statement of counsel cannot be verified, and hence must be disregarded.

It is said by the counsel, in the brief submitted in behalf of the plaintiff in error, that there were irregularities in the charging, in the absence of said counsel, a jury, which had failed to agree upon a verdict. There is found in the record no evidence of this alleged fact. It cannot be assumed to exist, and the argument based thereon must be disregarded. So, also, of the claim that a nunc pro tunc order was improperly made, and that the defendant was sentenced in vacation.

The judgment of the district court is affirmed.

ANHEUSER-BUSCH BREWING ASS'N v. MURRAY.

(Supreme Court of Nebraska. March 18, 1896.)

PROOF OF AGENCY—REVIEW ON APPEAL.

1. Agency cannot be proven by the mere declarations of one assuming to act in that capacity.

2. The finding of a jury will be set aside where there is not sufficient evidence to support it.

(Syllabus by the Court.)

Error to district court, Adams county; Beall, Judge.

Action by Alexander H. Murray against Anheuser-Busch Brewing Association. Judgment for plaintiff. Defendant brings error. Reversed.

Capps & Stevens, for plaintiff in error. C. H. Tanner, for defendant in error.

NORVAL, J. Alexander H. Murray brought suit in the court below against the Anheuser-Busch Brewing Association, alleging in the petition, substantially, that the defendant, on the 1st day of January, 1891, contracted with him to manufacture for it 175 tons of ice, at 85 cents per ton, if taken at the place of manufacture, or $1.15 per ton if delivered by plaintiff at the vaults, vats, and beer-cooling house of the defendant in the city of Hastings; that, in pursuance of said contract, plaintiff manufactured said quantity of ice for the defendant, and tendered the same to

it, both at the place of manufacture and at the other point designated in the contract; that defendant refused to receive any of said ice, or pay plaintiff for its manufacture; and that there is due from defendant $148.75, and interest at 7 per cent. from February 15, 1891, for which sum, with interest, judgment is demanded. The answer puts in issue the averments of the petition. Upon the trial to a jury, a verdict was returned for the plaintiff for $127.50, and judgment was entered thereon. The defendant has prosecuted a petition in error to this court.

We will notice but one of the 42 assignments of error, and that is that the trial court erred in holding there was evidence upon which to found a liability against this plaintiff. The record discloses that the defendant is engaged in the manufacture of beer at St. Louis, Mo., and that one J. H. Ellis is a wholesale dealer in the city of Hastings, in keg and bottle beer of defendant's manufacture. In January, 1891, Murray, being the owner or manager of a natatorium in the city of Hastings, which contained a large pool or artificial lake, capable of collecting and holding water in a body until frozen into ice, entered into a verbal contract with Ellis to put up 175 tons of ice, upon the terms stated in the petition. The pool or lake was thereupon filled by Murray with water, which, after the mercury had fallen low enough, formed into ice about 12 inches thick, and sufficient in quantity to meet the requirements of said contract. Ellis refused to receive or accept the ice when tendered.

The defendant below insists that Ellis was not authorized to, nor did he, represent it in the making of the contract in question. Upon a careful reading of the evidence, we are satisfied that it fails to show that Ellis was the agent of the defendant for any purpose whatever. He handled its beer, it is true, but not under a contract of agency. Ellis purchased the beer of the manufacturer in St. Louis, in car-load lots, on 30 days' time, and shipped the same to Hastings, where he sold it to retail dealers on his own account, and alone reaped whatever profits there were derived therefrom. Ellis, in handling the beer, used the defendant's cooling house, vaults, and vats in the city of Hastings; but the defendant was not to, nor did it, furnish the ice used in storing, preserving, and cooling the beer bought by Ellis. The latter alone contracted for and procured the ice on his own account. The only evidence tending to establish the relation of principal and agent between the defendant and Ellis is certain alleged declarations of the latter, and the fact that he procured to be printed on the defendant's wagon, used by him in his business, "J. H. Ellis, Agent." It is not shown that any officer or representative of the defendant had any knowledge that the foregoing sign was upon the wagon. Agency cannot be established by the mere declarations of the alleged agent. Nostrum v. Halliday, 39 Neb. 828, 58 N. W. 429; Burke v. Frye, 44 Neb. 223, 62 N. W. 476; Richardson & Boynton Co. v. School Dist., 45 Neb. 777, 64 N. W. 218. There is an entire failure of proof to show that Ellis was the agent of defendant, or possessed authority to bind it in the transaction.

Whether the alleged contract is within the statute of frauds, and therefore void, because not in writing, it is unnecessary to determine. The judgment will be reversed, and the cause remanded. Reversed and remanded.

RAGAN, C., not sitting.

HANOVER FIRE INS. CO. et al. v. PARROTTE.

(Supreme Court of Nebraska. March 18, 1896.)

INSURANCE—PROOF OF LOSS—ADMISSIONS.

The proof of loss submitted by the plaintiff, in an action upon a policy of insurance, contained this clause, partly written and partly printed: "The building described by said policy, or containing said property, was occupied in its several parts by the parties hereafter named, and for the following purposes: Used as a residence by Hill Adair, up to 3:30 p. m., Sept. 20, 1890, and for no other purpose whatever." *Held*, not an admission that the insured property remained unoccupied for 10 days thereafter, within the terms of the policy, providing that it should be null and void in case the premises insured were at any time unoccupied for more than 10 consecutive days.

(Syllabus by the Court.)

Error to district court, Douglas county; Doane, Judge.

Action by Marcus L. Parrotte against the Hanover Fire Insurance Company and the Citizens' Fire Insurance Company. Judgment for plaintiff, and defendants bring error. Affirmed.

Bartlett, Crane & Baldrige and Thos. D. Crane, for plaintiffs in error. Francis A. Brogan, for defendant in error.

POST, C. J. This was an action upon a policy of insurance, in the district court for Douglas county, where, on a trial of the issues joined, there was a verdict and judgment for the plaintiff therein, and which has been removed into this court for review by means of the petition in error of the defendant companies.

The property covered by the policy was a story and a half frame dwelling house, situated upon lot 3, in block 6, Hawthorne addition to the city of Omaha, and was, according to the pleadings, destroyed by fire October 2, 1890. The defense relied upon is the alleged breach of the following condition of the policy: "If the premises described in this policy be unoccupied for more than 10 consecutive days, * * * then, and in every such case, this policy shall be void." It is alleged that the premises insured were, at the time of the loss, on October 2d, unoccupied, and had been so unoccupied for more

than 10 days immediately preceding said date. The reply is a general denial. The plaintiff below introduced in evidence the policy above mentioned, and testified, in his own behalf, to the loss by fire of the property insured. The defendant thereupon introduced in evidence the proof of loss made and certified by the insured on the 11th day of December, 1890. The plaintiff, in the preparation of said proof, employed a blank form, apparently furnished by the defendant company for that purpose, and which, among other printed matter, contains the following: "The building described by said policy, or containing said property, was occupied in its several parts by the parties hereinafter named, and for the following purposes, to wit." In the space immediately following the above is inserted, in writing, these words: "Used as a residence by Hill Adair, up to 3:30 p. m., Sept. 20, 1890,"—and which is followed by the printed words, "and for no other purpose whatever."

The judgment complained of is clearly right. Indeed, it is the only one possible upon the record before us; and the district court might, with propriety, have directed a verdict for the plaintiff at the conclusion of the trial. The statement quoted from the proof of loss, and which is relied upon for a reversal of the judgment, raises no presumption of a breach of the condition of the policy with respect to the occupancy of the building insured. The language therein employed obviously refers, not to the fact, but to the character, of the occupancy, and by no reasonable construction can it be inferred therefrom that said building remained unoccupied after the removal of the particular tenant on September 20th, 12 days previous to the loss. The defense relied upon was an affirmative one, as to which the burden was upon the defendant company; and, on account of the failure of proof to sustain the allegation of the answer, the judgment must be affirmed.

McFARLAND v. WEST SIDE IMP. CO.

(Supreme Court of Nebraska. March 18, 1896.)

TRIAL—DOCUMENT IN EVIDENCE—WITHDRAWAL—BILL OF EXCEPTIONS—AMENDMENT.

1. A trial court should never permit a document introduced in evidence to be withdrawn, unless the party so withdrawing it, at the time, leaves with the reporter a concededly correct copy of the document withdrawn; and the furnishing of such copy should be made a condition precedent for leave to withdraw the original document.

2. This court will not as a matter of course, permit a record to be withdrawn for the purpose of amending a bill of exceptions; and especially is this true where it appears that a failure to incorporate into the bill of exceptions all the evidence is due to the laches of the party seeking the amendment.

3. The plaintiff in error filed here a bill of exceptions from which two exhibits introduced in evidence on the trial of the case in the district court were omitted. These exhibitions, when introduced in evidence, were by counsel for defendant in error, by leave of the court, withdrawn, but counsel did not then or afterwards furnish the court reporter with copies of such exhibits. *Held*, that leave would be granted plaintiff in error to withdraw the record here, for the purpose of submitting the bill of exceptions to the trial judge, on application for amendment.

(Syllabus by the Court.)

Error to district court, Lancaster county; Tibbets, Judge.

Action by the West Side Improvement Company against J. D. McFarland. Judgment for plaintiff, and defendant brings error. Motion for leave to return bill of exceptions to district court for correction. Granted.

A. G. Greenlee, for the motion. Ricketts & Wilson, opposed.

RAGAN, C. This is an application of the plaintiff in error for leave to withdraw the record, for the purpose of having the bill of exceptions amended by inserting therein two exhibits, which he alleged were introduced in evidence on the trial of the case, and by inadvertence omitted from the bill of exceptions when signed and allowed by the trial court. The application is resisted by the defendant in error, and the evidence as to whether these exhibits were in the bill of exceptions when presented to the trial judge for allowance is conflicting. The affidavits filed by the defendant in error in resistance of this application are to the effect that the exhibits in question were introduced in evidence on the trial of the case; that counsel for the defendant in error then asked and obtained leave of the court to withdraw said exhibits; that they did withdraw the exhibits, and have since retained them in their possession; that neither at the time they withdrew them nor since did they furnish the official court reporter with copies of the exhibits withdrawn. On this evidence alone, we think the application of the plaintiff in error should be sustained. A trial court should never permit a document introduced in evidence to be withdrawn unless the party so withdrawing it, at the time, leaves with the reporter a concededly correct copy of the document withdrawn.

The furnishing to the reporter of such copy should be made a condition precedent by the court of the leave to withdraw the original document. It appears from the affidavit of the judge who tried this case in the court below that he did not decide it until the evidence had been typewritten, and presented to him, and at that time neither of the exhibits in question nor copies thereof were in the typewritten evidence.

We think that the failure of the present bill of exceptions to contain these exhibits is due to the fact of defendant in error's counsel withdrawing the exhibits after they were introduced in evidence, and not supplying the reporter with copies thereof. This court will not, as a matter of course, permit a record to be withdrawn for the purpose of amending a bill of exceptions; and especially is this true

where it appears that the failure to incorporate into the bill of exceptions all the evidence is due to the laches of the party seeking the amendment. Here the court has jurisdiction of the subject-matter and of the parties to the action. The record before us shows that the exhibits in question were introduced in evidence. There is no dispute whatever as to their identity, and it appears that the defect in the bill of exceptions is probably due to the conduct of counsel for the defendant in error in withdrawing the exhibits, and not, at the time, supplying the court reporter with copies thereof. The motion of the plaintiff in error for leave to withdraw the record for the purpose of having the bill of exceptions submitted to the trial judge, on application for amendment, sustained; record to be returned to this court in 20 days. Judgment accordingly.

BUSH v. STATE.

(Supreme Court of Nebraska. March 18, 1896.)

CRIMINAL LAW—APPEAL—ASSIGNMENTS OF ERROR—INSTRUCTIONS—BURGLARY—EVIDENCE.

1. An assignment of error for the overruling of a motion for a continuance will not be considered by this court, when the record fails to disclose that such motion was ever passed upon by the trial court.
2. Instructions will not be reviewed unless the record shows they were excepted to when given.
3. It is not error to refuse an instruction, where the substance thereof has been given to the jury in other instructions.
4. *Held*, that the evidence sustains the conviction for burglary.

(Syllabus by the Court.)

Error to district court, Lancaster county; Tibbets, Judge.

George Bush was convicted of burglary, and brings error. Affirmed.

Coffin & Stone, for plaintiff in error. A. S. Churchill, Atty. Gen., and Geo. A. Day, Deputy, for defendant in error.

NORVAL, J. The defendant, George Bush, was tried and convicted on a charge of feloniously breaking and entering a dwelling house, in the nighttime, with the intent to commit a larceny. Judgment and sentence of imprisonment in the penitentiary for the period of eight years were entered against him, from which he prosecutes error to this court.

The defendant's motion to strike out the unauthenticated statement of the trial judge, found in the transcript, of what transpired during the proceedings, is sustained, as it is not made part of the record in this case.

It is argued that the court erred in overruling the defendant's motion for a continuance. With the statement above referred to eliminated from the record, there is nothing to show that the defendant's application for a continuance was not granted, or, if denied, that an exception was taken to the ruling. This assignment is not, therefore, well taken.

Criticisms are made in the brief of the 2d, 3d, 4th, 5th, 6th, 9th, and 10th instructions given by the court on its own motion. The record fails to disclose that an exception was taken to the giving of any of said instructions; hence no foundation has been laid for their review here, and they will not be considered. Heidt v. State, 20 Neb. 492, 30 N. W. 626; Hill v. State, 42 Neb. 519, 60 N. W. 916; Carleton v. State, 43 Neb. 373, 61 N. W. 699; Gravely v. State, 45 Neb. 878, 64 N. W. 452.

The defendant requested twenty-one instructions, all of which were refused by the court, and an exception was taken to such refusal. We have examined the several requests to charge, and find that, in so far as they correctly state the law applicable to the case, they have been fully covered by the instructions given. Therefore it was not reversible error to refuse to repeat them. Kerkow v. Bauer, 15 Neb. 150, 18 N. W. 27; City of Lincoln v. Smith, 28 Neb. 762, 45 N. W. 41; Olive v. State, 11 Neb. 1, 7 N. W. 444.

It is argued that the evidence failed to show that the breaking and entering of the building occurred in the nighttime. If the state's witnesses are to be believed, the crime was committed during the night season. There is in the record some evidence tending to show that it was daylight at the time the defendant effected an entrance to the building. The jury passed upon the conflicting evidence, and we discover no reason why their verdict should be disturbed. Affirmed.

WHITE v. SMITH et al. (POLLOCK, Intervener).

(Supreme Court of Nebraska. March 18, 1896.)

APPEAL—REVIEW—BILL OF EXCEPTIONS.

A decree of the district court cannot be reviewed upon a question of fact, when the evidence has not been preserved by a bill of exceptions duly settled and allowed.

(Syllabus by the Court.)

Appeal from district court, Cedar county; Norris, Judge.

Action by Win S. White against Nannie Smith and Levi Smith. William A. Pollock intervenes. Judgment for plaintiff, and the intervener appeals. Affirmed.

Addison M. Gooding, for appellant. W. E. Gantt, for appellee.

NORVAL, J. Win S. White brought suit in the court below to foreclose a real-estate mortgage executed by Nannie Smith and Levi Smith. Subsequently Pollock filed a petition of intervention, but no copy thereof is to be found in the record. A decree of foreclosure was entered, and leave given plaintiff to answer the petition of the intervener, which answer was duly filed. In the meantime the property was sold under the decree to the plaintiff, the sale was confirmed, and a sheriff's deed was issued to

him. Subsequently,—but at what time, or what term of court, the record does not show,—the cause was heard upon the petition of the intervener, Pollock, the answer thereto of White, and the evidence; and a decree was entered in favor of the latter, canceling a quitclaim deed from J. L. Krosen and wife to Pollock, under which conveyance the latter claimed title to the property described in the mortgage, and quieting the title in the plaintiff. From the last decree, Pollock appeals, claiming that the findings are contrary to the evidence.

The condition of the record is such that we are unable to review the findings and decree. The testimony was not preserved by a bill of exceptions. There is attached to the transcript a draft of a proposed bill, but it was never allowed by either the trial judge, or the clerk of the district court, and plaintiff now protests against its being considered. The proposed bill was returned by plaintiff to intervener with objections to its allowance, and no steps were taken to secure its settlement, so far as this record discloses. There is, however, attached to said draft of the bill of exceptions the following certificate: "State of Nebraska, Cedar County—ss.: I, Jno. J. Goebel, clerk of the district court in and for Cedar county, hereby certify that the foregoing is a true and complete transcript of all papers and proofs received or known to me as such clerk in this case. Jno. J. Goebel, Clerk Dist. Court." This did not constitute a settlement or allowance of the bill. Moreover, the clerk had no power to settle a bill of exceptions in this case, inasmuch as he had not been authorized or empowered to do so by a written stipulation of the parties or their attorneys. As the testimony has not been made a part of the record by a bill of exceptions duly allowed, the decree must be affirmed.

CALLEN v. ROSE.

(Supreme Court of Nebraska. March 18, 1896.)

CHATTEL MORTGAGES—FORECLOSURE—CONVERSION—DAMAGES—INSTRUCTIONS.

1. A mortgagee of chattels, in the foreclosure of his mortgage, must comply substantially with the requirements of the statute, where they have not been waived by the mortgagor; and, if the mortgagee fails to do so in an essential matter, he is liable to the mortgagor for the value of the property, less the mortgage lien thereon.
2. Evidence examined, and *held*, that the damages assessed in this case are not excessive.
3. Testimony must be confined to the issues tendered by the pleadings.
4. Unaccepted propositions of compromise are inadmissible in evidence.
5. Where there are no instructions in the record brought to this court, none will be reviewed.

(Syllabus by the Court.)

Error to district court, Sherman county; Holcomb, Judge.

Action by John W. Rose against James L. Callen. Judgment for plaintiff. Defendant brings error. Affirmed.

J. R. Scott, for plaintiff in error. Nightingale Bros. and Aaron Wall, for defendant in error.

NORVAL, J. John W. Rose recovered a judgment, in the sum of $194, against James L. Callen, for the conversion of certain chattels which the defendant took from him under a chattel mortgage. Callen is a resident of Mills county, Iowa, and owns a farm in Sherman county, this state. Rose, during the transactions hereafter stated, occupied said farm as Callen's tenant. On October 24, 1889, Rose, being indebted to Callen, gave him a chattel mortgage upon 2 horses, a mare, 60 head of hogs, 2 cows, 3 calves, and some farming implements, to secure the payment of a claim of $412.40, due November 1, 1890. Subsequently Rose butchered one of the cows, and disposed of a part of the hogs; but the remainder of the property continued in his possession until September, 1890, when, before the maturity of the mortgage debt, Callen seized the chattels under the mortgage, and disposed of most of them at private sale, without advertisement, and without the mortgagor's consent, so he testified. The remainder of the property Callen converted to his own use. Rose sued for the value of the property, and Callen has brought error upon the judgment rendered against him.

It is the settled law of this state that the mortgagee of chattels, in the foreclosure of his mortgage, must comply substantially with the requirements of the statute, unless waived by the mortgagor, and that, if he fails so to do in an essential matter, the mortgagor is entitled to have the value of the property applied upon the mortgage debt; and, if such value exceeds such debt, the mortgagor may recover the difference from the mortgagee. Loeb v. Milner, 21 Neb. 392, 32 N. W. 205; Coad v. Cattle Co., 32 Neb. 762, 94 N. W. 757; Watch Co. v. Manifold, 36 Neb. 801, 55 N. W. 236; Bank v. Sharpe, 40 Neb. 128, 58 N. W. 734. The soundness of this rule is not now assailed, but it is claimed that the damages assessed by the jury are excessive; in other words, that the jury rendered a verdict for more than the excess of the value of the property above the amount due on the mortgage. Plaintiff below, in his testimony, gave a description of each piece of property, and testified to the market value thereof at the time it was taken; the aggregate estimate, according to his testimony, being over $740. Jean Whitman, a witness for the plaintiff, who was acquainted with the chattels and their worth, in his testimony, placed the value about $90 less. The total amount of the mortgage lien, when the property was taken by the defendant, was $450. A verdict for $194, based upon the testimony of these witnesses, was not excessive. It is true the witnesses for the defendant fixed the market value of the prop-

erty considerably lower than that given by the other side, but it was for the jury alone to pass upon the credibility of the witnesses. Their finding, being supported by sufficient testimony, cannot be molested by us.

The court excluded testimony offered by the defendant to show that one of the articles seized, a mower, had been previously mortgaged to another party by the plaintiff, and that the lien created thereby had not been paid. It is claimed that this ruling of the court was erroneous; that the defendant was entitled to have the amount of such mortgage deducted from the value of the mower. A sufficient answer to this contention is that no such issue was tendered by the pleadings. The defendant should have set up that fact in his answer. Not having done so, he could not avail himself of it upon the trial.

Complaint is made of the exclusion of the testimony of one J. P. Braden relating to a conversation between defendant and plaintiff. It is disclosed that Braden went with Callen to see Rose in regard to the property, before it was taken, for the purpose of effecting a settlement with the latter. Propositions of compromise were made from one to the other, which were not accepted, and it was the conversation which, on that occasion, took place between them relating to the proposed settlement, that defendant sought to prove. It was clearly inadmissible in evidence, and was properly excluded. Kierstead v. Brown, 23 Neb. 595, 37 N. W. 471; Eldridge v. Hargreaves, 30 Neb. 638, 46 N. W. 923.

It is finally insisted that errors were committed in the giving and refusing of the instructions. No particular instruction is pointed out in the brief as being bad, nor are we informed of the number of defendant's request to charge which, it is claimed, was wrongly refused. Besides, no complaint is made, either in the motion for a new trial or petition in error, of any instruction. Furthermore, not a single instruction is to be found in the record before us. Hence, none will be reviewed.

This disposes of the questions discussed, and the judgment must be affirmed. Affirmed.

ROSEWATER v. STATE.

(Supreme Court of Nebraska. March 18, 1896.)

CONTEMPT—NEWSPAPER ARTICLE.

1. To constitute any publication contemptuous, it must reflect upon the conduct of the court in reference to a cause or proceeding then pending in court and undetermined, and be of a character tending to influence its decision, or obstruct, interrupt, or embarrass the due administration of justice. Percival v. State, 64 N. W. 221, 45 Neb. 741, followed.

2. Where a newspaper article is not per se contemptuous, or where it is susceptible of more than one reasonable construction, one of which is innocent, and requires an innuendo to apply its meaning to the court, and the record fails to disclose that the language was employed in its culpable sense, the publisher is not liable for contempt. Hawes v. State, 64 N. W. 699, 46 Neb. 149.

(Syllabus by the Court.)

Error to district court, Douglas county; Scott, Judge.

Edward Rosewater was adjudged guilty of contempt, and brings error. Reversed.

E. W. Simeral, for plaintiff in error. A. S. Churchill, Atty. Gen., and Geo. A. Day, Dep. Atty. Gen., for the State.

NORVAL, J. Edward Rosewater was adjudged by the district court of Douglas county guilty of having committed a contempt of that court, and sentenced to pay a fine of $500 and to imprisonment in the county jail for the period of 30 days. The defendant is charged with the publication, in the Omaha Bee, of the following portion of an article which appeared therein, to wit: "Justice without Equality. Sentences Adjusted to Fit the Men. One Party to a Crime Gets a Five-Year Sentence in the Penitentiary, while Another Gets the Benefit of a Pull. Persons who were around the criminal section of the district court yesterday afternoon witnessed a striking illustration of what it is to be possessed of a pull. These same persons were also given an illustration of how easy it is for a man to keep out of the penitentiary, if the pull is worked for all it is worth." The charge is founded upon the same fragment or portion of the newspaper article upon which the contempt proceedings were based in the case of Percival v. State, 45 Neb. 741, 64 N. W. 221. The only substantial difference between the information or affidavits filed by the county attorney in the two cases is that in the reported case it was averred that Percival wrote and caused to be published the article in question, while in the one at bar it is alleged that Mr. Rosewater, as editor, proprietor, and manager of the Omaha Bee, "published, and caused to be published, and permitted to be published," the aforesaid article in the evening edition of said newspaper. The record discloses that no part of the article of which complaint is made was written by Mr. Rosewater, that he had no knowledge of its existence until after it was published, and that he did not directly or indirectly order or cause it to be inserted. It is also established that the Omaha Bee is published by the Bee Publishing Company, a corporation; that the defendant is and was one of the stockholders therein, and the editor in chief of said newspaper, and as such had the general management and control of the policy of the paper, and the different editions thereof, at the time the alleged contemptuous article was published.

The attorney general contends that the editor in chief of a newspaper is liable, in a proceeding like this, for contemptuous articles which appear in the columns of his paper, even though he had no knowledge of

such articles until after their publication. The brief of the state contains an able argument in support of this proposition, fortified by decisions from courts of recognized ability and standing. We do not feel called upon now to enter upon a discussion of the question, or to decide it, although the point may be fairly raised by the record. We adopt this course inasmuch as the defendant, in his answer to the rule to show cause why he should not be attached for contempt, has expressly disclaimed any desire to evade responsibility for the publication in question by reason of the fact that he is the editor in chief of the different editions of the Bee, and because, in his brief filed in this court, he has cited no authorities in opposition to the principle contended for by the attorney general. Furthermore, conceding for the present purposes the doctrine invoked by the state to be sound, yet the cause must be reversed for the reasons hereafter stated.

As already indicated, this conviction is based upon the same publication that was alleged to constitute a contempt in the Percival Case. It was there shown that Percival did not write, or cause to be published, the caption or headlines of the article, but that he did write the following: "Persons who were around the criminal section of the district court yesterday afternoon witnessed a striking illustration of what it is to be possessed of a pull. These same persons were also given an illustration of how easy it is for a man to keep out of the penitentiary, if the pull is worked for all it is worth." The conviction in that case was reversed, the court holding that the language quoted was not per se libelous; that, unaided by innuendo, it did not apply to the court, or reflect upon its integrity, nor tend to corrupt or embarrass the administration of justice; and that the article was susceptible or capable of an innocent interpretation. Harrison, J., in the opinion filed therein, in commenting upon that portion of the article admitted to have been written by Percival, says: "It cannot be said, upon its face, to refer to any case pending at the time it was written and published, or to any designated case. In its terms, it deals with some past transaction or proceedings. The phrase, 'possessed of a pull,' is, to speak strictly, without an intelligible meaning, and is, in any event, so doubtful and uncertain that it cannot be applied as imputing that the court was corrupt, as is claimed in the complaint, with any greater certainty than it may be said to refer to some other person or persons, or to actions or motives erroneous and improper, but not corrupt. The portion of the article admitted and proved to be the work of plaintiff in error, and the proof made, were insufficient to support a charge and conviction of contempt, and sentence therefor." Upon a reconsideration of the question, aided by the briefs and arguments of counsel, we are fully satisfied with the conclusion there reached. That decision therefore controls this, as to that portion of the publication set out in the information herein which is not included in the headlines or caption.

It remains to be determined whether the headlines, either standing alone, or when read in connection with the remainder of the publication upon which these proceedings are based, in law constitute a contempt of court. We again quote that portion of the article set out in the information which we designate as the "headlines": "Justice without Equality. Sentences Adjusted to Fit the Men. One Party to a Crime Gets a Five-Year Sentence in the Penitentiary, while Another Gets the Benefit of a Pull." It will be observed that the foregoing, whether considered by itself, or taken in connection with the rest of the article alleged in the information to be contemptuous, is not per se libelous. It purports on its face to relate to proceedings past and ended, and to have no reference to any matter or cause at the time pending in court. The comments in question, unaided by innuendoes, cannot be said to be of a character tending to influence the decision of the court, or to impede, interrupt, or embarrass it in the exercise of its proper functions; and, as the proofs fail to show that they were employed in their culpable sense, they do not amount to a contempt of court. Hawes v. State, 46 Neb. 149, 64 N. W. 699. "Justice without equality" is a meaningless expression. No wrong or improper motive is imputed to the court or judge in the statement, "Sentences adjusted to fit the men." It is our understanding that sentences should be so imposed. A person convicted for his first offense, and who is young in years, ordinarily, ought not to receive so severe a punishment as an old, hardened criminal, convicted of crime of the same grade. Some good citizens have expressed the thought that the courts of the country have not at all times adjusted their sentences to fit the men and their crimes. In other words, some criminals have been punished too severely, while others have received sentences so light as to amount to a travesty upon justice. The phrase, "the benefit of a pull," as was said in the Percival Case, has no intelligible meaning. At least, in the connection in which it was used, we cannot say that it necessarily signifies that the court was corrupt, or unduly influenced. The part of the article complained of, in and of itself, casts no reflection upon the court. The defendant, in his verified answer to the rule entered against him to show cause, denies that the language of the publication is susceptible of the interpretation placed thereon by the innuendoes in the information, or that the defendant "did willfully, wrongfully, unlawfully, and contumaciously, and with the intent of bringing the district court of Douglas county, which is presided over by Judge C. R. Scott, into public contempt, disrepute, or ridicule, or to destroy the influence, honor, and integrity of said court and

said Cunningham R. Scott, as the judge thereof, or to have it believed that said court, or the said Cunningham R. Scott, as judge thereof, was corrupt, or influenced by corrupt motives, or for the purpose of destroying the efficacy of the court in the administration of public justice, or for the purpose of vilifying or traducing the said court, or the judge thereof, in the due administration of justice in any suit then and there pending." Considering the publication in connection with the above unequivocal denials in the answer of the innuendoes of the information, the conclusion is irresistible that the conviction cannot stand. The defendant insists that the language of the article was not employed in a libelous sense, or with the intent to cast reflections upon the court or judge. As it is capable of an innocent meaning, such a construction must be given it. The language made the basis of the charge preferred against the defendant is a very small segment of the article of which it formed a part. That portion of the article not set out in the information contains some very strong expressions, which may have been a flagrant abuse of the liberty of the press. These proceedings are not, however, predicated thereon, and we do not wish to be understood as in any manner approving such portion of the publication. We are deciding the case alone upon the fragment of the article which is set out in the information, and we hold that it is not contemptuous. The constitution guaranties that "every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty." Const. art. 1, § 5. But this constitutional right does not protect any person from punishment for contempt of court for publishing a newspaper article commenting upon a pending cause or proceeding, when the publication is calculated to hinder, obstruct, or impede the due administration of justice. The power conferred upon a court to punish for contempt is to enforce respect and obedience to its authority, and is necessary to accomplish the objects and purposes for which it was created. The power is not given to compel sentimental respect. It is not every uncomplimentary comment or criticism upon a judge that he can afford to notice. "While the power to punish when contempts are really committed is one which should be exercised promptly in proper cases, yet it is in some respects an arbitrary power, and hence one which ought to be kept within prudent limits. This is particularly the policy of the law in regard to indirect contempts. Haskett v. State, 51 Ind. 176. No one ought to be found guilty upon a doubtful charge of indirect contempt, and especially so in a case in any manner involving the freedom of the press. It is true that too often, under the guise of a guarantied freedom, the press transcends the limits of manly criticism, and resorts to methods injurious to persons and tribunals justly entitled to the moral support of all law-abiding citizens; but such digressions are not always unmixed evils, and it is only in rare instances that legal proceedings in repression of such a license can with propriety be resorted to." Cheadle v. State (Ind. Sup.) 11 N. E. 426. While the power to punish for indirect contempt exists in the court, it should only be exercised when it is manifest that the publication was intended to bring the court into disrepute, and to destroy confidence in it, and obstruct or embarrass the administration of justice. The record failing to present such a case, the judgment and sentence are reversed, and the cause dismissed. Judgment accordingly.

STATE ex rel. KING et al. v. HALL, Judge

(Supreme Court of Nebraska. March 18, 1896.)

SUPREME COURT—ORIGINAL JURISDICTION—WRITS OF PROHIBITION.

1. The original jurisdiction of this court is, by section 2, art. 6, of the constitution, restricted to cases relating to the revenue, civil cases to which the state is a party, mandamus, quo warranto and habeas corpus.

2. It is not within the power of the legislature to confer upon this court original jurisdiction over subjects not enumerated in the constitution. Miller v. Wheeler, 51 N. W. 137, 38 Neb. 765.

3. The constitution has not conferred upon this court original jurisdiction to award a writ of prohibition as an independent remedy.

4. Whether a writ of prohibition may be allowed by this court in aid of its appellate jurisdiction, quære.

(Syllabus by the Court.)

Application by the state, on the relation of Shepherd H. King and others, for a writ of prohibition against Charles L. Hall, judge of the district court. Writ denied.

J. R. Webster, Geo. A. Adams, and Fred Shepherd, for relators. Chas. L. Hall, in pro. per. L. C. Burr and A. S. Tibbets, for respondent.

POST, C. J. A rule was, upon the sworn information of the relators, allowed against the respondent, one of the judges of the district court for Lancaster county, to show cause why a writ of prohibition should not issue from this court, restraining him, the said respondent, from making certain orders in the case of William L. Morrison v. The Lincoln Savings Bank & Safe-Deposit Company, pending in said court. The ground of the application, briefly stated, is that the respondent is one of the subscribers for the original stock of said bank, which is now insolvent; that, of the amount so subscribed, there has been paid 10 per cent., and no more, leaving the respondent liable to the creditors of the bank for 90 per cent. of his aforesaid subscription, by reason of which he is disqualified to act in said case, or to make any orders therein affecting the rights of the creditors, but notwithstanding said fact the respondent did on the 12th day of January, 1896, while presiding over one of the divi-

sions of the district court for said Lancaster county, assume to appoint one J. E. Hill as receiver to wind up the business and affairs of said bank; that a motion was subsequently made by the relators for the discharge of said receiver, and for the appointment of a more suitable person to execute the said trust; and that the respondent, although disqualified to act in the premises, by reason of the facts herein stated, is about to, and will, unless restrained by this court, pass upon and decide said motion, etc. The respondent, in obedience to the nisi order, has submitted a statement under oath, denying seriatim the allegations of the information, and unites with the relator in affirming the jurisdiction of this court to entertain the proceeding, notwithstanding our intimation to the contrary. We appreciate the delicacy of the position in which Judge Hall is placed by this proceeding, and can but commend his course in insisting upon a determination of the merits of the controversy, although we must decline, for reasons hereafter stated, to entertain that question.

Owing to the fact, already appearing, that the parties hereto agree in asserting the jurisdiction of this court over the subject of the controversy, we have been deprived of the assistance which would, under the circumstances, have been expected from counsel, in the investigation of so important a subject. We have, however, devoted to an examination of that question the time at our disposal, and which has resulted in a conclusion adverse to the contention in favor of our jurisdiction. The development of the remedy by means of the writ of prohibition in the court of queen's bench, and also in this country, is both entertaining and profitable, as a field for study. But that subject is foreign to the present inquiry, since the question here involved is one of constitutional construction, and depends upon the interpretation given to the express provisions of that instrument. This court, except in the exercise of its appellate jurisdiction, is one of limited and enumerated powers. It shall have jurisdiction, says the constitution, "in cases relating to the revenue, civil cases in which the state shall be a party, mandamus, quo warranto, habeas corpus and such appellate jurisdiction as may be provided by law." Const. art. 6, § 2. That provision, it was held in Miller v. Wheeler, 33 Neb. 765, 51 N. W. 137, is a grant of power, and, by implication, limits the original jurisdiction of this court to the subjects therein enumerated. The peculiar character of a constitutional tribunal is that it is not susceptible of change, in any essential respect, save in the manner prescribed in the fundamental law itself. That principle was early recognized by the supreme court of the United States, in giving effect to the provision of the federal constitution defining its original jurisdiction, viz.: The supreme court shall have original jurisdiction "in all cases affecting embassadors and other public ministers and consuls, and those in which a state shall be a party." Const. U. S. art. 3, § 2. The question of the power of congress to confer upon that court jurisdiction in mandamus proceedings was presented in Marbury v. Madison, 1 Cranch, 137, and resolved in the negative, Chief Justice Marshall using this forcible language: "If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts, according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage,—is entirely without meaning,—if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction where the constitution has declared their jurisdiction shall be original, and original jurisdiction where the constitution has declared it shall be appellate, the distribution of jurisdiction made in the constitution is form without substance." And the doctrine thus stated is supported by an unbroken line of decisions by that court, including the recent case of California v. Southern Pac. Co., 157 U. S. 229, 15 Sup. Ct. 591. Other courts have gone still further in denying to the legislature power to enlarge their jurisdiction. For instance, in Sevinskey v. Wagus, 76 Md. 335, 25 Atl. 468, under a constitutional provision conferring upon the Maryland court of appeals jurisdiction "coextensive with the limits of the state, and such as is now or may hereafter be prescribed by law," that court refused to entertain an application for a writ of habeas corpus, although the legislature has expressly declared that "the court of appeals, and the chief justice thereof, shall have power to grant the writ of habeas corpus and to exercise jurisdiction on all matters relating thereto throughout the whole state." In the opinion of the court, Alvey, C. J., after proving that the court of appeals had, under the previous constitution, appellate jurisdiction only, says: "It would therefore seem to be clear that the jurisdiction of this court is appellate only; for if not so, and the legislature could confer original jurisdiction upon it in cases of habeas corpus, it could also confer such jurisdiction in cases of mandamus, or in cases of any other subject-matter of original jurisdiction." But the precise question here involved was before the supreme court of Illinois in the recent case of People v. Horton,[1] 44 N. E. —, under a constitution after which ours appears to have been modeled, and which confers upon that court original jurisdiction "in cases relating to the revenue, in mandamus and habeas corpus and appellate jurisdiction in all other cases." It was held (citing Field v. People, 2 Scam. 79, and Campbell v. Campbell, 22 Ill. 664) that the original jurisdiction of that court cannot be

[1] Rehearing pending.

extended by implication, but is limited to the subjects specially enumerated in the constitution, and that it was accordingly without authority to allow the writ of prohibition. It was further held (but as to which we express no opinion) that that court is without authority to award the writ of prohibition, even in an ancillary proceeding in aid of its appellate jurisdiction. See, also, Hawes, Jur. § 39; Brown, Jur. § 14; Works, Courts & Jur. 428. A consideration of the authorities cited can lead but to a single conclusion, viz. that it is not within the constitutional power of this court to grant the relief sought. The rule should be discharged. Rule discharged.

LIVESEY v. HAMILTON et al.

(Supreme Court of Nebraska. March 18, 1896.)

MECHANIC'S LIEN—PAYMENT BY NOTE—DESCRIPTION OF MATERIAL MAN.

1. The mere fact that the owner of real property has given his note for a portion of the amount due for materials furnished for making erections on his property does not relieve such property from a mechanic's lien filed against the same for the entire amount of the material so furnished.

2. Where a party has furnished materials for the improvement of real property, and in all respects has complied with the mechanic's lien law in respect thereto, his rights will not be *held* destroyed, merely because, in taking a note for the amount due, he has described himself by the fanciful designation of the "Western Cornice Works," when there is no claim that, thereby, any one was misled or injured.

(Syllabus by the Court.)

Appeal from district court, Douglas county; Walton, Judge.

Action by Henry Livesey against John R. Hamilton, Francis A. Hamilton, and Christian Specht, the last of whom filed a cross petition. James G. Winstanly and Jacob Emminger answered the case by leave of court. Judgment for plaintiff and defendant Specht, and Winstanly and Emminger appeal. Affirmed.

Weaver & Giller, for appellants. Kennedy, Gilbert & Anderson and Wharton & Baird, for appellees.

RYAN, C. The appellants in this case are James G. Winstanly and Jacob B. Emminger, purchasers of certain real property from John R. and Francis Hamilton, by whom improvements thereof had been previously contracted for. The case was begun in the district court of Douglas county by Henry Livesey as the assignee of a mechanic's lien by John McGowan on account of services rendered and material furnished by him. The contract between McGowan and John R. and Francis A. Hamilton consisted of an oral acceptance of a written bid for doing certain of the work specified, and for furnishing such material as therefor should be required. There was no necessity that this mere bid should be attached to the claim for a lien, for it was not a written contract. It is urged that Livesey cannot maintain an action as the assignee of the claim for a lien because such lien, as alleged, was not perfected when the assignment thereof was made. The filing was of date October 22, 1891. The assignment was made February 25th thereafter. So that the facts are not correctly assumed for the purposes of this argument. Before the claim for a lien was filed, J. R. Hamilton gave his note for $500, a part of the amount due to John McGowan, who indorsed the same to Henry Livesey, by whom it was discounted at the bank. Not being paid at maturity, the note was taken up by Henry Livesey, who now holds the same as owner. As already stated, McGowan transferred to Henry Livesey his whole claim for a lien as an entirety. We therefore cannot understand how this assignment can be injuriously affected by the mere fact that Livesey holds a note for $500, evidencing, as due him, a part of the claim in respect to which the mechanic's lien held by him was filed. There was no evidence that this note was given or accepted as payment. Therefore no good reason exists for treating it as a pro tanto satisfaction of the lien assigned to Livesey.

There was made a defendant Christian Specht, by whom there was filed a cross petition, in which he alleged that, under a verbal agreement, he had furnished material and performed labor in improving the real property above referred to; that, after allowing all credits for payments made, there still remained due $280. There was, in the cross petition of Christian Specht, this language: "This defendant further represents that, as a part of said indebtedness, said John R. Hamilton executed and delivered to this defendant, by the name, style, and description of 'Western Cornice Works,' his promissory note for the principal sum of $265," etc. There are urged, in opposition to the enforcement of Mr. Specht's lien, the objections that the above-described note had been by him used as collateral security, and that whatever claim really exists is in favor of the Western Cornice Works, and not in favor of Specht. As indicated by the language above quoted, the designation "Western Cornice Works" was not employed to indicate a corporation or company, but it was a picturesque and fanciful description of Mr. Specht, invented and used by himself. The evidence shows that he was the sole proprietor and manager of the business and property, and controlled it absolutely, although in doing so its proprietorship and management were referred to by him as that of the "Western Cornice Works." By this fiction no one was deceived, and it is not suggested that any one interested was not aware of the identity of Christian Specht with the Western Cornice Works. There was, therefore, no substantial reason for not granting the relief prayed by Mr. Specht, as was done in the district court, for no other objection has been urged, except that there was not set up, in connection with the claim for a

mechanic's lien, a written contract with Mr. Specht. This objection is of the same unsubstantial character as that which, in this action, was set up adversely to Henry Livesey, and must therefore be held unavailing. No other question is discussed by the appellants, and the judgment of the district court is affirmed.

GALLIGHER v. WOLF et al.

(Supreme Court of Nebraska. March 18, 1896.)

APPEALS FROM JUSTICE'S COURT—PRACTICE—WEIGHT OF EVIDENCE.

1. If, in an appeal to the district court from a judgment of a justice of the peace, the appeal bond is believed to be insufficient, it is proper for the appellee to file a motion asking the court to order a change or renewal of such undertaking.

2. In such a case, if the court is satisfied of the insufficiency of the appeal undertaking, it may make the order requested; and it is proper practice to fix the time within which such change or renewal shall be effected, and to enter a dismissal of the action for a noncompliance with such order.

3. The finding of a trial court on conflicting testimony will not be disturbed on error or appeal unless clearly and manifestly wrong.

4. The evidence examined, and *held* to sustain the findings of the trial court.

(Syllabus by the Court.)

Error to district court, Douglas county; Keysor, Judge.

Action by Theodore Galligher against Aaron Wolf and others in justice's court. There was a judgment for defendants, and, from the judgment of the district court overruling a motion to vacate an order dismissing the appeal, plaintiff brings error. Affirmed.

D. Van Etten, for plaintiff in error. Will H. Thompson and Smith & Sheean, for defendants in error.

HARRISON, J. In an action commenced, and in which there was a trial and judgment for defendants, in justice's court in Douglas county, there was an appeal taken by the unsuccessful party to the district court; and, during the pendency thereof, the defendants moved the court to require the appellant to furnish a further and sufficient appeal undertaking, for the alleged reason that the surety who signed the bond on file in the case was insolvent, and judgment on the bond would be uncollectible. This motion was filed March 28, 1892, soon after the appeal was docketed in the district court; and, on June 4th following, its finding was sustained, on the showing, as to the facts involved, made by the party in whose interest it was filed, the other party offering no evidence, in form of affidavits or otherwise, on the points raised by the motion, and the appellant was ordered to furnish new and sufficient appeal undertaking within 15 days. This order was not complied with, and on July 7, 1892, the defendants moved the court to dismiss the appeal, because of such noncompliance. On July 11th, another motion was filed for defendants, similar in terms and the purpose sought to be attained with that filed July 7th, four days prior. The motion to dismiss was presented to the court, and, on hearing, was sustained, and the case dismissed, at the costs of plaintiff. On the last-mentioned date there was a motion filed for plaintiff to vacate the order made June 4th, by which plaintiff was required to furnish a new and sufficient appeal bond, the ground of the motion being that the surety signer on the original undertaking was responsible, and had justified when he executed it, or before its approval. On the 19th day of July, plaintiff moved the court to vacate the order of dismissal of the action, for stated reasons: "(1) Said decision is contrary to law. (2) Said order was irregularly obtained, without the knowledge or consent of plaintiff, and by misconduct of the prevailing party." This motion was supported by affidavits, the statements of which tended to show the responsibility of the surety on the appeal undertaking, and what was claimed to be irregularity in obtaining the order dismissing the case. Contradictory affidavits were filed on behalf of defendants, and, on the hearing, plaintiff's motion to vacate the court's order dismissing the cause was overruled. To secure a reversal of this ruling is the purpose of these proceedings.

It is contended that there was not sufficient evidence to support the order of the court by which the plaintiff was required to file a new and sufficient appeal bond, and, further, that, on the facts as shown by the parties, the action of the court in overruling the motion to vacate the order of dismissal was erroneous, and clearly opposed to the weight of the evidence on such point.

If the appeal undertaking was considered insufficient, it was proper for the appellees to file the motion asking the court to order its change or renewal (see section 1016 of the Code of Civil Procedure), and for the court, if satisfied of its insufficiency, to make the order requested. And it was proper practice, although there did not exist any statutory provision to such effect, to fix the time within which such change or renewal should be effected, and also enter a dismissal of the action for a noncompliance with its order in respect to the undertaking. Robare v. Kendall, 22 Neb. 677, 35 N. W. 940. We are satisfied from the record that the action of the court in ordering the renewal of the appeal undertaking was supported by sufficient evidence, and, further, that, in respect to the alleged irregularities in obtaining the order dismissing the case, the evidence was conflicting, and the decision of the trial judge thereon entitled to stand, from which conclusions it follows that the judgment of the trial court must be affirmed.

OAKLAND HOME FIRE INS. CO. v. BANK OF COMMERCE OF GRAND ISLAND.

(Supreme Court of Nebraska. March 18, 1896.)

INSURANCE—TRANSFER OF PROPERTY—ASSIGNMENT OF POLICY — RIGHTS OF MORTGAGEE—QUESTION FOR JURY.

1. In an action upon an insurance policy, one defense being that the insurer had parted with all interest in the insured "property before the policy was issued," the question whether the insured was, at the time the policy issued, the owner of the property, was, on conflicting evidence, properly submitted to the jury. Rochester Loan & Banking Co. v. Liberty Ins. Co., 62 N. W. 877, 44 Neb. 537, followed.

2. The policy was sued on by the Bank of Commerce, a mortgagee of the premises. It was issued to the owner, J., and contained provisions whereunder a transfer of the property or an assignment of the policy, without consent of the insurer, avoided the policy. Before the loss, J. had conveyed the premises to B., and assigned the policy to him. The insurer pleaded this conveyance and assignment without consent of the insurer as a defense. Attached to the policy was the following: "Loss, if any, under this policy, payable to the Bank of Commerce or its assigns, as its mortgage interest may then appear." In the body of the policy was the following: "If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee, or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto." *Held*: (a) That these two clauses should be construed together; (b) that the clause in the body of the policy rendered conditions expressed in the policy applicable to the interest of a mortgagee having rights thereunder only where there was written upon, attached, or appended to the policy some provision or condition rendering such conditions of the policy applicable, and defining the manner of their applicability; (c) that, the clause attached to the policy containing no such provision or condition, the mortgagee was entitled to recovery, notwithstanding conditions in the policy which might defeat a recovery by the owner.

(Syllabus by the Court.)

Error to district court, Hall county; Harrison, Judge.

Action by the Bank of Commerce of Grand Island against the Oakland Home Fire Insurance Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

William H. Platt and Ralph Platt, for plaintiff in error. W. H. Thompson and W. A. Prince, for defendant in error.

IRVINE, C. This was an action on a policy of fire insurance written in favor of J. Nelson Jones, and having attached an instrument, signed by the agents issuing the policy, the essential part of which is as follows: "Loss, if any, under this policy, payable to the Bank of Commerce, or its assigns, as its mortgage interest may then appear." The policy and the slip attached both bore date October 17, 1889, and were both executed on that day. The policy ran for five years from that date. Not far from the time when the policy was issued, the premises insured were conveyed to one Brownfield, and an assignment to Brownfield, signed by Jones, appears on the policy. This bears two dates,—October 17, 1889, and December 12, 1890. No written approval of this assignment appears on the policy. The Bank of Commerce was the owner of mortgages on the premises to the full amount of the policy. A total loss occurred October 19, 1890. In the district court there were a verdict and judgment for the plaintiff, which is defendant in error, to reverse which the insurance company brings the case here.

The contentions of the insurance company, based on proper assignments of error, are as follows: First. That the conveyance to Brownfield was prior to the issuance of the policy, and that, therefore, Jones had no insurable interest, and the policy never took effect. Second. That, under the conditions of the policy, it was avoided by the attempted assignment thereof before loss, without the consent of the company. Third. That what is styled the "loss payable clause," attached to the policy, was merely a direction as to who should receive the proceeds in case of loss; that it was subject to all the conditions of the policy, and the policy not being available to Jones, because of a want of insurable interest, by his conveyance of the property and assignment of the policy to Brownfield, the bank, deriving its rights entirely through Jones, cannot recover. We shall consider these several propositions without special reference to the assignments of error on which they are based.

As to the first point, it is enough to say that there was evidence sufficient to sustain a finding that while negotiations had been carried on before the policy was issued, looking towards a sale of the property by Jones to Brownfield, and while a deed of conveyance had actually been executed, the deed had not been delivered, and the contract of sale had not assumed an obligatory form, until some time after the issuance of the policy. This issue was submitted to the jury under instructions part of which were not excepted to by the company. It was properly a question for the jury. Rochester Loan & Banking Co. v. Liberty Ins. Co., 44 Neb. 537, 62 N. W. 877. The verdict on this issue cannot be disturbed; and it must therefore be taken as settled that Jones was the owner when the policy was issued.

We may pass over the second contention, and assume, for the purposes of this case, that the subsequent transfer of the property and assignment of the policy by Jones to Brownfield would be sufficient to prevent a recovery by Jones, and would vest no right in Brownfield. We do not think the soundness of this contention is necessarily involved in the decision of the case. We therefore go directly to the claim of the plaintiff.

The "loss payable clause" has already been

quoted. In the body of the policy appears the following: "If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee, or of any person or corporation having an interest in the subject of insurance other than the interest of the insured, as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto." That the plaintiff did have an interest as mortgagee in the subject of insurance, and that this interest was created with the consent of the company, is indisputable. The question is as to the construction of the latter portion of this clause. There can be no doubt that the "loss payable clause" and this clause, quoted from the body of the policy, must be construed together. It is the contention of the insurance company, in effect, that the "loss payable clause" was not an independent contract between the mortgagee and the insurer, but was simply a direction as to payment, and that the mortgagee's rights must be derived through those of the owner, in spite of the clause in the body of the policy, which it claims should be so construed as to make all the conditions and provisions of the policy binding upon the mortgagee, except as other stipulations in the "loss payable clause" might vary those provisions and conditions. If the language were ambiguous in its grammatical signification, we would be compelled to adopt that construction which would be more favorable to the insured. Insurance policies are not contracts deliberated upon, clause by clause, and effected after detailed negotiations between insured and insurer. The actual contract is, for the most part, entered into before the policy is delivered. The policy is proposed and tendered by the insurer on its own form. If it seeks to protect itself by a condition, it should clearly express that condition by the policy. If it resorts to ambiguous language, under familiar rules of construction, such language must be taken most strongly against the party proposing it, and in favor of the other party. But we do not see any marked ambiguity in this policy. We repeat the clause, omitting words not essential to its construction on the feature before us: "If * * * an interest * * * shall exist in favor of the mortgagee, * * * the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto." "The conditions hereinbefore contained shall apply," not absolutely, but in a qualified way, "in the manner expressed in such provisions and conditions * * * as shall be written upon, attached or appended hereto"; that is, in order to render the general conditions of the policy applicable to the interest of a mortgagee, there must be written upon, attached or appended to, the policy, relating to the interest of the mortgagee, some provisions or conditions expressing in what manner the conditions of the policy shall be so applicable. Neither in the "loss payable clause," nor otherwise, by writing upon, attached to, or appended to, the policy, were there any provisions or conditions carrying the conditions of the policy into such clause, or rendering them in any manner applicable. The authorities cited by plaintiff in error are not opposed to this construction. In some cases the mortgage clause was not executed until after the policy had become voidable; and was then issued without new consideration, while the insurer was ignorant of the facts avoiding the policy. In other cases, the "loss payable clause" stood alone, without provision in the policy as to its meaning or extent. In this case, in view of the clause in the policy, the "loss payable clause" must be taken as if it contained an express provision insuring the mortgagee, without regard to the conditions imposed upon the owner in the body of the policy. So construed, the case falls within the rule announced in Phœnix Ins. Co. v. Omaha Loan & Trust Co., 41 Neb. 834, 60 N. W. 133. As we view the case, the mortgagee was entitled to recover to the extent of its interest, without regard to acts or omissions of the owner which might, as between the insurer and such owner, defeat a recovery. Judgment affirmed.

HARRISON, J., not sitting.

TAYLOR v. STANDARD LIFE & ACCIDENT INS. CO.

(Supreme Court of Nebraska. March 18, 1896.)

SURETYSHIP—ALTERATION OF CONTRACT—DISCHARGE.

A contract between an insurance company and its agent provided that the latter should make monthly reports of business transacted, and, on demand, pay over to his principal all moneys due him. The agent's compensation was fixed at 25 per cent. of the business done, and he gave a bond to secure the performance of his contract. After the execution of the bond, and without the knowledge of the surety thereon, the agent's compensation was changed to 28⅓ per cent., and he was given permission to employ solicitors of insurance, paying them out of his commission. In a suit against the surety on the bond, to recover money which it was alleged the agent had not accounted for, *held*: (1) That the compensation of the agent was not an essential ingredient of the contract of the surety, and increasing his compensation did not amount to a re-employment of the agent at a different compensation from that fixed in the contract; (2) that there had been no material alteration in the terms of the contract to secure the performance of which the bond was given, and that the surety thereon was not released.

(Syllabus by the Court.)

Error to district court, Douglas county; Davis, Judge.

Action by M. C. Nichols, for whom was substituted the Standard Life & Accident Insurance Company, against W. B. Taylor.

There was a judgment for plaintiff, and defendant brings error. Affirmed.

Frank T. Ransom, for plaintiff in error. Geo. W. Ambrose and Frank H. Gaines, for defendant in error.

RAGAN, C. On the 23d day of September, 1890, one M. C. Nichols was a general or district agent of the Standard Life & Accident Insurance Company of Detroit, Mich., hereinafter called the "Insurance Company." On that date he appointed one R. C. McClure his agent for the purpose of canvassing for applications for insurance in the insurance company, issuing policies and tickets therefor, and attending to such other duties as might properly appertain to the agency in and for the city of Denver, Colo. By the terms of McClure's contract of employment, which was in writing, he agreed to keep regular and accurate statements of all the transactions and business done by him as Nichols' agent, and, on or before the 10th of each month, transmit to Nichols a report in detail of the business transacted up to and including the last day of the previous month. These reports were to show the balance for which McClure was accountable by reason of his agency. The contract of employment provided further that McClure should hold in trust for Nichols all moneys and securities collected and received by him as agent, and faithfully pay over and account for the same to Nichols or to the insurance company, or its representative, in case of Nichols' resignation, removal, or death. On the 24th day of September, 1890, McClure, as principal, and W. B. Taylor, as surety, executed a bond to Nichols, conditioned for the faithful performance by McClure of his agreements in his said contract of employment as Nichols' agent. Nichols brought this action to the district court of Douglas county, against Taylor, the surety on the bond, to recover a sum of money which he alleged McClure had collected as agent, and failed to account for and pay over. By agreement of counsel the insurance company was substituted in the district court as plaintiff for Nichols. It had a verdict and judgment, and Taylor prosecutes to this court a petition in error.

1. The first assignment of error argued in the brief here relates to the ruling of the district court in excluding evidence offered by Taylor to prove that the principals in the bond had changed the contract to secure the performance of which the bond sued on was given; or, in effect, that whatever money McClure had collected and failed to account for, while agent of Nichols, he had collected under a contract made between Nichols and McClure subsequent to the date of the contract of the 23d of September, 1890, and materially different from said contract. Taylor, in his answer, admitted the execution of the contract of September 23, 1890, between Nichols and McClure, the execution of the bond sued upon, and substantially denied all the other allegations in the petition. Another defense interposed by Taylor was that from the time of the execution of the contract of the 23d of September, 1890, McClure made regular monthly reports to Nichols; that said reports showed what was due from McClure on account of his agency; that Nichols, upon receipt of said reports, did not insist on McClure's paying the amount which the report showed he owed, but allowed McClure to retain said amounts, and extended the time within which the said sums of money might be paid. Another defense of Taylor's was that Nichols, knowing that McClure was in default, neglected to notify Taylor, the surety, of the fact, and continued to deal with McClure, and allow him to continue to act as agent under the contract and bond. A still further defense pleaded by Taylor was that Nichols was guilty of negligence in not demanding from McClure on the 10th of each month, when he made a report, the amount of money which the report showed he (McClure) was indebted, and was guilty of negligence in neglecting to notify Taylor of the condition of McClure's accounts. Neither argument nor citation of authority is necessary to show that under this answer the plaintiff in error was not entitled to have evidence he offered go to the jury. If the principals to the contract, to secure the performance of which by McClure the bond was given, materially modified that contract, so that the money collected by McClure, and not accounted for by him, was in fact collected under a contract materially different from the one to secure which the bond sued on was given, then that fact should have been pleaded as an affirmative defense. The fact, if it existed, was a new matter, and could not be proved under a general denial.

2. The second assignment of error argued relates to the refusal of the district court to give the jury the following instruction: "If you believe from the evidence that up to the 3d day of June, 1891, the said R. C. McClure acted as agent, under the contract of September 23, 1890, for the plaintiff, and up to that date he paid over to the plaintiff or its agent all moneys coming into his hands by virtue of the agency, and that about that date said McClure and the plaintiff modified the contract of September 23, 1890, by a letter of June 3, 1891, and that all the money for which said McClure is now in default was collected by him as agent of the plaintiff under the modification of June 3, 1891, you will find for the defendant, W. B. Taylor." The letter introduced in evidence, by which plaintiff in error claims that the contract of the 23d of September, 1890, was modified by Nichols and McClure, conceded to McClure a commission on all new business of 28½ per cent., whereas, under the contract of September 23, 1890, McClure's commission on business was to be 25 per cent. This change in

the amount of compensation which McClure was to receive in no manner changed the duties of McClure, and did not amount to a material modification of the contract between McClure and Nichols; and, were it competent and relevant evidence, it would not prove, or tend to prove, a material alteration of the contract to secure the performance of which the bond in suit was given. Machine Co. v. Webster, 47 Iowa, 357; Insurance Co. v. Sedgwick, 110 Mass. 163. The letter also authorized McClure to secure or appoint solicitors of insurance, if he should think best, on the basis that his (McClure's) commission was to be 28⅛ per cent. on new business; the persons so appointed as solicitors by him to be paid their commissions out of the commission allowed him (McClure). This was not adding to the obligations or duties required of McClure by his contract, and not a material alteration of it. In other words, the risk which the surety assumed in signing McClure's bond was not increased, or, indeed, changed, by this letter. The letter itself was irrelevant testimony, under the issues made by the pleadings, and should not have been admitted. But the letter, as evidence, did not have the effect claimed for it by the plaintiff in error. The compensation of McClure was not an essential ingredient of the contract of the surety, nor did this letter amount to a re-employment of McClure at a different compensation. The court did not err in refusing to give the instruction. The judgment of the district court is right, and is in all things affirmed.

ANDRES et al. v. KRIDLER.

(Supreme Court of Nebraska. March 18, 1896.)

BILL OF EXCEPTIONS—AUTHENTICATION—ASSIGNMENTS OF ERROR—PLEADING—COMPLAINT.

1. The original bill of exceptions allowed by the district court or judge will not be examined by this court, unless authenticated in the manner prescribed by statute.

2. Assignments of error relating to the sufficiency of the evidence, and the rulings of the court in receiving and excluding evidence, will be disregarded, in the absence of a bill of exceptions properly allowed and authenticated.

3. Where the pleadings disclose a cause of action against a defendant personally, superadded words, such as "agent," "executor," or "director," should be rejected as descriptio personæ. Thomas v. Carson, 65 N. W. 899, 46 Neb. 765.

(Syllabus by the Court.)

Error to district court, Douglas county; Scott, Judge.

Action by W. H. Kridler against Phillip Andres and others. Judgment for plaintiff. Defendants bring error. Affirmed.

Charles W. Haller, for plaintiffs in error. John P. Breen, for defendant in error.

POST, C. J. The defendant in error, as plaintiff in the district court, recovered a judgment against the plaintiffs in error, defendants therein, upon an instrument of which the following is a copy: "$500. Omaha, Neb., March 24, 1888. Ninety days after date, we promise to pay to Dennis J. Keleher, or order, five hundred dollars, for value received, payable at the banking house of McCague Brothers, Omaha, Nebraska, with interest at the rate of ten per cent. per annum until paid. Phillip Andres, Pres., J. W. McDonald, J. H. Standeven, Thomas Falconer, C. M. O'Donoran, Dennis J. Keleher, John Jenkins, Directors, Omaha Truth P. & P. Company." Separate answers were filed by the several defendants, in all of which it was, in substance, alleged that the instrument sued on was the note of the Omaha Truth Printing & Publishing Company, a corporation; that it was taken and accepted by Keleher, the payee therein named, with the distinct understanding and agreement that it was the obligation of the corporation named, and not the contract of the individual signers or any of them. It was further alleged that the plaintiff therein was not a bona fide holder of said note, and that he took it after maturity, with notice of the defendant's rights in the premises. The plaintiff, in reply, denied the allegations of the answers, and charged that said note was executed by the defendants as their personal obligation, and not in behalf of said corporation.

From the transcript of the judgment, it appears that the cause was called for trial, having been reached in its order, November 7, 1892, and, there being no appearance for the defendants, a jury was waived by the plaintiff, and a trial had to the court, with the result stated. The defendants in due time moved to set aside the judgment so rendered, and for a new trial, assigning therefor the following grounds: "(1) There was irregularity in the prevailing party by which the above-named five defendants were prevented from having a fair trial. (2) There was misconduct of the prevailing party. (3) Said five defendants and the attorneys of said five defendants were the victims of accident and surprise, which ordinary prudence could not have guarded against. (4) There was error in the assessment of the amount of recovery. (5) The decision is not sustained by sufficient evidence, and is contrary to law." Said motion, coming on for hearing at a later day of the term, was by the court overruled, to which order exceptions were duly taken, and the cause removed into this court for review.

It appears, from the transcript, that evidence was submitted in support of the allegations made in the first, second, third, and fifth assignments of the motion for new trial. But the alleged bill of exceptions, although apparently allowed by the trial judge, is not authenticated in the manner required by statute to make it a record of this court. Indeed, there is no pretense whatever of an authentication, and the assignments which depend upon a bill of exceptions must accordingly be disregarded. Flynn v. Jordan, 17

Neb. 520, 23 N. W. 519; Machine Co. v. Gerhold, 47 Neb. —, 66 N. W. 538; Oltmanns v. Findlay, 47 Neb. —, 66 N. W. 425, and cases cited.

It is, however, contended that the petition failed to state a cause of action against the defendants therein named, for the reason that the instrument sued on is the contract of the corporation named, and not of the individual signers. We held, in Thomas v. Carson, 46 Neb. 765, 65 N. W. 899, that, where a petition or complaint states a cause of action in favor of the plaintiff personally, superadded words, such as "agent," "executor," or "trustee," should be rejected as descriptio personæ. See, also, Farrel v. Reed, 46 Neb. 258, 64 N. W. 959. The rule as there stated is sanctioned by the overwhelming weight of authority, and is, without doubt, applicable to the facts of the case at bar.

Our attention is also called to an error in the assessment of damage, whereby judgment was allowed for 18 cents in excess of the amount actually due on the note. The amount named, although small, is not beneath the cognizance of the court, and the defendant in error will accordingly be required to remit the amount erroneously assessed in his favor; and, upon the filing of such remittitur within 20 days, the judgment will be affirmed. Affirmed.

MALM v. THELIN.

(Supreme Court of Nebraska. March 18, 1896.)

TRIAL — OBJECTIONS TO EVIDENCE — MASTER AND SERVANT — ASSUMPTION OF RISK — PRESUMPTION — PLEADING.

1. Where a question is asked a witness, in itself proper and not open to objection, the adverse party does not waive his right to object to an answer to such question containing inadmissible matter by not having objected to the question itself.

2. In such case, the admissibility of testimony contained in the answer is properly presented for review by a motion to strike out the answer and an exception to an order overruling such motion.

3. A servant assumes risks arising from defective appliances used or to be used by him, or from the manner in which the business in which he is to take part is conducted, when such risks are known to him, or apparent and obvious to persons of his experience and understanding, if he voluntarily enters into the employment or continues in it without complaint or objection as to the hazards. Railway Co. v. Baxter, 60 N. W. 1044, 42 Neb. 793, followed.

4. The presumption is that such risk has been assumed by the servant; and, in order to recover, the burden is upon the plaintiff to establish one of the exceptions to the rule.

5. In his petition, he must plead the existence of the facts creating such exception.

6. Evidence tending to show that defective machinery was used under a promise by the master to remove the defect *held* inadmissible, where such promise had not been pleaded.

(Syllabus by the Court.)

Error to district court, Douglas county; Doane, Judge.

Action by Mary Thelin against Charles E. Malm. There was a judgment for plaintiff, and defendant brings error. Reversed, with directions.

John P. Breen, for plaintiff in error. Gustave Anderson and C. P. Hallegan, for defendant in error.

IRVINE, C. The defendant in error brought this action against the plaintiff in error to recover on account of injuries sustained by defendant in error in operating machinery while in the employ of the plaintiff in error, a laundryman. She recovered judgment for $2,500. For convenience, the parties will be referred to as plaintiff and defendant as their positions were in the district court.

The petition, after alleging that the defendant was the owner of and operated a laundry in Omaha, and that the plaintiff was his servant in the operation thereof, alleged that there was, in the laundry, a certain machine called a "mangle," which was, on June 27, 1890, incomplete, imperfect, unsafe, and wholly unfit for use, in that it had no guard or protection for the fingers or hands at the point where the clothes were received into the machine; that the defendant well knew of the defect in the machine, but negligently used and operated said machine, and directed the plaintiff to operate the same; that, on said 27th of June, while plaintiff was using said machine, as directed by the defendant, she had three fingers of her left hand cut and bruised by said machine, so that amputation was necessary; "that said injury was caused by or through no fault or negligence on the part of said plaintiff, but because, and solely on account of, the incompleteness of said machine, and the want of the aforesaid guard or protection on said machine, and the recklessness, carelessness, and negligence on the part of said defendant for ordering or directing this plaintiff to work with said machine while said machine was in the condition hereinbefore set forth." The answer admits that defendant owned and operated the laundry in question, that plaintiff was his servant, that he kept a mangle in said laundry, and that plaintiff was injured therein, and denies all other allegations of the petition. An accord and satisfaction were also pleaded; but it will not be necessary, at this time, to notice this defense. It will be observed that the petition does not charge that plaintiff was inexperienced, or that she was not aware of the defect in the machine, and it is not charged that she used it relying on the promise of the defendant to repair the defect. The evidence, without contradiction, shows that, before plaintiff was directed to use the machine, attention was specially called to the defect, and that she was aware thereof.

At this point in plaintiff's testimony, the following occurred: "You may state whether or not he [the defendant] said anything to you in regard to using the mangle? A. Yes;

the first day we was using the mangle, he said, 'We will get that guard as soon as we can.' Mr. Breen: What is that answer? A. He will get that guard as soon as he can get it. (Defendant objects to the last answer, and moves that it be stricken out, on the ground that there is no such issue in the pleadings as a promise to repair the defect in this machine. Motion overruled, to which defendant excepts.)" The overruling of this motion is assigned as error. In considering this assignment, the question first arises whether, under the circumstances, the question having been answered without objection, the overruling of a motion to strike out the testimony is open to review. It has been several times held that, where a question is answered without objection, objections to the evidence are waived, and cannot thereafter be presented by a motion to strike out the evidence so admitted. Palmer v. Witcherly, 15 Neb. 98, 17 N. W. 364; Oberfelder v. Kavanaugh, 29 Neb. 427, 45 N. W. 471; Insurance Co. v. Richardson, 40 Neb. 1, 58 N. W. 597; Brown v. Cleveland, 44 Neb. 329, 62 N. W. 463. In all of these cases, however, it either affirmatively appears from the report, or it is a fair presumption from the facts stated, that the questions which elicited the objectionable evidence were of such a character that objections interposed thereto before the questions were answered would have prevented the admission of the evidence. Where the objectionable matter appears in an answer not properly responsive to a question, the rule must be different. This distinction was indicated in Gran v. Houston, 45 Neb. 813, 64 N. W. 245. In Kissinger v. Staley, 44 Neb. 783, 63 N. W. 55, it was held that, if the evidence was recited in a narrative form, or volunteered by the witness, or if it was not responsive to a question asked, a motion to strike out must be made in order to present anything for review. The reason is that, where the evidence is given in narrative form, or volunteered by the witness, or appears in an answer not responsive to the question propounded, no opportunity exists for objecting before the evidence is elicited, as no question has been asked sufficient to apprise the court or counsel that such evidence is about to be adduced. The same reasons exist, and the same rule should apply, where a question has been asked, in itself not open to objection, and the witness, in answer thereto, states something which is objectionable, although it may be fairly responsive to the question. Now, the question asked in this case was whether or not the defendant said anything in regard to using the mangle. This question, strictly speaking, called only for a categorical answer, upon which further questions might be founded. But, assuming that it called for a specific answer as to what was said, the question was not, in itself, open to objection. The plaintiff pleaded that she had been commanded by defendant to operate the machine, and, in view of this pleading, the question seemed to call for that command; and an objection urged to it would have been properly overruled. Instead of that, the witness answered that the defendant said that he would get the guard as soon as he could. This answer was evidently not heard, and counsel asked to have it repeated, and then moved to strike it out because irrelevant, under the pleadings. Under the circumstances, we think that defendant availed himself of the first opportunity to object to evidence of this character, and that his motion to strike out the answer raises the question of the admissibility of the evidence of a promise on the part of defendant to remove the defect in the machine.

A servant assumes the risks arising from defective appliances used or to be used by him, or from the manner in which the business in which he is to take part is conducted, when such risks are known to him, or apparent and obvious to persons of his experience and understanding, if he voluntarily enters into the employment, or continues in it without complaint or objection as to the hazards. Railroad Co. v. Baxter, 42 Neb. 793, 60 N. W. 1044; Dehning v. Iron Works, 46 Neb. 556, 65 N. W. 186. In this state, this rule has been modified to this extent, that where the servant, in obedience to the requirements of his master, incurs the risk of machinery or appliances which, although dangerous, are not of such a character that they may not be safely used by the exercise of reasonable skill and caution, he does not, as a matter of law, assume the risk of injury from accident resulting from the master's negligence. Railroad Co. v. Finlayson, 16 Neb. 578, 20 N. W. 860; Lee v. Smart, 45 Neb. 318, 63 N. W. 940; Dehning v. Iron Works, supra. Therefore, the presumption is that a servant employing machinery obviously defective has assumed the risk occasioned by the use of such machinery; and, in order to recover, he must rebut that presumption; and, in order to rebut it, he must not only prove, but he must plead, the facts which create an exception to the rule,—as, for instance, that, on complaint to the master, a promise was made to remove the defect, and the machinery was used relying upon that promise. In Railway Co. v. Baxter, supra, a judgment was reversed because the petition did not plead such exceptions; and in Dehning v. Iron Works, supra, an amendment had been required in a similar case before the plaintiff was permitted to introduce evidence of such exceptions. The following cases also hold that, in order for the plaintiff to avail himself of such exceptions, they must be specially pleaded. Bogenschutz v. Smith, 84 Ky. 330, 1 S. W. 578; Railroad Co. v. Doyle, 49 Tex. 190; Railway Co. v. Sandford, 117 Ind. 265, 19 N. E. 770; Hayden v. Manufacturing Co., 29 Conn. 548; Stephenson v. Duncan, 73 Wis. 404, 41 N. W. 337; Car Co. v. Norman, 49 Ohio St. 598, 32 N. E. 857.

In this case the plaintiff, without pleading the particular exception to the general rule referred to, was permitted, over objections, to introduce evidence of the existence of that exception. This was erroneous, and particularly prejudicial, because it was neither pleaded nor proved that the defect was not obvious, that the plaintiff was inexperienced, or that other circumstances existed, except the one referred to, which would permit a recovery, and the case finally rested largely on the fact of this promise. The judgment must be reversed, and the cause remanded, with directions to the district court to permit the plaintiff, if she so desires, to amend her petition. Judgment accordingly.

MURPHEY v. VIRGIN.

(Supreme Court of Nebraska. March 18, 1896.)

TRIAL — STATEMENT OF ISSUES — WITNESS — CREDIBILITY — PROVINCE OF JURY — CONVERSION.

1. Evidence examined, and *held* to sustain the verdict.

2. Where pleadings contain matters of evidence, rather than ultimate facts, the court sufficiently states the issues by stating tersely the ultimate facts pleaded, and disregarding such evidentiary facts.

3. A jury is not bound to blindly accept as true all testimony which is not directly contradicted or impeached. The testimony of a witness should be weighed in connection with all the facts in the case. Instructions substantially to that effect are not erroneous.

4. Money taken forcibly, and without the consent of the owner, may be recovered back, and the fact that the owner was indebted to the wrongdoer in an amount as great as the sum taken is no defense.

5. It is not error to refuse to give instructions directing the jury what degree of importance should be attached to particular evidence.

(Syllabus by the Court.)

Error to district court, Seward county; Wheeler, Judge.

Action by Maria Virgin against James E. Murphey for conversion. There was a judgment for plaintiff, and defendant brings error. Affirmed.

George B. France, for plaintiff in error. D. C. McKillip, for defendant in error.

IRVINE, C. The defendant in error was the plaintiff in the district court, and, in her petition, charged that Murphey, on or about August 3, 1889, assaulted her, and took from her possession gold and silver coin of the amount and value of $463,—her money,—and converted the same to his own use. The defense set up was that Murphey had been a surety on the official bond of Alexander Virgin, plaintiff's husband, as treasurer of a school district; that judgment was recovered on the bond for $1,292, and that Murphey, by virtue of said judgment, and at the request of Mrs. Virgin, paid upon said judgment, and for other expenses in connection with Mr. Virgin's default, $466.08; that Virgin had been the owner of certain land, which, without consideration, he conveyed to Mrs. Virgin, who held the title in trust for him; that Mr. and Mrs. Virgin agreed, in consideration of Murphey's paying the money referred to, upon the sale of said land, to apply its proceeds to the repayment of Murphey; that on August 3, 1889, Mr. and Mrs. Virgin sold said land, and, out of the money received, paid to Murphey said sum of $466.08, being the money here sued for, and took and received from Murphey a receipt acknowledging the payment of the same, in full satisfaction of Murphey's claims aforesaid. The plaintiff recovered judgment.

The first assignment of error argued is that the verdict is not sustained by the evidence. According to Mrs Virgin's testimony, when the sale of the land was consummated she met the purchaser in the office of a third person, and he paid to her the money in coin. Murphey was present, and Mrs. Virgin offered to pay him $25, which she said she owed him. She had placed the rest of the money in a reticule. Murphey declared he would have the whole of it, and forcibly took it from the reticule, at the same time threatening Mrs. Virgin with a revolver. It may be here remarked that there is no evidence in the record in support of the averment that the land belonged to Mr. Virgin, although it clearly appears that there was an indebtedness to the amount claimed from Mr. Virgin to Murphey, on account of the judgment upon the bond, and expenses of litigation. This would seem to quite thoroughly establish the plaintiff's prima facie case. Most of Mrs. Virgin's testimony was contradicted by other witnesses, but it was for the jury, and not for this court to determine who was most worthy of belief. Murphey does not directly deny that the money was taken against Mrs. Virgin's consent, although he denies he used force. His defense is based chiefly on testimony from several witnesses to the effect that, after the transaction in the office, Mrs. Virgin went voluntarily to Murphey's house, and paid to him $6.07, being the difference between the money which he obtained in the office and the amount due him from Virgin, and insisted upon taking a receipt from him acknowledging satisfaction of the whole claim. This receipt was not produced, Mrs. Virgin emphatically denying that she had ever obtained it, but it was proved by a letter-press copy bearing no signature. There is also testimony to the effect that Mrs. Virgin had said to third persons that she had so paid Murphey's claim. Most of this testimony is denied by Mrs. Virgin, although she admits going from the office to Murphey's house for the purpose of giving Mrs. Murphey "a piece of her mind," and that she there gave Murphey a dollar. She says she was much excited, and did this, saying that, as he had taken the remainder, he might as well have the whole of it. We think there was enough to sustain the verdict. There was certainly sufficient to establish a prima facie case, and the burden of proving what

counsel term a "ratification" was upon Murphey. While his evidence in that behalf was not met by the clearest and most satisfactory proof to the contrary, we think it was fairly within the province of the jury to say whether his defense had been established.

Certain rulings on the evidence cannot be considered, for the reason that in the petition in error there are no assignments specifying such rulings.

The remaining assignments relate to the instructions. It is claimed that the second instruction, which stated the defense, was erroneous because not complete. The instruction was as follows: "For answer the defendant alleges that on and prior to the 3d day of August, 1889, the plaintiff and her husband, Alexander C. Virgin, were indebted to him in the sum of $466.08, and that on the said 3d day of August, 1889, the plaintiff and said Alexander paid and delivered to the defendant the sum of $466.08, being the sum of money due the defendant from the plaintiff; and for further answer the defendant denies each and every other allegation contained in plaintiff's petition." It is argued that the court should have instructed the jury specifically, as alleged in the answer, that defendant claimed the money because it had been derived from land sold, which the plaintiff and her husband agreed should be applied upon the debt. We think this was unnecessary. The instruction given states in concise language the legal effect of the answer. The manner in which the money was obtained, the manner in which the alleged indebtedness arose, and the manner of payment, were matters of evidence, rather than of pleading.

The fourth instruction was as follows: "You are the judges of the credibility of the witnesses, and of the weight to be attached to each and all of them; and you are not bound to take the testimony of any witness as absolutely true, and you should not do so if you are satisfied, from all the facts and circumstances proved on the trial, that such witness is mistaken in the matter testified to by him, or that for any other reason his testimony is untrue or unreliable." This instruction is complained of because of the statement that the jury was not bound to take the testimony of any witness as absolutely true; it being argued that the jury is compelled to believe a witness, where not contradicted or impeached. We think the whole instruction, in connection with the fifth, which is the usual instruction in regard to considering the interest, bias, demeanor, and intelligence of witnesses, states the law correctly. A fair construction of the court's language would not authorize the jury to arbitrarily and unreasonably disregard uncontradicted testimony from an honest, unbiased, intelligent, and apparently truthful witness. The instruction does, however, tell the jury that they need not blindly accept testimony, but should weigh it in connection with all the facts and circumstances in evidence, and give it such credence as, under all the proof, is warranted. This is correct. Other instructions are complained of as unfairly repeating the theory of the plaintiff. Without quoting them, we will merely say that we do not think they are in any degree open to that criticism.

The first instruction requested by the defendant was to the effect that, even if Murphey's act in getting the money was wrongful, still, if afterwards the plaintiff paid the balance due him, and demanded and obtained a receipt therefor, such acts would be a ratification. We think the principle of this instruction was covered by the court's sixth, which was that if the defendant forcibly, and without the consent of plaintiff, took the money, and the plaintiff afterwards, with full knowledge of the material facts, voluntarily consented to defendant's retaining such money as a settlement of an existing debt against her and her husband, then there would be a ratification. The court's instruction was, in this respect, fully as advantageous to the plaintiff as the one requested, and was a more accurate statement of the law. The ratification would arise, as stated by the court, from plaintiff's consenting that the money taken should be so retained. The payment of the balance and taking a receipt—elements embodied in the instruction requested—would merely be evidence of such consent.

The second instruction requested, while somewhat involved in its language, was, in effect, that, if the money was due Murphey, plaintiff could not recover, although it was taken against her consent. This doctrine could not for a minute be tolerated. A man has no right to resort to robbery to collect his claims.

The third instruction requested was correctly refused, because it told the jury that the failure of the plaintiff to make a demand for the money was a "strong circumstance that she considered the receipt of the sum by the defendants as a payment." It is not error to refuse to instruct the jury as to the weight to be given different portions of the evidence. It was for the jury to determine how strong the circumstance was.

The remaining instructions requested were on the subject of ratification, and were covered by the court's sixth. Judgment affirmed.

STALL v. JONES et al.

(Supreme Court of Nebraska. March 18, 1896.)

MORTGAGE—DEED ABSOLUTE IN FORM—EVIDENCE—LIMITATIONS—ADVERSE POSSESSION.

1. While a preponderance of the evidence is sufficient to establish an issue in any civil action, and while this court will not, in the exercise of its appellate jurisdiction, weigh conflicting evidence, still, in order to sustain a finding for the plaintiff in an action to have a deed absolute in form declared a mortgage, the evidence on behalf of plaintiff, when taken together, and without regard to the contradicting evidence, should present a state of facts consonant with reason, and consistent in its different parts.

2. The statute of limitations runs against a bill to declare a deed absolute in form a mortgage in favor of a grantee in possession, from the time such possession becomes adverse to the grantor's title.

3. That grantee's possession is adverse may be inferred from the exercise by him of acts of ownership after payment of the debt.

4. In this state a deed absolute in form passes the legal title, although intended as security for a debt, and for most purposes treated as a mortgage.

5. Therefore, where the grantee under such a deed is in possession, the grantor's equity of redemption may be defeated by a parol settlement defeating his right to an accounting.

(Syllabus by the Court.)

Appeal from district court, Seward county; Wheeler, Judge.

Action by Irwin Stall against Claudius Jones and others. Judgment for plaintiff, and defendant Jones appeals. Reversed.

Reese & Gilkeson and D. C. McKillip, for appellant. Pound & Burr, R. P. Anderson, George H. Terwilliger, and Thomas A. Healey, for appellee.

IRVINE, C. In December, 1875, Stall conveyed to Jones the N. W. ¼ of section 22, township 10 N., of range 2 E., in Seward county. December 17, 1891, he instituted this action for the purpose of having the conveyance declared to have been a mortgage, for an accounting of the amount due thereon, and of the rents and profits of the land which had been in Jones' possession ever since the conveyance. The answer of Jones admits the conveyance, but alleges that it was in pursuance of an absolute sale of the premises; pleads laches, the statute of limitations, and adverse possession. The district court found for the plaintiff, and also made special findings, not necessary to here notice, because they amounted to a general finding for plaintiff on the issues joined. The defendant Jones appeals, the other defendants not appearing to have any beneficial interest.

The case, in its nature, calls for a review of the evidence, to ascertain whether it supports the findings of the district court; and the appellant insists that the rule in such cases is that a mere preponderance of the evidence is not sufficient to establish the plaintiff's case; that, in order to show that a conveyance absolute in form was in legal effect a mortgage, the evidence must be free from doubt, or, at least, that it must be of a most clear and convincing character. This position is supported to a certain extent by Schade v. Bessinger, 3 Neb. 140, and Deroins v. Jennings, 4 Neb. 97. The rule stated in the latter case is that a court of equity will not declare a deed absolute in form a mortgage, unless the proof is clear, consistent, and satisfactory that the object of the transaction was to create a security for the payment of money. On the other hand, it has been held, in relation to similar statements with regard to the degree of evidence required to establish the good faith of a conveyance from husband to wife, that in all civil cases only a preponderance of the evidence is necessary (Stevens v. Carson, 30 Neb. 544, 46 N. W. 655); and likewise as to the establishment of a parol gift (Wylie v. Charlton, 43 Neb. 840, 62 N. W. 220). In the case last cited, it was said that, in determining on which side the preponderance of evidence lay, the circumstances naturally casting suspicion upon testimony to establish a parol gift were proper for consideration, but that such circumstances did not create a different rule as to the degree of evidence required. We adhere to the doctrine of the two later cases, that only a preponderance of evidence is required to establish an issue in civil actions; and we also adhere to the settled doctrine of this court that it cannot, in the exercise of its appellate jurisdiction, undertake to weigh conflicting evidence, but will, where the evidence is conflicting, refuse to set aside the finding of the trial court. Still, we do not think that this rule requires that we should, in all cases, sustain a finding merely because a search through the record discloses here and there isolated statements of witnesses, which, taken together, and disregarding all the rest, would sustain the finding. It is necessary to regard the case made by the successful party to some extent as an entirety; and we think the rule stated in Schade v. Bessinger and Deroins v. Jennings a correct one, not at all conflicting with other cases, provided it be applied simply so far as to require that, in such cases as we are considering, the plaintiff, to prevail, must present consistent and satisfactory evidence, which, if believed, would be sufficient to establish his case. If, on his side, such evidence is presented, the mere fact that it is contradicted by defendant's witnesses would not prevent a recovery, provided the trial court, in weighing the testimony, considered the evidence on behalf of plaintiff worthy of belief. But the plaintiff's proof, when taken by itself, ought to be reasonable and consistent with known facts.

In the case before us, it is possible to accept a portion of the plaintiff's testimony, and a portion of defendant's, and thus gain sufficient to support the findings; but, in order to do so, it is necessary to believe the plaintiff in some points where he is contradicted by several witnesses, by his own conduct, and by the circumstances, and then to follow this by absolutely disbelieving and rejecting other portions of his testimony, and accepting on these points testimony of the defendant contradicted by the plaintiff. A complete review of the 400 pages of evidence is impracticable, and it would be unprofitable. We shall content ourselves by an attempt to summarize its most important features. The plaintiff's testimony is that he bought the land in question in 1874. It was incumbered by a mortgage in favor of R. E. Moore, for $500, bearing 12 per cent. interest, and due in

May, 1876. Stall became indebted to Jones to an amount of $80 or over; and in the autumn of 1875, an execution having been issued on a judgment against him in favor of a third person, he made arrangements with Jones by which Jones agreed to advance him other money, so as to make his indebtedness $520. To secure this, Stall executed the deed in question, being in form an absolute conveyance of the premises. Jones, on his part, according to Stall's testimony, agreed to discharge Moore's mortgage when it became due, and to carry the debt at 10 per cent. It is beyond dispute that an indebtedness of $520 was created from Stall to Jones at about this time, and that Stall paid this from time to time, so that it was entirely discharged in March, 1878. Jones was let into possession on the execution of the deed, and has ever since occupied the land by his tenants. When Moore's mortgage became due, he paid it. Stall also testifies that in 1877 he found a purchaser for the land at $1,200, and consulted Jones in regard to its sale; but Jones advised him not to sell, saying that he (Jones) would take care of it, and that Stall could realize more than he was then offered. Stall also testifies to a recognition by Jones in September, 1882, of Stall's ownership. But, even according to Stall's testimony, this was somewhat equivocal. It was to the effect that Stall met Jones in Seward, and "told him, 'We had better make a sale of the land, as I would like to get a little money out of it;' and he told me, 'No,' to let the land go till after election. Then he told me it was all right; that I could do without the money, and after election he would make it all right." There is no distinct evidence of any further transactions until 1889, when Stall testifies that he demanded a reconveyance, and Jones wrote him a check for $20, which he handed to him, and said that was all he could do, and then rushed out. In cross-examination, Stall says that he understood from what Jones said that that transaction ended the business. Stall took the check, and used its proceeds. In 1890, according to Stall, he again besought Jones for a settlement, and Jones said the affair was too old to open up. To a certain extent, Stall is corroborated by his wife in regard to the purpose of executing the deed; and he is in part corroborated by another witness in regard to the transaction of 1882. Jones squarely contradicts him in regard to all the essential features of the case. He says the $520 loan was secured by chattel mortgage; and Stall admits that one or more chattel mortgages were executed to secure it. It may be stated that it appears quite clearly that these mortgages were in themselves sufficient security. It is undisputed that Jones has made improvements on the land to the amount of at least $3,000, although Stall swears that he had no knowledge that such improvements were made until shortly before the action was begun. The testimony of strangers is almost altogether corroborative of Jones.

If the case rested entirely upon the proof in regard to the original character of the transaction, without regard to the other circumstances, the finding might be sustained; but, taking the plaintiff's own testimony concerning the whole course of the transaction, it is far from satisfactory. According to the plaintiff, the land was worth $1,600 at the time of the conveyance. The incumbrance, including the Moore mortgage, was but a little over $1,000. By March, 1878, Stall, by direct payments, had discharged the $520 indebtedness. This left only to be met the debt created on account of the Moore mortgage, of $500 and interest. Stall testifies that, during nearly the whole period, the rental value of the land has been from $300 to $400 per annum. It is, of course, possible, but it is very highly improbable, that Stall, who is incidentally shown to have been in financial difficulties during at least a portion of this period, should have permitted Jones to remain in possession and in perception of the profits of this land for 16 years before bringing suit, for 13 years after the original indebtedness had been paid, and for at least 10 years after the profits of the land should have discharged the Moore indebtedness. This delay cannot be accounted for by any recognition by Jones of Stall's rights, because, according to Stall himself, Jones was on each occasion guarded and equivocal; and the language which he used could not have been such as to lull Stall into a sense of security. On the contrary, if the events occurred as Stall describes them, Jones' conduct would rather have caused uneasiness and doubt as to his good faith. The evidence shows that Stall lived about five miles from the land, and it is equally improbable that, if he thought he had any interest therein, he should have been all those years in ignorance of the fact that Jones was making valuable and extensive improvements thereon. In this investigation, we disregard much testimony in regard to statements of Stall disavowing interest in the land, because Stall denies having made such statements. But we cannot disregard the fact that, in 1890, Stall filed two petitions against Jones in the district court, under his oath, alleging that the conveyance had been made to Jones in trust, and for the convenience of Stall, and without consideration, without any reference to an indebtedness or a mortgage.

But, if we could sustain the finding as to the nature of the original transaction, we would be at once met by the issue raised on the plea of the statute of limitations. In Morrow v. Jones, 41 Neb. 867, 60 N. W. 369, it was held that, as a rule, the right to foreclose and the right to redeem are reciprocal, and that the right to redeem is barred when the right to foreclose would be. In some cases, it is held that, against a mortgagee in possession, the statute runs against a bill to re-

deem from the payment of the debt. Stillwell v. Hamm, 97 Mo. 579, 11 S. W. 252; Knowlton v. Walker, 13 Wis. 264. But it is the more general doctrine that the statute begins to run from the time the mortgagee's possession becomes adverse, and that this does not occur while the mortgagor's rights are admitted. McPherson v. Hayward, 81 Me. 329, 17 Atl. 164; Waldo v. Rice, 14 Wis. 310; Robinson v. Fife, 3 Ohio St. 551; Fisk v. Stewart, 26 Minn 365, 4 N. W. 611; Miner v. Beekman, 50 N. Y. 337; Hubbell v. Sibley, Id. 468. Applying this rule to the present case, it is true it does not appear from the plaintiff's testimony that Jones expressly denied plaintiff's title prior to 1890. But, if we are to believe plaintiff in regard to the rental value of the land, the whole indebtedness must have been discharged more than 10 years before suit brought. During this period, Jones continued to lease the land, to make improvements thereon, and generally treat it as his own. There was certainly enough to justify a finding that his possession had become adverse, although we do not say that the evidence compelled such finding. In order, however, to account in any reasonable manner for Jones' continued possession in subordination to Stall's rights, we must accept Stall's improbable testimony as to the facts surrounding the original transaction, and then disbelieve his testimony as to rental value of the property.

Finally, if we pursue the course indicated, we are confronted with the transaction of 1889, when Stall says Jones gave him a check for $20, and told him that was all he would do; and Stall accepted the check, and used its proceeds, understanding that Jones tendered it as a final settlement of the transaction. In the case of an ordinary mortgage, which, under our law, creates a lien and passes no title, it is reasonably clear that a right to redeem could not be barred by a transaction of this character lying entirely in parol. But in this state a deed absolute in form, although intended as security, and in general treated as a mortgage, passes the legal title to the mortgagee. Gallagher v. Giddings, 33 Neb. 222, 49 N. W. 1126; Harrington v. Birdsall, 38 Neb. 176, 56 N. W. 961. Where the legal title has passed, where the mortgagee is in possession, and where an arrangement is entered into which defeats the mortgagor's right to an accounting, we see no reason why it should not bar a redemption. Where a deed absolute in form is executed, and a written defeasance or bond for reconveyance is given back, and the mortgagor voluntarily surrenders or cancels the defeasance or bond, this renders the conveyance absolute, and vests complete title in the mortgagee. Trull v. Skinner, 17 Pick. 213; Harrison v. Trustees, 12 Mass. 456; Shubert v. Stanley, 52 Ind. 46. So, where an absolute deed is given as security for the payment of money, the grantor may abandon the payment of the debt, cancel the secret agreement, and treat his conveyance as absolute; and, if he do so, he will be bound by his election. Carpenter v. Carpenter, 70 Ill. 457. The Massachusetts cases go upon the ground that the mortgagor, by voluntarily destroying the evidence which would constitute the conveyance a mortgage, estops himself from thereafter claiming that it was a mortgage. So here, if Stall, knowing that the check was tendered him as a complete and final settlement of the account, accepted it and retained it, he bound himself by the accounting so had, and is without standing to maintain this bill for an accounting and redemption, because the accounting is essential to the redemption. It is true that Stall's account of the last transaction is contradicted by Jones and by other witnesses, who testify that it related to an entirely different matter. But we repeat that we cannot zigzag through the record, accept Stall's testimony on some points, and entirely discredit it on others, believing the witnesses who contradict him, and so reach a conclusion that there was satisfactory evidence in support of the decree.

We hold that the findings are not supported by the evidence, not because we have weighed the conflicting evidence, and believe that the trial court wrongfully passed upon the conflict, but because Stall's testimony and that offered in support thereof, when taken alone, do not present a consistent and reasonable state of facts, entitling him to relief. We are not bound to accept isolated statements of witnesses as sufficient to make out a case, when they are inconsistent with one another, and not reasonably reconcilable with known and established facts. Reversed and dismissed.

GARBER v. PALMER, BLANCHARD & CO.

(Supreme Court of Nebraska. March 18, 1896.)

REPLEVIN—DISMISSAL—DAMAGES.

1. A plaintiff in an action of replevin, who has obtained possession of the property under the writ, cannot be permitted, without the consent of the defendant, to dismiss the action.

2. When a plaintiff in replevin, who has obtained the property, fails in his proof, or fails to prosecute the action, the defendant is entitled to judgment, and a trial of his right of property or possession, for the purpose of establishing his damages

(Syllabus by the Court.)

Error to district court, Webster county; Beall, Judge.

Action by Palmer, Blanchard & Co., a corporation, against Samuel Garber. Dismissed at plaintiff's cost, and defendant brings error. Reversed.

James McNeny, for plaintiff in error.

IRVINE, C. This was an action in replevin by Palmer, Blanchard & Co., a corporation, against Garber, for 300 head of cattle, alleged to be worth $8,000, and appraised at $5,000. The answer was a general denial.

After each side had rested its case, the plaintiff moved the court "to dismiss this action without liability to the defendant herein," whereupon the following order was made: "On consideration whereof the court sustains said motion, and it is hereby considered, ordered, and adjudged that said action be, and the same is hereby, dismissed at plaintiff's costs. And it is further considered and adjudged that said plaintiff be, and he is hereby, discharged from all liability to defendant herein. Defendant thereupon asks that the cause, as to him, be submitted to the jury upon the evidence and the instructions submitted to the court. On consideration whereof, the court refuses to grant said application. And the court further refuses to grant any other motion or application on the part of the defendant, and refuses to make or render any other ruling, finding, or judgment, save and except the above." It appears, not from the record proper, but from the bill of exceptions, that the property had been delivered to the plaintiff under the writ. The evidence discloses that Garber and one Higby, who was cashier of the Farmers' & Merchants' Banking Company of Red Cloud, made an arrangement with Palmer, Blanchard & Co., who were live-stock commission men at South Omaha, whereby the Farmers' & Merchants' Bank issued a letter of credit in favor of Garber, on the faith of which Garber bought the cattle in controversy, in New Mexico, drawing on the bank for the purchase price. The agreement was that the South Omaha National Bank should issue to the Farmers' & Merchants' Bank a corresponding letter of credit; that Garber should secure advances by Palmer, Blanchard & Co.. by chattel mortgage; that the Farmers' & Merchants' Bank should, in pursuance of its letter of credit, honor Garber's drafts for the purchase money; and that, on the execution of the mortgages, drafts should be drawn, with the mortgages attached, which should be paid by Palmer, Blanchard & Co. The details of the latter part of the agreement were not made clear, nor are they material. It sufficiently appears that, through some arrangement then made, Palmer, Blanchard & Co. were, upon being secured by chattel mortgages executed by Garber, to pay the advances made by the Farmers' & Merchants' Bank to him. When the cattle arrived in Nebraska, Garber executed two mortgages, each of which covered 150 head of cattle,—one for $5,000, the other for $2,435.17. These were delivered to the bank, together with notes representing the debt, and a draft was drawn on Palmer, Blanchard & Co., for the amount. Palmer, Blanchard & Co. refused to accept the draft, claiming that the mortgages should have covered certain hogs and corn, in addition to the cattle. After Palmer, Blanchard & Co. had refused to accept the draft, Garber prepared to ship the cattle, for sale, to Kansas City, when this action was instituted. It is quite evident that officers of the bank instituted the action; but Mr. Blanchard, representing Palmer, Blanchard & Co., appeared on the scene the next morning, and joined in the replevin bond. On the trial he testified to the foregoing facts, and testified, distinctly and positively, that his company had refused to accept the mortgages, and that it had no interest or claim upon the cattle.

It was on this state of facts that the court, on plaintiff's motion, dismissed the action, and forbade the defendant the privilege of proving his damages. That error was committed is self-evident, but there is the difficulty in stating reasons for reversal which always attends an attempt to demonstrate an axiom. The district court may have proceeded upon the theory that section 430 of the Code gives the plaintiff in every action a right to dismiss without prejudice at any time before final submission. But this provision does not apply to actions of replevin. In replevin, where the property is delivered to the plaintiff, he practically obtains his execution before judgment. He accomplishes the main object of his suit through the preliminary process of the court. It is sometimes said that both parties then become actors. The plaintiff has taken the property, and the burden falls upon him of establishing his right thereto; and, unless he recovers on the strength of his own title, the defendant is entitled to judgment for the return of the property, or for its value. He can no more abandon the case than can a defendant in an action of trover. It is true that section 190 of the Code provides that where judgment is rendered against the plaintiff on demurrer, or if the plaintiff otherwise fails to prosecute to final judgment, the court shall impanel a jury to inquire into the right of property and right of possession of the defendant, and, if the jury be satisfied that either was in the defendant, they shall assess such damages as may be right and proper. But this section is enacted for the purpose of an assessment of damages, such as a plaintiff is entitled to on default in ordinary actions. The defendant is entitled to judgment unless the plaintiff proves his own title. St. John v. Swanback, 39 Neb. 841, 28 N. W. 288; Jenkins v. Mitchell, 40 Neb. 664, 59 N. W. 90; Kavanaugh v. Brodball, 40 Neb. 875, 59 N. W. 517; Peterson v. Lodwick, 44 Neb. 771, 62 N. W. 1100; Johannson v. Miller, 45 Neb. 53, 63 N. W. 141. In case the plaintiff, by failure of evidence, or by failure to prosecute his case, fails to establish such affirmative right in himself, the defendant is entitled to the procedure accorded by section 190, not for the purpose of establishing his right, but for the purpose of assessing his damages. It follows, from the nature of this action, and from the feature of the plaintiff's securing the property before he has established his rights, he cannot, by a dismissal of the action, avoid the necessity of making the necessary proof. He cannot, by his own ex parte

affidavit, obtain property in the possession of another, and then, by dismissal, leave the other party without an opportunity to defend his right, and without a remedy. The proposition is so evident—the contrary so unjust, so absurd, and so preposterous—that neither argument nor authority should be necessary. Still, the question has been several times decided by this court. Aultman v. Reams, 9 Neb. 487, 4 N. W. 81; Moore v. Herron, 17 Neb. 697, 703, 24 N. W. 425, 451; Ahlman v. Meyer, 19 Neb. 63, 26 N. W. 584.

The action taken by the court might have been error without prejudice, had the plaintiff, beyond contradiction, established its right. But it did not do so. In the first place, the petition stated no cause of action. It alleged a special ownership in the property, without setting out the facts in relation thereto. A plaintiff in replevin, claiming under a chattel mortgage, must allege a special ownership, and plead the facts. Musser v. King, 40 Neb. 892, 59 N. W. 744; Randall v. Persons, 42 Neb. 607, 60 N. W. 898; Sharp v. Johnson, 44 Neb. 165, 62 N. W. 466; Camp v. Pollock, 45 Neb. 771, 64 N. W. 231; Strahle v. Bank, 47 Neb. —, 66 N. W. 415. In the second place, the plaintiff absolutely failed to prove ownership, general or special, or right of possession; but, on the contrary, its own evidence was that it had no claim at all, and had refused to accept the mortgages under which alone there was any pretense of a claim. Possibly the district court thought that the evidence showed that the suit had not been authorized by Palmer, Blanchard & Co., and that that company was not, therefore, the actual plaintiff. But such evidence as was introduced to this effect was not in support of any pleading by Palmer, Blanchard & Co. to that effect. It was not relevant, under the issues, except as it might operate in favor of the defendant, and was no ground for dismissing the case without a judgment for defendant. Finally, the evidence showed that, while the suit had been begun without authority, Palmer, Blanchard & Co. had certainly ratified the acts of the person commencing it. Blanchard signed the replevin bond. Several continuances were taken, on Palmer, Blanchard & Co.'s motion. Palmer, Blanchard & Co. prosecuted the action, so far as it was prosecuted. It appears that, after the cattle had been taken under the writ, they were shipped to Palmer, Blanchard & Co. for sale. They were sold by that company, and the proceeds remitted to Higby, who had assumed the indebtedness in favor of the Farmers' & Merchants' Bank created by the transaction. But this merely shows that Palmer, Blanchard & Co. ratified the suit, and prosecuted it, without a shadow of a claim of right, not for their own protection, but in order to protect Higby, it being explained in the evidence that this course was taken in order to prevent creditors of Garber from reaching the cattle. In brief, the transaction was in consummation of a conspiracy between Higby and Palmer, Blanchard & Co. to seize the cattle without any right thereto, and without tangible claim of right, knowing they had no such right, for the purpose of, in that way, securing payment of a debt of Garber's. An inexcusable error was committed. Possibly, no party to the case has suffered greatly, because the proceeds of the property were applied to the payment of a debt of Garber's. But it is not in such a manner that a creditor can be permitted to obtain a preference. Reversed and remanded.

OMAHA REAL ESTATE & TRUST CO. v. REITER et al.

(Supreme Court of Nebraska. March 18, 1896.)

EJECTMENT—TITLE TO SUPPORT—STATUTES—REPEAL—DEED—PROOF—TRIAL PRACTICE.

1. A plaintiff, in an action of ejectment, must recover on the strength of his own title or right to the property, and cannot rely upon the weakness or invalidity of the defendant's title or right.

2. The plaintiff, to recover in ejectment, must possess and prove a legal title.

3. Where there exist two statutes, between which there is a direct and irreconcilable conflict, the latest in point of time will be upheld and prevail.

4. Where there are two sections of a statute on the same general subject, and enacted at the same time, and one section is afterwards amended so that it directly conflicts with the other, the amended section, being the latest expression of the lawmaker on the subject, will prevail, and the other be repealed by implication, when not repealed in express terms.

5. Section 5 of an act entitled "Of Real Estate and the Alienation Thereof by Deed," passed January 26, 1856 (Sess. Laws, p. 80, c. 31), as amended February 15, 1864 (Sess. Laws, p. 58, c. 12), was in direct and irreconcilable conflict with the provisions of section 44 of chapter 31 of the same statute, passed at the same time, and consequently operated its repeal by implication.

6. Where two sections or portions of the same statute, passed at the same time, are inconsistent with and repugnant to each other, so much so that both cannot be enforced, the last section or last words will be allowed to prevail, and the section or words in conflict therewith *held* to be repealed.

7. Sections 5 and 41 of chapter 43, entitled "Real Estate," of the Revised Statutes of 1866, were enacted at the same time, as parts of the same statute, and, being in some of their provisions so repugnant that both could not be executed, insomuch as they conflicted, the last section (41) prevailed, and the other was repealed.

8. The title to real estate appeared, from the record, to be in Joel S. Smith. A deed, which purported to convey such real estate, and which, in its recitals and also in the acknowledgment, designated the grantor as "Joel S. Smith," but which was signed "John S. Smith," *held* not competent evidence to prove a conveyance of the title of Joel S. Smith, in the absence of other proof establishing that the person who signed the deed, John S. Smith, and Joel S. Smith were one and the same person.

9. The granting or overruling of an application, by a party to a suit, who has rested his case, to withdraw the rest, and offer or introduce further testimony, is a matter within the discretion of the trial judge; and where such an application has been allowed for the purpose of affording a party an opportunity to offer or introduce testimony on certain subjects specified

in the motion and allowance, and the party seeks to extend the privilege accorded further, so as to include other and entirely different subjects, it is within the discretion of the trial court to grant or refuse such extension; and, unless an abuse of discretion appears in a refusal so to do, it will not be error or cause for a reversal of the judgment.

10. The rule announced in paragraph 1 of the syllabus in the case of Hoadley v. Stephens, 4 Neb. 431, to the extent it relates to the acknowledgment of deeds in another state than this, before a commissioner of deeds for this state, overruled.

(Syllabus by the Court.)

Error to district court, Douglas county; Scott, Judge.

Separate actions of ejectment by the Omaha Real Estate & Trust Company against Joseph S. Kragscow, John W. Rodefer and others, Sarah J. Shaw and another, and Charles E. Reiter, respectively. There were judgments for the several defendants, and plaintiff brings error. Affirmed.

Geo. W. Covell, for plaintiff in error. Wharton & Baird, J. E. Nevin, and Bartlett, Crane & Baldrige, for defendants in error.

HARRISON, J. October 3, 1891, an action of ejectment was commenced by the plaintiff against Joseph S. Kragscow, in the district court of Douglas county, the property involved being described in the petition as follows: "Lots No. thirty-nine (39) and No. forty (40), in block No. one (1), in Saunders & Heimbaugh's addition to Walnut Hill, an addition to the city of Omaha." It was alleged that the defendant had, ever since the 23d day of December, 1890, unlawfully kept and was holding possession of the property, and keeping plaintiff out of possession thereof. It was also charged that defendant had received rents and profits of the premises to the amount of $94. Plaintiff prayed judgment for the possession of the property, and a recovery of the rents and profits. Defendant answered, admitting possession of the property, alleging affirmatively his lawful possession thereof since February 1, 1888, and denying the other allegations of the petition. To this there was a reply, denying the allegations of the answer in regard to the lawful possession of the defendant. On the same date, October 3, 1891, three other cases of ejectment were instituted in the same court,—one against Sarah M. Shaw et al., one against John W. Rodefer et al., and one against Charles E. Reiter,—each to recover possession of property situate in the addition which we have hereinbefore stated; also, to recover rents and profits of the premises involved in each case, alleged to have been received by the parties defendant. Issues were joined, and on March 27, 1893, the first-mentioned case was called for trial, a jury was waived, and trial had to the court. At the beginning of the trial, the parties entered into the following agreement, which was made of record. "It is agreed by the parties to try this case, and that a finding shall be had by the court, and the other cases (being numbers 27-160, 27-161, 27-162, and 27-163) shall abide the result of the finding in this case, except as to proof and finding and judgment as to rental values." The cases have, by stipulation, all been presented to this court together, there being separate record and bill of exceptions in each case. The judgments in the district court were adverse to the plaintiff, and reversals are sought here.

In the brief filed for plaintiff there is a statement of some facts which serves, and is almost necessary, as an introduction, in order to a proper understanding of the other and further facts and questions developed by the evidence, as offered and introduced, or rejected, during the trial. We will, for this statement, quote from the brief: "Prior to the 1st day of August, 1886, the Omaha Real Estate & Trust Company purchased the tract of land on which Saunders & Heimbaugh's addition to Walnut Hill was after said purchase situated, and laid out and platted said addition upon said tract, and duly dedicated the same. On August 1, 1886, the said Omaha Real Estate & Trust Company sold and conveyed the premises in controversy in these actions, as well as a large number of other lots in said addition, to the Pleasant Hill Building Association, a corporation of Douglas county, Nebraska. On that day the Omaha Real Estate & Trust Company loaned to the Pleasant Hill Building Association $16,175, and took the notes of said last-named corporation therefor, bearing interest at 8 and 10 per cent., and, as security for the payment of said notes, received from said corporation a mortgage for said amount upon the property in controversy in these suits, as well as the other property which was conveyed to said corporation by plaintiff August 1, 1886, which mortgage was, immediately upon delivery thereof, recorded. On or about March 22, 1890, an action to foreclose said mortgage was begun, which resulted in a decree of foreclosure against all of the real estate described in said mortgage, and an order of sale thereof, directing J. F. Gardner, as special master commissioner, to sell the premises, after appraising and advertising the same, who proceeded to appraise, advertise, and sell the same. At the said sale, the Omaha Real Estate & Trust Company became the purchaser of all the lots described in the mortgage and the decree, which included the property in controversy in these suits in ejectment. The sale of these lots was confirmed by the court, and deed ordered to be made to the purchaser, and on December 23, 1890, a deed was executed and delivered by said special master commissioner for the premises in controversy herein, and other property, to the Omaha Real Estate & Trust Company, which deed was on that day recorded."

Counsel for plaintiff states that it was his understanding that plaintiff and defendants claimed that their rights to the properties

arose from the same, or a common, source of title, the Pleasant Hill Building Association, and, in accordance with this belief or understanding, he first introduced in evidence the mortgage foreclosure proceedings, which were noticed in the preliminary statement of facts; also, the deed of the special master commissioner, made to plaintiff, pursuant to its purchase of the property at the foreclosure sale. A certified copy of the deed executed by plaintiff to the Pleasant Hill Building Association was offered on behalf of plaintiff, for the purpose of showing that, at the time of the foreclosure proceedings, such association had the title to the property; and, after introducing some evidence in regard to rental values of the premises in controversy, the plaintiff rested his case. But the record shows that the rest was withdrawn, and the plaintiff was allowed to introduce further testimony. We will now say that whenever, hereafter, reference is herein made to a deed, conveyance, or will, it will be one which purports to transfer or affect the premises in controversy. Counsel for plaintiff next offered as evidence a warranty deed from Alexander H. Baker and wife to Pierce C. Heimbaugh and Nathan Merriam; then, a deed from the last-mentioned parties to the Omaha Real Estate & Trust Company; and next, a quitclaim deed from Alexander H. Baker to the same company. There was next introduced a plat of Saunders & Heimbaugh's addition to Walnut Hill, and the record shows the taking of testimony closed. Then appears the following:

"Plaintiff now asks to withdraw his rest, and show source of title from the government of the United States to Alexander H. Baker. I desire, also, to show, by extrinsic evidence, or by the original deed to the Pleasant Hill Building Association, executed by the Omaha Real Estate & Trust Company, that it was conveyed in the conveying clause to the Pleasant Hill Building Association; and I ask it, on the ground of surprise, because, until today, it was never brought to my notice that there was any defect in the records of the grantee of the Omaha Real Estate & Trust Company,—that is, it was never brought to my notice that the grantee's name in the conveying clause was not the Pleasant Hill Building Association,—and I offer to make this proof by the production of the original deed to the Pleasant Hill Building Association, the secretary of that association, I believe, being in town, and having in his possession the original deed. I don't include in the proposition an offer of the deed for the purpose of showing that the party who witnesses the deed was other or different than the one that has been shown to be a stockholder of the Omaha Real Estate & Trust Company. The Court: I will allow you to trace the title from the government down to Baker if you want to. I will allow you to introduce the original deed from the Omaha Real Estate & Trust Company to the Pleasant Hill Building Association, if you can, but inasmuch as you say that in no manner you expect to prove the witnessing of the deeds is different from what has been shown. Mr. Covell: And, further, if the original deed to the Pleasant Hill Building Association cannot be found, I ask to show, by parol evidence, in consequence of ambiguity in the deed, that the deed was actually made to the Pleasant Hill Building Association, instead of to the Pleasant Hill Association, by reason of ambiguity in the deed. The Court: You can introduce what you stated,—chain of title from the government down to A. H. Baker, and the original deed, if you can, for the purpose of showing whatever the deed may show."

There was then offered in evidence a certified copy of a patent from the United States to Samuel Conger, a certified copy of the record of a deed from Conger to Enos Lowe, and a certified copy of the record of a deed from Enos Lowe and wife to Roswell G. Pierce. To this last deed, when offered, a number of objections were interposed, among which was the following: "That the deed purports to be acknowledged before Thomas J. Ratham, a commissioner of deeds for Nebraska, for Pottawattamie county, Iowa; that the acknowledgment has not, affixed or attached thereto, the certificate of the secretary of state, as required by the laws in force at the time of the recording of the same, and was therefore not entitled to admission in the records." The objection was sustained, and the deed excluded. There was next offered in evidence a deed by the sheriff of Douglas county to one Joel S. Smith, purporting to convey any title held by Roswell G. Pierce. This deed, on objection, was excluded. This was followed by an offer of a deed which, in its recitals, gave the name of the grantor as Joel S. Smith, the same name being stated in the acknowledgment; but the instrument was signed by John S. Smith. On objection, this deed was excluded. A number of other instruments of conveyance were offered to complete the chain of title, including the original deed from the Omaha Real Estate & Trust Company to the Pleasant Hill Building Association; also, the original mortgage from the building association to the real estate and trust company,—both of which were objected to on the ground that no title had been shown in the party grantor in either conveyance, and that the first-offered deed was witnessed by a stockholder of the company, who was also its secretary, and purported to have been acknowledged before a person who was a shareholder in the grantor company; that the mortgage was attested by the secretary, also a stockholder of the association, the grantor, and its acknowledgment purports to have been taken before a stockholder of the company, the

mortgagee. The objections were sustained, and both deed and mortgage were excluded from the evidence. The counsel for plaintiff at this time asked a witness he had called to the stand whether he was acquainted with defendant, Joseph S. Kragscow, and the defendants in the other actions; and, following his answer, asked him: "You may state, if you know, under what claim of title the defendants in this action claim, if they make any claim of title." Immediately succeeding this, in the record, appears the following: "Objection by defendant—First, as incompetent, irrelevant, and immaterial; second, for the reason that counsel for the plaintiff only asked permission of this court, at the time these cases were being decided by his honor, and at the close of his decision, to simply make a record here showing title from the government down to Baker, and also asking the privilege to offer in evidence the original deed from the Omaha Real Estate & Trust Company to the Pleasant Hill Building Association, and permission having been given by the court simply for those two purposes and no other. The Court: The court only gave permission that, in these four cases, after having announced the opinion of the court against the plaintiff, when the case was regularly reached on the 27th day of March, 1893, counsel for the plaintiff then requested that the plaintiff be permitted to introduce evidence of title from the government down to Baker and the original deed from the Omaha Real Estate & Trust Company to the Pleasant Hill Building Association; that leave was granted, after the judgment had been announced by the court, to plaintiff in those four cases; and the court will not now permit evidence to be introduced other than as that requested by the counsel for plaintiff, and sustains the objection going to the evidence sought by these interrogatories. Plaintiff excepts. Plaintiff offers to prove, by this witness, that the defendants in the several actions in which we are seeking to introduce testimony claim under the Pleasant Hill Building Association, and to be in possession of the premises in controversy in this action under the Pleasant Hill Building Association, by virtue of contracts of sale for the premises involved in this action, executed to them by the Pleasant Hill Building Association; and this offer is made of proof by this witness because he knows the fact, having seen the contracts himself in the hands of the defendants to this action, whom he has stated that he knew." The same objection was made to the offer as to the question, and this, further: "And for the additional reason that the testimony offered is not the best evidence, the contracts themselves being the best evidence." The objections to question and offer were sustained.

Before proceeding with the examination and discussion of the alleged errors of the trial court, relied upon by counsel for plaintiff in the argument herein, it may be as well to state that defendants did not offer any proof of title, but rested their rights and relied upon possession of the premises. This, in actions of ejectment, they could do, as it is the rule therein that the plaintiff must recover upon the strength of his own title or right, and cannot rely upon the weakness of that of his adversary, the defendant. Gregory v. Kenyon, 34 Neb. 640, 52 N. W. 685, Franklin v. Kelly, 2 Neb. 112; Morton v. Green, Id. 451; O'Brien v. Gaslin, 24 Neb. 561, 39 N. W. 449; Buck v. Gage, 27 Neb. 306, 43 N. W. 110. If there is a common source of title, or the defendant claims under the same person as plaintiff, in proving title, the plaintiff need go no further back than the common source. Barton v. Erickson, 14 Neb. 164, 15 N. W. 206; Carson v. Dundas, 39 Neb. 503, 58 N. W. 141. But where this is not the case, the plaintiff must show a grant from the state or United States, and a regular and uninterrupted chain of title to himself; or, in other words, he must prove title. No doubt, proof of title would be sufficient, if possession necessary to establish title was shown either in plaintiff or those under whom he claims; but with this we have nothing to do in this case. It was not shown, during the trial, that plaintiff and defendants claimed under the same person, or from common source of title; hence, it devolved upon plaintiff to prove title in itself.

In the attempt to do this, as we have before stated, as one link of the chain of title, there was offered a certificate copy of the record of a deed from Enos Lowe and wife to Roswell G. Pierce, which was objected to because it was acknowledged before a commissioner of deeds for Nebraska, in a county of the state of Iowa, and was not authenticated by the certificate of the secretary of state, which objection was sustained, and the deed not allowed in evidence. This is one of the errors of which counsel for plaintiff complains, and for the strength of this complaint he relies upon matter contained in certain sections of the statute, viz. sections 4 and 5 of chapter 73, Comp. St., which are in reference to the acknowledgment of deeds or instruments of conveyance, and are as follows: Section 4: "If executed and acknowledged or proved in any other state, territory, or district of the United States, it must be executed and acknowledged or proved either according to the laws of such state, territory or district or in accordance with the law of this state, and such acknowledgment shall be made before and certified by any officer authorized by the laws of such state, territory, or district to take and certify acknowledgments, or by a commissioner of deeds appointed by the governor of this state for that purpose." Section 5: "In all cases provided for in section four of this chapter (if such acknowledgment or proof is taken before a commissioner appointed by the governor of this state for that purpose, notary public or other officer using

an official seal), the instrument thus acknowledged or proved shall be entitled to be recorded without further authentication: provided, that in all other cases the deed or other instrument shall have attached thereto a certificate of the clerk of a court of record or other proper certifying officer of the county, district or state within which the acknowledgment or proof was taken, under the seal of his office, showing that the person whose name is subscribed to the certificate of acknowledgment was, at the date thereof such officer as he is therein represented to be, that he is well acquainted with the handwriting of such officer, that he believes the said signature of such officer to be genuine, and that the deed or other instrument is executed and acknowledged according to the laws of such state, district or territory." To which we will add the following, from section 13 of the same chapter: "Every deed acknowledged or proved, and certified by any of the officers before named, including the certificate specified in section five of this chapter, whenever such certificate is required by law, may be read in evidence without further proof, and shall be entitled to be recorded. * * *" In support of the defendants' contention that the excluded conveyance was not authenticated as by law required, we are referred especially to section 36 of this same chapter 73, which is as follows: "When any deed, or other instrument shall be proved or acknowledged, or any oath or affirmation shall be taken before any commissioner appointed by virtue of this chapter, before it shall be entitled to be used, recorded or read in evidence, in addition to the preceding requisites, there shall be subjoined or affixed to the certificate, signed and sealed by each commissioner as aforesaid, a certificate under the hand and official seal of the secretary of state of Nebraska, certifying that such commissioner was, at the time of taking such proof or acknowledgment, or of administering such oath or affirmation, duly authorized to take the same, and that the secretary is acquainted with the handwriting of such commissioner, or has compared the signature to such certificate with the signature of such commissioner deposited in his office, and has also compared the impression of the seal affixed to such certificate with the impression of the seal of such commissioner deposited in his office, and that he verily believes the signature and the impression of the seal of the said certificate to be genuine."

The three or four preceding sections of the chapter are in reference to the appointment of commissioners of deeds, and in a general way defining their duties and powers. Section 36, quoted above, appears as section 44 of chapter 31, entitled "Real Estate and the Alienation Thereof by Deed," approved January 26, 1856; also, as section 41, c. 43, Rev. St. 1866, under title "Real Estate"; section 36, Gen. St. 1873; and section 4360, Cobbey's Ann. St. 1893. This section was enacted in 1856, and was re-enacted, February 15, 1864, in an act entitled "An act to revise and consolidate the laws of a general nature passed at the second session of the legislative assembly of this territory," being section 42 of chapter 12 of the act. February 13, 1865, there was passed an act, entitled "An act to amend chapter twelve of an act entitled 'An act to revise and consolidate the laws of a general nature passed at the second session of the legislative assembly of this territory,' approved February 15th, 1864" (Sess. Laws 1865, p. 53), and which was as follows:

"Section 1. Be it enacted by the council and house of representatives of the territory of Nebraska, that section five of chapter twelve of an act entitled 'An act to revise and consolidate the laws of a general nature passed at the second session of the legislative assembly of this territory,' is hereby amended so as to read as follows, namely: In all cases provided for in section four of this act (if such acknowledgment or proof is taken before a commissioner appointed by the governor of this territory for that purpose, notary public or other officer using an official seal), the instrument thus acknowledged or proven shall be entitled to be recorded without further authentication. * * *

"Sec. 2. This act shall take effect and be in force from and after its passage.

"Approved February 13, 1865."

It is strenuously argued by counsel for plaintiff that the passage of this act operated a repeal by implication of the section now numbered 36, then numbered 42, of chapter 12, which required the certificate of the secretary of state to be attached to the acknowledgment of a deed taken before a commissioner of deeds. It is clear that there was an irreconcilable conflict between section 42 of chapter 12 and section 5 as amended by the later act; that they could not both stand and be enforced, for, if a deed was executed and acknowledged before a commissioner of deeds, and presented for record without the certificate of the secretary of state, it would be sufficiently authenticated, under the provisions of section 5 as amended, but its record necessarily denied if the provisions of section 42 (now 36) were enforced, and the last act, or the amended section 5, prevailed, and the other section was repealed by implication. State v. Howe, 28 Neb. 618, 44 N. W. 874. Sections 4 and 5, as enacted January 26, 1856, were as follows: Section 4: "If acknowledged or proved in any other state or territory or district of the United States, it must be done according to the laws of such state, territory, or district and must be acknowledged or proved before any officer authorized to do so by the laws of such state, territory or district, or before a commissioner appointed by the governor of this territory for that purpose." Section 5: "In cases provided for in the last section unless when taken before such commissioner, the deed shall have attached thereto a certificate of the clerk or other proper certifying officer of a

court of record of the county or district within which it was taken under the seal of his office, that the person whose name is subscribed to the certificate of acknowledgment or proof was, at the date thereof, such officer as he is therein represented to be, that he is well acquainted with the handwriting of such officer, and that he believes the signature of such officer to be genuine, and that the deed is executed and acknowledged, or proved according to the laws of such state or territory." Sess. Laws 1856, p. 80, c. 31, §§ 4, 5. Section 4 was again enacted, in the same terms, February 15, 1864. Section 5 was, at the same date, again enacted, with the following changes: In place of the words "unless when taken," the words "except where such acknowledgment is taken" were used; and also the words "or state" were inserted after the word "district," and the words "within which the acknowledgment was taken" were substituted for the words "within which it was taken." Section 4 was again enacted, unchanged, February 12, 1866, and section 5, as amended February 13, 1865 (the amendment we have hereinbefore noticed), was also again enacted February 12, 1866. But the section in regard to the authentication of a conveyance acknowledged before a commissioner of deeds by the certificate of the secretary of state also appeared in the Revised Statutes of 1866 as section 41 of chapter 43 thereof. Sections 4 and 5, hereinbefore referred to, were, by such numbers, sections of this same chapter; and there was the same conflict between the provisions of section 41 and section 5 as had existed as they appeared as numbered in prior enactments, subsequent to the amendment of section 5, February 13, 1865, as hereinbefore noticed. It was said, in an opinion in Albertson v. State, 9 Neb. 429, 2 N. W. 742, 892, in which this court considered the question of a conflict between different parts of sections of the Revised Statutes of 1866: "The Revised Statutes of 1866 were passed as one act, and in such case the well-known rule applies that, where there is an irreconcilable conflict between different sections or parts of the same statute, the last words stand, and those which are in conflict therewith are, so far as there is a conflict, repealed." And it was held, "where there is an irreconcilable conflict between different sections or parts of the same statute, the last words stand, and those in conflict therewith are repealed." Applying this rule in the case at bar, the section now numbered 36 must stand, and so much of section 5 as is in conflict therewith must be held to be repealed or without force.

It is further insisted, in this connection, by counsel for plaintiff, that the second section of an act passed June 13, 1867, to amend section 38 of chapter 43 of the Revised Statutes of 1866, entitled "Real Estate," now section 33, c. 73, Comp. St., and a part of section 4357 of Cobbey's Annotated Statutes of 1893, which reads as follows: "All acts performed in pursuance of the laws of this state or of the laws of the territory of Nebraska, by commissioners of deeds heretofore appointed by the governor of the territory of Nebraska, shall be deemed and held to be valid and binding in law" (Laws 1867 [Sp. Sess.] p. 52, § 2),—has made binding and legalized all deeds acknowledged before commissioners of deeds prior to its passage, and the deed from Lowe to Pierce, being one of such, was thus relieved of any defect which may have existed; and, further, that section 4 of chapter 61 of an act passed in 1887, which section is now section 4a of chapter 73 of the Compiled Statutes and 4328 of Cobbey's Annotated Statutes of 1893, and which reads as follows: "All deeds heretofore executed and acknowledged in accordance with the provisions of this act shall be and are hereby declared to be legal and valid,"—was effectual in curing any defect which may have existed in the authentication of the deed from Lowe to Pierce. These two sections, when examined, and the first in connection with the provisions of the section of which it was enacted as amendatory, it is plain, have no reference to the authentication of the acts or deeds mentioned in them, and were not passed with the purpose in view of relieving acts performed or deeds acknowledged before commissioners of deeds of any defects in their authentication, and did not do so for the deed in question. The deed served, no doubt, to pass the title to the land from the grantor to the grantee. This it would do without any acknowledgment or authentication. But, lacking the certificate of the secretary of state, it was not entitled to be used, recorded, or read in evidence; and, if recorded, a certified copy of it as so recorded could not properly be received in evidence, and the trial court did not err in rejecting it when offered. In the case of Hoadley v. Stephens (see opinion in 4 Neb. 431), in which the question of whether a deed executed in Virginia, and acknowledged before a justice of the peace there, would be received in evidence in the courts of this state without further authentication, or any proof that it was executed and acknowledged according to the laws of Virginia, sections 4 and 5 of the Statutes, as hereinbefore quoted, were referred to, and their provisions applied, and it was held: "Where a deed is executed and acknowledged in another state before a commissioner of deeds of this state, a notary public, or other officer using an official seal, the law presumes a compliance with the law of the place of execution, and no further authentication is necessary. But in all other cases there must be attached thereto a certificate of the clerk of a court of record, or other certifying officer, under his official seal, showing that the person taking such acknowledgment was the officer therein represented, that he is well acquainted with his handwriting, that he believes his signature to be genuine, and

that such deed is executed according to the laws of such state." Whether the provisions of section 36 (as it was then) of the General Statutes, requiring the certificate of the secretary of state to be attached to a deed acknowledged before a commissioner of deeds, was considered, we cannot say. No reference to or mention of it was made in the opinion. It follows, from the views herein expressed, that so much of the rule announced in the case alluded to as effected acknowledgments taken before commissioners of deeds, must be overruled.

A certified copy of the record of a deed executed by the sheriff of Douglas county, purporting to convey the title of Roswell G. Pierce to Joel S. Smith, was offered, and, immediately following this, a certified copy of a deed which recited that the grantor's name was Joel S. Smith, and by the acknowledgment he was stated to be Joel S. Smith, but the deed was executed by John S. Smith. This offered testimony was objected to, and the objection sustained; and, we think, correctly. It was clearly not competent to prove a conveyance of any title of Joel S. Smith by a deed signed by John S. Smith. They would not be presumed to be the same persons. Conceding, for the purpose of argument, that the title was in Joel S. Smith, conveyance of the title from him to a grantee could not be proved by a deed executed by John S. Smith, in the absence of proof that he was the same person as Joel S. Smith. Ambs v. Railway Co. (Minn.) 46 N. W. 321, and cases cited. There was offered, by plaintiff, in connection with the certified copy of the record of this deed, a certified copy of the record of an affidavit, in which it was sought, by statements therein made, to show that the deed was that of Joel S. Smith, and had been executed by him, and not John S. Smith; but, on objection, this was excluded. In this action, we think, there was no error. It was the record of an ex parte affidavit, and was plainly not competent as evidence on the trial of a cause of this nature.

The determination of the further question of the competency as evidence of the deeds attested by a stockholder of the grantor or grantee, and acknowledged before a stockholder, is not necessary to a decision of the case, and we need not now discuss or settle it. If it was error to exclude the deed, it was error without prejudice, as the proof of the chain of title was broken and incomplete before these deeds were reached.

There is one further matter of complaint urged in behalf of plaintiff, viz. that the trial court erred in not allowing the proof offered to show that the defendants were in possession of, and claiming a right to, the premises involved in the action, under and by virtue of contracts of purchase with the same person or company under whom the plaintiff claimed title, or that the source of title was a common one. It will be remembered that the case had been tried on the theory, as stated by counsel for plaintiff, that the parties to the action were claiming under a common source of title, and had been submitted to the court, and a decision had been announced on the conditions as established by the circumstances and facts then in evidence and before the court, and on motion of plaintiff the case had been reopened for the hearing of further testimony on particular subjects specifically named,—to prove a chain of title from the United States, and to offer the original deed from the Omaha Real Estate & Trust Company to the Pleasant Hill Building Association. Full opportunity was afforded for the introduction of the matters requested, and, at the close of the hearing thus accorded, the offer was made of testimony in regard to the contracts of purchase. The opening of a case after the parties thereto have announced the closing of offers of testimony, at the instance or request of either, for the offer or introduction of further evidence, is a matter which rests wholly within the discretion of the trial judge; but it should be given a wide range, and liberally exercised in cases where such action will subserve the due administration of justice between litigants, always with a proper regard, however, to the observance and enforcement of settled rules and laws of procedure, and an orderly course of business. In full view of what had transpired during the trial of this case, and the stage of the proceedings at which the action of the court against which this complaint is directed occurred, we cannot say that there was any abuse of its discretion in such action, calling for a reversal of the judgments. The judgments of the trial court must be affirmed. Affirmed.

GROESBECK v. BENNETT et al.

(Supreme Court of Michigan. March 31, 1896.)

CANCELLATION OF PLEDGE—EVIDENCE—SUFFICIENCY—FRAUD.

In an action to cancel a pledge it appeared that complainant had been induced to execute a pledge note for an amount in excess of the true amount owing by him; that he had been further induced to pledge, as security for said note, a mortgage, the value of which was largely in excess of the amount of the note, giving the pledgee the right to sell the mortgage, in default of payment of the note, at public or private sale, without notice. It appeared, too, that complainant was a man of little education, ignorant, and improvident in business, and of a yielding and confiding nature. *Held*, that the evidence justified a decree canceling the pledge and reducing the amount of the note to the amount actually owing by complainant.

Appeal from circuit court, Macomb county, in chancery; James B. Eldredge, Judge.

Action by Henry C. Groesbeck against William C. Bennett and others to foreclose a mortgage and cancel a pledge of such mortgage. There was judgment for plaintiff, and defendants appealed. Affirmed.

Byron R. Erskine, for appellants. Sloman, Groesbeck & Robinson, for appellee.

LONG, C. J. This bill was filed to foreclose a mortgage upon certain real estate situate in Macomb county, and to set aside and cancel a certain pledge of the same mortgage. The proofs were taken in open court, and a decree of foreclosure entered, together with an order setting aside the pledge. From this decree Jay S. Bennett and Ira B. Bennett, who were the pledgees named in the pledge, appeal.

The court below made findings of fact, with which the parties appealing seem in the main to be satisfied, but contend that the court was in error in setting aside the pledge, and in finding too small an amount due to the pledgees therein. The facts as found by the court are substantially that on December 12, 1893, the complainant, being the owner of about 107 acres of land, entered into an agreement with John H. Barnes to sell the same to him at the price of $125 per acre. This agreement was duly recorded, and by its terms $10 was paid down at the time of its execution, $100 was to be paid November 18, 1893, $100 on March 18th and $100 on April 18th following. The times and terms of the balance of the payments it is unnecessary to state. On January 14, 1893, Barnes entered into a written agreement of sale of the premises to the defendant William C. Bennett. The price of the land was fixed in this contract at $175 per acre. Two hundred dollars was paid down, and payments were to be made, $200 in 30 days, $4,000 in 60 days, when a deed was to be given, and a mortgage taken back for the balance of the purchase money, payable $5,000 on or before 3 years and the balance on or before 5 years, with interest at 6 per cent. annually. On November 18th this contract was modified, and the purchase price of the lands reduced to $150 per acre. This appears to have been in consideration of a payment of $500 by Bennett. In this agreement reference was made to the contract of Barnes with complainant, and it was agreed that on payment of $2,275 by Bennett to Barnes it was to be assigned to Bennett, and Barnes was to pay the $100 due the complainant March 18, 1893. This agreement between Barnes and Bennett was subsequently changed, and he agreed to accept $1,500 in lieu of exacting $2,275. In April, 1893, Barnes advised the complainant that he had sold the land to Bennett, and notified him to meet with them for the purpose of preparing the deed. Bennett, at this meeting, was prepared to pay the complainant the unpaid part of the $1,000 payment, to wit, $690, and to pay Barnes the $1,500 going to him. At this meeting it appeared that the lands were incumbered by mortgages then held by defendants Chapoton and Crittenden, upon which was unpaid $3,425; and it was then arranged that Bennett should go to Mt. Clemens, and see Chapoton and Crittenden, and arrange to remove such incumbrances. Barnes at that time indorsed an assignment of his contract with complainant to Bennett, and Bennett deposited a certified check in favor of Barnes in the bank in escrow to await the result of the interview with Chapoton and Crittenden. The complainant then made a deed of the lands to Bennett, with full covenants of warranty, and, among other things, that the lands were free from all incumbrances whatever; the consideration being stated in the deed to be $16,050, and the number of acres 115. A mortgage at the same time was drawn from Bennett to the complainant for $2,375, to be paid on or before seven years from date, with interest at 6 per cent., payable annually. With these two papers the complainant and Bennett went to Mt. Clemens, and it was there arranged with Chapoton and Crittenden that complainant should pay interest upon the amount due to them to March 14, 1893, and give them his notes for the amount of their claim, to draw interest from March 14, 1893, and to assign them the mortgage taken from Bennett of $12,375 as collateral security to his notes. This arrangement was carried out, and complainant gave Chapoton one note for $1,525, due in six months, and one for $1,200, due in one year, and also gave Crittenden one note for $700, due in six months,—all drawing interest at 7 per cent. from March 14, 1893; and delivered to them the assignment of the mortgage made by Bennett as collateral security. Bennett paid to the complainant at that time, by check, $690, and from which complainant paid to Chapoton and Crittenden the interest on the amount then due to March 14, 1893. Complainant claimed in the court below that under this arrangement he was not carrying out the contract with Barnes, but was selling to William C. Bennett pursuant to a new arrangement, made on their way to Mt. Clemens, by which Bennett was to pay him at the rate of $150 per acre; that he gave the notes to Chapoton and Crittenden and assigned the $12,375 mortgage really to accommodate Bennett, who, he claimed, was to pay the notes given to Chapoton and Crittenden as a part of the purchase price of the land, and that Bennett so promised. The court found against the complainant upon that proposition, saying: "It is hardly possible that Bennett would have paid Barnes the amount he did,—some $2,200,—and yet pay complainant $690, and give a mortgage of $12,375, and pay to Chapoton and Crittenden $3,425, aggregating $18,690; that complainant at that time must have understood that he was to deed free from all incumbrances, consequently was bound to provide for the release of the Chapoton and Crittenden mortgages." The conclusion reached by the court below on this question was that the parties were carrying out the contract as it then existed between the complainant and Barnes,—that is, the land was called 107 acres, and the purchase price $125 per acre,—and that

Chapoton and Crittenden released their mortgages and took the mortgage given by Bennett as collateral security to complainant's notes for the purpose of clearing the premises of that incumbrance. As the complainant did not appeal, we need not discuss this finding, as the defendants themselves are satisfied with it. Some time after this arrangement was made, William C. Bennett gave to his sons, Jay S. and Ira B. Bennett, doing business as Bennett Bros., three mortgages, each to secure his note for $8,000. One of these mortgages was given on this land. It is claimed by Bennett Bros. that William C. Bennett was indebted to them from $16,000 to $18,000, and that he was receiving advances from them; that these mortgages were given as blanket mortgages, to cover whatever debt he might incur to them. The court below found this to be the fact. Some time later, the Chapoton and Crittenden notes not being paid, and just before their maturity, Bennett Bros. purchased them, and they were indorsed over from Chapoton and Crittenden to Bennett Bros., without recourse. The mortgage of $12,357 was also assigned to them. Defendants Bennett Bros. claimed that this was done to protect their interest as mortgagees in the $8,000 given them by William C. Bennett. After Bennett Bros. had acquired the claims of Chapoton and Crittenden, William C. Bennett commenced suit in the Wayne circuit court against the complainant upon these notes. This suit Bennett Bros. afterwards discontinued, claiming that William C. Bennett had no authority to commence it. They then notified the complainant that he must take care of these notes. William C. Bennett appears to have interested himself for Bennett Bros. to induce the complainant to take care of them, and was informed by the complainant that he could not do so, as at that time he had been arrested for carrying on a saloon business without a license in Detroit, and he needed $300 to pay the license. A meeting was then arranged between the complainant and Bennett Bros. and William C. Bennett. A blank form of pledge note had been procured by Bennett Bros. previous to this, and the complainant was induced to sign such pledge note, which reads as follows:

"Detroit, June 8, 1894. $4,095.40. Six months after date, I promise to pay Jay C. Bennett and Ira B. Bennett, or order, four thousand ninety-five and forty-hundredths dollars, with interest at eight per cent. per annum. Value received. [Sig.] Henry C. Grosbeck.

"And have deposited or pledged with them a certain real-estate mortgage, dated April 8, 1893, executed by William C. Bennett, of Detroit, Michigan, to me, recorded in the register's office of Macomb county, said state, on the same day, in Liber 81 of Mortgages, at page 175, as security thereto; and I hereby authorize and empower the said Jay S. Bennett and Ira B. Bennett, in the event of non-performance of this agreement, to sell said mortgage at public or private sale or otherwise, at their option, and without further notice to me. [Sig.] Henry C. Grosbeck.

"Witness: [Sig.] Nelson K. Riddle."

The court below found that this pledge was for a considerable more than the amount due on the Chapoton and Crittenden notes with the $300 added which Bennett Bros. advanced that day to complainant, and the court says: "This, on the hearing, is claimed to have been made up of unpaid taxes on the land, and of the sums of $49 and $25 advanced by William C. Bennett. The rate of interest in the pledge note is fixed at eight per cent. Complainant testifies that at the time the rate read to him was seven per cent., and he contends that subscription to the note was not fully read to him." The court, after commenting upon the manner in which this pledge was procured with interest at 8 per cent., and the amounts that were added to make it $4,095.40, concludes that undue advantage was taken by Bennett Bros., and by the decree canceled and set aside the pledge note, awarding sale of the premises under the mortgage, but directed that the commissioner, out of the proceeds of such sale, pay to Bennett Bros. the amount paid by them to Chapoton and Crittenden for the notes, with interest at 7 per cent. to the time of payment over to them of the moneys by the commissioner; and also awarding to them the $300 advanced to the complainant, with interest at 7 per cent., and making these moneys and the interest thereof a lien upon the mortgage.

The only contention made by the defendants Bennett Bros. is that the court was in error in setting aside and canceling this pledge note, and refusing to give them the full amount thereof. It would not profit any one to set out the testimony in full, which led the court to that conclusion. The testimony was taken in open court, and that court had an opportunity to see the witnesses, and judge of their truthfulness or untruthfulness; and, under the circumstances, was able to judge of the merits of the controversy as are we. We have carefully examined the testimony, and from it and surrounding circumstances and the situation of the parties are led to the conclusion that the court below was correct. The complainant was a man of but little education, somewhat improvident, and unaccustomed to business transactions. The property had come to him from his father, and he seems wholly incompetent to take care of and protect his own interest. We feel he was overreached in giving this pledge note. The defendants Bennett Bros. were apparently men of large business experience, and, with the defendant William C. Bennett, were able to get into their possession this pledge note, by the terms of which they had a right to sell at public or private sale this mortgage of $12,375, which was well secured, without any notice whatever to complainant. It is apparent that they had added a large amount to

these notes over and above the amount actually their due. The decree of the lower court will be affirmed, with costs of both courts to the complainant. The other justices concurred.

CITY OF DETROIT v. DONOVAN, Circuit Judge.

(Supreme Court of Michigan. March 24, 1896.)

Application on the relation of city of Detroit against J. W. Donovan, Wayne circuit judge, for writ of mandamus to compel defendant to vacate a judgment against relator. On motion to modify an order granting the writ. Denied.

B. T. Prentis, for the motion.

PER CURIAM. On motion, a judgment which was entered nunc pro tunc against the relator in the Wayne circuit court was set aside by this court on February 25, 1896. A motion is now made to modify this order, and to allow the judgment to stand as of the date it was actually entered. The claim is made that, unless this be allowed, the plaintiff in the case will lose his interest on the judgment from the date of the verdict to the time of the entry of the judgment. We see no difficulty in the saving of the interest in the entry of a new judgment. The motion must be denied.

RYAN v. MEYER et al.

(Supreme Court of Michigan. March 24, 1896.)

FRAUDULENT CONVEYANCE — HOMESTEAD — ALLOWANCE OF CLAIM.

Where a husband conveys property to his wife, the moving cause being to place it beyond the reach of his creditors, it will be subjected to judgments against him.

Appeal from circuit court, Isabella county, in chancery; Peter F. Dodds, Judge.

Bill in aid of execution by John T. Ryan against Alexander Meyer and others. From the judgment rendered, defendants appeal. Affirmed.

Fancher & Sangster, for appellants. Francis N. Dodds, for appellee.

MONTGOMERY, J. This is a bill in aid of execution. After the indebtedness to complainant was incurred, and before execution was issued, defendant Alexander Meyer conveyed to his wife, Rosana, 120 acres of land. At the same date he conveyed to George Walter another 40 acres of land, and transferred to him personal property. The transactions with Walter are not directly involved, except as matter of evidence bearing on good faith. The defendants set up that in 1871 defendant Rosana Meyer advanced to her husband $1,200, which was invested in land in Ohio; that this land was sold two years later, and another piece of land bought, which, after three years more, was traded for the land in suit and $1,600 in money; that the deed to this last-mentioned piece of property was taken in the name of Alexander Meyer with the express understanding and agreement that the said Rosana Meyer was to have $3,000, with interest thereon, on request. It should be stated that the two descriptions of land held at different times in Ohio were in the name of Alexander Meyer. We are convinced by the testimony that there never was any such agreement to repay Rosana Meyer $3,000, with interest, as set up in the answer, or to pay any other sum than the $1,200 with interest; and this conclusion is based upon the testimony of Alexander Meyer himself and the admission of Mrs. Meyer. We are also convinced that the transactions were not in good faith. The farm was fairly worth at least $5,000, as we find from the testimony. If we treat the advance of $1,200 as a lien, it would amount, with interest, at the date of the transfer, to $2,856. There was a mortgage of $600 on the place, leaving an excess of indebtedness of about $1,600. Defendant contends that the homestead might have been transferred, and that creditors could not complain. This homestead claim is not set up in the answer, and, if it is to be treated as within the issue, the entire transaction occurring at the same time ought to be considered; and, from the testimony of George Walters, it appears that on the occasion of the transfer of the property to him, made at the same time, he executed to defendant Rosana a mortgage for $500, which, with the excess in this property over the homestead valuation and what was in fact due Rosana, would substantially equal the claim of complainant. We think the purpose of placing this property beyond the reach of creditors was the moving cause of the transfer, and that the circuit judge was right in subjecting the property to complainant's levy. The decree will be affirmed, with costs. The other justices concurred.

HELLER v. CHICAGO & G. T. RY. CO.

(Supreme Court of Michigan. March 31, 1896.)

CARRIERS — LIVE-STOCK SHIPMENTS — NEGLECT OF SHIPPER TO SEND CARE TAKER.

1. A railroad company does not assume the common-law duties of a common carrier in respect to stock shipped over its line, but is only bound to transport the same with ordinary care and skill, and with reasonable dispatch.

2. In the absence of a special contract by a carrier to look after stock shipped over its line, a shipper who neglects to send a care taker with his cattle assumes all damages caused by their unduly crowding and injuring one another, and that which results from their natural restiveness and viciousness.

3. Where a declaration contains several grounds of negligence, the court should instruct the jury as to those on which alone recovery may be had, and eliminate the others.

Error to circuit court, Saginaw county; Robert B. McKnight, Judge.

Action by Gustav Heller against the Chicago & Grand Trunk Railway Company for injury to cattle shipped over defendant's road. From a judgment for plaintiff, defendant brings error. Reversed.

Plaintiff's firm, of which he is the survivor, purchased some cattle at the stock yards in Chicago. His agent ordered a car from the defendant company in which to ship them. The car was furnished, and was 33 feet long and 8 feet wide upon the inside. Into this car were loaded 24 steers, weighing 25,800 pounds, or 1,075 pounds each. The defendant was not responsible for the loading. Plaintiff could put in as many or as few cattle as he chose. The car was to be shipped over the defendant's road to Flint, Mich., and from thence over the Flint & Père Marquette Railway to Saginaw. The usual time for the performance of the journey was from 24 to 32 hours. The loaded car was then delivered to the defendant for transportation. The train consisted of 24 cars, the others being loaded with hogs. The car left Chicago at 2:30 p. m., March 14th, and reached Saginaw at 4:15 a. m., March 16th. Plaintiff furnished no man to accompany the cattle and take care of them on the route. The train was supplied with air brakes, the same as are in use on passenger trains, so that stops and starts could be made with as little jar or jerk as possible. On arriving at a station called "Hazlitt Park," toward noon of the 15th, the conductor discovered that three of the cattle were down, and that they all appeared restless and uneasy. He testified that the car was overloaded, that he wired the superintendent for a larger car, and asked for instructions. On arriving at Bancroft, 19 miles further, about noon, in obedience to instructions, this car of cattle was sidetracked, the cattle taken out, watered, fed, and rested 11 hours, a larger car furnished, the cattle loaded in it, and the journey completed. Before arriving at Bancroft one steer had died. His body was removed, and it was reloaded in the large car with the other cattle, and shipped to Saginaw. The cattle were delivered in bad condition, their flesh bruised, some ribs broken, and one dead. Plaintiff brought suit to recover damages for the injury, and obtained a verdict of $150. The declaration contains six counts, some based upon the common-law liability of the defendant as a common carrier, and others based upon alleged negligence. The court, in its instructions, eliminated the counts as to the common-law liability, and left it to the jury to determine, under the first two counts, whether the defendant was guilty of negligence which caused the injury. These two counts are substantially the same. On account of the importance of the case, we quote the allegation of negligence in full. It is as follows:

"Yet the said defendant, not regarding its said duty in that behalf, did not carry and convey said cattle in said car of said defendant from said Chicago to said Saginaw, with such reasonable dispatch and care, and did not feed, water, and properly care for the same, but wholly failed and neglected to do so. That said cattle, after being so placed in said car at said Chicago at said time, to wit, 7 o'clock in the forenoon of the 14th day of March, 1893, were carried, and said car was hauled, negligently, and with such want of reasonable care and dispatch, by said defendant, from said Chicago to said Saginaw, that said car did not arrive at said Saginaw until, to wit, 10 o'clock in the forenoon of the 16th day of March, 1893; and that said defendant, contriving and willfully intending to injure and defraud the said Gustav Heller, surviving partner of Mary Hubert and Gustav Heller, as aforesaid, negligently and carelessly, and without reasonable dispatch, hauled said car, containing said cattle, from said Chicago to said Saginaw, without devoting any care or attention to said cattle whatever, without food, water, change of position, or care. Said cattle had not been fed or watered since leaving said Chicago as aforesaid, and could not, owing to their position in said car, lie down. That the weather during all of said time was extremely cold. That said cattle were continuously in said car from said 7 o'clock of the forenoon of said 14th day of March, 1893, until 10 o'clock in the forenoon of the 16th day of March, 1893, without food, water, care, or opportunity to lie down, and without adequate protection from the extreme cold, and, owing to their number, were during all that time in a cramped and uncomfortable position in said car; and that said cattle, by reason of such neglect and delay in transportation as aforesaid, and want of food, water, and care, and long confinement in said car in said cramped and uncomfortable position, and without any fault or negligence on the part of said Gustav Heller, surviving partner of the said Mary Hubert and Gustav Heller, suffered greatly thereby, and became, by reason of said cold weather, want of food, water, room, and care, sick, sore, lame, weak, bruised, jammed, gored, ribs broken, and disordered, and so remained for a long space of time, to wit, from thence hitherto, and became and were greatly reduced in value. And by reason of the neglect and delay of defendant in transporting said cattle as aforesaid, and the sickness and suffering occasioned by the delay, and by said cold and want of food, water, and care as aforesaid, one of said cattle of and belonging to said Gustav Heller, surviving partner of said Mary Hubert and Gustav Heller aforesaid, and of the value of $55, was found dead when said car arrived at Saginaw as aforesaid. Six other cattle were badly bruised all over, jammed, gored, and their ribs broken and damaged to the extent of $180. Thirteen others were jammed, bruised, gored, and lacerated, and in a weak, damaged, and dying condition, and damaged to the extent of $135."

The fact is established beond controversy that it is customary for shippers of live stock to send a man with the train to look after their cattle, to keep them upon their feet, and to attend to watering and feeding them. No neglect is shown in the management of the train, unless it is to be inferred from the fact of the injury to the animals. There was no

collision, and those in charge of the train testified that it was run in the usual manner, and without accident, from Chicago to Flint.

L. C. Stanley (E. W. Meddaugh and Geer & Williams, of counsel), for appellant. Ferdinand Brucker and Chauncey H. Gage, for appellee.

GRANT, J. (after stating the facts). It is of importance to state what grounds of negligence are set forth in the declaration. They are as follows: (1) Delay in transit; (2) failure to feed, water, and properly care for them; (3) in keeping them in the car from 7 o'clock on March 14th until 10 o'clock on March 16th, without food, water, care, or opportunity to lie down, and without adequate protection from the cold; (4) placing them in the car in a cramped and uncomfortable position. The declaration, in summing up the cause of the injury, states that it was "occasioned by the delay, and by said cold, and want of food, water, care, and room." Upon these allegations, or some of them, must rest the plaintiff's right of recovery.

We will first note those which must be eliminated: (a) Plaintiff suffered nothing by delay, and did not upon the trial, and does not now, ask recovery upon that basis. The cattle were not kept in the car, as charged, but were removed and fed and watered within the time required by the interstate commerce law of the United States. Rev. St. U. S. § 4386. They were properly watered and fed. Those in charge of the cattle at Bancroft so testified. There is no evidence to the contrary, and nothing to impeach the witnesses. (b) He cannot recover for want of room. If the car was overloaded, this was his own fault. Plaintiff conceded this, and claimed that the car was not overloaded. The court properly instructed the jury that, if overloading was the cause of the injury, plaintiff could not recover. (c) Defendant was not responsible for any injury from the cold weather, nor was there any evidence that the cattle suffered from the cold.

There is, therefore, left only the question whether the defendant performed its duty in properly caring for the animals, for want of care is the only basis upon which a recovery can be had. It is not alleged or claimed that there was negligence in the management of the train. This brings us to the important questions: What risk did plaintiff assume? And what duty did defendant owe to plaintiff in the care of the property committed to it for transportation? The court instructed the jury that the defendant was not liable as a common carrier. Such has been the rule in this state for the last 25 years. Railroad Co. v. McDonough, 21 Mich. 165. The able opinion in that case was written by the late Mr. Justice Christiancy, and is exhaustive in both its reasoning and the authorities cited. While it is usually sufficient to refer to the authority, yet the reason there given is so cogent and forcible in its application to this case that I am constrained to quote parts of it: "Animals have wants of their own to be supplied; and this is a mode of conveyance at which, from their nature and habits, most animals instinctively revolt; and cattle especially, crowded in a dense mass, frightened by the noise of the engine, the rattling, jolting, and frequent concussions of the cars, in their frenzy, injure each other by trampling, plunging, goring, or throwing down; and frequently, on long routes, their strength exhausted by hunger and thirst, fatigue, and fright, the weak easily fall and are trampled upon, and, unless helped up, must soon die. Hogs, also, swelter and perish. It is a mode of transportation which, but for its necessity, would be gross cruelty, and indictable as such. The risk may be greatly lessened by care and vigilance, by feeding and watering at proper intervals, by getting up those that are down, and otherwise. But this imposes a degree of care and an amount of labor so different from what is required in reference to other kinds of property that I do not think this kind of property falls within the reasons upon which the common-law liability of common carriers was fixed." The court further, in discussing what these carriers would naturally do if they were common carriers, or held themselves out as such, said that they (the carriers) "must employ a corps of men skilled in the care and management of stock, a business quite foreign in its character from that of operating a railroad, and that they must make many other provisions to guard against injury and risk which are not required for other property generally transported by railroads. Now, we must shut our eyes to what is notorious to all business men, or we must take judicial notice, as I think we are bound to do, that this is not the mode, and such are not the principles, upon which this great and rapidly increasing business of transporting live stock to an Eastern market is generally, if at all, done upon the railroads of this state (if, in fact, in any other of the Western states). I think we are also bound to know that, if this business were done in this mode and upon these principles, and could be done in no other way, and the railroads were to be held responsible as insurers for all damages not caused by the act of God or the public enemies (which is strictly the common-law liability), or by the viciousness of some particular animal or animals in the mass, which would be a ludicrous distinction applied to a car load of cattle, or for all such as might be prevented by human agency, the railroad companies, to indemnify themselves against such risks and the extraordinary expenses of this mode of doing the business, must, of course, demand a much higher freight; and, if they can be compelled to carry at all in this way, they must provide themselves with

all the conveniences I have mentioned, and keep on hand a special corps of experienced stockmen; and, being compelled to keep them, and having gone to the expense of the necessary conveniences, it would then be for their interest to charge the higher freight in all cases, and refuse to carry upon any other terms. And, in this manner, those who would prefer to take the care and risk upon themselves for a lower freight would be deprived of the opportunity. The law of common carriers is founded mainly upon considerations of public policy, and these considerations, therefore, should not be overlooked. On the other hand, if the drover, with a sufficient force of his own men, experienced in the proper management of the cattle, goes upon the same train free of charge, in a drover's car, provided for that purpose, and has the entire charge, care, and management of the cattle, and the responsibility for care and injury incident to that mode of transportation, the company only furnishing the proper cars and motive power, and being responsible only for their sufficiency, and the proper mode of making up and running the train, it is manifest there will be much less liability to injury or loss, and that the companies can afford to carry the cattle at greatly reduced rates. This, undoubtedly, is the mode, substantially, in which this branch of business is carried on generally upon the railroads of this state, and probably other Western states, so far as relates to the transportation of cattle to an Eastern market,—sometimes by special contract, setting forth the terms, as in a bill of lading, receipt, or ticket, and sometimes only by the uniform course of business as adopted by the company, and acted upon by their employers." Plaintiff assumed all the ordinary risks of transportation and all injury which resulted from the cramped and crowded condition of the cattle, from their restiveness, viciousness, exhaustion, hunger, and thirst during their transportation, and also from the jars and concussions incident to starting and stopping the train. The defendant owed the duty to transport the car and its contents with ordinary prudence, skill, and care, and with reasonable dispatch. It was understood, and was a part of the contract, that the car was to be transported within the usual time of from 24 to 32 hours, and that the defendant was under no obligation to unload, water, and feed the cattle if transported within that time. Upon ascertaining that plaintiff had no one in charge of the cattle, it would undoubtedly have been the duty of the defendant to unload and water and feed them when, from any cause, it was unable to transport and deliver them within the usual time. The defendant, upon ascertaining the condition of the cattle (whether because the conductor found that he could not deliver them within the usual time, or not, is immaterial), unloaded and took care of the cattle in a proper manner. In doing this it performed its entire duty towards the plaintiff.

The court instructed the jury that the custom of the shipper to send a care taker was universal, that it was established beyond controversy, that it applied to this case, that it became a part of the contract, and that plaintiff was bound by it. The court failed to instruct the jury as to the effect of this custom. The plaintiff assumed all those risks and injuries resulting from his failure to comply with this custom to send a care taker. One of the principal reasons why some one should be employed to keep constant watch of animals, while in these cars, is that it is dangerous for one to lie down. It is therefore necessary that all be kept standing, and, if one gets down, that he should be gotten up as soon as possible. The danger from one lying down is apparent. He is apt to be trampled upon, his flesh bruised and bones broken, and he is also a constant menace to those who are standing. The plaintiff not only did not send such a care taker, but he did not request the defendant to assume such care, did not notify it that he was sending no care taker, nor request its agents in charge of the train to exercise any supervision or care over them. He therefore assumed all the risks from the failure upon his part to comply with the custom. This custom was recognized by this court as early as 1867. McMillan v. Railway Co., 16 Mich. 109. The conductor and brakemen of this train had other constant and important duties to perform in its management. To impose upon them the additional duty of looking after 24 cars of live stock, and to see that the animals were kept in proper condition and position, would be unreasonable, and not a duty assumed by this defendant. The rates of transportation are fixed with a view to the universal custom that the shipper must perform this duty if he desires it to be performed, or make a special contract with the carrier to do so. Kimball v. Railroad Co., 26 Vt. 258. Now, it is evident that such a care taker could have watched these cattle, and prevented this injury, whether they were overloaded or not. For this neglect the plaintiff alone is responsible, and it bars his recovery. In German v. Railroad Co., 38 Iowa, 127, the defendant was held liable because it shipped some of the plaintiff's cars without notice to him, and thus prevented him from accompanying them as he intended. The defendant was properly held liable for not taking the care which the owner would have taken, had he not been prevented from occupying the train.

It is insisted by the defendant that this car was overloaded, that this caused the injury, and that such overloading was negligence per se. As already shown, the plaintiff alone was responsible for the manner of loading. Nine witnesses, experienced in the transportation of cattle, testified that the car was overloaded. The plaintiff, his agent who shipped them, and two other witnesses gave their

opinions that the car was not overloaded. The plaintiff admitted that it would have been impossible to get another animal in the car. One of plaintiff's witnesses had had experience from 1871 to 1876, in the summer time, in shipping and driving cattle in the Indian Territory. His impression was that the cars which were then used were 33 feet long, but he said he might be mistaken. He would not say that even 27 cattle were too many to put in such a car. He also testified that it would be dangerous to ship cattle without some one in charge of them. The conductor, upon investigation, determined that the car was too small, and put his company to the expense of sending a larger one with which to complete the journey. Aside from the opinions of the witnesses, the fact is that, when these cattle were placed in the customary manner, crosswise of the car, each one had only 16½ inches in which to stand, and that, whether standing crosswise or in any other manner, each animal had but 11 square feet of room. It requires the opinion of no witness to inform us that each animal was more than 16½ inches in thickness, and that they could not stand in this crowded condition without their ribs being compressed within a space less than their natural limits. Animals so situated are completely helpless, and the weaker ones must soon become exhausted, and fall down. One had died, and the two others which were down lay apparently lifeless, before they had been in transit 24 hours. Speaking for myself, I do not hesitate to say that such loading was negligence per se, and, under the laws of this state, would be indictable as cruelty to animals. Inasmuch, however, as the determination of this question is not essential, and some of my brethren are of the opinion that there was a conflict of evidence, which was proper for the determination of the jury, we do not pass upon it. Under the case made by the evidence, the court should, as requested, have directed a verdict for the defendant.

It is contended that it was negligence for the defendant to place the body of the dead steer in the car at Bancroft, and that injury resulted from this act. It is evident that most of the injury was done before the original car reached Bancroft, and, as already stated, the plaintiff was responsible for this. It is impossible to determine what, if any, injury was caused after the car left Bancroft. If this act was negligence, it was clearly the duty of the plaintiff to show what injury, if any, resulted therefrom. He could not, in any event, recover for an injury, part of which was caused by his own neglect, without showing that which resulted from defendant's subsequent negligence. No such act of negligence is alleged, and quære whether he can recover without alleging it. Plaintiff knew the position of this dead animal in the car when delivered, and, knowing it, there is much force in the position that he should have alleged it.

In the event of a new trial, it is proper to note some other errors that were committed, upon the basis that a case may be made which should be left to the jury. The court failed to instruct the jury, as it should have done, what acts charged in the declaration should be eliminated from their consideration. The court left it to the jury upon the general statement that the defendant was liable "if it did not give that care to the cattle which it should have given, and did not handle them with that degree of care to convey them safely and without injury." Where a declaration contains several grounds of negligence, it is the duty of the court to instruct the jury as to those upon which, alone, recovery can be based, and to eliminate the others. The court should, as requested, have instructed the jury that the defendant did not undertake to render the additional service of watching and starting the cattle up, so as to prevent any sinking down and getting under the feet of the others, or prevent their unduly crowding and injuring one another; that plaintiff assumed any damage or loss that might be occasioned by want of an attendant, and also all that resulted from the nature, restiveness, and viciousness of the animals. The judgment must be reversed, and a new trial ordered.

LONG, C. J., and HOOKER and MOORE, JJ., concurred with GRANT, J. MONTGOMERY, J., concurred in the result.

TYLER v. NELSON.

(Supreme Court of Michigan. March 31, 1896.)

REVIEW ON APPEAL—OBJECTIONS NOT RAISED BELOW—EVIDENCE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

1. An objection to the sufficiency of the declaration cannot be raised for the first time on appeal.

2. Where it appeared that defendant, who was approaching plaintiff in a buggy on the opposite side of the road, drove across and ran into the latter's horse, evidence as to previous ill feeling on defendant's part towards plaintiff, and as to what defendant subsequently said about the collision, was competent to show his motive in crossing the road.

3. Where one driving north on the west track of the highway crosses the road, and wantonly drives into and injures the horse of one approaching from the other direction, he will be liable for such injury, though the other may himself have been careless in turning to the left instead of to the right.

Error to circuit court, Van Buren county; George M. Buck, Judge.

Trespass on the case by Sheridan Tyler against John Nelson. From a judgment for plaintiff, defendant brings error. Affirmed.

W. N. Cook and T. J. Cavanaugh, for appellant. A. H. Chandler and Heckert & Chandler, for appellee.

MOORE, J. This case was commenced in justice court, tried there, appealed to the

circuit court, and tried there. A verdict and judgment were rendered for $40 in favor of the plaintiff. The defendant appeals to this court.

The declaration was in a plea of trespass on the case, "for that, whereas, the said defendant on, to wit, the 7th day of November, A. D. 1894, at the township of Covert, in said county, with force and arms, drove a certain vehicle, to wit, a buggy, which he, the said defendant, was then and there driving in and along the public highway, with great force and violence upon and against a five year old mare of him, the said plaintiff, of great value, to wit, of the value of one hundred dollars, which said mare he, the said plaintiff, was then driving in and along the said public highway, and thereby, then and there, the said defendant drove the end of one of the thills of his said buggy into the side of said plaintiff's mare, whereby she was greatly wounded, and soon after by reason of said wound died." The plea was the general issue, with notice "that the defendant, on the trial of this cause, will give in evidence, and insist in his defense, that, at the time, mentioned in plaintiff's declaration, of driving his horse and carriage, as in said declaration alleged, the defendant was driving north on the highway on a slow trot, and turned his horse to the right, when the plaintiff, who was driving his horse on a slow trot towards the south, on meeting the defendant, suddenly turned his horse to the left, and crossed the road in front of defendant's horse, before the defendant had time to hold up; that, if the plaintiff's horse was injured by the thill of defendant's carriage, as alleged in his declaration, the same was done by plaintiff's negligence or fault." It was the claim of the plaintiff, on the trial, that, while he was driving on the highway, going south in the east track of the highway, he saw the defendant coming towards him, from the south, in the west track of the highway, "the defendant left the west traveled track of the highway, and drove almost directly across to the east traveled track, on which plaintiff was driving, and in a manner so sudden and unexpected that the plaintiff, in endeavoring to avoid a collision, turned his horse to the left, and drove into the ditch adjoining such east tract, but that the defendant, instead of so turning aside as to avoid a collision, drove his horse, in a grossly wanton, willful, and negligent manner, against the plaintiff's horse, whereby said plaintiff's horse was so wounded that it afterwards died." The defendant denied these claims of the plaintiff, and insisted that he is not responsible for the collision, nor for any injury which resulted therefrom. He claimed that, while he was driving on the public highway, and in the exercise of due care, he met the plaintiff, and that the plaintiff, instead of turning to the right, as defendant expected him to do, and as, in the exercise of due care, he ought to have done, turned to the left so suddenly that a collision occurred, and that, if damage resulted to the plaintiff, it was brought about, either wholly or in part, by the negligence of the plaintiff himself.

The first assignment of error is that the declaration is not sufficient, in law, to maintain this action. We think the declaration sufficient for a declaration in justice court. No objection was made, either in justice court or in the circuit court, to the sufficiency of the declaration. As we have repeatedly held, it is too late to raise a question of that nature in this court for the first time.

The second, third, and fourth assignments of error relate to the testimony that was allowed to go to the jury as to the feeling Nelson had towards Tyler before, and continuing up to, the time of the collision and what he said about the collision. We think this testimony competent, as bearing upon the question of intent or motive of the defendant in crossing over from the west track to the east track in the manner in which he did. Tribune Co. v. McArthur, 16 Mich. 452; Druse v. Wheeler, 22 Mich. 443. All the other assignments of error relate to the refusal of the court to give defendant's requests, and to the general charge as given by the court.

The testimony in the case was very conflicting. If the jury accepted the version given by the plaintiff and his witnesses, it is difficult to see how they could have avoided giving the plaintiff a verdict. On the other hand, if the jury had found the account of the transaction to be as claimed by the defendant and his witnesses, their verdict must have been for the defendant. The learned trial judge gave, in his general charge, the substance of all the defendant's requests to charge that were good law and applicable to the case. So far as it is necessary to quote his charge, it is as follows:

"The burden of proof is on the plaintiff to establish the truth of the matters which he alleges by a fair preponderance of the evidence in the case. He is not bound to prove his case beyond a reasonable doubt, but he should prove the facts which he alleges by evidence which, in the mind of the jury, weighs more than the evidence given on the part of the defendant. And I instruct you, gentlemen, in several requests as presented me by the defendant, as follows: You are further instructed that the injury alone will not support an action on the case. There must be a concurrence of the injury and wrong, and if the act be not unlawful in itself, then, unless done in a manner, at a time, or under such circumstances as would render it wrongful or lacking in due regard for the rights of others, there can be no liability for the injury that may result. You are instructed that a highway is a public way, for the use of the public in general, for

passage and traffic, without distinction, and the restrictions upon its use are only such as are calculated to secure to the general public the largest practicable benefit from the enjoyment of the easement; and inconveniences such as are only incident to a reasonable use under impartial regulations are not actionable. You are further instructed that the law of the road and regulation of public carriages is as follows: Whenever any persons shall meet each other on a bridge or road, traveling in carriages, cars, sleds, sleighs, or other vehicles, each person shall seasonably drive his carriage or other vehicle to the right of the middle of the traveled part of such bridge or road, so that the respective carriages or other vehicles aforesaid may pass each other without interference. You are instructed that the traveled part of the road, referred to in the last instruction given you, means that part which is wrought by travel, and is not confined simply to the traveled wheel track. The burden of proof is on the plaintiff, not only to show negligence and misconduct on the part of the defendant, but also to show ordinary care and diligence on his own part; and, if you should find that he did not use ordinary care and diligence on his own part, and thus contributed to the injury, and that defendant was guilty of no more than ordinary negligence, you should return a verdict of no cause for action. The law of the road, as given you in the instruction just read, requires a traveler by any vehicle on the public highway, on meeting another vehicle, to turn to the right, instead of to the left. But the fact that a person turns to the left, instead of turning to the right, is not conclusive of the question of due care or negligence on his part. There may be cases in which due and proper care would require that he should turn to the left, instead of to the right, and in which it would be negligence on his part to turn to the right. If you, in view of all the circumstances, as you find them to have been, find that, in the exercise of due and proper care, the plaintiff should have turned to the right, instead of turning to the left, then his turning to the left would be negligence on his part; but if, under all the circumstances, it was apparently safer for him to turn to the left, and he did only what a man of ordinary prudence would have done under similar circumstances, then he had a right to disregard the law of the road in that particular, and his turning to the left would not in itself be negligence. If, on the other hand, you find that plaintiff, in the exercise of due care, could have avoided the collision by turning to the right, and that a man of ordinary prudence would have done so, and that, instead of so doing, he turned to the left, and thereby came into collision with the vehicle of the defendant, then such conduct would be negligence on his part; and if you should find that his negligence contributed to the injury received by the plaintiff, he cannot recover, unless you should find that the action of the defendant was wanton, willful, or so grossly negligent as to indicate a wanton disregard of the rights of the plaintiff. And I further instruct you, as requested, on defendant's part, as follows: You are further instructed that, though you believe, from the evidence, the injury complained of resulted from ordinary negligence on the part of the defendant, still this would not entitle the plaintiff to recover, if you also believe, from the evidence, that, by using reasonable and ordinary care and judgment, the plaintiff could have avoided the collision, and saved his horse from injury. I use the term 'ordinary negligence,' gentlemen, and I will further instruct you as to the difference between what is called in law, 'ordinary negligence' and 'gross negligence.' The purport of this instruction is that, if you find the defendant only used ordinary negligence,—that is, disregarded those rules of conduct that a man of ordinary prudence would have followed,—but was not guilty of any gross negligence, or wanton and willful disregard of the plaintiff's rights, then if the plaintiff himself was also negligent, he cannot recover; the rule of law being that, where two parties are careless, and no evil is intended by one against the other, and no gross negligence or wanton disregard by one of the rights of the other, then neither of the parties can recover for the injury. Also, as further requested by defendant, that, in order to entitle the plaintiff to recover damages for injuries sustained by reason of the collision, he must show the injuries to have been attributable to the misconduct of the defendant in this case, and under such circumstances as to exonerate himself (the plaintiff) from all contributory negligence on his part; and unless such is apparent from the evidence in this case, it will be your duty to find a verdict of no cause for action. And I modify that, precisely as I did the former, by saying that would be true if defendant was guilty of nothing more than what is called 'ordinary negligence.' On the part of the plaintiff I instruct you as follows: That, if you should find, from the evidence, that the plaintiff was guilty of contributing negligence, yet, if it is further found, from the evidence, that defendant's own conduct was wanton, willful or reckless, whereby said plaintiff suffered injury, as he claims in his declaration, then said plaintiff can recover his damages as may be proved.

"The questions in this case, gentlemen, which might be naturally determined in their order, would be these: The first question: Was the defendant himself negligent? Was he guilty of any wrong towards the plaintiff? If he was not, then you should return a verdict, without making any further inquiry. If, on the other hand, you find that he was negligent, that his acts were not such as a man of ordinary prudence would have performed, then the next question would be the degree of negligence of which he was guilty.

Ordinary negligence is a disregard, as I have already indicated, of those rules of conduct which govern men of ordinary care and prudence. It is not required of a man that he should use the highest degree of care,—that he should be always as careful as it is possible for him to be. It is incumbent upon him only to be as careful as men of ordinary prudence and judgment would be under the same or similar circumstances. So that the first question would be, was the defendant lacking in this regard? Were his acts such as a man of ordinary care, prudence, judgment, and caution would not have done? Now, if he was not as careful as men of ordinary prudence would be, then that would be simply what the law calls 'ordinary negligence'; and if his conduct was no more than this, then the next inquiry would be whether the plaintiff was himself free from the negligence which contributed to the injury. That is, would the injury have been brought about if the plaintiff had been himself as careful as men of ordinary prudence would be? The same criterion should determine his conduct as that of the defendant. The plaintiff would not be obliged to use the highest degree of care in order to avoid injury to himself. He would only be required to use that degree of prudence and caution which men of ordinary prudence and caution would use under precisely or very similar circumstances as you may find them to have been from the testimony. Now, as I have instructed you, if the defendant was only ordinarily negligent,—that is, if he was careless,—and the plaintiff was careless too, and the injury would not have happened without the plaintiff's carelessness, or if the plaintiff's carelessness contributed in any degree to the bringing about of the injury to himself, then he cannot recover; the rule of law being, as I have indicated, where two parties are negligent, though the negligence be ordinary negligence, neither can recover from the other. If, however, you find, as you have already been instructed, that the plaintiff was himself not in the exercise of due and proper care, but that his conduct was negligent, still, if you find that the conduct of the defendant was wanton and willful, and if he drove his horse and vehicle purposely into plaintiff, or if, as plaintiff claims, he was trying to crowd him, and was doing that which showed a manifest recklessness and disregard of the rights of the plaintiff, and utter indifference as to whether the plaintiff was injured or not, then another rule would obtain, and he would be liable for his conduct, even though the plaintiff himself may have been careless. So, as I say, it not only may be important for you to determine whether or not the defendant was negligent, but the degree of negligence of which he was guilty. And if you should find that he was guilty of wanton, willful or gross negligence as I have defined it, then it would be no defense that the plaintiff himself was careless. In determining these questions, gentlemen, you are to be the sole judges. You are men of experience and intelligence and caution, men of affairs, and in the light of the testimony, looking at it just as you find it to be from the testimony in the case, it will be for you to say whether the parties were negligent, or whether they were in the exercise of due care, and if the defendant was negligent, the degree of negligence, and the motive by which he was actuated, and what there is disclosed by his conduct at that time."

The judgment is affirmed, with costs. The other justices concurred.

COOLEY v. KINNEY.

(Supreme Court of Michigan. March 31, 1896.)

MORTGAGES—SEVERAL MORTGAGEES—SURVIVORSHIP—COMMON-LAW RULE.

1. A mortgage, executed to the mortgagees in lieu of their heirship interests in the mortgagor's estate, which provided simply that $200 should be paid to C. on a certain date, and $200 to L. at a later date, was not a joint mortgage; and, on the death of C. before the mortgage matured as to her, L. was not, as survivor, entitled to foreclose for the whole mount,—$400.

2. How. St. § 5560, providing that grants to two or more persons shall be construed to create estates in common, is subject to the exception of section 5561, which excludes mortgages; but this does not prevent the execution of a mortgage with covenants which are several, but leaves the rule as at common law.

Error to circuit court, Van Buren county; George M. Buck, Judge.

Suit by Cora Cooley against Hiram A. Kinney to recover an alleged consideration for the release of a mortgage. From a judgment in favor of plaintiff, defendant brings error. Reversed.

L. A. Tabor, for appellant. T. J. Cavanaugh, for appellee.

MONTGOMERY, J. The plaintiff sued to recover the agreed consideration for executing the discharge of a certain mortgage, alleging that the defendant recognized her right to, and agreed to pay her for the discharge of the mortgage, $350. Defendant denied this, and claimed that he agreed to pay her but $150, the amount due her. It appears by the testimony that in January, 1882, Oren G. Kinney, the grandfather of plaintiff, executed to plaintiff and her sister a mortgage, in consideration of mutual love and affection and one dollar, with a condition as follows: "Provided, always, and these presents are upon this express condition, that if the said party of the first part shall and do well and truly pay, or cause to be paid, to the said party of the second part, the sum of four hundred dollars, without interest, as follows: $200.00 on the fifth day of October, A. D. 1892, to Cora L. Hancock, without interest, and the sum of $200.00 to be paid on the twelfth day of September, A. D. 1890, without interest, to Lillie May Hancock. This sum is given to them in

lieu of heirship interest in my estate, and, in the event of their decease, then this mortgage to be null and void. In case of such payments, then this mortgage to be void." Defendant is the uncle of plaintiff, and the son of the mortgagee, claiming under a deed made by him. On the trial the plaintiff testified that her sister, Lillie May, died before reaching her majority; that, after her sister's death, defendant told her that she was entitled to the $400; that in March, 1893, defendant asked her to discharge the mortgage, and agreed to give his note for $350, she having previously received $50 of the amount; she therefore executed a discharge, in which she assumed to discharge the mortgage on her own account, and as heir of her sister, although it was known to both parties that plaintiff's father was still living. This testimony of plaintiff was strenuously denied by defendant, who testified that he agreed to pay her but $150; and in this he was supported by the scrivener, and other testimony. The jury, however, found with the plaintiff.

Numerous questions are raised, but we think it will be necessary to consider but one. The circuit judge charged "that where a mortgage is given to two persons, and one dies, the entire amount of the mortgage becomes due and owing to the survivor thereof; and as a matter of law, in this case, if you should find that this plaintiff, together with her sister, held a mortgage upon the premises of Oren G. Kinney and wife, and that afterwards her sister died, she, being the survivor of the two, would have had a perfect right to foreclose the said mortgage for the entire amount owing upon said mortgage." The covenants are several, and for the benefit of the parties severally. It is true that at the common law, as to a mortgage given to two or more jointly, the right of survivorship exists; at least, as to the remedy. See Martin v. Reynolds, 6 Mich. 70. And the statute (Howell, § 5560) providing that grants to two or more persons shall be construed to create estates in common is subject to the exception in the next section, which excludes mortgages. The effect of this legislation is not, however, as we think, to prevent the execution of a mortgage with covenants which are several. The sole effect is to leave the rule as at common law, and a mortgage which was not joint at the common law is no more so since this statute. In this case there is no covenant to pay this plaintiff, either severally or jointly with her sister, any more than $200. The covenant to pay her sister, Lillie May, is distinct, and does not even name her heirs, representatives, or assigns. We think it clear that there was no survivorship in plaintiff entitling her to foreclose for the full amount. There is no trust relation established by the mortgage which entitles her to receive this sum in trust for any one entitled to take. In short, there is no covenant to pay it to her either individually, or to herself and another jointly. See Jones, Mortg. § 135; Burnett v. Pratt, 22 Pick. 556; Brown v. Bates, 55 Me. 520; Gilson v. Gilson, 2 Allen, 115. In the case last cited the court, speaking of a provision like that contained in our section 5561, said: "Rev. St. c. 59, § 11, it is true, has excepted mortgages from the broad provision that all conveyances to two or more persons shall be construed to create estates in common, and not in joint tenancy, but this provision only operates to leave open the inquiry in each particular case as to the character of the mortgage. If the mortgage is given to secure a joint debt, it will be construed as a joint estate; but if the mortgage is given to secure separate debts, obligations, or duties, each mortgagee is entitled to enforce his right in his own name." We think the circuit judge was therefore in error in instructing the jury that the plaintiff could have foreclosed the mortgage in her own name for the $400, and that on the death of one mortgagee the entire amount of the mortgage became due and owing to the survivor thereof. Judgment reversed, and new trial ordered. The other justices concurred.

FILLMORE v. GREAT CAMP OF THE MACCABEES OF MICHIGAN et al.

(Supreme Court of Michigan. March 31, 1896.)

MUTUAL BENEFIT INSURANCE—PROOF OF LOSS—WAIVER—RIGHTS OF BENEFICIARY.

1. Where a mutual benefit association had expressly waived proof of death, it is an unnecessary and unreasonable requirement to demand that the beneficiary should supply such proof in the form prescribed by the by-laws of the association, with many of the provisions of which she could not comply.

2. The beneficiary of a mutual benefit association must enforce her claim under the rules of the association, and, in the absence of fraud, must exhaust her remedy under the charter and by-laws before she has any remedy in the courts.

Petition by Catherine M. Fillmore for leave to file a bill of review against the Great Camp of the Maccabees of Michigan and others.

B. M. Thompson, for petitioner. De Vere Hall, for respondents.

GRANT, J. The essential facts in this case will be found in 103 Mich. 437, 61 N. W. 785. After the rendition of that decision, complainant paid the costs of the suit, and presented her claim to the executive committee of the great camp. In presenting this claim, she stated, through her attorneys, that proofs of death were waived by the executive committee under date of July, 1893. The committee replied to this that no consideration could be given to the alleged claim unless proofs of death were submitted in the usual way and on the blanks prescribed by the committee. Blanks in use for such purpose were inclosed with the communication to her attorneys. She thereupon filed this petition for leave to file a bill of review. The principal reasons assigned by

her are the refusal of the committee to pass upon her claim, and the fact that this committee, which consists of three, have already passed upon the merits of her claim, and are therefore incompetent to hear it. One of them, Mr. Aitken, was the great commander upon whose advice the officers of the local tent notified Mr. Fillmore that he was expelled. Another is the attorney who has conducted this litigation on the part of the defendants. The third, upon the date of July 17, 1893, wrote to the plaintiff's agent that Mr. Fillmore was not, at the time of his death, in good standing, and therefore there was no necessity of sending blank proofs of death. It it also alleged that the personnel of the executive committee has changed by the election of two of these members since the decree. The petitioner further alleges that she cannot now comply with the requirements of these proofs of loss, because they are required to be presented within one year of the date of death, which year has expired, and they now require her to furnish a certificate, to be made by the commander, the record keeper, and the finance keeper, that the deceased was in good financial standing, having paid all dues and assessments up to the date of his death, and was a member of the tent. The answer admits the refusal of the committee to act, and insists upon the duty of the complainant, under the by-laws of the order, to submit her proofs upon the customary blanks; and, as a reason therefor, they assert that their sole reason for so doing was that the hearing of said claim should be conducted according to the laws, rules, and regulations governing said order and said executive committee. They also assert, in their answer, and their attorney stated upon the hearing, that they were willing and ready to proceed with the hearing of the claim, and to give her the right to appeal to the great camp.

We think the committee should have proceeded to hear the claim in the form it was presented. They had expressly waived proofs of loss. It was therefore unnecessary and unreasonable to require her to use the blank form of proof, with many of the provisions of which she could not comply. It has been repeatedly decided, by this court and others, that, when insurance companies expressly waive proofs of loss or of death, it is unnecessary to furnish them, and the hearing of the claims should proceed without them. Under the former opinion in this case and the authorities there cited, it was the duty of the complainant to proceed to enforce her claim under the charter and by-laws of the defendant, and if she has any remedy in the courts it must be after that remedy is exhausted, unless a case of fraud or undue oppression is made out on the part of the defendant and its officers. We do not think that such a case is made. The executive committee are bound to take the evidence, and submit it, with their conclusions, to the great camp, where her claim may be heard and her proofs presented. There is no showing that the great camp is prejudiced against her claim. The question involved is an important one, namely, whether a member owning stock in a brewing corporation is engaged in the manufacture or sale of spirituous or malt liquors as a beverage, either as a principal, agent, or servant, in consequence of which his membership is forfeited. It is sufficient, for this case, to say that she must exhaust her remedy, provided by the rules of this voluntary association, by which Mr. Fillmore was bound as a voluntary member. The prayer of the petition must be denied. The other justices concurred.

GOW et al. v. COLLIN & PARKER LUMBER CO. et al.

(Supreme Court of Michigan. March 31, 1896.)

CORPORATIONS—ESTOPPEL TO ATTACK CORPORATE EXISTENCE—CONTRACT—RESCISSION IN PART.

1. Where an association was recognized by the public authorities as a duly-organized corporation, and did business and filed its annual reports as such, a creditor who dealt with it as a corporation cannot attack its corporate existence, and hold its stockholders liable as partners. Glass-Beveling Co. v. Bulkley (Mich.) 65 N. W. 291, followed.

2. One who seeks to foreclose a mortgage purporting to be executed by a corporation thereby affirms the corporate existence of the mortgagor.

3. A party cannot affirm a mortgage in part by seeking foreclosure, and disaffirm it in part by asking that liens established by prior mortgages, and recognized in the mortgage sought to be foreclosed, be set aside.

Appeal from circuit court, Muskegon county, in chancery; Fred J. Russell, Judge.

Bill by James Gow and another against the Collin & Parker Lumber Company and others to enforce a partnership liability against the stockholders of the principal defendant, to foreclose mortgages, and for other relief. A demurrer to the bill was sustained, and complainants appeal. Affirmed.

Bunker & Carpenter, for appellants. John Vanderwerp (Frank H. Smith, of counsel), for appellee Elwell.

MOORE, J. The complainants, James Gow and John Campbell, are copartners composing the firm of Gow & Campbell, engaged in a general lumber business at North Muskegon, where they own a mill. July 13, 1890, the defendants William W. Collin, Charles H. Parker, and John A. Elwell incorporated under the name of the Collin & Parker Lumber Company, for the purpose of "the purchase, manufacture, and sale of lumber, shingles, and other forest products, and carrying on a general lumber business, and, incident thereto, to purchase and sell timber lands and timber," and to that end executed and filed articles of association for the incorporation of said company. The cap-

ital stock of the company was $20,000, divided into 2,000 shares, of which Collin held 1,998, and Parker and Elwell held one share each. The articles of association filed with the clerk of Muskegon county state that the entire sum of the capital stock was paid in. August 30, 1890, the Collin & Parker Lumber Company increased its capital stock to $30,000. January 24, 1891, the company filed its annual report in the office of the clerk of Muskegon county, in which it was stated that the capital stock was divided as follows: "William W. Collin, 2,059 shares; Charles H. Parker, 60 shares; John A. Elwell, 1 share." The report also stated that: "The amount of capital stock is $30,000.00; the amount of capital actually paid in is $21,200.00; the amount invested in real estate is none; the amount of personal estate is $47,715.87; the amount of the debts of the corporation is $45,927.65; the amount of the credits of the corporation is $21,230.56." January 30, 1892, the company filed its second annual report, in which it was stated the division of the capital stock had not changed from that of the previous year, and that its liabilities and assets were as follows: "The amount of capital stock is $30,000.00; the amount of capital stock actually paid in is $21,200.00; the amount invested in real estate is $3,000.00; the amount of personal estate is $54,586.84; the amount of the debts of the corporation is $53,630.32; the amount of the credits of the corporation is $26,509.30."

The complainants allege that, relying on the statements in the articles of association and in the annual reports, and believing that the company had a capital stock of $20,000, subscribed in good faith and paid in, and that the company was doing a legitimate and profitable business, and that the stock in trade and assets of the company were increasing, and never having any information to the contrary prior to December 20, 1892, in the year 1891 and the early part of 1892 sold to said company large quantities of lumber, for which the company paid in full; that complainant Gow, on or about May 10, 1891, and prior to the time when complainants made any sale of lumber to the company, made inquiries of Colon C. Billinghurst, cashier of the defendant the Lumberman's National Bank, as to the financial responsibility of said company, in order to ascertain whether it would be safe for complainants to sell to the company on credit, and were assured by Billinghurst that the company was all right, and that it would be safe for complainants to sell to the company on credit. August 1, 1892, Collin, in behalf of the company, applied to complainants to purchase a million feet of lumber. Complainant Gow, knowing that defendants Hovey & McCracken had had and were having deals with said company, applied to McCracken for information as to the financial strength and credit of the company, and was assured by McCracken that the company was all right, that its financial responsibility and credit were good, and that Hovey & McCracken had sold to said company $20,000 worth of lumber at a time, but McCracken did not disclose to complainant that they had any security or guaranty for the payment of the same, and complainants were ignorant of that fact until December 20, 1892; that complainants, relying upon the financial strength and credit of said company as disclosed by its articles of association and annual reports, as well as upon the representations of McCracken, sold to the company, August 18, 1892, a million feet of lumber for $7,276.87, and delivered the same to the company from time to time, and took in payment therefor the notes of the company, described as follows: September 10, 1892, $3,000; September 26, 1892, $2,500; October 11, 1892, $1,776.87,—all payable to the order of complainants, 90 days after date, respectively. December 20, 1892, the Collin & Parker Lumber Company executed and delivered to the Lumberman's National Bank a chattel mortgage for $6,000, covering all the personal property of the company, its accounts, bills receivable, and books of account, which mortgage was recorded the same day as a first mortgage. On the same day, defendants also executed and delivered a second mortgage on the above-described personal property, books of account, etc., to Hovey & McCracken, for $14,425.39. Four other mortgages on the same property, except the accounts, bills receivable, books of account, etc., were also executed by the defendants in the following order, for the amounts specified: To complainants Gow & Campbell, for $7,276.87; to Gray Bros. Manufacturing Co., for $1,302.26; to C. S. Bacon & Co., for $3,198.47; to James E. Austin & Co., for $531. All of the mortgages were executed subject to the lien of the mortgage or mortgages that preceded them. December 28, 1892, Bacon & Co. and Austin & Co. assigned their mortgages to the complainants.

The bill of complaint alleges: That Collin & Parker, at the time of the incorporation of the Collin & Parker Lumber Company, were pecuniarily irresponsible, and that Elwell was and is a man of large means and excellent credit. That he is the father-in-law of Collin. That their incorporation was simply to procure a means of credit for Collin & Parker by lending the name and business standing of Elwell. That the statement made by them that the entire capital stock was paid in was false. That the company has never had any capital stock or stock in trade other than the lumber acquired after their incorporation from other firms and corporations, except some lumber purchased by Collin from Hovey & McCracken, for the payment of which Elwell had become personally responsible. This lumber was turned over to the company by Collin. The agreement between Elwell and

Hovey & McCracken has been twice renewed and is still in force. That no payment has been made to Hovey & McCracken for lumber so purchased or thereafter purchased from them by said company or said Collin or said Elwell, except from the proceeds of the sale of the stock acquired by said company. That the annual reports were false and misleading, and were filed for the purpose of enabling the company to extend their credit. That all the statements made by the company relative to their business standing were intentionally and designedly for the purpose of misleading, deceiving, and taking a fraudulent advantage of those who should sell them lumber. That the defendants the Lumberman's National Bank and Hovey & McCracken were cognizant of the true condition and status of the company. That by reason of the premises the Collin & Parker Lumber Company never existed as a corporation, and is not now, and never was, a corporation, but now is, and since the date of its pretended incorporation has been, a copartnership; and that Collin, Parker, and Elwell are now, and since July 30, 1890, have been, copartners, and are jointly and severally liable as such. The bill also alleges that on December 20, 1892, the bank and Hovey & McCracken took possession of the company's property by virtue of their mortgages, and proceeded to collect all outstanding accounts. Complainants were refused access to the books of the company, and claim there is yet sufficient assets to discharge the indebtedness due to them; that there is now due them on the mortgage executed to them by the company $5,500, with interest on $3,000 at the rate of 8 per cent. from December 12, 1892; that there is now due complainants on the mortgage given by the Collin & Parker Lumber Company to Bacon & Co. $1,900, with interest as follows: On $1,500 from December 12, 1892, and on $400 from December 25, 1892; that there is due complainants on the mortgage given by the company to Austin & Co. $531; that the remaining sums secured by said mortgages will become due as therein respectively stated; that no payments have been made on any of said mortgages, nor has any proceeding at law been had for the recovery of the debts, or any part thereof, secured thereby. The complainants asked that the pretended incorporation of the Collin & Parker Lumber Company be declared to be void, and that the stockholders be decreed to be partners, and liable for the debt of the complainants, and that the court will determine how much is due complainants; that the Collin & Parker Lumber Company, William W. Collin, Charles H. Parker, and John A. Elwell may be decreed to pay that amount, with costs; that the Lumberman's National Bank and Hovey & McCracken be required to disclose the true status of their business relationship with the company, and to disclose if the company has given them other security than the first and second mortgages mentioned before; for a writ of injunction restraining the bank and Hovey & McCracken from disposing of any of the property of the company, and that they apply what they have received from the assets of the lumber company on their mortgage; for the appointment of a receiver for the Collin & Parker Lumber Company, and the application on complainant's mortgage of the assets of the company; for a personal decree for any deficiency against Collin, Parker, and Elwell, and a prayer for general relief. Defendant Elwell demurred to the bill, and the demurrer was sustained. Complainants failed to file an amended bill, and the court ordered the dismissal of the bill of complaint. The case is brought here for review.

The complainants seek to have the corporation known as the Collin & Parker Lumber Company declared invalid and void, and its stockholders held to be partners, and liable for the indebtedness due the complainants. Are the complainants in a position to make that claim and to seek that relief? The company, in form, was duly incorporated, was recognized by the public authorities, and filed its annual reports, and did business as a corporation. The complainants dealt with it as a corporation, and accepted its mortgages, made as a corporation. In the case of Glass-Beveling Co. v. Bulkley (Mich.) 65 N. W. 291, it was held that, where an association was recognized by the public authorities as a duly-organized corporation, and did business and filed its annual reports as such, a creditor who dealt with it as a corporation cannot attack its corporate existence, and hold its stockholders liable as partners. See Swartwout v. Railroad Co., 24 Mich. 389; Bank v. Stone, 38 Mich. 779, and cases there cited. The case at issue must be governed in that respect by the above-mentioned cases. The complainants urge that, if it be conceded that they cannot raise the question of the validity of the corporation, and that the defendant Elwell cannot be held liable on the complainants' mortgage as a copartner, the bill will still lie as against him. They urge that the bill is primarily one for the foreclosure of a mortgage, and an accounting, an injunction, and a receiver; that, as such, it was properly filed, and that Elwell is a necessary party if the complainants obtain the relief they are entitled to. They urge that the capital stock of the company, as between it and its creditors, should have been fully paid by its incorporators; that the creditor dealt with the corporation relying upon all its capital stock being paid in. They argue that, as the capital stock was in fact paid by the lumber furnished by Hovey & McCracken to the amount of $20,000, which was to be paid for by Collin with his notes, guarantied by Elwell, the creditors have a right to say that those notes shall be paid by Collin and Elwell from other funds than the assets of the company. They further argue that to allow the notes guarantied by Elwell to be paid out of the assets of the

corporation, would leave the corporation in the position of never having had in fact any capital stock. They insist that upon the facts stated in the bill the complainants are entitled to call on Mr. Elwell to furnish the full amount of the guarantied $20,000, to meet the claims of the creditors of the Collin & Parker Lumber Company, and that Elwell should be compelled to answer. They cite in support of their position, Doyle v. Mizner, 42 Mich. 332, 3 N. W. 968; Attorney General v. Hanchett, 42 Mich. 436, 4 N. W. 182. In addition to the reason we have already mentioned, growing out of the fact that by their dealings with it the complainants have recognized the existence of the corporation, there are two difficulties in the way of this contention. One is that the facts stated in the bill do not necessarily establish the inference that the $20,000, or any part of it, which was to be paid to Hovey & McCracken for the lumber sold Collin, previous to the organization of the corporation, has been paid out of the assets of the corporation. The mortgage—which is a part of complainants' bill—which Hovey & McCracken took from the corporation shows upon its face that it was given for some other debt than that of Collin. The notes the payment of which are secured by the mortgage bear date two years subsequent to the organization of the corporation, and the notes were the notes of the corporation, and were executed as such. The other difficulty is that the mortgages complainants are seeking to foreclose all mention and recognize the preceding mortgages. Can the complainants affirm the mortgages in part, as they seek to do by attempting to foreclose them, and disaffirm them in important particulars, by asking this court to set aside the lien established by the prior mortgages, which liens are recognized in the mortgages sought to be foreclosed by the complainants? It is a well-established principle of law that a party cannot affirm such parts of a contract as will inure to its benefit, and rescind that part which is disadvantageous. The rescission must be entire. The contract cannot be treated as valid for one purpose and void for another. Galloway v. Holmes, 1 Doug. (Mich.) 330; Jewett v. Petit, 4 Mich. 508; Sloan v. Holcomb, 29 Mich. 161; Thompson v. Howard, 31 Mich. 309; Dunks v. Fuller, 32 Mich. 242; Walsh v. Sisson, 49 Mich. 423, 13 N. W. 802; Rowley v. Towsley, 53 Mich. 329, 19 N. W. 20; Farwell v. Myers, 59 Mich. 179, 26 N. W. 328; Merrill v. Wilson, 66 Mich. 232, 33 N. W. 716; Button v. Trader, 75 Mich. 295, 42 N. W. 834. By seeking to sustain this suit as a proceeding to foreclose mortgages executed by the corporation known as the Collin & Parker Lumber Company, the complainants affirm the corporate existence of that company as a legal body, and the legality of the mortgages mentioned in the bill of complaint. The demurrer is sustained, with costs. The other justices concurred.

SMITH et al. v. WAALKES.

(Supreme Court of Michigan. March 31, 1896.)

INJUNCTION—NONRESIDENT COMPLAINANT—JURISDICTION—CONTEMPT—ABATEMENT—REFERENCE.

1. A wife, who was a nonresident, filed a bill against her husband and his co-defendant W., alleging that, while living in California, her husband owned a mortgage on W.'s property in Michigan; that W. came to them to secure a release of the mortgage, but, failing in this, afterwards obtained undue influence over her husband, induced him to turn over to him the mortgage and other property, and to return with him to Michigan; that there her husband gave a release of the mortgage to W., turned over to him household furniture belonging to complainant, and falsely reported that complainant had run away with a paramour and would not return to Michigan. The prayer was for an injunction restraining W. from disposing of or incumbering his property, for divorce and alimony from her husband, and that the decree for alimony should be a lien on W.'s property. Further, that if she could not legally file a bill for divorce because she was a nonresident, the injunction be continued till she could acquire a residence. *Held*, that the facts were sufficient to show such a conspiracy to deprive complainant of property rights as would entitle her to an injunction as prayed.

2. After the writ had been served, W., without having answered or demurred to the bill or moved to dissolve the injunction, executed a mortgage on some of his property, and thus violated the injunction. Afterwards the husband of complainant died. *Held*, that the suit did not so abate on the death of the husband as to purge W. of contempt.

3. When the court was in possession of the facts, and the defense was simply a question of law, and no request was made to have interrogatories framed, or for a reference, the court could dispose of the contempt proceedings without framing interrogatories and taking proof.

Appeal from circuit court, Kent county, in chancery; William E. Grove, Judge.

Bill by Jane Smith and others against Martin Waalkes for an injunction. From an order convicting him of contempt in violating the injunction, defendant appeals. Affirmed.

C. O. Smedley (B. M. Corwin, of counsel), for appellant. Earle & Hyde, for appellees.

MOORE, J. The complainant filed a bill in chancery against her husband, Baltus Smith, and this defendant. The bill shows: That she and Baltus Smith were married in Kent county in 1873, and that they had been out of the state, in Kansas, Texas, Colorado, and California, and that neither had resided in the state but a short time immediately preceding the filing of the bill of complaint. That they had lived together as husband and wife until August, 1894. That complainant had borne her husband seven children, three of whom were then living, their ages ranging from 16 to 8 years. That in the spring of 1894, Smith and his family were living in California. That at that time Smith owned a real-estate mortgage for $1,600 upon the property of defendant, Waalkes, located in Grand Rapids. That spring Waalkes came to the Smiths, in California, and tried to get Smith and his wife to discharge the mortgage, and let him

make a first mortgage upon the property, and give them a second mortgage. They declined to do that, and Waalkes became incensed at Mrs. Smith, and in a large measure obtained control of Smith, and began to insinuate to him that his wife was guilty of improper conduct with other men; and that Smith finally came to believe Waalkes' statements to be true. That while Waalkes was there in California he took up a coal-mining claim, and about the 1st of August, 1894, induced Smith to turn over to him the real-estate mortgage and other property, consisting of notes (all that he had) amounting to about $3,000, in pretended consideration of the transfer to him by Waalkes of the mining claim. That the mining claim was entirely worthless, and that the real purpose of the transfer was to get the property of Smith out of the reach of complainant and the children, and then to get Smith to desert his family. That about August 1, 1894, Smith and Waalkes left California, Smith pretending that he had a position in Kansas, where he was going. That complainant thereupon gave him two dollars to buy food on the journey, and bade him goodbye. That instead of stopping in Kansas they came direct to Grand Rapids, and had, up to the time of filing the bill, remained there. That immediately upon their arrival they stated to complainant's father, mother, brother, and sisters, and to a large number of her friends, that complainant would not return to Grand Rapids, but had run away with another man, and had been guilty of abusing Smith, and had deserted him while he was sick, and that the children had conspired with complainant to abuse and ill-treat Smith, and that she was as bad as any prostitute on Waterloo street, and had stated that she would not return with her husband, but would remain with her paramour, and was waiting for her parents to die, to get some of their money. The bill further alleges that when complainant was deserted by her husband she had no means, and could not return to Grand Rapids, and that Smith and Waalkes succeeded in making her relatives here believe the statements about her character, but that about the 20th of January her friends in Grand Rapids sent her money, and she came back February 2, 1895. That Smith and Waalkes conspired together to defeat her in recovering alimony, and to defeat any claim that she might have for herself and children in the property and money so transferred by Smith to Waalkes. That after the return of Smith and Waalkes to Grand Rapids, Smith also turned over to Waalkes the household furniture belonging to complainant; and that she is entirely without means, and living upon the charity of her friends. That every statement derogatory to the character of complainant made by Smith and Waalkes is absolutely false, and entirely without foundation. That the statements were made to defraud complainant, and defeat her claim for alimony. The bill further shows that Waalkes has real estate in the city of Grand Rapids, and a specific description thereof is set out; that Smith, after his return to Grand Rapids, discharged the $1,600 mortgage on Waalkes' property; and that, unless Waalkes is restrained, he will dispose of his property, in order to hinder and defeat complainant. The bill prayed that Waalkes be enjoined from disposing of or incumbering his property, and from disposing of the notes turned out to him by Smith; and also prayed for a divorce between the parties, and for alimony; and that the decree for alimony be a lien upon the real estate of Waalkes, and that he be decreed to pay alimony so to be awarded; and there was also a prayer for general relief. After this prayer came the folowing: "(14) Or, if it shall appear that, on account of the absence of your oratrix out of the state of Michigan, she is not entitled to file a bill for divorce at this time, in this court, that the said Martin Waalkes may be enjoined and restrained, as prayed for above, until your oratrix may legally file a bill for a divorce against the said defendant, Baltus Smith, and obtain a decree therein for divorce and alimony as prayed for herein." Judge Grove ordered an injunction, and the same was properly served, and at the time the bill was filed a lis pendens was recorded in the office of the register of deeds. The injunction was served February 16, 1895. March 23, 1895, Waalkes executed a mortgage upon a portion of the property for $3,000, and the mortgage was recorded. Thereafter, and before the death of Baltus Smith, complainant filed a petition asking leave to amend the bill of complaint by making the children parties complainant, and also a further prayer for relief. On the 13th of April, 1895, Baltus Smith died. Two days later, defendant, Waalkes, demurred to the bill of complaint, after the death of Baltus Smith, and also after the petition to amend the bill had been filed, and while it was pending. August 3, 1895, the suit was revived by naming complainant, who had been appointed administratrix of the estate of Baltus Smith, deceased, and the order provided that she should be classed as a complainant. Defendant, Waalkes, was required to show cause, August 19, 1895, why he should not be punished for contempt in violating the injunction by executing the mortgage of March 23, 1895. Waalkes filed his answer, setting forth that he was not guilty of violating the injunction issued in said cause; that Jane Smith filed said bill for the purpose of obtaining a decree of divorce from her husband, Baltus Smith, and for the purpose of obtaining alimony; that when Baltus Smith died the suit abated, and was entirely at an end, because the relief sought against Martin Waalkes was only ancillary to the suit for divorce; that the suit for slander commenced by capias by said Jane Smith against said Martin Waalkes was commenced simultaneously with the issuing of said injunction, and was done for the purpose of preventing said Martin Waalkes from ob-

taining bail, because said injunction would hinder him in giving security to his bondsmen; that what incumbrance he did place on his homestead was given for the benefit of said Jane Smith, because it was only a conditional mortgage, which provided for a payment to her if she was successful in her slander suit; that it was impossible for him to obtain bail without giving the mortgage, and that he would have to go to jail if he did not put in said bail bond; that he had been imprisoned one day and one night, to wit, the 15th of November, 1895; that he appeared in said cause, and filed a demurrer to the bill of complaint, and that the said demurrer had not yet been heard or disposed of. Judge Grove fined the defendant $200 for his contempt, and ordered him to pay the sum to the complainants for their damages in the matter. No interrogatories were filed, and Judge Grove held that, inasmuch as a lis pendens was on record, the mortgagees obtained no valid lien upon the real estate as against complainant, and that her damage by reason of the injury done her by the giving of the said mortgage, is $200. Defendant appeals from the order convicting him of contempt in violating the injunction, and claims that the court had no jurisdiction, because the proceeding is one for divorce; that the complainant was not a resident of the state, and that the court had no right to issue the injunction, and for that reason to ignore it would not be a contempt of court.

It is not necessary to discuss whether, because of not residing in the state a sufficient length of time, the complainant could sustain the bill as a proceeding for divorce or not. She sufficiently alleged a conspiracy between her husband and the defendant to deprive her of property rights to authorize the court to issue a writ of injunction to prevent any further disposition of the property until she has lived in the state a sufficient length of time to authorize her to maintain a suit for divorce, and to have her interest in the property of her husband determined by the court. There is a sufficient statement of facts entitling her to relief, to sustain the bill as an injunction bill, upon the filing of which the court was authorized to issue a writ of injunction, which must be respected by the parties litigant. The following cases are suggestive of the principle followed by the trial court. Whipple v. Farrar, 3 Mich. 436; Jones v. Smith, 22 Mich. 360; Flanders v. Chamberlain, 24 Mich. 305; Miller v. Stepper, 32 Mich. 193; Dayton v. Dayton, 68 Mich. 437, 36 N. W. 209; Ireland v. Miller, 71 Mich. 119, 39 N. W. 16; Bush v. Freer, 91 Mich. 315, 51 N. W. 1002. It is also claimed that the death of Baltus Smith ended the suit wholly, so that the court was not warranted in entertaining the contempt proceedings. The bill authorized the court to allow the writ of injunction which was issued and served. The defendant neither answered nor demurred to the bill or moved to dissolve the injunction. He simply ignored the process of the court. If he is guilty of contempt at all, it was for acts done long before the death of Baltus Smith. If we are right in construing this bill as one containing sufficient allegations to warrant the issuing of the writ of injunction, the death of Baltus Smith would not abate the suit as to defendant, Waalkes. Seibly v. Circuit Judge (Mich.) 63 N. W. 528.

The only remaining question to discuss is, was it necessary, before the court could dispose of the contempt proceedings, to frame interrogatories and take proofs? In answer to the petition that he be punished for contempt, Waalkes filed a sworn answer, in which he "states the facts and circumstances in said cause to be as follows." He then recites the facts, which do not differ materially from what was recited in the petition, but seeks to justify his action in the way hereinbefore stated. No request was made by defendant to have interrogatories framed, or for an order of reference. The case was heard and disposed of upon the pleadings and proceedings hereinbefore stated. There was no dispute about what occurred. The pleadings, including the sworn statement of defendant, Waalkes, show just what was done. They showed the issuing of the writ of injunction, its personal service upon Waalkes, its violation, the manner in which it was violated, the extent of its violation, and its effect upon the property rights of the complainant. The defense in the contempt proceeding did not grow out of disputed facts, but was purely a question of law, in relation to which the defendant was mistaken. Judge Grove had all the facts before him which could have been brought out by a reference to a commissioner. He was as well qualified to dispose of the proceedings without the framing of interrogatories as he would have been with them. The case is affirmed, with costs. The other justices concurred.

RIVARD et al. v. RIVARD et al.

(Supreme Court of Michigan. March 31, 1896.)

WILLS — UNDUE INFLUENCE — APPEAL — UNSOUNDNESS OF MIND — EXPERT TESTIMONY.

1. A testator, who had made a will dividing his property between his seven children, from time to time added codicils, the effect of which was to so change the will that the most of his property was given to two sons. On appeal from the probate of the will there was evidence that one of the two sons resided with his father during the later years of his life, and the other was a frequent visitor; that after interviews with this son the testator talked against another son, and spoke of fixing matters differently. *Held*, that such evidence justified the court in submitting the question of undue influence to the jury.

2. An objection that a question asked a witness is "incompetent," without more, will not be considered, unless the real point of objection was too palpable to require the assignment of

more specific grounds to call the trial court's attention to it.

3. Statements embodied in a hypothetical question to a medical expert, calling for his opinion as to mental condition, asked by the contestants of a will on the ground of the unsoundness of mind of a testator, should be limited to those facts testified to which, if true, are indicative of mental unsoundness.

4. A hypothetical question to a medical expert, calling for his opinion, upon the facts assumed, as to the mental capacity of a testator, is not objectionable because it includes the question of his power to comprehend "his moral obligations to others, and the objects of his bounty," where, from the context, it would be readily understood that it referred to the moral obligation of the testator to his children.

5. The testimony of experts is to be treated like that of other witnesses, and it is for the jury to judge of the weight to which it is entitled, without discriminative instructions from the court.

6. A judgment will not be reversed for trivial errors in the admission of testimony which cannot be presumed to have affected the verdict.

7. A testator possessed of property worth $250,000 or more, having made a will when 64 years old, during the remaining 18 years of his life added 12 codicils, some of them at short intervals, two being executed on the same date. Two, executed within a few days of each other, were in exactly the same language, and two others in substance the same. By one of such codicils he entirely disinherited his youngest daughter, without any apparent reason, unless, as testified to by some witnesses, he acted under a delusion as to her character. Others of his children and grandchildren, who were dependent, were meagerly provided for, while the greater part of his property was left to two sons. There was also other testimony, though not undisputed, tending to show many acts indicating unsound mind during the later years of testator's life. *Held*, that all such facts and testimony were proper to be considered by the jury, and that their verdict setting aside the will would not be disturbed.

Error to circuit court, Wayne county; Robert E. Frazer, Judge.

Appeal by Charles Rivard and others, heirs at law, from an order of the probate court allowing the will of Ferdinand C. Rivard, deceased. There was a verdict for contestants, and judgment setting aside the will, from which Paul Rivard and Ephraim Rivard, executors and proponents, bring error. Affirmed.

Ferdinand C. Rivard died testate in 1892, at the age of 82 years. He owned a farm of 400 acres, situated about six miles from the city of Detroit, on the road to Grosse Point. There he was born and always lived. A part of the farm he inherited. The rest he obtained by purchase. He was a shrewd, careful, economical man. He amassed considerable property, and at his death owned some real estate in the city of Detroit, and two farms in Macomb county, besides considerable personal property. His wife died in 1874. Shortly after her death he made his will dated September 12, 1874. He afterwards executed 12 codicils thereto, dated, respectively, as follows: (1) July 6, 1875; (2) August 28, 1880; (3) September 11, 1880; (4) same date; (5) August 25, 1882; (6) May 9, 1883; (7) February 7, 1885; (8) March 16, 1886; (9) April 2, 1886; (10) May 23, 1888; (11) May 28, 1888; (12) May 26, 1890. He had seven children,—three sons and four daughters,—all of whom were living when the original will was made. By this will he made an equitable division of his property among his children. By his various codicils he took away the larger share given by the first will to five of his children, and left most of it to his two sons Paul and Ephraim. The will is attacked upon the ground of incompetency and undue influence. These questions were submitted to a jury, who decided in favor of the contestants.

His daughter Archange was married to a Mr. Connon in 1870. This marriage was unfortunate, Mr. Connon being a spendthrift and a man of bad character. She had eight children, and in 1881 she left him, and, at her father's request, took them all, and went to his house to live. His daughter Pauline in 1870 married a Mr. Lodewyck. She died May 19, 1880, leaving five children. These children went to their grandfather's to live after her death. About four months after her death, Rose married Mr. Lodewyck. Mr. Rivard naturally was opposed to the marriage in so short a time after the death of Pauline. He refused his assent, whereupon Rose and Lodewyck went away, and were married without his knowledge. Julia, at 19 years of age, left home, lived some three years with Mr. and Mrs. Lodewyck, and then entered a convent. Charles, who by the first will was made equal with Paul and Ephraim, was by one of the codicils bequeathed only a life estate.

Errors are assigned upon the refusal to give certain instructions requested by the proponents, in giving certain instructions requested by the contestants, in giving certain oral instructions, and in the exclusion and admission of testimony.

The court, at the request of proponents, after stating the statute of wills, and the power of every person to devise his property, instructed them as follows: "(1) The intention of the statute of wills is that every one of full age and sound mind shall be at liberty, in making a will, to select the object of his bounty, among his relatives, at discretion, or to pass them by, if he so disposes. (2) The court or jury cannot interfere with a testator's voluntary and intelligent bequests, or inquire into the propriety of any disposition he chooses to make, so long as the will is not unlawful in its terms, and is legally executed." To this request the court added, "and the testator is, at the time of its execution, of sound mind." "(3) And the question as to the capacity of the one who makes the will must refer to the will in question,—not his capacity to make any will in general,—and must refer to the time when the will was made. (4) If the testator intends, of his own free will, to make certain dispositions of his property; if he is capable of knowing what he is doing, of understanding to whom he gives his property by his will, and in what propor-

tions, and what heirs he is depriving of property,—this is sufficient to sustain the will, if he, at the time of making such will, is of sufficient age and sound mind. (5) It is not necessary that Ferdinand C. Rivard should have had the most perfect and complete understanding of all matters relating to his property, and all their bearings, that a person of good and vigorous health might have had. Nor is he required to know the precise legal effect of every provision in the will." To this the court added, "provided he is at the time of sound mind." "(6) The capacity to make a contract is sufficient to make a will, and a less degree will answer for making a will than a contract. (7) The will will not be set aside merely because its maker was weak, or sometimes foolish, or lacked the average mental capacity of his neighbors, or did not dispose of his property as others, who knew nothing of his reasons, might think he ought to have done." To this the court added, "if he was of sound mind at the time he executed it." "(8) It is immaterial that by the provisions of the will any child or children or grandchildren were disinherited, or the provision that was made for them in the will was subsequently changed by the codicils. It is immaterial whether the provisions of the will are or are not such as the jurors may think ought to have been incorporated in it. This is no reason for setting aside the will, provided that the jury find that at the time of the making of it the testator was of full age, and sound mind sufficient to understand its meaning, the objects to whom these bequests were made, and the child or children he has disinherited. (9) It is not necessary that the evidence should show what, in the opinion of the jurors, may have been a sufficient reason for omitting any one or more of his heirs from the provisions of the will. The justice or injustice of such omission cannot be inquired into, providing the testator was of full age and sound mind, and acted without any undue influence, and understood fully what he was doing, when he made the will by which he omitted any one or more of his heirs from the bequests. (10) The evidence is undisputed that for thirty years before his death the testator, Ferdinand C. Rivard, carried on his business of farming, made contracts and leases, bought and sold real estate and personal property, and that no one, so far as the evidence shows, ever questioned his mental capacity or competency to do so. These facts may be taken into consideration by the jury, and given weight by them, in determining the question as to whether, when he executed the will, he was of sound mind. (11) Even if the jury believed some of the provisions of the will betray ingratitude and the want of natural affection, showing that he did not distribute his estate equally among his relatives, still those facts alone do not prove the want of testamentary capacity." This request is marked, "Given as modified;" but there is nothing to show how modified, unless it be by the oral charge of the court. "(12) If Ferdinand C. Rivard, at the time of making his will, knew the nature and effect of it,—knew his children, and the circumstances of each of them in life; the extent of his property, and the scope and bearing of the provisions of his will; how much he was giving to each, and the way he was giving it, and which of them he was passing by,—and gave the property according to his free will and wishes, and he was of sound and disposing mind and memory, and competent to make it, his will would be valid, and should stand. It was his right to make it, and not the right of the jury to make or unmake it for him. (13) A testator has the capacity that his will shows him to possess. (14) A testator competent to make a will has the right to make it as he wills and wishes, and is not required to give any reasons why he has made it in the way he has." (15) The court, at proponents' request, also instructed the jury to find, in answer to special requests, that the testator, when the will was executed, did know the extent and value of his property, and also knew his children. (16) John Ward, an attorney of long standing and experience in the city of Detroit, was the attorney for Mr. Rivard for many years; drew the will and the codicils. Contestants' counsel argued to the jury that Mr. Rivard was unduly influenced by Mr. Ward. The court, at proponents' request, instructed the jury that there was no evidence to show any undue influence on the part of Mr. Ward to bring about either the will, or any codicil to it, but did not, as requested, instruct them to disregard the arguments of counsel for the contestants on this point.

The court gave the following requests on the part of the contestants: "(1) It is essential to the validity of a will that the person should be of sound mind, and that its provisions be the real wish of the testator himself, freed from all undue influence affecting its provisions. (2) While the undue influence which operates to defeat a will must be such as to overcome the free action of the mind at the very time of making the testamentary disposition of the property, it is also true that the pressure may sometimes have been brought previously. If such pressure has been brought previously, and remains, so as to coerce the mind of the testator, at the time the will was executed, it cannot be upheld. (3) Proof of undue influence must be made out, in most instances, by proof of facts and circumstances. Such facts and circumstances, standing alone, may be trivial, but when taken together, and considered in relation to all the other facts of the case, must satisfy the jury of its existence. (4) In order for the jury to find that Rivard was of sound mind, the jury must be satisfied that at the time of making the will he not only had sufficient memory to recall the several persons who might, or ought to be, the fitting objects of his bounty, but sufficient understanding to

comprehend his relationship to them, their relationship to him, and their claims upon him. (5) It is essential to the exercise of the power to make a will that a testator shall understand the nature of the act he is doing, that he shall be able to comprehend and appreciate his relationship to others who might or ought to be the objects of his bounty, and that nothing shall so far influence his will in disposing of his property as to bring about a disposition of it which, if his mind had been sound, would not have been made. (6) It is essential to the exercise of the power to make a will that the testator be able to comprehend and appreciate his relations to others who might or ought to be the objects of his bounty, and that no disorder of the mind shall so far poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties, as to render him incapable of such comprehension and appreciation, and to bring about a disposal of his property which, if his mind had been sound, would not have been made. (7) If insane suspicion or insane aversion takes the place of natural affection; if reason and judgment are lost, and the mind becomes wild and its functions disturbed, so as to lead to a testamentary disposition due only to such influences,—then the condition of testamentary capacity fails, and a will made under such circumstances cannot stand. (8) In determining the question of a testator's capacity, the jury are at liberty to consider the character of the will itself,—whether simple in its provisions and applications, or otherwise; the jury being instructed that the question of capacity always relates to the capacity of the testator to make the particular instrument in controversy. (9) The jury may consider the nature and character of the will, and, if it be contrary to natural justice, this, with the other facts of the case, may be considered by the jury in the determination of the question whether or not the testator was of sound mind. (10) In determining the question of testator's capacity, the jury are at liberty to consider whether or not the claims of near relationship have been disregarded; and, if they find that such claims have been so disregarded, they may consider that fact, in connection with the other circumstances of the case, and give it such weight as, in their sound judgment and discretion, they shall think it entitled to. (11) In determining the question of testator's capacity, it is the duty of the jury to consider all the facts which, by a preponderance of evidence, they find to be true. If these facts, taken together, and rightly considered by the jury, fail to satisfy them that, at the time of making the will, Rivard was capable of comprehending and appreciating the claims which his children had upon him, then they must reject it. (12) It is essential to the making of a valid will that the testator be of disposing mind and memory. Failure of memory, if the jury find it to have existed, may be considered by the jury, in connection with all the other circumstances of the case, in determining testator's capacity; and that they are at liberty to give it such weight as, under all the circumstances of the case, they, in the exercise of their sound judgment and discretion, think it entitled to. (13) If the jury believe that the testator was laboring under partial insanity or monomania, and that the will was the direct offspring of such partial insanity or monomania, then the jury is instructed that the will must be regarded as invalid, even though the general capacity of the testator to do ordinary business be unimpeached, provided such monomania so affects the testator, in the making of his will, as to show him of unsound mind in that particular. (14) The instructions given as to the capacity to make the will are equally applicable to the capacity to make the codicils, and must be so regarded by the jury. (15) The jury is instructed that, while a man is not to be regarded of unsound mind simply because the provisions of his will are unjust, yet the jury have a right to take into consideration the provisions of his will; and if they find them to be unjust, in view of the claims that his children rightfully had upon his bounty, the jury have a right to consider this fact, in connection with all the other circumstances of the case, in determining whether or not the testator was of sound mind. (16) The jury is instructed that if Rivard was of sound mind, and desired to prevent Lodewyck from having any benefit from whatever share of his property he might desire Pauline's children to receive, it was not necessary for him to cut off such children absolutely, as was done by the codicil of February 7, 1885. He could have vested the title in a trustee for the benefit of such children during their lives."

After reading to the jury the above requests, the court gave the jury oral instructions, the material parts of which, affecting the questions raised, are as follows: "Testimony has been introduced in this case showing, or tending to show, that the testator, Ferdinand C. Rivard, was disturbed by fear of some impending danger, that he was unkind to his wife and children, that he was cruel in his treatment of domestic animals, that he demanded of his children strict obedience, that he restricted them in their pleasures, and that he exhibited other peculiarities in his conduct. All this testimony is introduced for the purpose of showing you what kind of a man Ferdinand C. Rivard was. These doings have been met by disclaimer on the part of proponents of this will, and evidence has been introduced tending to maintain their position. That is, the evidence on the part of the proponents has disputed the propositions of contestants; and, as to the truth or falsity of the evidence on these questions, I leave that to you. A great deal of evidence has been introduced in this case to show that Ferdinand C. Rivard was a man capable not only of comprehending the

property he possessed, the nature of it, of knowing the land he owned, and its boundaries, but that he was shrewd in making a bargain, and that he was generally competent to conduct business affairs. I think there is not any evidence in this case that would warrant you in finding that Ferdinand C. Rivard was not a man of ordinary business capacity, and that this business capacity continued up to his death. I have no doubt, from the evidence, that he was capable of understanding what property he possessed, and that he was capable of managing it successfully. Neither do I think the evidence in this case would warrant you in finding that he was a man who did not know his children when he met them, and that he did not know his grandchildren, and what relation they were to him. But the main and all-important question—it seems to me—for you to consider is whether, under the evidence in this case, Ferdinand C. Rivard was of sufficiently sound mind to comprehend the obligations he was under to his children, and those who were dependent upon his bounty, or entitled to his bounty, and it is for the purpose of enlightening you upon this question that so much of this evidence has been introduced. And, in considering this question, it is your duty to examine carefully into the conduct and behavior of the testator towards his wife and children and those surrounding him, so that you may form a clear insight into the real condition of the testator's mind. And it is with the view of enlightening you on this question that this evidence in regard to his treatment of animals that surrounded him was introduced, so that you may justly judge as to the character and condition of the testator's mind. A man may be perfectly sound, and able to conduct his business and understand his affairs, and even to know to whom he has given his property, and still be in such a condition of mind that he is incapable of comprehending his duties towards others. In other words, he may be perfectly sound in many particulars, and be unsound in others, or some one particular. This is what is known as 'monomania.' If a person is a monomaniac, and his will is affected by the peculiar character of his mania to such an extent that a jury shall believe that he is of unsound mind, then that will is not the will of the person executing it, because it is the will of a man of diseased or unsound mind, in that particular. So you see that in this case it is necessary for you to discriminate in the application of this testimony as to the particular thing in which this testator is claimed not to have possessed sufficient intellect or capacity to execute this will. You are at liberty, also, to take into consideration the terms of the will itself, not for the purpose of substituting your opinion for the opinion of the testator as to the manner in which he should have disposed of his property, but for the purpose of ascertaining, and, from what has been shown by all the testimony in this case, taking into consideration every characteristic of this man, and his conduct through all his life, whether such a will would be the product of such a man with a sound or unsound mind. You are also at liberty, for the purpose of determining this proposition, to take into consideration the reasons that have been assigned for the disposition of the property in the manner it had been disposed of by this will, not for the purpose of deciding or determining whether you would make such a will or not, but for the purpose of determining whether Ferdinand C. Rivard—such a man as the testimony in the case has shown him to be—would or would not, if he was a man of sound mind, be actuated by the reasons assigned. In other words, all the testimony is simply for the purpose of enabling you to arrive at a conclusion as to the condition of this man's mind, as judged by his acts. A man owes certain duties to his family,—to those he has been instrumental in bringing into the world. He is under certain legal and moral obligations to them, and, if these obligations are overlooked or disregarded, then it is important for you to inquire whether the reasons that are assigned for overlooking or disregarding these duties were such as actually operated upon him, if his mind was sound, in so doing. If they did, and the reasons were sufficient to him, and his mind was sound, then this will cannot be set aside; but if, on the other hand, these reasons indicate to you, together with all the testimony in this case, that the mind of Ferdinand C. Rivard was not sound in this regard, then you are as much at liberty to deny this will to probate as if he were incompetent in every particular, if the incompetency which you find affected the provisions of the will that is here presented."

The court refused to instruct the jury that there was no evidence of undue influence, or incompetency to make the will; also, that if he was of sound mind, sufficient to enable him to buy and sell and deal in property on the basis of contract, to buy for cash, to give deeds and leases, and to make gifts, this implied sufficient capacity to devise his property by will; also, that if he was nervous, of violent temper, and unjust in his dealings, or tyrannical, these, of themselves, do not prove anything against his testamentary capacity; also, that expert testimony of the kind given in this case is uncertain and unreliable, and but little weight should be given to it. Two other questions, in addition to those above mentioned, were proposed by the proponents: "When the instrument was executed, did the testator understand the provisions made for his children, and did he understand how to make them? Did the testator, at the time the will was made and the changes were made by codicils, act upon reasons satisfactory to himself, in making the several changes?"

The above is a sufficient statement of the case. Any further reference to facts will be made in connection with the points raised.

John Atkinson (Henry M. Cheever and John Ward, of counsel), for appellants. Don M.

Dickinson (Samuel S. Harris and John D. Conely, of counsel), for appellees.

GRANT, J. (after stating the facts). 1. The court did not err in refusing to instruct the jury that there was no evidence of undue influence. It must be borne in mind that the first will was a fairly equitable division of the testator's property among his children. This was in accordance with the natural affection which every father is supposed to have for his offspring. There is no evidence that any influence was exercised over Mr. Rivard in the execution of that will, or that there was then any alienation of affection between him and any of his children. If the case had been tried upon the theory that this will was valid, and must stand, although it were established that the codicils were invalid on account of undue influence or incompetency, a different and important question, upon which we find no decision by this court, would have been presented. It was, however, presented to the court and jury upon the theory that the execution of a codicil is a re-execution of the entire will, and that, if there was such undue influence or incompetency as would invalidate the codicils, it would invalidate the entire will. All through the trial the original will and the codicils were referred to as one will. No request was made to instruct the jury upon this theory. It was raised in this court for the first time. Cases will be reviewed by the appellate courts upon the points and theories presented to the nisi prius courts. No better illustration of the justice of this rule can be found than the present case. Had the proponents desired to make this issue, it was their clear duty to have done so in the court below. We therefore refrain from discussing this question, or commenting upon the authorities cited.

Soon after the execution of the original will, Mr. Rivard commenced, by codicils, to diminish the shares of some and increase those of others, until finally, by those codicils and deeds of conveyance, he had practically disinherited all but Paul and Ephraim, and left to them almost the entirety of a property worth between $250,000 and $400,000. Some of those whom he thus disinherited were in more need of his bounty than Paul and Ephraim, because they were less able to take care of themselves, and were possessed of less property. Every person will naturally say that some good reason must be found to account for such a disposal of a large property by a parent. Undue influence is not exercised openly. Like crime, it seeks secrecy in which to accomplish its poisonous work. It is largely a matter of inference from facts and circumstances surrounding the testator, his character and mental condition as shown by the evidence, and the opportunity possessed by the beneficiary for the exercise of such control. Marx v. McGlynn, 88 N. Y. 357; Hartman v. Strickler, 82 Va. 237; Porter v. Throop, 47 Mich. 324, 11 N. W. 174. It is unnecessary in this case to go to the extent of the holding in Marx v. McGlynn and Hartman v. Strickler, to the effect that the presumption of undue influence arises from the fact that the will is in disregard of a parent's natural affection. Ephraim lived at home, with his father, for about five years before his death. Paul was a frequent visitor, and in consultation with him. There is evidence on the part of the contestants that Mr. Rivard made remarks against his son Charles after his interviews with Paul, and spoke about fixing matters differently. The learned circuit judge submitted this question to the jury, and, upon a motion for a new trial, refused to disturb the verdict. We think he was correct, in that there was substantial evidence for the consideration of the jury.

2. Three witnesses, named Lodewyck, Frech, and Gore, testified that in their opinion Mr. Rivard was of unsound mind. The objection made to the inquiry propounded to Lodewyck and Frech was that it was "incompetent, and any inquiry as to his mental soundness or unsoundness must be confined to the time the will was made, and the codicils." Under this objection, counsel can now complain only of the second reason for their objection. The objection that it was "incompetent" is too indefinite. The term includes many reasons which counsel might have had in mind, but which were not apparent to the court. In Ward v. Ward, 37 Mich. 258, the objection made was that the question was "incompetent, irrelevant, and immaterial." The court said: "The ground of the objection was not stated at all, and, considering the circumstances, the point now urged was not so obvious as to probably occur to the judge's mind on the tender of the general objection. The plaintiff in error is therefore not entitled to insist on the ground here taken." In Stevens v. Hope, 52 Mich. 65, 17 N. W. 698, it is said, "Objections made in this form are not entitled to notice, unless it happens that the true point of objection is too palpable to call for anything more definite." See, also, Brown v. Weightman, 62 Mich. 557, 29 N. W. 98; Association v. Fisher, 95 Mich. 274, 54 N. W. 759. Counsel cannot now raise the point that these witnesses had not shown sufficient facts and knowledge upon which to base an opinion. To similar questions propounded to the witness Gore, the specific objection was made that he had not shown sufficient knowledge on his part to give an opinion. We are all of the opinion that this witness' testimony was competent. He had described looks and actions and language inconsistent with a normal state of mind. We deem it unimportant to state his testimony.

3. Dr. English, a medical expert upon insanity, was produced as a witness for the contestants. A very long hypothetical question was propounded to him. It assumed

the existence of certain facts, as all such questions do, which contestants claim they had given testimony to prove. After the statement, the question was, "What have you to say as to the mental condition of this man, from the time of his wife's death down to his death?" The answer was, "The history seems to be that of an insane person, so far as I can judge from the question." After this was answered a second question was propounded, asking for the witness' opinion whether Mr. Rivard was "capable of comprehending his moral obligations to others, and the objects of his bounty; the relations of his children and grandchildren to him; the situation and disposition of his property so as to hold those in mind; his obligations to others; his consideration of the objects of his bounty; his property, and the extent of it,—so as to be able to make this will and these codicils of his own understanding." It is now urged that this question was incompetent because it includes certain facts which are indicative of sanity, rather than insanity, and that the jury were given to understand by the question that they were inserted as indicative of insanity. No such objection was made upon the trial, and it will not now be considered by us. The court, of its own motion, did modify some of the hypothetical statements which were eliminated from the question. If counsel for proponents objected to other statements, they should have called the attention of the court to them. The usual and better practice is to first introduce all the evidence to support the assumed facts stated in the hypothetical question. If, however, after the close of the testimony, it be found that such question contains assumed facts, which there is no evidence to support, opposing counsel should move to have the answer stricken, and excluded from the consideration of the jury. Wilkinson v. Spring Works, 73 Mich. 418, 41 N. W. 490. The competency of such questions is too well established to be now questioned. The duty of the trial judge is to limit the question to those facts which, if the jury find them to be true, are indicative of insanity. The hypothetical question in this case included the facts which the contestants had given evidence tending to sustain. The second question was attacked in the court below, and is attacked here, upon the ground that it included moral obligations, and that it is of no consequence whether Mr. Rivard did or did not understand his moral obligations to others. It is insisted that the question and answer related to the moral incompetency of the testator, and not to his mental incompetency, which is the test. The word was evidently not used in regard to the moral character of the testator, or his moral obligations to his neighbors in the business transactions of life. It related to the obligations which a parent owes to his children. He was under no legal obligation to devise his property or leave it to his children who were of age. Certainly, as to those who were not of age, it would not be inappropriate to say that a father owes a moral obligation to his children to provide out of his property the means for their support and education. The term was used with reference to his obligations to his children. The jury could not well have understood it in any other light. There is precedent for its use in this connection. The lord chief justice, in Banks v. Goodfellow, L. R. 5 Q. B. 549, says: "Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion or aversion take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition due only to their baneful influence,—in such a case it is obvious that the condition of testamentary power fails, and that a will made under such circumstances ought not to stand." The rigid cross-examination elicited many things favorable to the proponents, and gave the jury all the essential information for their consideration in determining how much weight they would give to the opinion of the expert There was no error in admitting this testimony.

4. The court did not err in refusing to instruct the jury that the expert testimony in this case was uncertain and unreliable, and that but little weight should be given to it. People v. Seaman (Mich.) 65 N. W. 203.

5. Testimony was introduced by the contestants to show that Mr. Rivard became angry at some of his boys, and sent them away from home, telling them to leave, and "go and eat mad cow." A Mr. Willemin was sworn for the proponents, and testified: That he was a lawyer of 44 years' practice, 20 years in this country. Was brought up in Paris, a graduate of the French university, and acquainted with the idioms of the French language. That the French expression for the above is, "Mangé de la vache enragée." That it was an expression much used in France, especially among the country people. "It means the same as, 'You go and have a hard time.' Suppose I should tell you the story of my life, and was in Australia part of the time, and fared very bad in that country; I would tell you, 'J'ai mangé de la vache enragée.' It means you have the hardest time one could ask to endure hardships." On cross-examination the witness was asked, "Would you use it to your own children?" He answered under objection and exception. It was probably not proper cross-examination. It had no relevancy to the subject-matter of his testimony in chief. It would, however, be a re-

flection upon the intelligence of any jury to hold that they could be misled or prejudiced by the answer, which was: "No; I would not, myself." Judgments should not be set aside for such trivial errors.

6. The principles governing the main question in this case have been so frequently and fully discussed in the decisions of this court that we deem it unnecessary to traverse the ground again. To do so would be supererogation. The former distinguished jurists of this court have ably expounded the rules and cited the principles governing all the questions raised. Some of the leading cases are Beaubien v. Cicotte, 12 Mich. 459; McGinnis v. Kempsey, 27 Mich. 363; Fraser v. Jennison, 42 Mich. 231, 3 N. W. 882; Kempsey v. McGinniss, 21 Mich. 123.

Apart from the question of undue influence, which has already been disposed of, the theory of the proponents is that the record contains no evidence of general incompetency, the result of senile dementia or general insanity, or of an insane delusion which affected the testamentary capacity of Mr. Rivard. Counsel urged, and requested the court to so charge, that Mr. Rivard was competent to attend to his business affairs, to make deeds, leases, and contracts, and was therefore competent to make a will, for the reason that it requires less capacity to make a will than to execute deeds and contracts. If the alleged incompetency depended upon senile dementia or general insanity, counsel's contention, under the instruction of the court as to his competency in this regard, would be correct, and the court should have directed a verdict for the proponents. This rule is settled, not only by the authorities in Michigan, but is recognized by courts generally. The difficulty of this contention is that it does not apply to this case, and the court eliminated it from the consideration of the jury by instructing them that Mr. Rivard was competent to do all these things, and that that competency continued to the end of his life. Counsel ignore the other well-settled rule,—that, while a man may be possessed of such capacity, he still may be unable to execute the will in question, on account of some delusion which has beclouded or taken away his judgment in regard to those who are the natural objects of his bounty. If a testator disinherits a daughter upon the belief that she is a bad woman or that she is not his own offspring, or a son upon the belief that he is a drunkard, or his grandchildren upon the belief that his son-in-law has threatened to kill him, and it appears that there is no foundation in fact for any such beliefs, and they are shown to be mere delusions, a will disinheriting such children and grandchildren is void, notwithstanding he was entirely sane upon every other subject, and fully competent to manage his business affairs. Justice Cooley makes the distinction clear in his able opinion in Fraser v. Jennison, supra, at page 231, 42 Mich., and page 882, 3 N. W.: "When the monomania is conceded, it is only necessary to inquire further whether the provisions of the will are or are not affected by it, and the will stands or falls by that test. [Citing a large number of authorities.] A man may believe himself to be the Supreme Ruler of the Universe, and nevertheless make a perfectly sensible division of his property; and the courts will sustain it, when it appears that his mania did not dictate its provisions." The converse of the proposition is true,—that where the monomania or delusion does dictate its provisions, and results in the disinheritance of the subjects of the delusion, whom he would otherwise remember in his will, it cannot stand. We are not dealing with a testator who has no children, but only collateral heirs, to whom he owes no duty, legal or moral, but with a parent, whose disinheritance ought, in the common sense of mankind, to be based upon some good reason. For this reason the court rightly instructed the jury that they might consider the terms of the will, in connection with the other evidence, in determining the question of the monomania or delusion. This is peculiarly true of the present case. These codicils present some peculiar features, which indicate a loss of memory and an unstable character. There were only 2 weeks between the second and third; 17 days between the eighth and ninth; 5 days between the tenth and eleventh; the third and fourth were made upon the same day; the eighth and ninth are identical in language. We find no satisfactory explanation of the execution of these two codicils within a few days of each other. By the sixth codicil he took away from his children all control of his funeral, burial, and selection of his grave and the erection of a monument, and committed it to his attorney, Mr. Ward. He disinherited his youngest daughter. If the testimony of the contestants is worthy of belief, he was under the insane delusion that she was an inmate of a house of ill fame. There is no shadow of a reason shown for this belief. If the jury found that this insane delusion was the cause of his disinheriting her, it alone would be sufficient to invalidate the will. Haines v. Hayden, 95 Mich. 332, 54 N. W. 911. The delusion in that case was that his wife was unfaithful to him, and that Alice, the daughter who was disinherited, was not his own child. It was said in McGinnis v. Kempsey, "If a party makes a will contrary to natural justice, this, with other facts, may be considered." The testator's daughter Rose was about 12 years of age when her mother died. The evidence for contestants showed that she assumed the mother's place in the household; did most of the work; she and her little sister milked the cows, and brought water from the lake, several hundred feet away; that she was faithful, obedient, and uncomplaining; that her lot was a hard one; that she did work which no father possessed of the property which her father had ought to permit a daughter to do. Nothing occurred to estrange

him from her until her marriage with Lodewyck. There is no evidence that he had any ill will toward Pauline, Lodewyck's first wife. Either from an unfortunate marriage, or from other causes, the mind of his daughter Archange had become unbalanced, and after she left her husband her father took her to an asylum for care and treatment. The common sense of mankind condemns, as contrary to natural justice, a will which practically disinherits such children, and leaves the bulk of a large fortune to two who have done no more than they to deserve it, and are better able to meet the vicissitudes and struggles of life; and courts and juries have the right to take that fact into consideration, in determining the competency of the testator to make the will.

The delusions claimed to directly affect the will are his belief that his daughter Julia, whom he totally disinherited, was an inmate of a house of ill fame; that Charles was a drunkard; and that his son-in-law Lodewyck, whose children he left with a mere pittance, and that tied up with harsh restrictions, had designs upon his life. So far as disclosed upon this record, there was not the slightest foundation for his belief in the unchastity of his daughter or the designs of Lodewyck. There is evidence from which it may be reasonably inferred that he had some foundation for his belief in the habits of his son Charles. Charles, however, was a witness, and the jury had a better chance to judge as to the foundation for his father's treatment, and whether his belief amounted to a delusion.

The evidence of the contestants tends to show a marked change in the habits and character of Mr. Rivard after the death of his wife; that he was afraid of her spirit; that he made his sons and the hired man sleep in the sitting room for some time, all having beds on the floor; that they slept with guns by their sides; that he said to his sons, "Your mother might come, and we had better sleep on the floor;" that he told them to sleep on their backs, so as to listen, for fear she would come, and told them to be ready to grab their guns to shoot if she should come; that he hung sleighbells across the windows; that he attended to the calls of nature in the room at night without using any convenience; that he was accustomed to sit upon his haunches in the house and in the fields, and along the fences; that he exhibited cruelty towards his dumb animals, so extreme and revolting as to be inconsistent with a sane mind; that he sometimes wore summer clothes in winter, and winter clothes in summer; that he sometimes slept with a flannel shirt or drawers tied about his neck, for fear that one of his daughters would cut his throat; and that he furnished diseased meat to eat. Now, while some of these peculiarities would not, of themselves, show incompetency to make a will, still they were important side lights to aid the jury in determining the main issue in the case. Bitner v. Bitner, 65 Pa. St. 347. It is just to here remark that the testimony of the proponents was in flat contradiction to most of the testimony on the part of the contestants, and, if the jury found that the facts testified to by the proponents' witnesses were true, Mr. Rivard was undoubtedly competent to execute the will, and the will should have been sustained. But these questions of fact were exclusively within the province of the jury, and they have settled them against the proponents. The charge was very clear in presenting the issue to them, and defining the rules by which they were to be governed. We find no error in the instruction given, or in the refusal to give the requests on behalf of the proponents which were refused. The refusal to submit the special questions numbered 4 and 5 has not been argued by counsel in their briefs, and therefore will not be considered. The judgment is affirmed. The other justices concurred.

SAWYER et al. v. CHOATE et al.

(Supreme Court of Wisconsin. March 10, 1896.)

NEGOTIABLE INSTRUMENTS—INDORSEMENT—TRIAL—TRANSACTION WITH DECEDENT—WITNESS—COMPETENCY—INSTRUCTIONS—BEST AND SECONDARY EVIDENCE.

1. In an action on a note, which was made by G. and indorsed by K., who has since died, the testimony of the maker and of the payee that K.'s indorsement was on the note when delivered to the payee, is not within Rev. St. § 4069, as in respect to a transaction had "personally" with a deceased person.

2. The testimony of the payee, that he furnished the money on the credit of the maker and K., does not show a previous arrangement with K., or that the arrangement, if any, was with K. personally.

3. A letter, written by K. to the maker, instructing him "to raise the money, and he would be here the first of the week to indorse paper," etc., is not a transaction had personally with K.

4. Both the maker and payee are competent to testify to the existence of the letter, and to its genuineness.

5. After it has been established that a letter has been lost, one who had read it to the recipient at the time it was received, because the latter was unable to read, may testify to the contents of the letter.

6. The reception of additional evidence to a fact already established by competent evidence is not prejudicial error.

7. An instruction: "The defendants claim that, if the note was not indorsed by K. until after its delivery to B. and C., then it was indorsed pursuant to a previous agreement. If you find that is true, your verdict should be for the defendants,"—leaves to the jury the question of an indorsement pursuant to a previous agreement.

8. A charge which, construed as a whole, plainly states the law applicable to the case, is without error.

Appeal from circuit court, Winnebago county; George W. Burnell, Judge.

Action by Edgar P. Sawyer and others, as executors of the estate of J. H. Kiel, de-

ceased, against Leander Choate, James M. Bray, and Peter Grattan. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

The action is based on the following facts: On January 8, 1888, one Peter Grattan executed his promissory note for $2,000 to Bray & Choate, for money furnished at the time. It was afterwards negotiated by Bray & Choate to the Commercial Bank of Oshkosh. At this time it had the indorsement of J. H. Kiel upon it. Kiel died. The note was presented, filed, and allowed as a claim against his estate, and paid by his executors. This action is brought to recover the sum so paid to Bray & Choate, on the alleged ground that Kiel's indorsement was for the accommodation of Bray & Choate, and without consideration. On the other hand, it is claimed by Bray & Choate that the note was given for money advanced by them for the joint use of Grattan and Kiel, and that Kiel indorsed it in order to assume responsibility for it as, virtually, a joint maker with Grattan. Grattan was joined as maker of the note. The question principally litigated was whether Kiel's indorsement was on the note at the time when Bray & Choate received it, or whether it was made afterwards, for the accommodation of Bray & Choate. Choate and Grattan both testify that it was there before the note was delivered to Bray & Choate, and that the money was advanced on the credit of that indorsement. Julius Kiel, son of J. H. Kiel, testifies that, at the date of the transaction, his father was in the state of Michigan, and many miles from Oshkosh. The questions mainly relate to the competency of this testimony. If the testimony was competent, it sustains the verdict.

Eaton & Weed and Gabe Bouck, for appellants. Hooper & Hooper, for respondents.

NEWMAN, J. (after stating the facts). It is said that the testimony of Choate and Grattan, to the effect that Kiel's indorsement was on the note at the time when it was delivered to Bray & Choate, was incompetent, on the ground that Kiel is dead, and that this was allowing opposite parties to testify in respect to a "transaction or communication by him [them] personally with a deceased person," in contravention to section 4069 of the Revised Statutes. Certainly, neither witness is within the literal terms of the section. The evidence does not disclose that either was present at or witnessed the act of indorsement. They testify, simply, that the signature was on the paper at the time when it was delivered. The testimony did not relate to any transaction or communication had personally with the deceased, and was competent. Daniels v. Foster, 26 Wis. 686.

Choate was permitted to testify that he furnished the money on the credit of Grattan and Kiel. This is said to be double error; that it permitted Choate to testify, in effect, to a claimed arrangement with Kiel, and was a conclusion founded on the fact of the arrangement claimed. It may be that the presence of the indorsement upon the paper is some evidence that it was put there in pursuance of some previous arrangement; but it does not show what that arrangement was, or whether it was made with the deceased personally. So it could not be error on the ground first stated. And, as to the second ground of error alleged, the testimony is to the effect, simply, that credit was given to the indorsement of Kiel. It is not that credit was given to any previous arrangement with him, personally, or otherwise. But, even if error, it was not prejudicial; for the mere fact that the indorsement was on the paper at the time of the delivery of the money was evidence sufficient that the money was paid on the credit of the indorsement. Snyder v. Wright, 13 Wis. 689. Additional evidence, to a fact already sufficiently proved by competent evidence, cannot well be prejudicial error, even if erroneously received.

Grattan was permitted to testify that he had received a letter, purporting to be from Kiel, and which "appeared to be signed" by him; that he was unable to read, and so had shown the letter to Choate, who had read it for him. The letter had not been preserved, but had become lost. Choate was permitted to identify the signature of Kiel to the letter, and to testify to its contents. He testified that "it instructed Grattan to raise the money, and he would be here the first of the week, and indorse paper," etc. The letter was not a transaction had personally with Kiel, within the intention of section 4069, Rev. St.; and it was competent for both Grattan and Choate to testify to its existence. They might also testify that, in their opinion, the letter was genuine. This is settled, for this state, by Daniels v. Foster, supra. Nor is there any reason, founded on the statute, why Choate, being a competent witness in the case, was incompetent to testify to the contents of the letter. There was no evidence, by either defendant, of transactions or communications had by them personally with Kiel.

Some complaint is made of the instructions given by the court. The court instructed that "it is claimed by the defendants (1) that this note was indorsed by Kiel before it was delivered to Bray & Choate; (2) that, if it was not indorsed by Kiel until after delivery to Bray & Choate, then such indorsement was made pursuant to previous agreement, by which he was to indorse as surety for Grattan, which would amount to the same thing, in law, as if the note had been indorsed before delivery. If you find, from the evidence, that either of these propositions is true, then your verdict should be for the defendants; but, if you find that neither of them is true, then your verdict should be for the plaintiffs. And, in this respect, it makes no difference whether he, Kiel, indorsed at the request of

the maker, Grattan, or of the payees, Bray & Choate. For the material question is, not at whose instance the indorsement was made, but did the payees part with their money upon the strength of the indorsement, and relying upon the credit of the indorser? The question for you to determine, therefore, is, did Kiel indorse this note as surety indorser for Grattan, or for the accommodation of Bray & Choate?" Several criticisms upon these instructions are made: (1) "That it told the jury that, if the note was indorsed after delivery to Bray & Choate, then the indorsement was made pursuant to a previous agreement," thus taking that question from the jury. The court said, in effect, on that point: "The defendants claim that, if the note was not indorsed by Kiel until after its delivery to Bray & Choate, then it was indorsed pursuant to a previous agreement. If you find that is true, your verdict should be for the defendants." That certainly left that question to the jury. It is also complained that the court instructed that it made no difference at whose request the indorsement was made, whether at the request of the maker of the note, Grattan, or at the request of the payees of the note, Bray & Choate. But this is not a fair estimation of what the court really did charge. It is familiar that the whole charge is to be read and construed together. The whole of a legal proposition, with all modifying facts, suitable for an instruction to the jury, cannot always, or often, be compressed within a single sentence. The court here plainly told the jury that the important question was whether the purpose of the indorsement was to become surety for Grattan, and Bray & Choate parted with their money on the credit of the indorsement; and, if that was the fact, it made no difference at whose request he became such surety. And that, plainly, is the law. The charge seems to have given the case fairly to the jury. No important error is found in the record. The judgment of the circuit court is affirmed.

MERCHANTS' EXCH. BANK v. FULDNER et al.

(Supreme Court of Wisconsin. Feb. 18, 1896.)

ACTION ON NOTE—BONA FIDE PURCHASER—RIGHT TO SET-OFF.

Defendants executed a note to a bank, which, after becoming insolvent, indorsed it, before maturity, to a third person as collateral, and the note was thereafter, and after maturity, transferred to plaintiff. *Held*, that defendants were entitled to set off the amount of funds on deposit to their credit in such bank at the date of insolvency.

Appeal from superior court, Milwaukee county; R. N. Austin, Judge.

Action by the Merchants' Exchange Bank against Herman Fuldner and another on a promissory note. From a judgment for plaintiff, defendants appeal. Reversed.

A statement of the main facts out of which this case arises will be found in Burnam v. Bank (herewith decided) 66 N. W. 510. It is not necessary to repeat the statement here. The action is upon a promissory note for $10,000, executed by the defendants to the South Side Savings Bank, and by it indorsed and transferred, before maturity, with other notes, as collateral security for a loan of $90,000. The plaintiff claims to have obtained title to it by means of the writing of July 14, 1893. All the notes which so came to its hands were, in the aggregate, of less face value than the amount of its claim against the savings bank. The defendants paid to Bigelow $7,500 upon this note, and claim an offset large enough to extinguish the balance. The offset grows out of these facts: The savings bank was insolvent when it pledged the note to Bigelow. When the plaintiff received it, it was past due. When the savings bank went into the hands of the receiver, the defendants had deposits in that bank, subject to their check, amounting to the sum of $2,608.34, no part of which has been paid to them. This they ask to have set off against the note in this action. A verdict was directed for the plaintiff for the full amount remaining unpaid upon the note. From judgment on that verdict this appeal is taken.

Turner, Bloodgood & Kemper, for appellants. Quarles, Spence & Quarles, for respondent.

NEWMAN, J. (after stating the facts). The sole question is whether the appellants are entitled to set off, in this action, the amount of their deposits against this note. It is not claimed that the plaintiff is a bona fide purchaser of the note, or has a better title than the savings bank had. It obtained the note on account of the antecedent indebtedness of the savings bank. But no part of that indebtedness was paid by it, nor was any new consideration whatever given; so it had no immunity against defenses not possessed by its assignor. This set-off would have been good against the savings bank at the time when it put the note into the hands of Bigelow. It was insolvent then. It would have been good against the note in the hands of the receiver, or of an assignee of the bank for the benefit of its creditors. This is fully discussed and settled in Jones v. Piening, 85 Wis. 264, 55 N. W. 413. The plaintiff stands in no better position. The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded for a new trial.

CARPENTER v. MOMSEN.

(Supreme Court of Wisconsin. March 10, 1896.)

PLEADINGS—EVASIVE ANSWERS.

The complaint in an action to recover of an assignee a note which prior to the assignment the assignor, as agent of petitioner, had in his possession, alleged that "the same came to the hands of the assignee." *Held*, that the answer, alleging, on information and belief, that "he has not the note demanded, but it is in the hands of a former agent" of the assignor, admitted that the note came to the hands of defendant, and did not show that it was not still within his control; the allegation, as a denial, being evasive, in that it was a negative pregnant, and because it attempted to deny on information and belief what was presumptively within defendant's personal knowledge.

On motion for rehearing. Denied.

For former report, see 65 N. W. 1027.

NEWMAN, J. In his brief, on a motion for a rehearing, the appellant complains that "the decision * * * affirms a judgment that requires, among other things, the appellant (assignee) to deliver a note of $700, given in the Liscomb loan, which he never had, and cannot produce; and there is absolutely nothing in the record to justify the finding upon which said judgment, in that particular, is based." This were indeed a serious error, if it were true. But it is not true. All that there is in the record relating to this matter of the Liscomb note is in the pleadings. The answer, according to well-settled rules of pleading, admits that this Liscomb note came to the hands of the appellant, and he does not show that it is not now within his control. The allegation of the petition is that "the same came to the hands of the assignee." The denial is, on information and belief, that "he has not the note demanded, but it is in the hands of a former agent of Day." As a denial it is evasive, as being a negative pregnant, and because it attempts to deny on information and belief what is presumptively within his personal knowledge. The other grounds of the motion are not such as require treatment at length. The motion for a rehearing is denied.

GALLAGER v SERFLING.

(Supreme Court of Wisconsin. March 10, 1896.)

JUSTICE OF THE PEACE—SECOND ADJOURNMENT.

Rev. St. § 3631, provides that no adjournment after the first shall be allowed on application of a party, unless he satisfy the justice, by oath, that he cannot safely proceed to trial; and section 3586 provides that if a justice of the peace be unable, from sickness, to attend to business when there is pending before him any matter undetermined, he may deliver his docket to some other justice, who may thereupon proceed to try and determine such matter. *Held*, that a justice lost jurisdiction by a second adjournment, "by consent of plaintiff, and in consequence of sickness of the court," in the absence and without consent of defendant, and without any cause shown by oath or affidavit.

Appeal from circuit court, Sheboygan county; N. S. Gilson, Judge.

Action by Mary Gallager against Julius Serfling. From a judgment affirming a judgment of a justice of the peace for plaintiff, defendant appeals. Reversed.

M. C. Mead, for appellant. F. H. Denison, for respondent.

PINNEY, J. This action was commenced before a justice of the peace, and upon the return day of the summons the parties appeared, issue was joined, and by consent the case was adjourned for nine days. On the adjourned day the plaintiff appeared, but the defendant did not; and thereupon, "by consent of the plaintiff, and in consequence of sickness of the court," but without any cause shown by oath or affidavit, the case was adjourned one week. On the second adjourned day the plaintiff appeared, but the defendant did not, and the plaintiff proceeded with her case; and the court, after hearing the evidence, gave judgment in favor of the plaintiff and against the defendant for $56.85 damages and $8.07 costs. The defendant sued out a writ of certiorari from the circuit court to reverse the judgment, assigning as ground for reversal that the justice lost jurisdiction of the action by the second adjournment without cause shown as required by law, and without the consent of the defendant. These facts appearing by the return to the writ, the circuit court gave judgment affirming the judgment of the justice, from which the defendant appealed.

The statute (Rev. St. § 3631) provides that "no adjournment after the first shall be allowed upon the application of a party, unless such party shall satisfy the justice by his own oath or the oath of some other person that he cannot safely proceed to trial for want of some material witness or testimony" (naming it), etc. It is settled that the allowance of a second adjournment before a justice, in the absence and without the consent of the defendant, and without the oath or affidavit provided in this section of the statute, deprives the justice of jurisdiction in the cause. Grace v. Mitchell, 31 Wis. 533; State v. Gust, 70 Wis. 631, 35 N. W. 559. This objection to the judgment of the justice is necessarily fatal. Section 3586, Rev. St., which provides that if any justice of the peace shall "be unable from sickness to attend to business, when there shall be pending before him any matter or action undetermined, he may deliver his docket and all the papers relating to such matter or action, with a minute of his proceedings therein, to some other justice of the same town, who may thereupon proceed to hear, try and determine such matter," etc., points out the course the justice should have pursued under the circumstances stated. He had no implied power to grant the

adjournment. For these reasons the judgment appealed from must be reversed. The judgment of the circuit court is reversed, and the cause is remanded, with directions to reverse the judgment of the justice.

CAREY v. LIVERPOOL & LONDON & GLOBE INS. CO.

FIRST NAT. BANK OF FOND DU LAC v. SAME.

(Supreme Court of Wisconsin. March 10, 1896.)

INSURANCE—INSURABLE INTEREST—OWNERSHIP.

The vendee of personal property under a bill of sale conveying absolute title, though given as security for debt, being in possession, and the debt being past due, is a sole and unconditional owner of the property, within the meaning of a contract of insurance which provides that the policy shall be void if the interest of the assured be other than unconditional and sole ownership.

Appeal from circuit court, Fond du Lac county; N. S. Gilson, Judge.

These actions were brought by Edwin A. Carey and the First National Bank of Fond du Lac, Wis., against the Liverpool & London & Globe Insurance Company, to recover for loss under policies of insurance. Defendant interposed a general demurrer in each case, which being overruled, defendant appealed. Affirmed.

Plaintiff in each case was in possession and had the legal title to a quantity of wood, ununder a conveyance by bill of sale absolute on its face, but in fact as security for debts due from the Wisconsin Furnace Company to the plaintiffs. On the 30th day of August, 1893, the debts were due, and exceeded in each case the value of the wood. Plaintiffs severally applied to the defendant for insurance against loss on the property by fire. Each explained to defendant's agent the character of the title, so that such agent fully understood the facts in that regard; and thereafter the defendant, through such agent, in consideration of the payment of $250 as premium, issued to plaintiff Carey a policy of insurance, insuring him against loss of his wood by fire till the 30th day of August, 1894, to the amount of $10,000; and a policy was likewise issued to plaintiff First National Bank of Fond du Lac, in consideration of the sum of $125, insuring it until the 30th day of August, 1894, against loss by fire on its wood to the amount of $5,000. Each policy provided, among other things, as follows: "This policy shall be void if the interest of the assured be other than unconditional and sole ownership," and "no officer, agent, or other representative of the company shall have the power to waive any provision or condition of the policy, except such as, by the terms of the policy, might be the subject of agreement indorsed thereon or added thereto; and, as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached thereto." The wood was destroyed by fire, and all the conditions of the policy in regard to proofs of loss were complied with; and after waiting the time specified in the policy for the payment of the loss, and on the failure and refusal of defendant to pay the same, these actions were brought on the policies. The complaint in each action states all the facts in regard to the assured's title to the wood, and sufficient to constitute a good cause of action, unless the fact that the wood was held as security renders the policies void under the provision in regard to sole and unconditional ownership. The facts in regard to the title fully appearing upon the face of the complaint, a general demurrer was interposed in each case, which was overruled, and from the orders entered these appeals were taken.

Cady & Cole and Geo. L. Williams, for appellant. Edward S. Bragg, for respondents.

MARSHALL, J. (after stating the facts). The only question considered on this appeal is, was the assured the sole and unconditional owner of the property covered by the policy of insurance, within the meaning of the language therein in that regard? Each bill of sale, though it conveyed the legal title to the assured, nevertheless, as between the parties thereto and between the vendee and the creditors of the vendor, constituted a mortgage. Bank v. Rugee, 59 Wis. 221, 18 N. W. 251; Lamson v. Moffat, 61 Wis. 153, 21 N. W. 62; Bank v. Damm, 63 Wis. 249, 23 N. W. 497, cited in appellant's brief. But otherwise the vendee, being in possession of the property, and the debt past due, was the sole and unconditional owner thereof, and was such within the meaning of the contract of insurance. May, Ins. §§ 286, 286c; Hubbard v. Insurance Co., 33 Iowa, 325. The principle which here controls was applied in Johannes v. Fire Office, 70 Wis. 196, 35 N. W. 298; Insurance Co. v. Dunham, 117 Pa. St. 460, 12 Atl. 668; and other cases cited in respondent's brief. Indeed, the law in relation to the subject is so well settled that it would be useless to enter upon any extended discussion of the matter. This conclusion renders unnecessary the consideration of any other question argued in the briefs of counsel. The order overruling the demurrer in each case is affirmed.

McCADDEN v. ABBOT et al.

(Supreme Court of Wisconsin. March 10, 1896.)

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.

In an action against a railway company for death of employé, deceased, an engineer, had seen an engine standing on a side track at a coal chute, some distance from his own engine, which was on main track. A few minutes later he left his own engine, and started across the side track leading to coal chute, was struck by the engine coming down from the coal chute, and killed. It appeared that the engine was running faster than usual for that part of the yards, and that the bell was not rung. *Held*, that deceased, by failure to look up and down the track before crossing, his view being unobstructed, and nothing to divert his attention, was guilty of contributory negligence, precluding recovery.

Appeal from circuit court, Fond du Lac county; N. S. Gilson, Judge.

Action for damages for death of plaintiff's intestate, brought by Elizabeth McCadden, administratrix of the estate of Anthony McCadden, deceased, against E. H. Abbot and J. A. Stewart, trustees in possession and operating the Wisconsin Central Railroad. There was judgment for defendants, and plaintiff appealed. Affirmed.

This is an action to recover damages for the death of plaintiff's intestate, caused by alleged negligence on the part of a locomotive engineer in the employ of the defendants. The deceased, Anthony D. McCadden, and his brother, James McCadden, were engaged in operating switch engine No. 13 for defendants, in the railway yards at Stevens Point, Wis.; the former being the fireman, and the latter the engineer. The yard was about 5,700 feet long, and was crossed, near the center, at right angles, by a public street 80 feet wide, called "Michigan Avenue." East of this avenue, about 75 feet, was the east end of a coal shed, which extended along one of the railway tracks, which may be called the "Coal-Shed Track," for a distance of 500 feet. In the center of the shed, towards the track, was a coal chute, and at this chute, on the occasion in question, switch engine No. 49 was taking coal. Engine No. 13 was on the main track, near the center of Michigan avenue, and about 335 feet east of engine No. 49. When engine No. 13 was so located, the deceased saw engine No. 49 at the coal chute. Both engines were headed toward the east. Engine No. 13, about the time deceased looked west, and observed engine 49 at the coal chute, commenced moving towards the west; and, after proceeding about 73 feet, the deceased, without looking again towards engine 49, stepped off of his engine to go to dinner, then proceeded about 17 feet, in a northeasterly direction, on his way to dinner, and stepped on to the coal-shed track, when he was instantly struck by engine 49, as it was backing up, at a speed of 15 miles an hour, and was killed. From the time he saw engine 49 at the coal chute till he stepped on the track and was killed, he traveled on engine 13 75 feet, and walked 17 feet. Had he looked in the direction of the coal chute before stepping upon the track, he would have seen the engine coming towards him, and prevented the injury. He had been, prior to his death, working in defendants' yards for a considerable length of time, and knew the manner in which the work was there carried on. The jury found, specially, that during such period it was the uniform custom to run the switch engines from 1 to 18 miles an hour in the yard west of Michigan avenue, and to run not faster than 6 miles per hour from the coal chute to Michigan avenue, which custom was known to the deceased; that he had no reason to expect that engine 49 would run faster than 6 miles an hour from the coal chute to the avenue; that it was running 15 miles per hour west of the avenue at the time he was killed. The jury also found, specially, as follows: "Twelfth question. Did the deceased, just about the time engine 13 stopped and commenced to move west, and before he started to leave the engine to go to dinner, look west, and see engine 49 standing at the coal chute? Answer. Yes. Thirteenth question. If you answer the last question 'Yes,' did ordinary care require him to look again before attempting to cross the coal-shed track? Answer. No." The jury further found that the engine bell on engine 49 was not rung as the engine backed over the avenue; that deceased was not guilty of any want of ordinary care which contributed to produce his death; that his death was caused by want of ordinary care on the part of the engineer of No. 49, in that he ran the engine at too great a rate of speed, and did not have the bell rung. The damages were assessed at $4,000. Plaintiff moved for judgment upon the verdict, which motion was denied. Defendants moved for judgment upon the special verdict, which motion was granted, and judgment was thereupon entered, from which this appeal was taken.

B. B. Park and Geo. W. Bird, for appellant. T. H. Gill and P. S. Abbot, for respondents.

MARSHALL, J. (after stating the facts). The finding of the jury to the effect that the failure of the deceased, after having observed engine No. 49 at the coal chute, to again look in that direction before venturing upon the railway track, was a conclusion in respect to a question of law, under the facts of this case, and therefore properly disregarded by the trial court on the motion for judgment. It appearing undisputed, by the evidence, or from the findings of the jury, that the deceased was so circumstanced, before stepping upon the track, that his view in the direction of the coal chute was unobstructed, that there was nothing to divert his attention, and that he ventured into the place of danger without

first looking in the direction of the approaching engine, though there was negligence on the part of the engineer in charge of such engine, in respect to the speed he was running, and the failure to sound the engine bell, and though, if it had run at the customary rate of speed from the coal chute to Michigan avenue, it would not have reached the point where the fatal accident took place till the deceased had passed over the track, he was, nevertheless, guilty of contributory negligence, which precludes recovery of damages for his death. The question here presented has been so recently and thoroughly discussed, and the law in regard to the matter so clearly stated, in the opinion of Mr. Justice Cassoday, in Schlimgen v. Railway Co., 90 Wis. 194, 62 N. W. 845, and also by Mr. Justice Pinney, in Nolan v. Railway Co., 91 Wis. 16, 64 N. W. 319, that a rediscussion of the subject at this time cannot more distinctly state the law applicable to the facts. It may safely be taken as settled, and to be so thoroughly intrenched in the jurisprudence of this state as not to be open to rediscussion or review, that, when a person approaches a railway track, having an opportunity to look and listen, if he fails so to do before venturing into the place of danger, such failure constitutes contributory negligence, so as to prevent any recovery on the ground of want of ordinary care on the part of those operating cars upon such track. This rule is so rigidly applied that its violation is not excused by want of ordinary care on the part of the railway company or its employés in respect to the speed of trains, or failure to give signals, or in any other respect, even though such failure amounts to a violation of law regulating the operation of trains. Among the clearest and most recent illustrations of the application of this rule, in the courts of other states, may be mentioned Nixon v. Railway Co., 84 Iowa, 331, 51 N. W. 157, where a person, without having his attention diverted, relying upon the custom to run trains on a particular track in but one direction, looked only in that direction, and was struck by a train coming from the other way, and injured, and it was held that he could not recover because of failure to look both ways; also, Sala v. Railway Co., 85 Iowa, 678, 52 N. W. 664, where it was held that a person who stepped upon a railway track without looking, and was injured, could not recover for such injury, though there was no flagman at the crossing, as the law required, and the train was running at an unlawful rate of speed; also, Gardner v. Railway Co., 97 Mich. 240, 56 N. W. 603, where it is held that a person, in attempting to cross a railway track, without first looking both ways, is guilty of contributory negligence, though his attention at the time be diverted by a switch engine in the vicinity. A multitude of other cases might be cited, all to the effect, as said in Schlimgen v. Railway Co., supra, "that a railway track is, in effect, a standing proclamation of danger." If a person chooses to take a position thereon, without first looking both ways and listening, he must suffer the consequences, without reference to any want of ordinary care on the part of those operating cars upon such track. Railway Co. v. Houston, 95 U. S. 697. It follows, from the foregoing, that the trial court properly granted defendants' motion for judgment upon the special verdict in favor of the defendants. Judgment affirmed.

SCHMIDT v. MENASHA WOODEN-WARE CO. et al.

(Supreme Court of Wisconsin. March 10, 1896.)

DISCOVERY BEFORE ISSUE JOINED.

Where an administrator, after the commencement of an action to recover for the negligent killing of his intestate under circumstances not presumptively within plaintiff's knowledge, files an affidavit for the examination of defendant in order to obtain the information necessary to frame a suitable complaint, as provided by Sanb. & B. Ann St. § 4096, the court may, in its discretion, lim't the subjects of inquiry, but cannot absolutely deny the examination, though a complaint in general terms might be framed without it.

Appeal from circuit court, Winnebago county; George W. Burnell, Judge.

Action by Anna Schmidt, as administratrix of Christ Schmidt, deceased, against the Menasha Wooden-Ware Company and another. From an order denying plaintiff the right to examine defendant under Sanb. & B. Ann. St. § 4096, to enable her to plead, said plaintiff appeals. Reversed.

This action was brought by the plaintiff, as administratrix of the estate of her deceased husband, Christ Schmidt, to recover damages against the defendants for causing his death by their negligence while he was in the employ of the defendant company, of which the defendant Noble was superintendent. The plaintiff sought to examine the said Noble and the officers of the wooden-ware company under section 4096, Sanb. & B. Ann. St., to enable her to plead, and had served notice and summons on the said Noble and such officers. The affidavit for the examination stated, in substance, the service of the summons, and that the plaintiff's husband was killed July 1, 1894, while in the employ of the wooden-ware company, through the negligence of the defendants, as she was informed and believed; that discovery was sought to enable the plaintiff to plead; that the defendant Noble was, at the time, the superintendent of the company, and had general charge and supervision of the factory in which her husband was employed; that she could not state the particular facts and circumstances of the negligence of the defendants which caused his death; that he was employed as a fireman in the factory of the defendant company, and was working

near a tank, or hot-water well, which was used by the company to warm water pumped therein, and to receive the drippings or condensed steam through pipes from other parts of the factory, and transmit the water, when heated, to the boilers in other parts of the factory; that a wooden plug or piece of plank in the end of the tank, or hot-water well, as she was informed and believed, blew out, and the steam and hot water escaping therefrom scalded the said Schmidt, causing his death; and that she had no special information as to the facts and circumstances of the explosion, or in reference to the negligence of the defendants, whether they were both guilty of such negligence or only the Menasha Wooden-Ware Company, but from information she charged that they were both guilty of negligence which caused his death. The affidavit specified 20 points upon which discovery was sought, relating in detail to the manner of construction and method of using said tank, or hot-water well, the machinery and apparatus connected with it, and the management and control of the same, and particularly as to the cause of the plug coming out and allowing the steam and hot water to scald and cause the death of the plaintiff's husband, and all facts and circumstances affecting the matter of the liability of the defendants. The defendants moved upon the papers and said affidavit for an order limiting the examination to certain specified subjects. At the hearing the court made an order wholly denying the plaintiff the right to make the proposed examination, and striking out the notice, affidavit, and subpœna, with $10 costs, from which the plaintiff appealed.

J. C. Kerwin, for appellant. Felker, Stewart & Felker, for respondents.

PINNEY, J. (after stating the facts). The statute (section 4096, Sanb. & B. Ann. St.) secured, as therein provided, to the plaintiff, the right to make the proposed examination as to any matter relevant to the controversy indicated in her affidavit, and she was entitled to have it any time after the commencement of the action and before judgment. The affidavit required by the statute for the examination before issue joined is to limit the scope of the inquiry to facts relevant to the points stated in it, and to enable the court or judge, in his discretion, to still further limit the subjects to which the examination shall extend. Here the court absolutely and unconditionally denied the proposed examination, upon the ground, as we understand, that it was not necessary to enable the plaintiff to frame her complaint, and that with the knowledge of the matters stated in the affidavit her attorney might frame one that would suffice, though general in its terms. The statute is a remedial and highly beneficial one, and has very properly been liberally construed. Kelly v. Railway Co., 60 Wis. 480, 19 N. W. 521; Cleveland v. Burnham, 60 Wis. 21, 17 N. W. 126, and 18 N. W. 190; Nichols v. McGeoch, 78 Wis. 360, 47 N. W. 372; Whereatt v. Ellis, 65 Wis. 643, 27 N. W. 630, and 28 N. W. 333; Frawley v. Cosgrove, 83 Wis. 443, 53 N. W. 689. If the plaintiff does not know the facts in detail, so as to enable her attorney to frame a complaint adapted to the real nature of the case, she may have an examination as to the facts bearing upon the question of the defendants' negligence or other material points such as will enable him to frame a complaint suited to the case, and upon which she can safely proceed to trial. It is no answer to the application to say that upon the facts already known a complaint may be framed which may or may not present the real merits of her case. She has a right to ascertain by such examination whether the imputation of negligence is well founded, and, if so, the particular circumstances and details of it. As was well said in Richards v. Allis, 82 Wis. 513, 52 N. W. 593: "If a party does not know whether another owes him or has collected any money belonging to him, and therefore cannot make such an averment in a complaint, he may bring his action by the service of a summons, and then proceed to examine the opposite party under section 4096, Rev. St., and obtain such discovery thereof as will enable him to plead." It may be that upon examination of the defendants the plaintiff will find that there is no ground for charging the defendants with fault, and expensive litigation may thus be avoided. The proceeding is one calculated to further the ends of justice, and lessen the expense and remove embarrassments in the way of a bona fide prosecution of legal rights; and it ought not to be unduly hampered or restricted. It appears that the deceased was an employé of the defendant company, working under its superintendent, Noble. He was entitled to be furnished with a suitable and safe place in which to work. He lost his life in such service, and under circumstances not presumptively within the plaintiff's knowledge, and in respect to which it appears she is actually ignorant. It is eminently just that she should be allowed the means of ascertaining whether any breach of duty or negligence on the part of the defendants, or either of them, was the cause of his death, and, if so, in what it consisted, and all material facts having any proper relation thereto. While the court, in the exercise of its discretion, might properly limit the subjects of inquiry, it ought not to have absolutely denied the plaintiff the proposed examination. The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

McCOY v. NORTHWESTERN MUTUAL RELIEF ASS'N.

(Supreme Court of Wisconsin. March 10, 1896.)

MUTUAL BENEFIT INSURANCE—LIMITED LIABILITY—SUICIDE—ESTOPPEL.

1. Where, under the application and certificate of membership, a mutual benefit association was not to be liable for the death of the assured by suicide, the association cannot be held liable for such death, even though neither the by-laws nor other rules of the association authorize such limitation.

2. The secretary of a mutual benefit association, without authority, entered into a contract of insurance with assured, providing against the liability of the association in case of suicide. Afterwards a by-law was adopted, providing against such liability, and a new form of certificate issued in accordance therewith. The assured was urged to exchange his old certificate for one of the new form, and, it also appeared, had paid at least two assessments for death by suicide. *Held*, that on the death of the assured by suicide the company was not estopped from pleading the violation as a forfeiture of the contract.

Appeal from circuit court, La Fayette county; George Clementson, Judge.

Action brought by Mary E. McCoy against the Northwestern Mutual Relief Association to recover under a contract of insurance. Judgment for plaintiff, and defendant appealed. Reversed.

This action is brought by the plaintiff against the defendant, a corporation doing an insurance business on the co-operative plan, on certificate of membership No. 7,844, issued to William McCoy, April 11, 1889, which matured and became payable to plaintiff as beneficiary, by his death by suicide, July 8, 1892, unless the manner of such death constitutes a defense to plaintiff's claim. The certificate, by its terms, requires defendant to pay plaintiff 80 per cent. of an assessment made upon the members of the association, under its system, not exceeding in all $2,000. The only method or remedy by which plaintiff can enforce her rights as beneficiary is by an action in equity to compel the association to comply with the terms of the certificate by making an assessment upon its members, and paying the proceeds thereof to her, not exceeding in all $2,000. Plaintiff's claim was duly proved under the rules and regulations of the association and the terms of the certificate, and, after the termination of the period within which defendant was required to levy the assessment, it having neglected and refused so to do, on the ground that the assured came to his death by suicide, this action was brought.

The application made by the assured for membership in the association, upon which the certificate was issued, contained the following: "I hereby agree that the association assumes no liability in case of suicide or self-destruction, and that the certificate of membership shall contain the usual terms, conditions, and regulations. * * *" Indorsed on the back of the certificate, and made a part of the contract of insurance, was the following: "(1) Suicide or self-destruction of the member herein named, whether voluntary or involuntary, sane or insane, at the time thereof, is not a risk assumed by this association. * * * (2) Neither the member * * * nor the association shall be liable upon the certificate * * * for any suicide or self-destruction for a greater amount than eighty per cent. of the assessment paid by such member." The trial court found facts in accordance with the foregoing. Also, in effect: That the articles of organization of the defendant, when the certificate was issued, provided that members should be entitled to receive benefits upon such terms and subject to such regulations as prescribed by the board of directors or the executive commitee. That, until January 15, 1890, there was no by-law or regulation of the defendant adopted in accordance with such articles, or at all, authorizing the issuance of a certificate with the provision against liability in case of death by suicide or self-destruction. That by the by-laws and regulations existing prior to the date mentioned, all certificates were payable absolutely upon maturity, by death, whether caused by suicide or otherwise, and that the form of application and certificate used by the association up to February 7, 1889, was in accordance therewith, after which date, by the secretary of the association, without authority of the board of directors, a provision was inserted in the applications and indorsed on the back of the certificates used, similar to the provisions in the application and on the back of the certificate in question, limiting mortuary benefits to cases of death from causes other than suicide or self-destruction. That in November, 1889, notice was sent to the members of the association, including the deceased, of a proposed amendment to the by-laws, providing against liability in case of death by suicide or self-destruction; and on the 15th day of January, 1890, pursuant to such notice, such an amendment was duly adopted, and it was provided that all certificates issued prior to January 25, 1890, should be known as "Old Series," and those issued after January 24, 1890, should be known as "New Series." A new provision was made in regard to the classification of certificates and in regard to assessments, applicable only to the new series; and it was further provided that members holding old series certificates should be assessed according to the old by-laws, though such holders might exchange such certificates for certificates of the new series. That on the 9th day of January, 1890, accompanied by a notice of an assessment, the deceased received a communication from the defendant in the form of a circular letter addressed to each member of the association, to the effect that after January 21, 1890, a new form of certificate would be issued, containing advantages over the old form, in that, among other things, there would no longer be any liability in case of death by suicide; and thereafter, July 11, 1892, he received anoth-

er circular letter, calling attention to the new regulations, and urging the exchange of the old for the new certificates, because of the exemption from liability in case of suicide. That prior to the death of the assured he paid eighteen assessments in consequence of the death of members, two of which were by suicide, one of such being November 30, 1890, and the other April 29, 1891, and in each case notice of the assessment was given, together with notice of the cause of death. The court found, as conclusions of law, in effect, that the provisions in the application and on the back of the certificate in regard to liability in case of death by suicide, were not in accordance with the by-laws of the defendant existing at the time such certificate was issued, and therefore they formed no part of the contract of insurance; that defendant had repeatedly shown that it so interpreted the contract by assessing the assured upon his certificate to pay death losses caused by suicide, and that defendant had waived any right to insist on such provisions by repeatedly assessing the assured for his full proportion of loss which accrued to the association on account of the death of members by suicide. Exceptions were taken on the part of defendant necessary to raise the questions here considered. Judgment was rendered in plaintiff's favor in accordance with the conclusions of the trial court, and from such judgment this appeal was taken.

N. W. Chynoweth, for appellant. Orton & Osborn, for respondent.

MARSHALL, J. (after stating the facts). It clearly appears from the foregoing statement of facts that the contract which the appellant and the assured made, as evidenced by the application for and the certificate of membership, provides in clear, unmistakable language against liability in case of death by suicide or self-destruction; but it is contended that, notwithstanding such is the case, the provisions in that regard do not form a part of the contract between the parties, because the by-laws of the association, at the time deceased was admitted to membership, did not authorize any such limitation upon its liability, and that such by-laws must prevail over the express contract of the parties in case of conflict. Such is the position of the respondent, as we understand it, and of the learned circuit judge before whom the case was tried at the circuit. If such is the law, obviously the judgment must be affirmed, because it is well settled that, if a contract for life insurance does not provide against liability in case of death by suicide or self-destruction, then such cause of death does not constitute a defense. Mills v. Rebstock, 29 Minn. 380, 13 N. W. 162; Darrow v. Society, 116 N. Y. 537, 22 N. E. 1093; Fitch v. Insurance Co., 59 N. Y. 557; Freeman v. Society, 42 Hun, 252. The articles of organization of the association did not contain any prohibition against the acceptance of members under contract providing against liability in the event of death by suicide or self-destruction. So, at the most, the issuance of the certificate in this case was a mere violation of the by-laws, which would not necessarily affect the contract. Morrison v. Insurance Co., 59 Wis. 162, 18 N. W. 13. It was there held, in effect, that where the certificate of membership of a mutual benefit society is inconsistent with the by-laws of the association, the certificate is, nevertheless, binding upon the company, according to its terms; distinguishing between the rule thus laid down and the rule in Luthe v. Insurance Co., 55 Wis. 543, 13 N. W. 490, where a policy of insurance, issued in a manner prohibited by the charter of the company, was held void on that ground. To the same effect is Davidson v. Society, 39 Minn. 303, 39 N. W. 803; also Fitzgerald v. Association (City Ct. N. Y.) 3 N. Y. Supp. 214, where it is held, in effect, that, in the absence of fraud, a provision in a certificate of membership in a mutual life association will prevail over a clause in the by-laws of such association conflicting therewith, and tending to limit its liability, though the application stipulates that such by-laws shall constitute a part of the contract. So in Insurance Co. v. Keyser, 32 N. H. 313, where it is held, in effect, that if a policy of insurance is issued in violation of the by-laws, if not prohibited by the charter, it is binding, according to its terms, on the corporation or association issuing it. Hirsch v. Grand Lodge, 56 Mo. App. 101, cited to the contrary, appears to be in perfect accord with the foregoing. While the decisions are not numerous on this subject, there is no substantial conflict, and we understand the general principle to be firmly established that though, generally speaking, a member of a mutual benefit association or insurance company is bound to take notice of its by-laws, even if not recited or referred to in the certificate of membership or policy, yet, when such certificate or policy and the by-laws conflict, so long as the contract as written is within the power of the association under its charter or articles of organization, it will prevail over the by-laws, and by it the rights and liabilities of the parties must be determined. Nibl. Mut. Ben. Soc. § 147. It follows from the foregoing that the conclusion of the trial court, to the effect that the by-laws of the appellant must prevail over the application for and the certificate of membership, cannot be supported, but, on the contrary, the latter must prevail, and be held the measure of the liability of the association on the certificate, and that no recovery thereon can be had unless by reason of the facts it is estopped from insisting upon the contract as made, and from setting up the cause of death as a defense.

It is claimed that the conduct of the association in its dealing with the deceased was such as to induce a belief on his part that, in the event of death by suicide, that fact would not be insisted upon as a defense, notwithstanding the provisions of the contract in that regard; that he relied upon such conduct by refusing to exchange his certificate for one of the new series, though repeatedly invited so to do, and twice paid assessments when the cause of death was suicide; and that it should now be estopped from having the benefit of any different position under its contract to the prejudice of the plaintiff. On this branch of the case much learning is displayed, and the general subject of waiver and estoppel in cases of forfeitures by breaches of conditions in contracts of insurance is ably discussed in respondent's brief in support of the contention that appellant is estopped from insisting upon a forfeiture in this case; but we are unable to see how the settled rules under which it is held that a forfeiture or condition of forfeiture may be waived applies here. What is insisted upon is not really the waiver of a forfeiture, or an equitable estoppel against insisting upon a condition of the policy, the violation of which would otherwise work a forfeiture. It is a misuse of the term to so speak of the loss of benefits under the certificate in question. What is here sought is not to prevent a forfeiture, but to make a new contract; to radically change the terms of the certificate so as to cover death by suicide, when by its terms that is expressly excluded from the contract. We do not understand that the doctrine of estoppel or waiver goes that far. After a loss accrues, an insurance company may, by its conduct, waive a forfeiture; or by some act before such loss it may induce the insured to do or not to do some act contrary to the stipulations of the policy, and thereby be estopped from setting up such violation as a forfeiture; but such conduct, though in conflict with the terms of the contract of insurance, and with the knowledge of the insured, and relied upon by him, will not have the effect to broaden out such contract so as to cover additional objects of insurance or causes of loss. To illustrate the principle here laid down, a policy of insurance against loss by fire cannot have ingrafted upon or added to it, by way of estoppel or waiver, provisions for insurance against loss by any other cause; and no more can a policy of life insurance, expressly limited to payment of a sum of money in the event of death from causes other than suicide or self-destruction, be broadened out by the application of the law of waiver or estoppel so as to cover the cause excluded under the contract. While a forfeiture of benefits contracted for may be waived, the doctrine of waiver or estoppel cannot be successfully invoked to create a liability for benefits not contracted for at all. From the foregoing it follows that the judgment of the circuit court must be reversed, and the cause remanded, with directions to dismiss the complaint, and render judgment in favor of the defendant for costs. Judgment accordingly.

CHRISTIANSON v. PIONEER FURNITURE CO.

(Supreme Court of Wisconsin. March 27, 1896.)

RES GESTÆ — CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS.

1. The declarations of deceased to a coemployé as to the cause of the injury, made a few minutes after it occurred, in a room adjoining the scene of the accident, was competent as a part of the res gestæ.

2. An instruction that, if the negligence of deceased was the direct cause of the injury, his representative could not recover, though the machinery was defective, "if he [deceased] knew of the defects," is erroneous, since it allows a recovery in case deceased had no knowledge of any defect, even though he was otherwise negligent.

Appeal from circuit court, La Crosse county; O. B. Wyman, Judge.

Action by John H. Christianson, as administrator of Peter Christianson, deceased, against the Pioneer Furniture Company. From a judgment for plaintiff, defendant appeals. Reversed.

This is an action to recover damages for the death of the plaintiff's intestate, which is alleged to have been caused by the defendant's negligence. The intestate, Peter Christianson, was 18 years and 2 months old at the time of his death, and was employed in the defendant's furniture factory at Eau Claire, and had been so employed for a little more than two years. On the 31st day of August, 1891, he was employed in feeding a certain circular ripsaw in the defendant's factory. A boy 14 years of age was assisting him, whose duty it was to take away the strip ripped from behind the saw. The pieces of wood being ripped consisted of strips of hardwood one inch in thickness, about three feet in length, and three inches in width, from which a strip of about one-eighth of an inch on one side was being ripped. The intestate stood at the south end of the saw table, and pushed the sticks through, and his assistant pulled them through on the other side. As one stick was going through, after it had been sawed into about five or six inches, it was suddenly thrown back with great force, and struck the intestate in the abdomen. He at once threw off the belt of the machine, went to the water pail and got a drink, then went to the closet just outside, and then went home, and died on the second day thereafter, from the effects of his injury. The testimony tended to show that the intestate had been employed principally in operating molding machines or stickers, but there was testimony that he had at times helped to operate ripsaws. On the afternoon in question he was set to work on the ripsaw by the foreman of the factory. It

was claimed by the plaintiff that the defendant was negligent in not furnishing a safe appliance for the intestate to work upon in that (1) the saw was dull; (2) the saw table worn and uneven; (3) that there was no spreader, or (4) guard, upon the saw. On the part of the defendant it was denied that there was negligence in any of these particulars, and it was claimed that the intestate was guilty of contributory negligence in not attending to his work, but that he was watching some boys at play in the shop at the time, and did not hold the stick down as it was passing through the saw. The trial resulted in a verdict and judgment for the plaintiff, and the defendant appealed.

V. W. James and Frint & Brindley, for appellant. T. F. Frawley and C. T. Bundy, for respondent.

WINSLOW, J. (after stating the facts). We were strongly urged to reverse this judgment on the ground that a verdict for the defendant should have been directed either on the ground that no negligence was shown on the part of the defendant, or on the ground that contributory negligence was conclusively shown; but we decline to do so. There was, in our judgment, sufficient evidence to carry the case to the jury on both of these propositions. This judgment must, however, be reversed on account of the rejection of competent evidence offered by the defendant. The facts were these: One Jackson was offered as a witness for defendant. He was an employé of the defendant at the time of the accident, and worked at a tenoning machine in the same room with the deceased, and about 50 feet from the ripsaw in question. It had appeared by the testimony of the boy who helped the deceased that, as soon as the board struck the deceased, he threw the belt from the machine, said that struck him pretty hard, walked at an ordinary gait to the water pail, about 50 feet distant, took a drink, and then walked out of the outside door, and entered a closet, about 8 or 10 feet, distant from the door, and adjoining the shop building. Jackson testified that he saw the deceased go out the door; that a boy came in right after deceased went out, and came past Jackson, and he asked the boy what was the matter, and the boy said, "Pete is hurt." Thereupon Jackson went right out to the closet, and found the deceased sitting, resting his face on his hands, pale, and apparently in pain. Jackson further testified that he at once had a conversation with him as to how the accident happened, and that the deceased stated in substance how it occurred. When asked to state the conversation, an objection to the testimony was sustained by the court. We think this ruling was erroneous. The conversation sought to be elicited was held with the main actor in the accident, a very few minutes after the fatal stroke, practically on the scene of the accident, and is so clearly and closely connected with the main fact as to impress the mind with the idea that it sprang spontaneously from it without design or premeditation. Within the decisions of this court in the cases of Hooker v. Railway Co., 76 Wis. 542, 44 N. W. 1085; Hermes v. Railway Co., 80 Wis. 590, 50 N. W. 584; and Reed v. City of Madison, 85 Wis. 667, 56 N. W. 182,—this verbal act was a part of the res gestæ.

Upon the subject of contributory negligence the court gave the following instruction to the jury: "If you find from the evidence that he was negligent and careless, and that his negligence and carelessness was the direct cause of the injury that occurred, then, even though this machinery was defective, the plaintiff is not entitled to recover, if he knew of the defects." This instruction is certainly erroneous. Under it the negligence of the deceased would only defeat a recovery in case the deceased knew of the defects in the machine. This is not the law. Although a correct instruction on the subject was given elsewhere in the charge, still, as there must be a new trial, we notice this error, so that it may not be repeated upon the second trial, without determining whether or not it would be sufficient of itself to call for reversal of the judgment. Judgment reversed, and action remanded for a new trial.

HUTCHINSON et al. v. HOLMES SANITARIUM.

(Supreme Court of Wisconsin. March 27, 1896.)

ABROGATION OF OLD CONTRACT BY NEW.

A contract, by which plaintiffs agreed to find a purchaser for defendant's property at $65,000, for a commission of $5,000, provided for the payment of a smaller sum to plaintiffs in case defendant effected a sale without their assistance. After considerable correspondence, defendant wrote: "Inasmuch as our former contract is practically annulled, I make you the following proposition: You sell the property for $40,000, your commission being four per cent.," and then followed the terms of payment by the purchaser, etc., making a complete contract in itself, without aid from the former agreement, and this plaintiffs accepted without objecting to the statement that the old contract was annulled. *Held*, that the former agreement was abrogated, and, the sale having been finally effected by defendant himself, plaintiffs could recover nothing.

Appeal from circuit court, St. Croix county; E. B. Bundy, Judge.

Action by Alfred L. Hutchinson and another against the Holmes Sanitarium. From a judgment for plaintiffs, defendant appeals. Reversed.

Action to recover broker's commission on the sale of real estate. The plaintiffs, in December, 1893, were partners at Weyauwega, Wis., and were doing a real estate and commission business, making a specialty of the sale or exchange of medical properties and business. The defendant at the same time was a corporation at Hudson, Wis., organized for the cure of the sick, and owning and op-

erating a large building, called the "Holmes Sanitarium," at Hudson, with grounds and medical appliances. Dr. Irving D. Wiltrout was president of the corporation, and general manager of its business. It is claimed that Dr. Wiltrout was in fact the real owner of the entire stock of the corporation at the time of the execution of the contracts hereinafter named, although nominally all but one share of such stock was in the name of his wife and various relatives and employés of the institution. It certainly seems to be a fact that Wiltrout, with the tacit consent of the stockholders, carried on the business in his own way, and had no meetings of directors. On the 22d day of December, 1893, Wiltrout made a contract with the plaintiffs, by which he placed the sanitarium in the hands of the plaintiffs for sale upon commission. The plaintiffs claim that in making this contract Wiltrout acted as agent, and on behalf of the corporation, while the defendant claims that Wiltrout had no authority, express or implied, to act for the corporation in such a matter. In this contract Wiltrout is described as "I. D. Wiltrout, M. D., proprietor of the Holmes Sanitarium, party of the first part," and the plaintiffs are named as parties of the second part. It is unnecessary to set forth all the terms of the contract. The plaintiffs agreed to take the sole agency for the sale of the sanitarium; to place it in the hands of five subagencies in five great cities, which are named; to pay all advertising expenses, all advertisements to be approved by Wiltrout; not to keep the sole agency longer than six months, with the right, however, to sell within a year to any person with whom negotiations had been opened during said six months; and not to make false representations as to the reasons for sale. The selling price was fixed at $65,000, payable $15,000 in cash, $20,000 by the assumption of a mortgage on the property, and the balance in installments secured by mortgage on the property. Then follow the following provisions as to commissions: "And in consideration of the services of said Hutchinson & Jones, the said party of the second part, the said party of the first part hereby agrees to pay said Hutchinson & Jones a commission of five thousand dollars, payable as soon as a sale of the Holmes Sanitarium is made, and the said sum of five thousand dollars to be paid to the said Hutchinson & Jones when the first payment of fifteen thousand dollars is received by the party of the first part from the purchaser. It being distinctly understood and agreed that the said Hutchinson & Jones shall receive the said sum of five thousand dollars as commissions whether the same is made by them directly or through any of their subagents; but, should the sale thereof be effected by the proprietor thereof, Dr. I. D. Wiltrout, in person, without any assistance from the said party of the second part or their subagents, then the commission or fees coming to said Hutchinson & Jones shall be one thousand dollars, which sum shall be payable as soon as contract of sale is completed." The contract further provided that Wiltrout gave the sole agency for the sale of the sanitarium to the plaintiffs, but that this should not interfere with the sale of the property by Wiltrout himself. The complaint alleged that in March, 1894, the contract was varied by the parties so that the selling price was fixed at $40,000, and the commissions were reduced to 4 per cent. instead of $5,000. The complaint also alleges the performance of all the conditions of the contract on their part in the way of advertising and making efforts to sell, and that one of their subagents, one Riley, made efforts to sell the same to one Dr. Sam C. Johnson; and that after the reduction in price the plaintiffs made further efforts to sell the same to Dr. Johnson at the reduced price. It is then alleged that on May 31, 1894, "the defendant Holmes Sanitarium and I. D. Wiltrout sold the Holmes Sanitarium to Dr. Sam C. Johnson." Judgment was demanded for the commission of 4 per cent. upon $40,000, or $1,600. The answer alleged, in substance, entire lack of authority on the part of Wiltrout to make the contract on behalf of the corporation; also that the contract was annulled, and a new and different one made; that the plaintiffs wholly failed to find any purchaser at the price named either in the original or the new contract. The trial was by the court, jury trial being waived. Much testimony was introduced showing the efforts made by the plaintiffs to sell the property. It appears by the correspondence that on the 15th of February, 1894, the plaintiffs became satisfied that they could not sell the property for $65,000, and they wrote a letter to Wiltrout, stating that fact, and proposing to undertake to sell it for $40,000, and inclosing a blank agreement, changing the original agreement so that it could be sold for $40,000, instead of $65,000, and allowing plaintiffs $3,000 instead of $5,000 commissions, "all other conditions and terms of the original contract to remain unchanged." Dr. Wiltrout answered this letter, refusing to agree to the change, or to sign the agreement; and it was never signed. Some other correspondence followed between the parties, which is not necessary to be stated. Mr. Marshall Riley, a subagent, was endeavoring to effect a sale to Dr. Johnson, and on the 15th day of March, 1894, the plaintiffs wrote the defendant the following letter: "Dear Doctor: We have been in correspondence with Mr. Riley, and he will not do anything more unless you will make a contract with us, agreeing to take $40,000 for the sale of the sanitarium, and giving six months from date in which to make sale. If you will give us such a contract, we will accept four per cent. as our commission. Let us know by return mail, and we will draw contracts, and send to you. Respectfully,

Hutchinson & Jones." In reply to this Wiltrout wrote, March 17, 1894, as follows: "If you can effect a sale of the Holmes Sanitarium at once, closing the sale inside ten days, at $42,000, we will allow you four per cent., and are ready to bind ourselves to pay this sum when cash is paid over to us. We must receive the entire sum coming to us in cash, and the sale must not include our personals and my wife's piano. Respectfully, I. D. Wiltrout." There does not appear to have been any reply to this letter, and on the 21st of March, 1894 Wiltrout wrote another letter to the plaintiffs in which he says: "I hold the property now at $40,000. Inasmuch as our former contract is practically annulled, I make you the following proposition: You sell the property for $40,000, your commission being four per cent.; the terms of sale to be as follows: The purchaser to assume the first mortgage of $20,000, and the remaining $20,000 to be paid in cash or its equivalent; and $2,000 of this $20,000 that is coming to us must be paid at once, to bind the contract of sale, and the remainder to be paid when possession will be taken, and this can be given in five days. Let me hear from you at once. Yours, truly, I. D. Wiltrout." To this letter the plaintiffs replied March 23, 1894, as follows: "Dear Doctor: We will push matters now at this end of the line, and see what we can accomplish under your new figures, to wit, $40,000 for the Holmes Sanitarium, commission 4 per cent; $20,000 cash, and the assumption of the mortgage for $20,000. Will write you every day or two as to progress made. Respectfully, Hutchinson & Jones." The plaintiffs thereafter wrote Dr. Johnson, offering the property to him at $40,000, but he declined. The court found that Wiltrout had authority to make the contract set out in the complaint; that it had not been rescinded, but that it had been modified only as to the selling price and the amount of the commission; that the stipulation to pay plaintiffs $1,000 in case Wiltrout sold it without assistance of plaintiffs remained in full force and effect; that plaintiffs failed to find a purchaser at any of the amounts named, and hence were not entitled either to the $5,000 or the 4 per cent. commission; but that, Wiltrout having sold the property about June 1, 1894, within six months after the date of the contract, to Dr. Sam C. Johnson, and the corporation having ratified such sale, the plaintiffs were entitled to recover $1,000 of the defendant under the written agreement. Judgment was rendered for the plaintiffs for $1,000 and costs, and the defendant appealed.

Baker & Helms, for appellant. James A. Frear and S. J. Bradford, for respondents.

WINSLOW, J. (after stating the facts). We find it unnecessary to consider or decide the question as to the power of Wiltrout to make the original contract in question on behalf of the corporation. Whether he had power to bind the corporation by that contract without authority from the board of directors or not, it seems entirely certain to us that, conceding the contract to be valid and binding on the corporation, it was annulled and rescinded in toto by the parties through their correspondence in February and March, 1894. This correspondence is set forth quite fully in the statement of the case, and it will not be necessary to repeat it here. It is enough to say that after much correspondence Dr. Wiltrout wrote the plaintiffs on March 21st that, "As our former contract is practically annulled, I make you the following proposition." Then follows a clear and complete proposition needing no help nor aid from the former contract. To this letter and proposition the plaintiffs replied, making no objection to the statement that the former contract was annulled, and accepted the new proposition. We can view this as nothing short of an abandonment and abrogation of the old contract and the substitution of another therefor. This new contract contained no provision for the payment of $1,000, or any sum, in case Wiltrout sold the sanitarium without the assistance of the plaintiffs, and hence there can be no recovery. The plaintiffs cannot recover the 4 per cent. because they did not produce a purchaser, and they cannot recover the $1,000 because the agreement to pay that sum had been abrogated by mutual consent. Judgment reversed, and action remanded, with direction to enter judgment for the defendant dismissing the plaintiffs' complaint.

STATE ex rel. OLLINGER et al. v. WEINFURTHER, County Clerk, et al.

(Supreme Court of Wisconsin. March 10, 1896.)

COUNTY BOARD—ANNEXING TOWNS—CERTIORARI—JURISDICTION—APPEARANCE AFTER JUDGMENT.

1. Action of the county board of supervisors in declaring, by ordinance, part of a town to be thereby attached to another town, should be reviewed by certiorari, directed to that board and not to the county clerk; and neither a writ directed to the clerk, nor a return thereto by the clerk, gives jurisdiction of the board or of the subject-matter of the ordinance; nor does the voluntary appearance in the proceeding of the towns or the county give jurisdiction, they having no interest in the matter.

2. A judgment, in a proceeding by certiorari to review action of a county board of supervisors, which is void because jurisdiction of the board was not obtained, is not aided by an attempted appearance by the board, after its rendition, and an informal adoption by the board of the judgment, nothing having been decided or changed in consequence or on the strength of that appearance.

Appeal from circuit court, Manitowoc county; N. S. Gilson, Judge.

Certiorari, on the relation of Nic Ollinger and others, against Joseph Weinfurther, as clerk of Manitowoc county, and others. From the judgment for relators, certain of defendants appeal. Reversed.

The city of Manitowoc was incorporated by an act of the legislature of 1870. It was organized of territory which was a part of the town of Manitowoc, and extends entirely across the town, so as completely to separate the town into two parts, at a distance of about two miles removed from each other, and not at any point contiguous to each other. That part of the town of Manitowoc which lies north of the city comprises about 9 full sections of land, and that part south of the city comprises about 3½ sections. About two-thirds of the voters of the town reside north of the city, and about one-third south of the city. This condition has existed ever since the incorporation of the city, until the 27th day of May, 1893, when the county board of supervisors of Manitowoc county, by an ordinance in due form, but without a written petition therefor, and without submission of the matter to a vote of the town, declared that part of the town of Manitowoc which lies south of the city to be thereby attached to and a part of the town of Newton, which was an adjoining town. On the relation of several residents of the territory so attached to the town of Newton, a writ of certiorari, addressed to Joseph Weinfurther, as county clerk of the county of Manitowoc, was issued out of the circuit court of Manitowoc county, and served upon the county clerk. The county clerk made what was denominated a "return," whereby he certified, in effect, that the proceedings of the board were correctly set forth in the writ of certiorari which was returned therewith. The towns of Manitowoc and Newton and the county of Manitowoc, upon invitation of the relators' attorneys, intervened in the action, and filed various affidavits. They also moved, upon the records, files, and affidavits, to supersede and to quash the writ. These motions were overruled. On the 25th day of April, 1895, the court rendered judgment on the merits, reversing the ordinance of the county board of supervisors. That board, up to this time, had not been a party to the action. On June 3, 1895, the district attorney of Manitowoc county appeared in the action, for the county board of supervisors of Manitowoc county, with the consent of the relators, and against the objection of the intervening towns and Manitowoc county. The appearance was for the purpose, if possible, of obviating objections to the direction of the writ and having the action finally determined. The district attorney stipulated with the attorneys for the relators to the effect that the county board of supervisors submit to the jurisdiction of the court, and adopt the return made by the county clerk as its return. The town and county of Manitowoc, only, appeal.

G. G. & C. N. Sedgwick and Charles E. Estabrook, for appellants. Nash & Nash, for respondents.

NEWMAN, J. (after stating the facts). In enacting the ordinance in question, the county board was acting in a political and governmental function, in the interest of the public, and not in the interest or for the county in its private or corporate capacity. The writ of certiorari, upon which it should be sought to review its action, should be directed to the officers or board whose act it was sought to review, whenever that is a permanent body, and has control of its own records. And this is true even where a clerk has custody of the records, as the mere agent of the corporation. The writ, in that case, should not be directed to the clerk, but to the board or body. If misdirected, the writ must be superseded or quashed. The court acquires no jurisdiction by it. State v. City of Fond du Lac, 42 Wis. 287; State v. Milwaukee Co., 58 Wis. 4, 16 N. W. 25; State v. City of Milwaukee, 86 Wis. 376, 57 N. W. 45; Ex parte Mayor, etc., of Albany, 23 Wend. 277; People v. Highway Com'rs, 30 N. Y. 72; Roberts v. Commissioners, 24 Mich. 182. The writ in this case was misdirected. It should have been directed to the county board of supervisors of Manitowoc county, and not to the county clerk. The appearance of the county clerk in the action, and his attempt to make a return to the writ, was futile to give jurisdiction of the board of supervisors, or of the case. The return is a nullity, and confers no jurisdiction, either of the person or of the subject-matter. People v. Highway Com'rs, supra. Until the proper defendant is before the court, the court can have no jurisdiction of the subject-matter. This can only be acquired by a proper writ, and a return made by the proper officer or board. The writ in this case should have been directed to the board of supervisors, and the return should have been made by the supervisors themselves, or a majority of them. Plymouth v. Plymouth Com'rs, 16 Gray, 341. Nor is a return, signed only by an attorney for the board, sufficient. Tewksbury v. Commissioners, 117 Mass. 563; Worcester & N. R. Co. v. Railroad Com'rs, 118 Mass. 561; Chase v. Board, 119 Mass. 556. So, neither the board of supervisors nor the subject-matter, the ordinance, was before the court.

It is said to be proper, in some cases involving private rights, to join, as defendants, persons having an interest adverse to the relator. However that may be, and whether it is applicable to cases involving only questions of public right, it is difficult to see how either of the towns of Newton or Manitowoc or Manitowoc county have any interest, in their private or corporate capacity, in this matter. Residents of the territory, or taxpayers, may be said to have an interest; but the corporations, as such, can have no interest. And their voluntary appearance in the action could not, at least in the absence of interest, confer jurisdiction. Nor is it perceived how the attempted appearance of the board of supervisors, after judgment, aids the judgment. It was void when rendered. It was void when the board of supervisors was represented as appearing. The court decided nothing, and changed nothing in consequence or on the

strength of that appearance. It is difficult to apprehend how the mere voluntary appearance by the board of supervisors, and its informal adoption of this nullity, could impart to it life and energy. This was held doubtful in People v. Highway Com'rs, supra, although the proper defendants appeared before judgment and litigated. This does not question the effect of an appearance by a natural person, in his own right, after judgment, in an ordinary action.

This case is not affected by those cases which hold that the writ should not be quashed, nor the action dismissed, after a hearing on the merits. Those are none of them cases of misdirection of the writ. They were all cases where the writ had been properly issued and returned, but was liable to be quashed for irregularities. McNamara v. Spees, 25 Wis. 539; Morse v. Spees, Id. 543; Owens v. State, 27 Wis. 456; State v. Milwaukee Co., supra. The writ should have been quashed on the motion of the county clerk, the party served as defendant therein. The judgment of the circuit court is reversed, and the cause remanded, with direction to quash the writ.

MEYER v. GARTHWAITE et al.

(Supreme Court of Wisconsin. March 10, 1896.)

EQUITY—BILL TO RECOVER ASSETS OF ESTATE—DEMURRER ORE TENUS—JURISDICTION OF CIRCUIT COURT.

1. The objection that a bill in equity fails to show equitable jurisdiction, because an adequate remedy exists at law, cannot be raised for the first time on trial by a demurrer ore tenus.

2. A complaint by an administrator de bonis non alleged that his intestate bequeathed his personalty to his widow for life, remainder to their son, who, though he was named and qualified as executor, never did anything about the administration, but lived with his mother, and that together they "controlled and managed" the property; that on the death of the son his widow and mother took possession and assumed the control of the estate of plaintiff's intestate; that his mother subsequently remarried, and that she and her husband gave part of the personalty to the son's wife, and kept the remainder, the respective amounts being unknown to plaintiff; that on the mother's death her husband retained possession of the remainder, the amount or form of which plaintiff did not know. *Held*, that the complaint stated a cause of action against the surviving husband for an accounting.

3. The circuit court which assumes jurisdiction of matters arising in the administration of estates, over which it has concurrent original jurisdiction with the county court only when special facts show that adequate relief cannot be given by the county court, will take jurisdiction of an action by a personal representative to recover a fund belonging to his intestate's estate, a discovery of which is rendered necessary by plaintiff's ignorance of its form and amount.

Appeal from circuit court, Grant county; George Clementson, Judge.

Action by Richard Meyer, administrator, against Edward Garthwaite and others, for possession of assets. From an order sustaining defendants' demurrer to the complaint, plaintiff appeals. Reversed.

This action is brought by the plaintiff, as administrator de bonis non, with the will annexed, of the estate of James Moore, deceased, against the defendant Edward Garthwaite, who is alleged to have in his possession certain unadministered assets of the estate of the deceased. The complaint alleges that the deceased, by his last will, left all his personal property to his wife, Sarah Moore, for her life, and to his only child, John S. Moore, after her death, and made John S. Moore executor of his will; that the will was admitted to probate, and John S. Moore qualified as executor, but did nothing about the administration; that he lived in the same house with his mother, and they two "controlled and managed" the property; that the property consisted mostly of money and money securities; that John S. died June 8, 1891, leaving a widow and child; that after the death of John S. his widow and mother, Sarah Moore, took possession of all the estate of James Moore, and assumed control and management of it; that Sarah Moore afterwards intermarried with the defendant Garthwaite; that they gave a part of the estate of James Moore to the widow of John S. Moore, and kept the rest themselves; that Sarah Moore died, and the said Edward Garthwaite took possession of and retains all the assets of the estate of James Moore which were with him and Sarah at the time of her death; that the plaintiff does not know the amount or form of such assets. The complaint demands judgment for an accounting of the property which came to the possession of the defendants, and that they be required to deliver the same, or the proceeds thereof, to the plaintiff. Garthwaite answered. On the trial the defendant Garthwaite interposed a demurrer ore tenus to the complaint, which the court sustained. From the order sustaining the demurrer, this appeal is taken.

Bushnell, Watkins & Moses, for appellant. John D. Wilson, for respondents.

NEWMAN, J. (after stating the facts). The objection to the jurisdiction of a court of equity on the ground that the plaintiff has an adequate remedy at law must be taken, in the first instance, by answer or demurrer on that ground, or it is waived. It cannot be raised afterwards by a demurrer ore tenus on the trial. Tenney v. Bank, 20 Wis. 152, 164; Sherry v. Smith, 72 Wis. 339, 39 N. W. 556; Sweetster v. Silber, 87 Wis. 102, 58 N. W. 239. The only question which could properly be raised by the demurrer ore tenus is, does the complaint state a cause of action in equity? Sherry v. Smith, supra.

It seems to be settled in this state that the circuit court, as a court of equity, has a general, original jurisdiction over matters arising in the administration of estates, concurrent with the county courts. 1 Pom. Eq. Jur. §§ 346-351; Glasscott v. Warner, 20

Wis. 654; Tryon v. Farnsworth, 30 Wis. 577; Brook v. Chappell, 34 Wis. 405; Catlin v. Wheeler, 49 Wis. 507, 520, 5 N. W. 935. Yet that jurisdiction is practically suspended to this extent: that the circuit court will decline to take jurisdiction over such matters unless such special facts appear as show that a complete and adequate remedy cannot be given by the county court. Batchelder v. Batchelder, 20 Wis. 452; Willis v. Fox, 25 Wis. 646; Kugler v. Prien, 62 Wis. 248, 22 N. W. 396; Hawley v. Tesch, 72 Wis. 299, 39 N. W. 483; 3 Pom. Eq. Jur. § 1154. So the circuit court should decline to take jurisdiction of this case, even if a cause of action which is within its general equity jurisdiction is stated, notwithstanding this question of jurisdiction has been waived by the defendant by omitting to raise it by answer or demurrer, unless it also appears by the complaint that circumstances exist which will render the remedy which is within the competency of the county court inadequate and incomplete. So the precise question in this case is whether the complaint states a cause of action in equity, of which the county court, by reason of its restricted jurisdiction, is incompetent to afford an adequate and complete remedy.

Does the complaint state a cause of action in equity? The will of James Moore gave all of his personal estate to his widow, Sarah Moore, "for and during her natural life," and after her death to John S. Moore, his only son, whom he appointed to be the executor of his will. The will was proved and admitted to probate. Letters testamentary were issued to John S. Moore, and he qualified by filing a proper bond. So far as appears, he did nothing towards administering the estate. He filed no sufficient inventory. The property "was mostly money and money securities," alleged to have been "more than four thousand dollars." John lived with his mother, in the same house, "as they had always done before." They kept all the personal property of the deceased, James Moore, "in their hands and possession, and together controlled and managed the same" until John S. died, June 8, 1891. John's widow and his mother, Sarah Moore, then took possession of the property, and "assumed the control and management thereof." Afterwards Sarah Moore intermarried with the defendant Edward Garthwaite, and they "together took and assumed and retained the possession, control, and management of all the said property," except that they gave a part of it to the widow of John S. The plaintiff does not know, and has no means of ascertaining, how much was given to John's widow, nor how much was retained by Sarah Moore and Garthwaite. Sarah Moore died intestate March 11, 1894, when Garthwaite took and assumed possession of all of such property which had been in the possession of Sarah Moore and himself, and still retains it. The plaintiff is administrator de bonis non of the estate of James Moore, and seeks for an accounting by the defendants Addie Moore, widow of John S., and Garthwaite. The question arising here is whether these facts show that this property in the hands of Garthwaite and Addie Moore is unadministered assets of the estate of James Moore, or had it been so dealt with as to become the property of John S. Moore before his death? The title to this property never vested in the widow of James. It was money and choses in action. The will made no specific bequest. She was entitled to the income only of the money and securities during her natural life. It was the duty of the executor to keep the money invested in permanent securities, and to pay over the accruing interest to the widow during her life. Then his title to the residue would become perfect. Golder v. Littlejohn, 30 Wis. 344, 351; Jones v. Jones, 66 Wis. 310, 28 N. W. 177; 6 Am. & Eng. Enc. Law, 883, 884, and cases cited in notes. So far as appears by the complaint, the title which vested in John S., in his representative capacity, remained unchanged at the time of his death. It is not alleged that he made any changes or did anything with or in reference to the property. The only allegation is that they "together controlled and managed the same." This is altogether too indefinite for an allegation that any of it was sold or disposed of. "The personal representative of the deceased, in the first instance, and until there has been some change in the mode of holding the assets, must always be treated as holding them en autre droit, and not in his own right." 3 Redf. Wills (3d Ed.) 130, par. 2. So far as appears, these are the identical securities, unchanged, which James Moore held. No doubt, John S. had power to sell and dispose of them for reinvestment, or other proper purpose. And no person could derive title to them but through him. Murphy v. Hanrahan, 50 Wis. 485, 7 N. W. 436; Melms v. Pfister, 59 Wis. 186, 18 N. W. 255; Gundry v. Henry's Estate, 65 Wis. 559, 27 N. W. 401; Miller v. Tracy, 86 Wis. 330, 56 N. W. 866. But, so long as Sarah Moore lived, he was bound to keep the fund entire, so that its proper income could be paid to her during her life. He might have substituted a bond, under section 3795 of the Revised Statutes, and thus become vested with the title in his own right, without further administration. In re Cole's Will, 52 Wis. 591, 9 N. W. 664. But, although sole residuary legatee, he could hardly hold the estate in his individual capacity, until he had performed all the purposes of the will, or had complied with the statute referred to. It is not averred that he had complied with the statute, and the purposes of the will had not yet been performed. The widow was still living, and entitled to the income. When personal property is disposed of by a residuary legacy, it does not vest at once in the legatee, but in the executors, by operation of law, subject to distribution, as in case of intestacy. Melms v. Pfister, 59 Wis. 186, 18

N. W. 255. This seems to establish that at the time of the death of John S. these assets were still in his hands as executor of his father's estate, and unadministered. Such unadministered assets pass to the administrator de bonis non, to be administered by him. 2 Williams, Ex'rs (7th Am. Ed.) 106. So it seems to be established that the plaintiff, in his character of administrator de bonis non, has a cause of action against, at least, some of the defendants.

Is it a cause of action of which a court of equity will take jurisdiction? It will, unquestionably, unless the county court can give an adequate and complete remedy. By the phrase "adequate and complete remedy" is meant a remedy "as practicable and efficient to the ends of justice, and its prompt administration, as the remedy in equity." When "time, expense, and a multiplicity of suits will be saved by it, and the rights of all concerned will be settled in one litigation," a court of equity has jurisdiction. Gullickson v. Madsen, 87 Wis. 19, 57 N. W. 965; 1 Pom. Eq. Jur. §§ 180, 243. Can the county court afford relief as practicable, as efficient, as prompt, as is the remedy in equity? It can entertain no action, whether at law or in equity, for the recovery of the possession of assets of estates which are in the process of administration in that court. The proper remedy of the administrator de bonis non for the recovery of specific, unconcealed assets, would be an action of replevin, in the circuit court, if the value was sufficient. This action is to recover a fund, of the amount, form, and condition of which the plaintiff is ignorant; so that a discovery is necessary. That is a distinct ground for the interposition of a court of equity, not abrogated by section 4096, Rev. St., except when it is in aid of another action. And equity alone could furnish efficient relief. At law a judgment for damages alone could be given, in case the property could not be found and physically taken, while in equity the court could enforce delivery by a proper order or judgment. A proceeding in the nature of a discovery may be had in the county court, under section 3825, Rev. St. But, if property is discovered, there is no remedy to enforce its delivery or restoration to the estate. Saddington's Estate v. Hewitt, 70 Wis. 240, 35 N. W. 552. After its discovery another action must be brought for its recovery, in a court of general jurisdiction, either at law or in equity, as the exigency of the case may require. This remedy requires circuity of action and a multiplicity of suits, —both grounds for the interposition of equity. Clearly the remedy which the county court can afford is not equally practicable, efficient, and prompt as the remedy in a court of equity. Within the rules above stated, the complaint states a cause of action in equity, of which the circuit court has jurisdiction. The order of the circuit court is reversed, and the cause remanded for further proceedings according to law.

SHATTUCK v. BATES.

(Supreme Court of Wisconsin. March 27, 1896.)

DEEDS — DEATH OF GRANTOR — PROOF OF EXECUTION—CONFLICT OF LAWS.

1. A deed purporting to have been signed by the grantor in presence of the subscribing witnesses, and bearing a certificate of a notary public in New York to the effect that the subscribing witnesses had, respectively, stated under oath, after the grantor's death, that they saw her sign, seal, and execute the instrument, is not proved, within Rev. St. § 2227, providing that "when any grantor shall die, * * * not having acknowledged his conveyance, the due execution thereof may be proved by any competent subscribing witness thereto before any court of record; and if all the subscribing witnesses to such deed shall be dead or out of this state, the same may be proved before any such court by proving the handwriting of the grantor and of any subscribing witness thereto."

2. The disposition of real estate in Wisconsin is governed entirely by the laws of Wisconsin.

Appeal from circuit court, Vernon county; O. B. Wyman, Judge.

Action by George W. Shattuck against Jesse T. Bates, in ejectment. From a judgment in favor of defendant, plaintiff appeals. Reversed.

C. W. Graves and H. P. Proctor, for appellant. C. J. Smith, for respondent.

CASSODAY, C. J. This is an action of ejectment to recover 200 acres of land described, commenced June 13, 1894. The answer put in issue the material allegations of the complaint. At the close of the trial the jury returned a verdict in favor of the defendant. From the judgment entered thereon the plaintiff brings this appeal. It is conceded by both parties that the title to the land was on December 19, 1882, and for some time prior thereto, in Margaret E. Shattuck. Her maiden name was Margaret E. Little. She married the plaintiff in 1872, and they lived together as husband and wife until 1881, when differences arose between them, and they separated; and she went and lived with her relatives in New York, and continued to reside there, separate and apart from her husband, until the time of her death, which took place February 24, 1888. She was never divorced from the plaintiff, and never had any other husband, and never had any children. The plaintiff contends that the title to the land remained in her to the time of her death, and then descended to him, as her husband, under and by virtue of the statute which declares that "if a woman shall die, leaving no issue, her estate shall descend to her husband, if she shall have one at the time of her decease." Rev. St. § 2270, subsec. 2.

There can be no question but that the plaintiff became the owner of the land on the death of his wife, unless she disposed of the same by some grant, conveyance, or devise. There is no pretense that she died testate. There is no claim that she ever disposed of the land, except by an instrument in writing bearing date December 19, 1882, purporting

to have been signed by her, under her hand and seal, in the presence of two subscribing witnesses, whose names appear, as subscribed thereto, and in and by which instrument she purports to have granted and conveyed to her brother Richard B. Little, his heirs and assigns forever, the land in question. There are, in the record, deeds of this land from Richard B. Little and wife to Elihu Marshall, dated July 18, 1889, and from Elihu Marshall to David Bobo, dated July 27, 1892, and from David Bobo and wife to the defendant, dated September 21, 1893. The instrument in writing bearing date December 19, 1882, and purporting to have been signed by Mrs. Shattuck, was received in evidence against objection; and the court charged the jury to the effect that it was sufficient to pass title to Richard B. Little, if, during her life, it was delivered so as to take effect as a deed; and the question of such delivery was the principal question submitted to the jury. Mrs. Shattuck had power to convey the land without her husband's joining in the conveyance. Rev. St. § 2221. The statutes provide that a conveyance of land, or any estate or interest therein, may be made by deed signed and sealed by the person from whom the estate or interest is intended to pass, "and acknowledged or proved as directed in this chapter, without any other act or ceremony whatever." Rev. St. § 2203. Every such conveyance executed by a married woman, of or relating to real estate, "may be acknowledged by her, or the proof of the execution thereof may be taken and certified the same as if she were unmarried." Rev. St. § 2224. "When any grantor shall die, * * * not having acknowledged his conveyance, the due execution thereof may be proved by any competent subscribing witness thereto before any court of record; and if all the subscribing witnesses to such deed shall be dead or out of this state, the same may be proved before any such court by proving the handwriting of the grantor and of any subscribing witness thereto." Rev. St. § 2227. We find no such proof of the execution of the written instrument dated December 19, 1882, in the record before us. The only evidence tending to prove such execution is contained in the deposition of Richard B. Little, which was offered by the plaintiff's counsel, and excluded on the objection of the defendant's counsel. Such rulings of the court seem to have been made on the theory that such execution was presumed. True, the statute provides that "every conveyance * * * being so executed and acknowledged or proved as to be entitled to record * * * shall be received in evidence, without further proof thereof." Rev. St. § 4156. The statute also provides that "every written instrument purporting to have been signed or executed by any person, shall be proof that it was so signed or executed, until the person by whom it purports to have been so signed or executed shall specifically deny the signature or execution of the same by his oath or affidavit, or by his pleading duly verified; but this section shall not extend to instruments purporting to have been signed or executed by any person who shall have died previous to the requirement of such proof." Rev. St. § 4192. Certainly the certificate of a notary public in New York, to the effect that the subscribing witnesses to that instrument had, respectively, said to him, under oath, a few weeks after Mrs. Shattuck's death, and nearly six years before the commencement of this action, that they saw her sign, seal, and execute the instrument, was not proof before any court as required by our statutes cited. The disposition of real estate in Wisconsin is governed entirely by the laws of Wisconsin, and not by the laws of New York or any other state. We must hold that the written instrument purporting to have been signed by Mrs. Shattuck was improperly admitted in evidence. And that is so whether that instrument is to be regarded as an absolute deed, or as an equitable mortgage. Rev. St. § 4242. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

BUCKSTAFF v. CITY OF OSHKOSH.

(Supreme Court of Wisconsin. March 10, 1896.)

NUISANCE—INJUNCTION—ACTION BY HEALTH OFFICER INDIVIDUALLY.

Rev. St. § 1411, directing a town health officer to take such measures for the prevention, suppression, and control of contagious disease as may be needful, does not authorize an action by him, in his own name, to enjoin the maintenance of an isolation hospital for contagious diseases near the town, as endangering the health of the people of the town.

Appeal from Winnebago county court; C. D. Cleveland, Judge.

Action by Robert Buckstaff, health officer, against the city of Oshkosh, for an injunction. From an order sustaining defendant's demurrer to the complaint, plaintiff appeals. Affirmed.

Plaintiff was health officer of the town of Algoma, Winnebago county. The board of health directed him to bring an action against the city of Oshkosh to restrain such city permanently from maintaining an isolation hospital as a place for the removal to and care for persons found in such city afflicted with smallpox and other contagious diseases, which hospital the defendant had established near one of the public highways in said town. The plaintiff set forth these facts, and by appropriate allegations, also, that the maintenance of such hospital would endanger the health of the people of the town of Algoma, and all persons who might travel along the highway near which such hospital was maintained. The defendant demurred to the complaint upon two grounds: (1) That the plaintiff has no legal capacity to sue, and (2) that the complaint fails to state a cause of action. The demurrer was sustained, and from the order entered this appeal was taken.

B. E. Van Keuren, for appellant. J. H. Davidson, for respondent.

MARSHALL, J. (after stating the facts). Looking at the complaint in the most favorable light for appellant, it was made, and the action brought by him, in his official capacity, as health officer of the town of Algoma, to restrain the defendant from maintaining therein a public nuisance, detrimental to the health of people generally, and particularly of the people of such town. We are unable to see any ground whatever for the claim that plaintiff has legal capacity to maintain this action. He is the mere agent or executive officer of the board of health, and in no sense the proper party plaintiff to prosecute a suit on behalf either of the board of health or the inhabitants of the town. Our attention is called to Inhabitants of Winthrop v. Farrar, 11 Allen, 398, in support of the complaint; but there the action was in the name of the town, not of the board of health or health officer. So, in City of Taunton v. Taylor, 116 Mass. 254, also cited in support of the complaint, there was a board of health, similar to boards of health in towns under the system in this state. Such board, under its power to prevent nuisances, made an order prohibiting the carrying on of an offensive vocation, and, upon violation of such order, an action in equity was brought to restrain the exercise of the prohibited trade, but in the name of the municipal corporation. Power was conferred on the board, by law, to enter the order prohibiting the carrying on of the objectionable business, and to take all necessary means to enforce such order. It was held that its action in that regard was in behalf of all the inhabitants of the municipality, and that the action was properly maintainable in its name. The example of that case furnishes ample authority, if any is needed, against the contention of appellant; but see, also, Quincy v. Kennard, 151 Mass. 563, 24 N. E. 860; Com. v. Parks, 155 Mass. 531, 30 N. E. 174. We conclude that there is no power, express or implied, under section 2, c. 167, Laws 1883,[1] upon which plaintiff mainly relies, authorizing the health officer to take such measures for the prevention, supervision, and control of the diseases mentioned in such chapter, or under any provision of such chapter, or otherwise, for the maintenance of this action, either in his own name, or in the name of the board of health. If maintainable at all, on behalf of the inhabitants of the town, then it is the proper party plaintiff, as the town of Algoma. Section 773, Rev. St.; Town of Pine Valley v. Town of Unity, 40 Wis. 682. But, whether the action lies, or, if so, whether it can be instituted without authority conferred by the electors, we need not, and do not undertake to, decide. The order of the circuit court sustaining the demurrer to the complaint is affirmed.

[1] Laws 1883, c. 167, § 2, directs town health officers "to take such measures for the prevention, suppression, and control of contagious disease as may be needful and proper, subject to the approval of the board of health."

HUBER v. LA CROSSE CITY RY. CO.

(Supreme Court of Wisconsin. March 27, 1896.)

MASTER AND SERVANT—NEGLIGENCE—PROXIMATE CAUSE—ELECTRIC WIRES.

In an action against an electric railway company for personal injury, it appeared that plaintiff, employed by an electric light company, while climbing a pole to remove an electric light, came in contact with a span wire supporting defendant's trolley wire and the iron post to which span wire was fastened, receiving an electric shock which threw him to the ground; that the trolley wire was suspended from the span wire by a bell insulator, and the span wire supplied with a circuit break, interposed between the trolley and the post; that the plaintiff was experienced, and knew all the dangers connected with the trolley and span wires. *Held* insufficient to show that defendant's negligence was the proximate cause of plaintiff's injury.

Appeal from circuit court, La Crosse county; O. B. Wyman, Judge.

Action brought by Frank Huber against the La Crosse City Railway Company for damages for injuries received in consequence of contact with a live electric wire, connected with defendant's street railway. There was a judgment for plaintiff, and defendant appeals. Reversed.

Action to recover damages sustained by the plaintiff by reason of alleged negligence of the defendant. The complaint charges that, at the time of the injury, the plaintiff was an employé of the Brush Electric Light Company, which maintained, at the northwest corner of the intersection of Main and Fourth streets, in La Crosse, a wooden pole, to support one end of a wire stretching across the intersection of the streets from northwest to southeast, from the center of which an electric street lamp was suspended, and, to the knowledge of the defendant, the employés of the light company were obliged to and did climb said wooden pole to attend to such street lamp; that the defendant erected an iron post or pole close to and adjoining such wooden pole, and to which one end of a span wire was attached, which supported its trolley wire in and over the center of Fourth street, and such span wire was so near to the wooden pole as to be dangerous to employés of the light company while climbing it, unless it was properly insulated and free from the electric current in the trolley; that the defendant negligently allowed said span wire to become charged with a powerful current from the trolley wire, which it supported, and the plaintiff, a lineman of the light company, while climbing the wooden pole, without fault on his part, came in contact with said span wire and said iron pole, so as to form a circuit, and he received a shock which caused him to fall a distance of about 20

feet, to the ground, whereby he was seriously injured; that, at the time, said light company, by its agents and employés, of whom the plaintiff was one, was engaged, at the request of the defendant, the railway company, in removing the said lamp from its position. The acts of negligence relied on were: (1) The erection of said iron pole in such close proximity to the pole of the light company as to render the climbing of the latter dangerous, unless the defendant's span wire was properly insulated from the trolley; (2) in operating a portion of its railway before it was fully completed, with the span wire in question uninsulated and charged with a heavy current that escaped from the trolley wire. The answer denied the negligence charged, and averred that the defendant, at the time, had constructed and maintained its posts, trolley wires, and other appliances in accordance with the city ordinance; that at the time the light company, by the plaintiff as its employé and by its superintendent, was engaged in carrying out a contract between it and the defendant for the removal of its wires, lamps, etc., where they interfered with the erection of the defendant's line, and that, while so engaged, the plaintiff carelessly came in contact and connection with said span wire at a point beyond which it was insulated, and received the alleged shock; that he well knew the point at which the span wire was insulated, and the consequences of making a connection with the same, and that he was guilty of contributory negligence. The defendant moved for a nonsuit at the close of the plaintiff's case, which was denied, and at the close of the evidence requested the court to direct a verdict for the defendant, which the court refused. The plaintiff had a verdict and judgment, from which the defendant appealed.

The evidence was that the trolley wire and span wire and the street lamp and poles were situated as stated in the complaint,—the wooden pole of the light company being about 30 feet high and 10 feet higher than the iron pole, and had a return wire from the lamp to the pole passing down it, to a ratchet near the bottom, so that the lamp could be raised and lowered to renew the carbons without climbing the pole, but to remove anything that got on the wires they would have to climb the pole; and at many street intersections in the line of the defendant's trolley, the light company maintained street lamps in a similar way, the position of which had to be changed when the defendant built its line, but at the defendant's cost. Accordingly, the defendant entered into a contract with the light company to make such changes or removals, and it entered upon the work thereof, the defendant not interfering with or taking any part in it. The defendant had constructed its line south on Fourth street to Main street, which runs east and west, and it was intended that its line should turn upon Main street in both directions. The method of construction was that iron poles or posts were erected opposite each other on both sides of the street at intervals. Wires, called "span wires," cross the street at the top of these poles and support the main or trolley wire, which is attached to them by a "bell hanger" or "bell insulator," which, when properly constructed, and in good condition, will prevent any escape of the trolley current to the span wire; and, as an additional precaution, where the poles are iron, as in this case, and to guard against any possible leakage or defect in the "bell insulator," there was placed in the span wire, and between the trolley and each iron pole or post, about 16 or 18 inches from the post, a "circuit break," so that any current that escaped from the bell insulator would be arrested, and would not reach the iron post. The evidence was that these appliances used by the defendant were of the best kind, and in good order, and tended to show that the construction and management of the defendant's line was under the control of a competent electrical engineer. The wooden pole of the light company, in question, was crooked, inclining towards the east and south, and its base was 7 or 8 inches east, and a little south, of the defendant's iron pole or post. About 10 feet from the ground, by reason of the crook in the wooden pole, the two were in contact, and by reason of the inclination of the wooden pole to the south and east, there was an interval, from the point between them, gradually increasing to about 8 inches at the top of the iron post, and opposite the span wire,—the iron post being west and a little north of the wooden pole. The span wire, running east from the top of the iron post, passed on the north side of the wooden pole, and about 3 or 4 inches distant. The west end of the circuit break in the span wire was 7¾ inches to the east of the wooden pole, and the end of the span wire east of the circuit break was 13¾ inches from the wooden pole, and the pole could be climbed from the south or east side without coming in contact with the span wire. A person climbing the wooden pole on the north side would have to pass over the span wire, and would usually come in contact with it in some way, but only with the portion of it between the iron post and the circuit break, which was dead or uncharged; but, in case of defect in both bell insulator and circuit break, should it be charged or "live," the person coming in contact with it, while adhering to the nonconducting wooden pole, would be safe, unless he at the same time came in contact with the iron post. The bell insulator and circuit break were in good order, and the span wire between the circuit break and the iron post which passed on the north side of the wooden pole was "dead." When the defendant company had reached the point in question with the construction of its line, its trolley wire was attached to this span wire by the bell insulator over the

center of Fourth street and on the north side of Main street, and quite a length of the trolley wire, intended to be used in curving onto Main street to the west, remained projecting south of the span wire, and was coiled up as far back as the bell insulator, and laid around and over the bell insulator, and upon the span wire and trolley wire to the north, so that, while the defendant operated its line so far as constructed, as it did continuously from August 8th to August 19th, when the accident occurred, this span wire became and was charged with the trolley current up towards said posts or poles as far as the circuit break. This coil of the trolley wire was bright new copper ¼ inch wire, about 4 feet in diameter, projecting 2 feet over on the span wire on each side, not more than 22 feet from the poles or posts, and in plain sight, and there was nothing to indicate that it was insulated from the span wire on which it rested. A person climbing the wooden pole of the light company could be injured by the current in the span wire in but one way, namely, by touching the span wire east of the circuit break, and at the same time touching the iron post in the opposite direction to the west, so as to form a circuit with his body between the iron post and the live span wire beyond the circuit break. After the defendant's wires had been put up, the street lamp of the light company could not be lowered, because it would come in contact, and might cause an accident, and it was necessary to put the light away from the defendant's wires. At the time of the accident, McMillan, the superintendent of the light company, with nine years' experience as an electrician, and fully acquainted with the subject of insulation, with the plaintiff, undertook to make the necessary change in removing and changing the position of the street lamp. The plaintiff had done nearly all this work up to this time. He had had about five years' experience in attending to lamps, repairing, setting poles, and other work, and had worked about a month in changing the lamps of the light company. He understood the method of construction and insulation of the defendant's lines, and the subject of insulation generally, had noticed both bell insulators and circuit breaks, and knew how they were attached, and what they were for, and had examined the manner of insulating the defendant's span wires. By direction of McMillan the plaintiff climbed the wooden pole on the north side, over and above the span wire and iron post, nearly to the top of the wooden post, drew the lamp in from the center of the street, and let it down to McMillan, and came down the pole on the north side, climbing over the span wire again. McMillan then climbed the wooden pole on the east side, passed the span wire, and prepared to hang the lamp at the side of the wooden pole. Having occasion to let fall a piece of the lamp wire twisted into a spiral form or coil, he dropped it, intending to let it go down on the south side of defendant's span wire; but, for want of careful management, it caught the span wire at a point 3½ or 4 feet east of the wooden post, and beyond the circuit break, so that from his position he was unable to get it off. He therefore directed the plaintiff to climb the pole again, and to take this coil off the span wire. The plaintiff climbed up on the north side of the wooden pole, as before, until his feet were about 17 feet above the ground, and his head was higher than the top of the iron pole. He testified: "I stood on my left spur, reached out, lifted this wire (an insulated one) off, and dropped it down, and came back to the pole, somewhere near, with the intention of getting in position, and I got caught. I supposed the span wire was a dead wire. I don't know how I made the connection by which the current went through me. I did not put my other hand on the wire. There was a burn across three fingers on the back of the right hand. The left arm or wrist was burned on the inner portion. I had not noticed the coil of trolley wire that lay coiled, in part upon the span wire and in part upon the trolley. I did not see it at all. I don't remember that I had ever been at this place while the defendant was operating its line." Both the plaintiff and McMillan knew that the trolley was in operation, and cars had been running to that point for eight days. The plaintiff testified that, "if I had seen this coil of trolley wire lying upon the span wire at that point, I probably would have known and understood that the current of electricity would have been conveyed to the span wire up to the circuit break; but I don't know. * * * In order to form a circuit my bare person had to come in contact both with the iron post and the span wire. Was wearing woolen clothes. Woolen clothes against the iron post would not form a circuit, if it was dry. Clothing was dry, and the iron post too." That he lifted the wire off the span wire with his left hand, having, at the time, his right arm around the wooden pole. That he did not then take hold of the span wire, or touch it with his left hand. "I got my left hand back somewhere near the pole. Can't tell you whether I was leaning against the span wire. Don't remember whether I touched the span wire or not."

Losey & Woodward, for appellant. Fruit & Brindley, for respondent.

PINNEY, J. (after stating the facts). 1. The plaintiff was engaged as a servant of the light company, and using its poles and appliances under the direction of its superintendent, performing an engagement that company had entered into with the defendant company to change the location and method of hanging the electric street lamps so that their use and management would not interfere with or embarrass the use and operation of the defendant's electric rail-

way, for a consideration to be paid by the defendant. Under the circumstances, the defendant was bound to the exercise of reasonable care and caution in the management and control of its railway, and of the electric current which was its motive power, so as not to injure the employés of the light company while engaged in such work. It was bound to avoid acts the natural and probable consequences of which might be to inflict injury on persons thus employed, and, if it omitted such precautions as were reasonably necessary, under the circumstances, it would be liable for such damages as any one thus engaged might suffer, being the proximate result of such neglect of duty. The rule was stated by Brett, M. R., in Heaven v. Pender, 11 Q. B. Div. 503, 509, that, "whenever one person is, by circumstances, placed in a position, with regard to another, that every one of ordinary sense, who did think, would at once recognize that, if he did not use ordinary care and skill, in his own conduct, with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." This principle was referred to in Zieman v. Elevator Co., 90 Wis. 503, 63 N. W. 1021, in Bright v. Barnett & Record Co., 88 Wis. 307, 60 N. W. 418, and in Thomas v. Winchester, 6 N. Y. 397. In Heaven v. Pender, supra, Cotton and Bowen, JJ., declined to approve the view expressed by the master of the rolls to its broadest extent. But, in the subsequent case of Thrussell v. Handyside, 20 Q. B. Div. 359, 363, the view of Brett, M. R., was expressly approved; Hawkins, J., saying "that, where a man is employed to do certain work, and knows that the work he is doing is dangerous to others, and that accidents are likely to happen, and knows that other persons are lawfully engaged in other work, and are under obligations to perform such work, the person engaged in the dangerous work is subject to the duty of using reasonable care, and taking precautions to prevent accidents arising from the work in which he is engaged."

2. As was said by Newman, J., in Block v. Railway Co., 89 Wis. 378, 61 N. W. 1101: "The negligence is not the proximate cause of the accident unless, under all the circumstances, the accident might have been reasonably foreseen by a man of ordinary intelligence and prudence. It is not enough to prove that the accident is the natural consequence of the negligence. It must also have been the probable consequence." Atkinson v. Transportation Co., 60 Wis. 141, 163, 18 N. W. 764; Barton v. Society, 83 Wis. 19, 52 N. W. 1129; McGowan v. Railway Co. (Wis.) 64 N. W. 891. A mere failure to ward against a result which could not have been reasonably expected, is not actionable negligence. Whether the negligence of the defendant was the proximate cause of the injury, so that it and the result stand in the relation of cause and effect, is a question for the jury, where the evidence is not clear, or the proper inference from undisputed evidence is in doubt. It is not, however, necessary that injury, in the precise form in which it in fact resulted, should have been foreseen. It is enough that it now appears to have been a natural and probable consequence. Lane v. Atlantic Works, 111 Mass. 136; Hill v. Winsor, 118 Mass. 258, 259. The evidence on this subject is not conflicting, and the real question is as to the inferences which may be fairly drawn from the evidence, and whether they are in doubt. It appears that the defendant had substantially complied with the statute (Laws of 1889, c. 375, § 1), and by bell insulators and circuit breaks had provided by suitable insulation against injury to persons or property by reason of the leakage or escape of the current of electricity from the trolley wire. The trolley wire and the span wires were sustained at an elevation of about 20 feet in the air. The bell insulators were to prevent the escape of the electric current from the trolley wire, and the circuit breaks to prevent the span wires, if they should become charged from the trolley, from charging the iron posts by the sidewalks. All reasonable and proper precautions had been taken, it must be conceded, against any probable injury to persons or property in the streets or on the sidewalks or elsewhere, except, possibly, to those whose duty it was to repair and give suitable attention to the span and trolley wires of the defendant, and the wires of the light company, so far as necessary in the operation of the respective lines. All such persons were understood to be, as the plaintiff was, familiar with the application of electricity to such uses, and with the theory of insulation, as well as the use and functions of the bell insulators and circuit breaks. The introduction and use of circuit breaks must be regarded, of itself, to the apprehension and judgment of these trained and experienced operatives, as a signal of danger,—a warning that any given span wire may be charged with a heavy current from the trolley, by leakage or otherwise. They cannot come near a span wire without being thus admonished, and of the general judgment in construction, that circuit breaks are necessary to secure immunity from electric shocks, and to prevent the iron posts from being charged with an electric current down to the streets. These are all parts of the lines with which they are familiar. It is to be considered that they understand the peril and the provided protection as well. The plaintiff was injured because the span wire became charged by coiling, over it and the trolley wire, a portion of the latter, designed to make the curve down Main street. There was no other apparent method of disposing of it for

the time being, and no reasonable grounds for supposing that any prudent and careful operative would have failed to notice it under the circumstances; and, if he did not, the circuit breaks provided protection against the charged span wire, unless he came in contact with the span wire beyond the circuit break and the iron post at the same time. This, we think, the defendant had no reasonable ground to suppose, in the present instance, that the plaintiff would do. The defendant had been operating its railway to the point in question for eight days, beyond which it had not been completed, and the plaintiff had been at work all this time and for some time previous, along the line, in changing the location of the street lamps of the light company, and knew that the trolley wire had been kept charged to operate the railway, and the defendant must have understood that he was familiar with these facts, as well as the near proximity of the iron and wooden poles, and the space between the iron poles and the outer end of the current break. These were obvious facts, and not to be mistaken or misunderstood. The injury could occur in only one way, as the plaintiff substantially tells us, namely, by his bare hand coming in contact with the span wire beyond the "circuit break," and his other hand, or part of his bare person, coming in contact, in the same instant, with the iron post, so as to pass the electric current through him. Could the defendant have reasonably anticipated, under these circumstances, the occurrence of an accident such as this? Ought the defendant to have foreseen it, in the light of attending circumstances? We think not. It clearly appears that the use of the wooden pole in climbing up or coming down was not dangerous, nor was it possible for the plaintiff, while climbing or clinging to it, to have received a shock even by touching the charged span wire, unless he completed the circuit, at the same instant, by touching the iron post with his naked hand or person. The defendant had no right to expect that an inexperienced operative would have climbed to such a point, much less that an experienced and competent one, with his knowledge of the situation, at the only possible point of danger, with the warning of the circuit break before him, would practically eliminate it as a means of safety, and, by placing his body substantially in its place, complete the electrical circuit, so that the current would necessarily pass through his body. It was not expected that he would have occasion to touch or come in contact with the span wire beyond the circuit break, or the iron post, for any purpose, and certainly not so as to complete an electrical circuit with his body.

We think the case of Illingsworth v. Light Co., 161 Mass. 583, 37 N. E. 778, where the right of use was given to the operatives of both companies in common, for that and other reasons, is distinguishable. We hold, therefore, that the evidence did not make a case to go to the jury to show that the negligence of the defendant relied on was the proximate cause of the plaintiff's injury. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

GROSS et al. v. MILWAUKEE MECHANICS INS. CO.

SAME v. WESTERN ASSUR. CO.

(Supreme Court of Wisconsin. March 27, 1896.)

INSURANCE—CONSOLIDATION OF ACTIONS—WAIVER OF PROOFS OF LOSS—BUILDING—DETACHED ROOM.

1. Under the provisions of Laws 1893, c. 235, permitting a plaintiff in an action on insurance policies to join as parties defendant all insurance companies interested in the loss, and of Rev. St. § 2792, authorizing the consolidation of actions which might have been joined, a court may properly consolidate separate actions by the same plaintiff against different insurance companies, growing out of the same loss.

2. A denial of liability by an insurer during the time for filing proofs of loss is a waiver of such proofs.

3. A shed, or lean-to, which formed part of a wooden store building at the times of the issuance of policies of insurance on goods therein, which was moved back to allow the building of an addition to the main building, and left standing three feet from such addition, to which it was connected by a wooden platform, nailed to both, and which continued to be used for the storing of goods as before, still remained a part of the building, and goods therein were covered by the insurance.

Appeal from circuit court, Wood county; Charles M. Webb, Judge.

Actions by Will Gross and others against the Milwaukee Mechanics Insurance Company and the Western Assurance Company, which were consolidated. Judgment for plaintiffs, and the several defendants appeal. Affirmed.

Action to recover on several insurance policies for loss by fire of property alleged to have been covered by such policies at the time of such fire. It was stipulated in the policies that the property was insured while contained in the one-story frame store building situated on the south side of Cranberry street in Centralia. The one-story frame store building referred to, at the time all the policies were issued, except one issued by the Western Assurance Company, June 11, 1893, consisted of a main building and a lean-to, or shed, in the rear, with a door for passage from the former into the latter, the two structures being used together as one building. Thereafter and before the fire, the shed was moved back about 20 feet, and an addition to the main building was built, extending back to within 3 feet of the shed, to which it was connected by a platform, nailed to both structures, with doors for convenient passage from such addition by way of the platform to the shed. Thereafter the shed was used substantially as before in conduct-

ing the store business, goods being kept there the same as when the policies were issued up to the time of the fire which destroyed or injured the goods therein. Liability for the loss was denied on the ground that the property when destroyed was not in the store building, hence not covered by the policies. December 11, 1893, an action was commenced against the Western Assurance Company on three of the policies, and in January, 1894, an action was commenced against the Milwaukee Mechanics Insurance Company on one policy. Thereafter both actions were consolidated by order of the court, and tried, with the result that judgment for plaintiffs was rendered, from which judgment defendants appealed separately.

Barbers & Beglinger, for appellants. George L. Williams, for respondents.

MARSHALL, J. (after stating the facts). The actions were properly consolidated. Chapter 235, Laws 1893, provides that, should the insured bring suit on any policy or policies of insurance, he may join as parties defendant any and all insurance companies interested in the loss. Section 2792, Rev. St., provides that, "when two or more actions are pending in the same court which might have been joined, the court or judge, on motion, shall, if no sufficient cause be shown to the contrary, consolidate them into one, by order." Under the law of 1893 the conclusion is easily reached that the actions might have been joined in the first instance; therefore it was the duty of the court to grant the motion to consolidate them when made, under section 2792, Rev. St., as no cause was shown to the contrary, the motion being made and heard on the pleadings, which were substantially the same in both cases. Exception was taken to the finding of the court that liability on the policies was denied during the time required for filing proofs of loss, but such finding is well supported by the evidence. Such denial of liability constituted a waiver of proofs of loss under repeated decisions of this court. McBride v. Insurance Co., 30 Wis. 503; Harriman v. Insurance Co., 49 Wis. 71, 5 N. W. 12; King v. Insurance Co., 58 Wis. 508, 17 N. W. 297; Campbell v. Insurance Co., 73 Wis. 100, 40 N. W. 661. The important question here presented is, was the structure in which the goods were located at the time of the fire a part of the one-story frame store building, within the meaning of the contract of insurance? Before the shed structure, called a "lean-to," was moved back, it obviously constituted a part of the store building. After its removal, and the construction of the addition at the back of the main building, it was connected therewith by a platform nailed to both structures, in which position it continued to be used down to the time of the fire, the same in all respects as at the time the policies were issued. Precedents involving similar questions are at hand, some of which were cited in the briefs of counsel. In Cargill v. Insurance Co., 33 Minn. 90, 22 N. W. 6, there was a warehouse located 2½ feet from the elevator building. The two buildings were fastened together by a few strips of board nailed upon each. Held that, as the warehouse was used as a part of the elevator, it must be considered as having been intended by the parties to be included in the designation "elevator building and additions." In Pettit v. Insurance Co., 41 Minn. 299, 43 N. W. 378, the words "St. Anthony Elevator and frame, iron-clad, metal-roofed building occupied for the storing and handling of grain, and known as the 'St. Anthony Elevator,' situated in Auditor's subdivision No. 1, E. D., Minneapolis, Minnesota," a building used in connection with the main elevator building, located 300 feet from the main building, and connected with it by two galleries, was held to be included within the descriptive words. The court said, in effect, that the broad description was not intended to limit the risk to the main building, because the language of the policy was not thus limited; that it was descriptive of the character, construction, purpose, and use of the building insured. To the same effect is Insurance Co. v. Roe, 71 Wis. 33, 36 N. W. 594. The descriptive words were, "frame planing mill building and addition." The engine room, consisting of an independent structure,—except so far as it was connected to the main building by a shaft for the transmission of power, and by a spout through which shavings were forced into the engine room,—was located 20 feet from such main building. It was held that the engine room was an essential part of the mill, and that the words "planing-mill building" were broad enough, under the circumstances, to include it. The reasoning of the cases cited, to which many more might be added, applies aptly to the facts of this case. The shed and main building, before the change, constituted the one-story store building. Its character in that regard, under the circumstances, was not changed by moving back the shed and constructing the addition. Such addition, former main building and shed, all connected and used together, constituted the one-story frame store building within the meaning of the policies at the time the loss accrued. Judgment affirmed on both appeals.

MIDDLESTADT v. WAUPACA STARCH & POTATO CO.

(Supreme Court of Wisconsin. March 27, 1896.)

WATER COURSE — POLLUTION BY OPERATION OF FACTORY—INJUNCTION.

The operation of a starch factory so as to pollute the waters of a natural stream and render them unfit for watering stock and ordinary domestic use will be enjoined at the instance of a riparian owner who is deprived of such use of the water.

Appeal from circuit court, Waupaca county; Charles M. Webb, Judge.

Action by William Middlestadt against the Waupaca Starch & Potato Company to enjoin the pollution of a natural stream. From a judgment for plaintiff, defendant appeals. Affirmed.

Action brought to restrain the defendant from throwing refuse matter from its starch factory into the Waupaca river, upon the theory that such refuse matter polluted the river and injured the plaintiff as a riparian owner. The court found that plaintiff was, and had been for several years, the owner of lands along the shores of the Waupaca river below defendant's starch factory, upon which lands he resided with his family; that defendant had operated the factory for several years, during which time it had been customary to throw the refuse matter therefrom into the river, which resulted in polluting the waters thereof and of Weyauwega Lake in front of plaintiff's farm so as to seriously injure the health and personal comfort of plaintiff and his family, and to prevent the use of the water of the river for domestic purposes, and that, unless restrained by the court, defendant would continue to so operate its factory and pollute the waters of the river, to plaintiff's damage; that the plaintiff had sustained damages to the amount of $100. Judgment was accordingly ordered in favor of plaintiff for $100, and costs, and perpetually restraining and enjoining the defendant from depositing refuse matter from its factory into the Waupaca river, and from polluting the water of said river by the operation of its factory.

E. L. & E. E. Browne and Barbers & Beglinger, for appellant. Felker, Goldberg & Felker, for respondent.

MARSHALL, J. (after stating the facts). It is contended that mere contamination of the water of the Waupaca river so as to injuriously affect the personal comfort of plaintiff and his family, and deprive him of the use of the water of such river for the purpose of watering his stock and for ordinary domestic uses as he could and did before defendant's wrongful acts, does not constitute a nuisance so long as the evidence does not show any loss of life or health; and plaintiff was a farmer having but a few head of stock, and owning the land for only 100 rods along the river, and there was no evidence to show that he ever used the water for household purposes. Wood, Nuis. § 1, states the rule thus: "Every lawful use by a person of his own property in such a way as to cause an injury to the property or rights of another, and producing material annoyance, inconvenience, discomfort, or hurt, and every enjoyment by one of his own property which violates the rights of another in an essential degree, constitutes an actionable nuisance, and damages are presumed." It is too well settled to need discussion at this time that a riparian owner of property is entitled to have the water of a stream flow to and through or by his land in its natural purity, and that anything done which so pollutes such water as to impair its value for the purposes for which it is ordinarily used by persons so circumstanced, causing offensive odors to arise therefrom, and injuriously affecting the beneficial enjoyment of adjoining property, may be restrained at the suit of the injured party; and neither distance from the source of pollution, nor public convenience, nor difficulty in avoiding the trouble can either justify or excuse the wrong; nor is actual pecuniary loss necessary in order that an action may be maintained to restrain it. The doctrine of equity applies that, where there is no adequate remedy at law, and there is an appreciable injury to a right, though no actual damage in the sense of ascertainable pecuniary loss can be shown, an action lies for damages against the person responsible for the wrong, and to restrain its continuance, and nominal damages will be presumed to sustain the action. Wood, Nuis. §§ 433–442. Also, in respect to the essential principles involved, see Pennoyer v. Allen, 56 Wis. 502, 14 N. W. 609; Greene v. Nunnemacher, 36 Wis. 50; Stadler v. Grieben, 61 Wis. 501, 21 N. W. 629, and cases cited therein. In the last case the present chief justice stated the rule in effect thus: It is well settled that the law gives to every person protection against every substantial injury to his rights. Let the injury be tangible, or the discomfort perceptible to the senses of ordinary people, or the uses of the property be materially affected or impaired, and an action accrues, either in law or in equity, to remedy the wrong. See, also, Robertson v. Stewart, 11 Sess. Cas. (3d Series) 189,—a Scotch case,—which was an action to restrain the operation of a starch factory in such a way as to pollute the waters of a stream bounding plaintiff's property. The court held that the putting of refuse matter from the factory into the stream so as to cause offensive odors to arise from the water constituted an actionable nuisance; though not a very great nuisance, yet actionable.

The facts found by the trial court, including the assessment of damages, are well supported by the evidence; and the injunction goes no further than to restrain defendant from operating the factory in such a manner as to seriously affect plaintiff and his family in the enjoyment of his property. It is fully warranted by the facts found. Judgment affirmed.

MAYNARD v. HALL et ux.

(Supreme Court of Wisconsin. March 10, 1896.)

USURY — FORFEITURE OF INTEREST — EQUITABLE RELIEF—TENDER OF PRINCIPAL.

1. Rev. St. Ill. 1881, c. 74, providing that, if any person shall contract to receive a greater rate of interest than 8 per cent., he shall forfeit the whole of said interest, and shall be entitled only to recover the principal, imposes the loss of all interest,—both that which accrues before and that accruing after maturity of the principal obligation.

2. The rule of equity requiring, as a condition of relief against a usurious contract, a tender of the principal sum, does not apply where a borrower, in a suit to foreclose a mortgage, sets up usury as a defense, and does not seek equitable relief.

3. Rev. St. § 1692, providing that a person, to be entitled to the benefit of a plea in usury, shall prove a tender of the principal sum, has no application to cases arising under, and governed by, the statutes of another state relating to usury.

Appeal from circuit court, La Fayette county; George Clementson, Judge.

Action by Malachi Maynard against Thomas Hall and Mary Jane Hall, his wife, to foreclose a mortgage. From a judgment for plaintiff, defendants appeal. Reversed.

This action was brought for the foreclosure of a mortgage executed by the defendants, Thomas Hall and Mary Jane Hall, his wife, to the plaintiff, a citizen of Illinois, to secure the payment of a note dated June 9, 1887, for $4,000, executed by them in Illinois, and payable to the plaintiff or order, on or before June 9, 1888, at the Bank of Apple River, at Apple River, Ill., with interest after date at the rate of 8 per cent. per annum, payable annually, until paid. The answer contests the right of the plaintiff to recover any more than the principal sum of $4,000, on the ground that the note and mortgage given to secure the debt of that amount were usurious under the law of Illinois in force at the time, which was pleaded and proved at the trial. It was found by the court that at the date of the note the defendant Thomas Hall was indebted to the plaintiff in a sum exceeding $4,000, and to secure that portion of said indebtedness the promissory note and mortgage in question were executed, and that it was agreed at the time that the defendant Hall should pay, and the plaintiff should receive, for interest on the said $4,000, 12 per cent. per annum, 8 per cent. whereof was agreed to be paid by the terms of the said note, and the additional 4 per cent., or $160, up to the maturity of the note, one year after date, was to be and was paid at the time in advance; that, soon after the maturity of the note, it was further agreed that the defendant Hall should pay, and the plaintiff should receive, 12 per cent. interest upon said note for the year next after its maturity,—that is to say, 4 per cent. per annum, or $160, in addition to the 8 per cent. secured thereby,—which the defendant Hall paid, and the plaintiff then received, in advance; both payments having been made by checks drawn on the plaintiff, who was a banker, by the defendant Hall, against his account with him, and were thereupon paid and charged accordingly. It was further found that the note and mortgage were Illinois contracts, to be governed by the interest and usury laws of that state existing at the time; and the cases of Bank v. Davis, 108 Ill. 633, and Harris v. Bressler, 119 Ill. 467, 10 N. E. 188, and other cases in the supreme and appellate courts of that state, were read in evidence. The court found the amount due on the note and mortgage was the principal sum of $4,000, with interest from June 9, 1888, the time when the note, by its terms, became due, at the rate of 6 per cent. per annum, and gave judgment of foreclosure accordingly, from which the defendants, Thomas Hall and Mary Jane Hall, his wife, appealed.

Orton & Osborn, for appellants. Wilson & Martin, for respondent.

PINNEY, J. (after stating the facts). The only question involved is whether the plaintiff was entitled to recover any money for interest on the note and mortgage. They are Illinois contracts, and governed wholly by the Illinois laws. The judgment to be given, in respect to the questions of usury and interest thereon, is to be such as the courts of that state would give, according to the laws of Illinois. By the Revised Statutes of Illinois of 1881 (chapter 74, §§ 1, 4–6), it is provided, in substance, that the lawful rate of interest shall be 6 per cent.; that it should be lawful, by written contract, for parties to agree that 8 per cent. per annum, or any less sum, should be paid; that no person should, directly or indirectly, accept or receive, in money, goods, etc., or in any other way, any greater sum or greater value for the loan, forbearance, or discount of any money, goods, or thing in action, than above specified, and that "if any person or corporation in this state shall contract to receive a greater rate of interest or discount than eight per cent. upon any contract, verbal or written, such person or corporation shall forfeit the whole of said interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation; and that all contracts executed after this act shall take effect, which shall provide for interest or compensation at a greater rate than herein specified on account of non-payment at maturity, shall be deemed usurious, and only the principal sum due thereon shall be recoverable." The above provisions are also made applicable to any written contract, wherever payable, if made in Illinois, or between citizens or corporations of that state and citizens or corporations of any other state, territory, or country, or shall be secured by mortgage or trust deed on lands in such state.

It is difficult to see how there can be any room for doubt of the legislative intent where it is enacted, as in these provisions, that, if any person or corporation shall contract to re-

ceive a greater rate of interest or discount than 8 per cent., such person or corporation "shall forfeit the whole of said interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation." The latter clause is too clear and decisive to admit of doubt or require construction. The statute is aimed at the evils supposed to grow out of usurious contracts, and it imposes the loss of all interest,—not only such as might accrue before the maturity of the obligation, but that, as well, which might accrue thereafter. The case of Bank v. Davis, 108 Ill. 633, relied on by the plaintiff, which arose under a statute the same in substance, holds that, where the contract is usurious, after the maturity of the obligation the principal sum will draw the legal rate of interest at 6 per cent., and that interest at that rate may be recovered thereon. This appears to be directly contrary to the words of the statute. The decision was by a divided court; two of its judges dissenting from this view, and two others of the seven holding that the transaction in question was not usurious. The proposition, therefore, for which the case is cited, could not have had the concurrence, it would seem, of more than three judges,—a minority of the court. In the subsequent case of Harris v. Bressler, 119 Ill. 467, 471, 10 N. E. 188, where the same question again arose, the case of Bank v. Davis, supra, was considered, and it was expressly overruled, as to this question, by the unanimous decision of the court, made before the securities in question were executed; and it was held in Harris v. Bressler, supra, that in such case no interest, but only the principal sum, could be recovered. Had the plaintiff sued the defendant Hall on the note in Illinois, it is manifest that, on the defense made that it was usurious, he could not have recovered any interest, and would have been "entitled only to recover the principal sum due." This view is decisive of the case.

As the defendants have not applied for equitable relief, the equity rule applicable to cases requiring a tender of the principal sum loaned, as a condition of relief, does not apply. The defendants stand on the defensive, and claim only what the statute secures to them. The provision of section 1692, Rev. St., that "when any person shall set up the plea of usury in any action instituted against him, such person to be entitled * * * to the benefit of such plea, shall prove a tender of the principal sum of money or thing loaned to a party entitled to recover the same," is a provision of the usury laws of this state, and relates only to actions upon contracts made usurious by the provision of the statute of this state, and has no application to a case like the present, arising under and governed by the statute against usury of another state. It follows that the judgment of the circuit court is erroneous as to the sum adjudged due, and must be reversed. The plaintiff cannot have judgment for more than the principal sum of $4,000 and costs. The judgment of the circuit court is reversed, and the cause is remanded, with directions to enter judgment in conformity to the opinion of this court.

STATE ex rel. NYE v. WEINGARTEN.

(Supreme Court of Wisconsin. March 27, 1896.)

QUO WARRANTO — TOWNS — VILLAGES — INDEPENDENT MUNICIPALITIES.

1. Laws 1889, c. 341, provided a new and uniform rule to determine whether a village should be considered an independent municipality from the town in which it is situated; and all villages incorporated after its passage are within section 2, declaring that a village not already independent "shall not become an independent municipality until so determined by a majority vote of both town and village," as therein provided.

2. Laws 1889, § 1, declaring that all villages which have elected an assessor pursuant to Laws 1887, c. 391, shall be separate from the town, and all that have not shall be deemed to be a part of the town, the same as though chapter 391 had not been enacted, fixed the status of villages at its passage, and those which thereafter elected an assessor did not thereby become independent municipalities.

Appeal from circuit court, La Crosse county; O. B. Wyman, Judge.

Proceeding in quo warranto by F. H. Nye against Charles Weingarten. From a judgment in favor of defendant, relator appeals. Affirmed.

This was a proceeding by quo warranto, in which the relator claimed the office of town clerk of the town of Hamilton, in La Crosse county, as against the defendant. Upon trial before the court, it appeared that both parties were candidates for the office at the town meeting April 3, 1894, and according to the canvass the relator received 130 votes, and the defendant 146; but whether the relator was elected depended upon whether 32 votes cast for the defendant by electors residing in the village of West Salem, situated in said town, were qualified electors of the town, and entitled to vote at said town meeting. If said 32 votes were not legal votes, then the defendant received only 114 legal votes for the office, and the relator received the highest number of votes, and was duly elected, and entitled to have and hold said office. The validity of said 32 votes depends upon the following facts, and whether the said 32 electors of said village of West Salem were, at the time of said town meeting, qualified electors of said town of Hamilton, and entitled to vote for the defendant at said election: The village of West Salem was incorporated as a village under the provisions of chapter 40, Rev. St., and acts amendatory thereof, June 8, 1893, and formed out of a part of the territory of the town of Hamilton. At the first election for village officers held in said village, in August, 1893, an assessor for said village was elected, pursuant to chapter 391, Laws 1887; and he qualified, but

did not perform any official duty. No election has ever been held, either in said village of West Salem or in the town of Hamilton, for the purpose of determining whether said village should be an independent municipality from said town, in the manner provided by law. The court held that all electors residing in the village of West Salem, April 3, 1894, were duly-qualified electors, and entitled to vote for town officers of the town of Hamilton at said town meeting, and that the 32 votes cast for the defendant by such electors were valid and legal votes; that the defendant was then duly elected to the office claimed by the relator, and entitled to hold the same; and judgment was given for the defendant and against the relator, from which the latter appealed.

Wyatt & Graves and Fruit & Brindley, for appellant. Losey & Woodward, for respondent.

PINNEY, J. (after stating the facts). In the case of Jones v. Kolb, 56 Wis. 263, 14 N. W. 177, the relations that had existed between towns and incorporated villages situated in such towns, prior to the enactment of chapter 40, Rev. St. 1878, and the policy of the state on this subject, were very fully considered, with a view to the construction and effect of said chapter; and the court arrived at the conclusion that it was "the undoubted intention of the legislature, in enacting said chapter prescribing the manner of organizing villages within this state, and defining the powers, duties, and privileges which such villages so organized should have, exercise, and enjoy, that when so organized they should be separate and independent municipal corporations"; and it was held that a resident and elector of a village so organized was not authorized to vote for town officers at the town meetings of the town within the limits of which the territory composing the village was situated, and that chapter 40, Rev. St., was a valid enactment. This accomplished a radical change in the relations which had theretofore existed between towns and villages thus circumstanced, and at the next session of the legislature after this decision, by chapter 178, § 4, Laws 1883 (section 892a, Sanb. & B. Ann. St.), it was provided that every legal voter residing within an incorporated village or city, the territory of which formed a part of any town, should be a legal voter at any town meeting in such town, unless upon a separate vote at a special town meeting and a special village or city meeting, called and held as provided by law, and provision was made for holding such meetings, to determine that the town and village or city should be and remain distinct for all purposes, in which case voters of a village or city were not to be voters at town meetings of the town in which the village or city was situated. Subsequently, by chapter 391, Laws 1887 (Sanb. & B. Ann. St. § 870a), chapter 40, Rev. St., was amended so as to confer upon incorporated villages or cities, not existing under special charter, the power to assess and collect all taxes within the same, levied and assessed for all purposes, and, to that end, provided for the election of an assessor in such cities and villages, and the making of assessments and tax rolls therein, and, by section 3, that "the electors residing within any incorporated village that assesses and collects the taxes under the provisions of this act, shall not be legal voters at any town meeting held in the town in which said village is situated"; and all acts and parts of acts in conflict with said act were repealed. This act was followed by chapter 341, Laws 1889 (section 870d, Sanb. & B. Ann. St.), relating to villages incorporated under chapter 40, Rev. St., and acts amendatory thereof, and "declaring the proper construction of chapter 391, Laws 1887," which provided that "until proceedings have been taken under this chapter for the purpose of determining whether any village organized under ch. 40, R. S., and a town within which such village may be situated, shall be separate and independent municipalities, or shall be united for town purposes, it is hereby declared that all villages which have elected an assessor pursuant to ch. 391 of the Laws of 1887, shall be separate and independent from the town; and that all villages which have not elected an assessor pursuant to said chapter, shall be deemed to be a part of the town for town purposes, the same as though said chapter 391 had not been enacted." Section 2 provides that: "Whether any village organized under chap. 40 R. S. shall be an independent municipality from the town in which it is situated shall depend upon the decision of such village and such town, separately made by special elections to be held in the village and the town; and in case the village shall be a separate and independent municipality, as provided in section one of this act, then it shall so remain separate and independent until both the town and the village shall by a majority vote, determine that they shall be united for town purposes; and in case the village shall not be an independent municipality as declared by section one of this act, then it shall not become an independent municipality until so determined by a majority vote of both town and village as so provided." The act contains special provisions for holding all elections under the act.

The question is whether the village of West Salem ever became an independent municipality from the town of Hamilton, in which it is situated. In State v. Alder, 87 Wis. 554, 58 N. W. 1045, it was held that the test of separation between a town and village situated within it is whether the village has elected an assessor pursuant to the provisions of said act of 1887; but that was a case where such determination by the election of an assessor had been made in 1888, and be-

fore the act of 1889. In the present case the village of West Salem was not incorporated until after the act of 1889,—July 8, 1893. Had this village a right, under the act of 1889, without a vote of both the city and village as therein provided, to become an independent municipality, by simply electing an assessor? We think it had no such right. When incorporated, it was united, by force of the law, with the town, for town purposes; and its case fell within the plain meaning of the last clause of section 2, c. 341, Laws 1889, and could not "become an independent municipality until so determined by a majority vote of both town and village," as above provided. The contention on the part of the relator is that the village was an independent municipality, as declared by section 1 of the act. Under that section, until a vote should be taken on the question whether the town and village should be separate and independent municipalities, or united for town purposes, "all villages which have elected an assessor pursuant to chap. 391, Laws 1887, shall remain separate," etc. The act of 1889, of necessity, had to deal with the existing status of villages situated in towns, and to make provision for cases arising in the future. To that end, section 1 deals with what had already occurred, and declares that "all villages which have not elected an assessor" pursuant to the act of 1887 "shall be deemed to be a part of the town for town purposes, the same as though said chapter" had not been enacted. The general policy indicated by the act was to make the question, in which they were both alike interested, whether such towns and villages in the future should be separate and independent municipalities, or united for town purposes,—one requiring the action of the electors of both the town and village, acting separately, for its determination; and it was intended to preserve the status where a village, by its own action, merely in electing an assessor before the act of 1889 was passed, had already settled that matter, and at the same time to provide a new and uniform rule as to all cases arising after the enactment of 1889. It was not, we think, intended that a village incorporated after this act was passed should have the power to determine in the future, as such villages had in the past, of its own motion, the question whether the town and village shall be separate and independent municipalities, requiring a division of the common property as provided in section 4, when full provisions for determining that question by the town and village by separate vote, by a fair and natural reading of the act of 1889, are contained therein, and all acts and parts of acts contrary to the provisions of such act have been repealed. In view, therefore, of the language of the act, past legislation, and the obvious scope and policy of the act of 1889, we must hold that at the time the town meeting was held in the town of Hamilton, in 1894, the village of West Salem was united with such town for town purposes. It follows that the 32 votes cast for the defendant by electors residing in such village were legal votes, and the circuit court rightly held that the defendant was legally elected town clerk. The judgment of the circuit court is affirmed.

HINZ v. CHICAGO, B. & N. R. CO.

(Supreme Court of Wisconsin. March 27, 1896.)

RAILROADS — EMPLOYES — ASSUMPTION OF RISKS.

A section hand, whose duties required him to ride over the road on a hand car, and who had been notified by the company, and of his own knowledge knew, that "wild" trains were frequently run over the road at a high rate of speed, assumed the risk of injury from being run into by one of these trains, running at a high rate of speed, on a foggy morning.

Appeal from circuit court, Buffalo county; E. B. Bundy, Judge.

Action by Augusta Hinz, administratrix, against the Chicago, Burlington & Northern Railroad Company for death of her intestate. From a judgment of nonsuit, plaintiff appeals. Affirmed.

The plaintiff's intestate was a section man on the defendant's railroad. On the morning of Sunday, September 9, 1894, the hand car upon which the crew of which he was one was going out over its section on its tour of inspection came in collision with one of defendant's locomotives hauling a fast stock train, and plaintiff's decedent was killed. The action is under the statute to recover damages for his wrongful death. Ordinarily, this crew started out to its daily work at 7 o'clock in the morning. On Sundays it made only a tour of inspection over its section, to see that the track was all right, and the roadway safe, and was permitted to choose its own time for doing it. They had agreed on the previous evening to start upon this morning at 6:25 a. m. When they started out at 6:15 it was after sunrise, but the morning was dark, by reason of a fog which prevailed, and was increasing in density. At this season of the year many stock trains passed over this road; as many as seven or eight trains a day, and sometimes more. This was additional to the ordinary business of the road. It was necessary to run them as "wild" trains; that is, each one was run under the orders of the train dispatcher, at La Crosse, and not according to any time card. This rendered it impracticable to notify the section men of the time of their expected passage at any given point. But the section men knew of the fact that such trains were to be expected, and were instructed that they must be on the lookout for them, and take care of themselves; that they would have no signals. They did not expect notification of the approach of such trains, other than the usual signals at crossings, stations, bridges, etc. This crew were

all experienced in the business, and knew the situation. Plaintiff's intestate had been at work on this section more than two years. This morning this crew had, in anticipation that they were liable to meet one of these wild trains, gone slowly, listening, and stopped twice to listen for such a train. They did not expect signals, for none were promised them, but they listened for the noise or rumble of a moving train. The noise of their own car, with the jar and rattle of their tools upon it, prevented their hearing the train. They saw it, dimly, coming through the fog, not more than 200 to 300 feet away. This was their first absolute knowledge of the approach of the train. The foreman of the crew cried, "Jump!" Two saved themselves by jumping. The third, plaintiff's intestate, was struck by the engine, thrown to one side, and killed. The engineer of the train had omitted none of the customary signals at crossings, stations, bridges, etc. The whistle had been sounded almost instantly before the collision for the bridge across the Chippewa river, and was heard by the engineer at the drawbridge, who also heard the noise of the collision. The bell had been constantly ringing through all the distance from St. Paul, moved by a steam bell ringer. No regulation or custom required the whistle to be sounded at other places than crossings, stations, and bridges; and at these places it was not for a signal to section men or other employés, but only to persons who were about to use the crossings. The engineer was at his post, and attentive to the coming track. He stopped his train without delay. The train was moving rapidly. These stock trains were fast-moving trains,—nearly as fast as the passenger trains,—to alleviate the sufferings of the animals carried, and to prevent loss to their owners. After the evidence of both sides was all in, the court granted a judgment of nonsuit. This appeal is from that judgment.

Hubbard & Taylor, for appellant. Robert Lees and Losey & Woodward, for respondent.

MARSHALL, J. No principle is more firmly established than that the servant assumes all the risks ordinarily incident to his employment, and all risks attending such employment as carried on by the master known to such servant, or which, by the exercise of ordinary intelligence and prudence, under the circumstances of the situation, he ought to know; that, when a servant of a railway company has knowledge of the manner in which its trains are run, in respect to anything that may subject persons circumstanced as such servant is liable to be in the performance of his duties, to danger of personal injury, he is presumed to assume all the risks of his employment resulting therefrom. Wright v. Railroad Co., 25 N. Y. 562; Haskins v. Railroad Co., 56 N. Y. 608; Naylor v. Railway Co., 53 Wis. 661, 11 N. W. 24; Brossman v. Railway Co., 113 Pa. St. 490, 6 Atl. 226; Larson v. Railway Co., 43 Minn. 423, 45 N. W. 722; Jolly v. Railroad Co., 93 Mich. 370, 53 N. W. 526; Olson v. Railway Co., 38 Minn. 117, 35 N. W. 866; Railroad Co. v. Wachter, 60 Md. 395; McGrath v. Railway Co. (Mass.; 1884) 18 Am. & Eng. Ry. Cas. 5. Indeed, the law pertaining to the subject is so well settled as not to be open to serious discussion. The authorities cited by the learned counsel for respondent, included above, so clearly cover the case that the conclusion here reached might well rest on them alone, or stand on a mere statement of legal principles so elementary without any reference to authorities on the subject. We do not understand that the learned counsel for appellant contended but that the law is as stated. They rely on the existence of the elements of danger of the fog, and speed of the train, as rendering the doctrine of assumed risks inapplicable to the facts of this case, at least in so far that the cause should have been submitted to the jury. A like contention was made in Railroad Co. v. Wachter, supra, where the facts were quite similar to the instant case. W. was employed as a trackman. He was proceeding on a hand car to his work of repairing the track. There was a dense fog. The noise of the hand car was such that he could not hear an approaching train. He knew that he was not on the time of any regular or scheduled train, but that extra trains were likely to be run at any time. He was struck by an extra, coming in the opposite direction, at a rapid rate of speed, without any previous warning, and was permanently injured. On these facts the court said, in effect, there ought not to be any difficulty in regard to the rules of law by which the rights or liabilities of the parties are to be determined. Plaintiff's intestate took upon himself all the risks of the service he was engaged in, growing out of the manner in which the work was carried on. He knew, or had a reasonable opportunity to know, how such service was conducted, and must abide by the consequences. Applying the law above stated and supported, plaintiff's intestate knew, or had reasonable opportunity of knowing, the risks that he subjected himself to in the service in which he was engaged, particularly in proceeding on the hand car, in a dense fog, under such circumstances that he could neither see nor hear an approaching train. He must, therefore, be considered to have assumed the risks attending such conduct, and his representatives must abide by the consequences. They cannot legally be shifted to the defendant, but must rest where they first fell. Such is the law governing this case upon the facts established by the undisputed evidence; hence the trial court properly granted defendant's motion for a nonsuit. The judgment is affirmed.

HAZER v. STREICH.

(Supreme Court of Wisconsin. March 10, 1896.)

CONTRACT—MEMORANDUM—WITNESS—REFRESHING MEMORY—COMPETENCY.

1. Evidence that a memorandum of a contract of sale was entered in the books of account of the vendee, by the vendee's bookkeeper, in the presence of the parties, is insufficient to render the memorandum admissible to prove the contract.

2. Evidence that a memorandum of a contract of sale was entered in the books of account of the vendee by his wife, acting as his bookkeeper, at his direction, in the presence of the parties, and then read over to them by her, will not render the wife competent to testify what the contract was.

3. A witness, after he has testified that he heard a contract of sale made; that the vendee's wife, acting as his bookkeeper, at his direction, wrote down a memorandum of the contract as dictated by him, in the presence of both parties, and then read it over to them; that he stood close enough to see but not to read it,—should be allowed to identify the memorandum, and, if he identified it, to use it to refresh his memory.

4. A memorandum of a contract of sale made by the vendee's bookkeeper by his direction, and as dictated by him, in the presence of the vendor, and then read over to them by the bookkeeper, becomes, on identification, competent evidence of the contract.

5. Where defendant, in an action by an administrator for the price of lumber sold by his intestate, claimed damages for the poor quality thereof, a refusal to allow defendant to answer whether he notified the deceased of the defect was proper, on the ground that it was a personal transaction, where it did not appear that the notice was written.

Appeal from Winnebago county court; C. D. Cleveland, Judge.

Action by George Hazer, administrator, against Gabriel Streich. From a judgment for plaintiff, defendant appeals. Reversed.

The plaintiff sued to recover the balance of the purchase price of a quantity of lumber sold and delivered by his intestate to the defendant. The defendant answered, claiming that he purchased the lumber at specified prices, but on the agreement to pay for the same in wagons, carts, sleighs, etc., at market prices, whenever plaintiff should order them, and that he had been at all times ready to pay for the same in that way, but that plaintiff had never requested or ordered such wagons, carts, etc., to be delivered. It was also claimed by the answer that a large quantity of the lumber was of poor quality; that a part of that ordered had not been delivered; and a counterclaim for damages on account of the poor quality of the lumber was also interposed. The plaintiff, by reply, denied the allegations of the counterclaim, and alleged that the lumber was sold after examination and inspection by the defendant. Upon the trial, the plaintiff made a prima facie case, and rested; whereupon the defendant was called, and testified that he was a manufacturer of wagons, sleighs, carts, etc., and that in 1892 and 1893 his wife, Louisa Streich, was his bookkeeper, and had entire charge of his books and accounts; and he produced a ledger which he identified as a ledger used by her in 1892, and a book of original entry. Louisa Streich was then called, and also identified the book, and opened it at page 476, whereon was account of Isaac Brown, the plaintiff's intestate. Her attention was then called to the following memorandum, at the head of the page: "Isaac Brown, Northport, Wis. 1892, Sept. 5. Agreement made with Isaac Brown, September 5, 1892: I am to take his white oak. 2¼, 2½, 3, 3½, and 4 in. first and second clear at Northport, at 22.50, delivered, in exchange for wagons, logging sleighs, dump carts, cutters, and so on. The 2 in. com. oak plank at 11.00 per M." And she stated that she was present when it was made; that it was made at the time of its date; that her husband, Isaac Brown, and one Mathwig, were also present. The memorandum was then offered in evidence, and excluded. Mrs. Streich then testified that she made the entry by direction of her husband, and that she read it over in presence of Brown, Mathwig, and her husband; and she was then asked to state what the contract was between her husband and Mr. Brown. An objection to this question was also sustained, on the ground that she was incompetent to testify, being the wife of the defendant. John Mathwig was then called, and testified that he saw Isaac Brown, Gabriel Streich, and Mrs. Streich together on the 5th of September, 1892, and heard the conversation between Brown and Streich in reference to the purchase of lumber; that there was a bargain made between Streich and Brown that Streich should get lumber from Brown; that he did not know what the language of the bargain was, but that he remembered that Streich dictated the bargain to his wife, and told her to write it down in the book, in the presence of Mr. Brown, and that she did write it down, and that she read it to all the parties after she wrote it down; that the bargain was that Brown was to furnish the lumber, and Streich was to pay him with work manufactured in his shop; that he stood where he could see Mrs. Streich write down the bargain, but that he was not close enough to read it. Thereupon witness was asked to look at the book, and see if that was the memorandum she made at the time. A general objection to this question was sustained, and the defendant excepted. At the close of the evidence, a verdict was rendered for the plaintiff for $752.55, and from judgment thereon the defendant has appealed.

Hume & Oellerich, for appellant. M. C. Phillips, for respondent.

WINSLOW, J. (after stating the facts). The important question in the case is whether the memorandum of the contract made by Mrs. Streich was admissible in evidence. It was first offered in evidence during the examination of Mrs. Streich, and we are clear-

ly of opinion that it was not then admissible. All that had then appeared in reference to it was that Mrs. Streich was her husband's bookkeeper, and that she had written it down in the ledger at his direction, in presence of the parties. It is very clear that it was not admissible as a book of account under the statute, because it is neither a charge nor a credit, nor an entry that properly belongs to an account. A memorandum otherwise incompetent cannot be made admissible by being written in a book of account.

After this offer was excluded, Mrs. Streich testified that she read it over in the presence of the parties, and then she was asked if she could tell what the contract was. An objection to this question was sustained, on the ground that she was the wife of the defendant, and incompetent to answer this question on that account. This ruling, also, we regard as correct. She was only competent to testify as to those matters in which she acted as the agent of her husband. She had heard the contract made, but she had not made it, nor taken any part in making it. Had she made no memorandum of it, but simply listened to it, we do not suppose it would be claimed that she could testify as to its terms. This, clearly, would not be testimony to any fact or transaction within the scope of her agency; and we cannot see how the fact that she made a memorandum of it makes competent that which was before incompetent.

A different question was presented, however, when the entry was offered in connection with the evidence of the witness Mathwig. This witness was entirely competent to testify as to anything that took place. He testified that he heard the contract made; that Mr. Streich dictated it to his wife; and that she wrote it down at his direction, in presence of both parties; that she read it after she wrote it down; and that he stood where he could see it, though not close enough to read it. He was then asked to look at the memorandum, and see if it was the memorandum which she made at the time; and an objection to this question was sustained, because it was not his memorandum, and he did not read it. This was error. It does not follow that, because he did not read the memorandum, he could not identify it. He could certainly use the memorandum to refresh his recollection, though not made by himself, if he could identify it upon inspection, and testify that he recollected it as the one made at the time of the transactions. Hill v. State, 17 Wis. 675. We think, also, in the present case, that, if he could so identify it, the memorandum would itself become substantive evidence. It appeared by Mathwig's testimony that it was read over by Mrs. Streich, in the presence of both parties, at the time, and without dissent, so far as appears. By this evidence, it became, if properly identified, not the mere memorandum of a witness, but an admission of the parties, and entitled to be introduced as such. It is very similar to the written memorandum introduced in evidence in the case of Eby v. Eby's Assignee, 5 Pa. St. 435. The reasoning in that case seems quite satisfactory and conclusive on the question.

Another question is raised as to a ruling on testimony, on which we think the court was certainly right. The defendant, Streich, was on the stand as a witness, and was asked if he ever notified Mr. Brown that the lumber was not in accordance with the contract. This was objected to, on the ground that Mr. Brown was deceased, and that the question called for a personal transaction with a deceased person. This objection was sustained practically on the ground, as stated by the court, that it called for a conversation with Mr. Brown. It is now said that the notification may have been by letter. If such was the method of notification, the question should have been so framed, especially after the ruling of the court, when it became apparent that the court had interpreted it as calling for a personal transaction. Judgment reversed, and action remanded for a new trial.

In re SCHMIDT'S ESTATE.

SPRIESTERBACH et al. v. SCHMIDT et al.
(Supreme Court of Minnesota. April 17, 1896.)

APPEAL—RECORD—BILL OF EXCEPTIONS.

Where, upon appeal to this court, the question to be determined depends upon an issue of fact, there must be a settled case or bill of exceptions, showing affirmatively that all the testimony pertaining to such issue is presented. (Syllabus by the Court.)

Appeal from district court, Dakota county; F. M. Crosby, Judge.

In the matter of the estate of Gottfried Schmidt. Christina Spriesterbach and others appeal from the judgment. Affirmed.

John W. Lane, for appellants. Stringer & Seymour, Hodgson & Schaller, W. W. Allen, Manahan & Howard, and Henry C. James, for respondents.

BUCK, J. This cause comes to this court on appeal from the judgment entered in the district court of Dakota county. The only testimony submitted to this court in the return is a stipulation of the respective counsel of certain facts, and a copy of the will of Gottfried Schmidt, which it is claimed were introduced in evidence on the trial in the district court. There is no settled case, no bill of exceptions, and no certificate attached to the record by the trial judge, showing that the return, or any part thereof, is true and correct, or that it contains all or any of the evidence. Under these circumstances, we cannot presume that there was error in the trial court in ordering judgment. Error must be made to appear affirmatively. The judgment is therefore affirmed.

DONOVAN v. SELL.

(Supreme Court of Minnesota. April 16, 1896.)

CHATTEL MORTGAGE—CONSTRUCTION — POSSESSION BY MORTGAGEE.

In September, 1893, the plaintiff, as security for a debt payable in September, 1894, executed to defendant a mortgage on crops of grain to be raised on the plaintiff's farm during the season of 1894. By the terms of the mortgage the mortgagor was to remain in possession as long as its covenants and conditions were fulfilled, bu it was also provided that, if the mortgagor should make any attempt to dispose of the property, thereupon the mortgagee should have the right to take possession. Shortly afterwards the plaintiff, as security for a debt payable in October, 1894, executed another chattel mortgage of like terms on the same property to another person. *Held*, that the execution of the second mortgage was not an attempt to dispose of the property within the meaning of the provisions of the first mortgage.

(Syllabus by the Court.)

Appeal from district court, Renville county; B. F. Webber, Judge.

Action by James Donovan against Emil F. Sell. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Affirmed.

Somerville & Olsen, for appellant. Thos. E. Boylan and McClelland & Tifft, for respondent.

BUCK, J. There are 13 assignments of error alleged by the appellant, but, after a careful examination of all of them, we find only one material question which we deem it necessary to consider. Several of the alleged errors are involved in this question, which relates to the giving of a second chattel mortgage by the same party covering the same property described in the first mortgage, and also including certain other personal property. On the 27th day of September, 1893, the plaintiff, Donovan, executed and delivered to the defendant, Sell, a promissory note for the sum of $117.61, payable September 15, 1894, drawing interest at the rate of 10 per cent. per annum, and to secure the payment the plaintiff at the same time executed to the defendant a chattel mortgage upon certain crops of wheat, oats, barley, corn, and flax which might thereafter be sown or planted during the year 1894 upon the land of plaintiff, situate in Renville county, Minn. This mortgage provided that, if the crops were not properly sown, cultivated, and cared for by the mortgagor, then the mortgagee might do this work, and market the crops, and deduct the expense out of the proceeds, and apply the balance thereof to the payment of the note and mortgage. This mortgage also contained this condition: "If any attempt shall be made by said mortgagor or any other person to dispose of or injure said property, or remove said property, or any part thereof, from said county of Renville, or if said mortgagor does not take proper care of said property, or if said mortgagee shall at any time deem himself insecure, then thereupon and thereafter it shall be lawful, and the said mortgagor hereby authorizes said mortgagee, his executors, administrators, or assigns, or his authorized agent, to take said property wherever the same may be found, and hold or sell and dispose of the same and all equity of redemption at public auction, with notice as provided by law, and upon such terms as said mortgagee or his agent may see fit, and said mortgagee may become the purchaser at said sale." The mortgagor was also, by the terms of the mortgage, to remain in possession of the property as long as its conditions were fulfilled. On the 28th day of September, 1893, the plaintiff, Donovan, executed a second chattel mortgage to one Stoddard upon the same property, and also upon nine hogs and one colt, to secure the payment of a note for $175, of the same date, drawing 7 per cent. interest per annum, payable October 1, 1894, which plaintiff then made to said Stoddard. No question is made as to priority of lien by reason of the filing of the second mortgage a few hours prior to that of the first mortgage, but both parties assume that plaintiff's mortgage is, and always has been, the prior mortgage. The defendant, alleging that there was a default in the conditions of said mortgage, did in the month of July, 1894, enter upon the plaintiff's premises where the crops were grown, and took possession of the wheat, a large part of which had been harvested, and the remainder was cut and harvested by the defendant, and the whole thereof, amounting to about 400 bushels, was sold by the defendant upon foreclosure sale of the mortgage for $184, and the entire proceeds applied to the payment of the note and expenses. While the defendant testified that he deemed this indebtedness insecure, not only by reason of the plaintiff giving the second mortgage, but for the reason that proper care was not taken of the crops by the plaintiff, yet it is quite evident that the principal ground for deeming the debt insecure was the fact that the plaintiff had given a second mortgage, which included the property described in the first mortgage. After the sale of the property by the defendant, the plaintiff brought this action in conversion, for the value of the wheat, and upon trial he recovered a verdict for $63.63. As we understand the record, the defendant was allowed the amount of his note and mortgage, and the verdict was rendered for the value of the wheat, less the amount of the note and mortgage. The question, then, arises whether the giving of the second mortgage upon the property included in the first was such a violation of its conditions as to justify the defendant in deeming the indebtedness insecure, and thus authorizing him to take possession of the property, and sell it under foreclosure proceedings. Gen. St. 1894, § 4145, reads as follows: "No mortgagee, nor any one claiming under him, shall have

any right, arbitrarily, or without just cause, based upon the actual existence of facts, to declare any of the conditions or stipulations of a mortgage broken prior to the time of default in the payment of such mortgage, or prior to the time when the conditions of such mortgage should be performed." This law was passed in 1879, and was intended to prevent the heartless exactions which were frequently and arbitrarily exercised by mortgagees deeming themselves insecure, without the existence of any facts or reasonable grounds for such belief. Its just and humane provisions have been of great practical benefit to the debtor class of this state. While the question under consideration is to a great extent one of law, yet the facts introduced in evidence in this case by both parties warrant us in thus briefly alluding to this statutory provision. This proceeding to foreclose the mortgage was commenced about two months prior to the maturity of the note which it secured, and the note secured by the second mortgage was not due until two weeks after the maturity of the first note. There was no attempt on the part of the mortgagor to remove the property, and it does not appear that the giving of the second mortgage was intended to injure or defraud the mortgagee or lessen his security, nor was there any attempt made by the second mortgagee to enforce any rights under his mortgage. The defendant knew of the execution of the second mortgage the very day it was made, and waited 10 months thereafter before he deemed his security in danger, and this was done without a change in the status or condition of the parties or property. We are of the opinion that he acted arbitrarily, without the existence of any facts which would constitute a reasonable ground for his deeming himself insecure, and that the provision in the mortgage, viz. if he shall atttempt to dispose of said property, was not, under the facts in this case, violated by the mortgagor giving the second mortgage. This phrase, usually found in chattel mortgages, is to be understood as the doing of an act by the mortgagor whereby he attempts to put the mortgaged property beyond the reach of the mortgagee, or embarrass him in readily securing possession thereof in case of default. It must be some act attempted by the mortgagor to prejudice or jeopardize the rights of the mortgagee. The second mortgage expressly provided that Donovan should remain in possession of the mortgaged property, and, if he was not in default in any of the provisions, Stoddard had no right to take or interfere with the property until after Sell's mortgage became due. There is no pretense that there was any such default, or that Stoddard ever attempted to exercise any dominion over the mortgaged property. To hold that a party may not in good faith give a second mortgage on the same property in the absence of any prohibitory clause in the first mortgage against so doing, would frequently be productive of great harm and injustice. The order denying the motion for a new trial is therefore affirmed.

STEENERSON v. GREAT NORTHERN RY. CO. et al.

(Supreme Court of Minnesota. April 16, 1896.)

PLEADING—DEMURRER—ALLEGATIONS OF SPECIAL DAMAGES.

1. A demurrer will only lie to a whole pleading or to the whole of a single cause of action or defense. Knoblauch v. Foglesong, 38 N. W. 360, 38 Minn. 459, followed.

2. *Held*, that allegations of special or consequential damages in the interveners' complaint, growing out of the alleged prior wrongful acts of the plaintiff, are not statements of separate causes of action, and therefore not demurrable.

(Syllabus by the Court.)

Appeal from district court, Polk county; Frank Ives, Judge.

Action by Halver Steenerson against the Great Northern Railway Company. Patrick Meehan and others intervened. A demurrer by plaintiff to the interveners' complaint was stricken out, and plaintiff appeals. Affirmed.

A. A. Miller, for appellant. Henry W. Lee, for respondents.

BUCK, J. The appellant, Steenerson, commenced an action in the district court of Polk county on the 3d day of August, 1895, against the defendant railway company to recover the possession of four car loads of lumber then in the possession of said company, the plaintiff alleging himself to be the owner of the lumber. The sheriff took possession of the property, and held it until it was rebonded by the defendant, to whom it was then returned. The defendant railroad company answered, claiming a special interest as common carriers in the lumber, alleging that it received the lumber from the interveners, P. & J. Meehan, and prayed that they be made parties to the action, which was accordingly done, with their consent, and they made and served a complaint in intervention, in which, among other things, they claim to be the owners of all the lumber described in the plaintiff's complaint, and deny plaintiff's right to the possession of any part thereof. The plaintiff interposed an answer to the interveners' complaint except to the seventh and eighth paragraphs thereof, to which he demurred, and the interveners then moved to strike out the demurrer as frivolous, which motion was granted by the trial court. From this order the plaintiff appeals to this court, and the interveners move to dismiss the appeal upon the ground that the order is not an appealable one. If the appellant's contention as to his right to demur is without merit, we need not discuss the interveners' motion to dismiss his appeal, because the result will

be the same as though we sustained the order of the trial court in striking out the demurrer. The merit of the question involved has been discussed by counsel, and it can be disposed of more satisfactorily upon this ground than upon any technicality. In the seventh paragraph of the interveners' complaint it is alleged that by reason of the wrongful conduct of the plaintiff in taking and detaining the lumber the interveners were compelled to pay the defendant railroad the sum of $48 as and for demurrage for the use of its cars while the same were wrongfully detained by the plaintiff, together with the charges for freight in transporting the lumber from and to certain points designated in the complaint. It is alleged in the eighth paragraph that the interveners were compelled to employ attorneys, and send them to St. Paul to confer with the officers of the defendant railroad company relative to the detention of said lumber, and to go to Crookston in person, and with an attorney, in order to obtain a release of said lumber; and that they were put to great trouble, annoyance, and expense by reason of the plaintiff's said wrongful conduct, and damaged thereby in the sum of $1,200. It is quite apparent that neither paragraph states a separate cause of action or defense. It is an attempt on the part of the pleader to allege special or consequential damages growing out of the alleged prior wrongful acts of the plaintiff, and not allegations of separate causes of action to which a demurrer would lie. "A demurrer will only lie to a whole pleading, or to the whole of a single cause of action or defense." Knoblauch v. Foglesong, 38 Minn. 459, 38 N. W. 366. If the plaintiff deems these allegations of damages insufficient or improper, he can, on the trial of the action, object to the admission of any evidence offered to sustain them, and thus test the question of their materiality. This would have been a commendable practice in the first instance, rather than by demurring to parts of a cause of action, and thus putting the litigants to the expense and trouble of appeal to this court when his demurrer was stricken out. The order of the trial court is affirmed.

STATE v. CLEARY.

(Supreme Court of Iowa. April 7, 1896.)

JUROR — EXAMINATION — LIQUOR NUISANCE — EVIDENCE — SUFFICIENCY.

1. On the examination of a juror to ascertain whether he was subject to a challenge for cause, it was not error to sustain an objection to the question, "Would the fact that a man had been indicted raise in your mind any presumption of guilt?"

2. As the question was not directed to the finding of the indictment against defendant, an answer thereto would have been immaterial.

3. A conviction for maintaining a liquor nuisance was sustained by evidence that defendant, before commencing business, in conversing with others, gave them cause to believe that he intended to sell liquor in a box car placed on a certain lot; that, while defendant was engaged in business in said car, men bought and drank beer there; that the odor of beer came from the car; and that empty beer kegs were piled behind the car.

4. That the car was searched at one time without finding beer would not show that it was not kept at other times.

Appeal from district court, Cherokee county; Scott M. Ladd, Judge.

The defendant was convicted of the crime of nuisance, committed by maintaining a place in which he kept for sale, and sold, intoxicating liquors in violation of law. From the judgment which required him to pay a fine and costs, he appeals. Affirmed.

Wm. Mulvaney and Claud M. Smith, for appellant. Milton Remley, Atty. Gen., and Jesse A. Miller, for the State.

ROBINSON, J. 1. While one Ames was being examined in regard to his qualification to act as a juror, he was asked this question: "Would the fact that a man had been indicted by the grand jury raise in your mind any presumption of guilt?" An objection to the question interposed by the state was sustained, and of that ruling the appellant complains. It was not erroneous. The record shows affirmatively that the juror was being examined for the purpose of ascertaining whether he was subject to a challenge for cause, and not with the view of a possible exercise of the right of peremptory challenge. But, if that had not been true, the answer sought would have been irrelevant, because it would not have shown an opinion or bias in regard to the defendant. What effect the finding of an indictment would have upon the mind of the juror in other cases was wholly immaterial. If the defendant desired to know the effect which the finding of the indictment in this case had upon the juror, a question which called for an answer in regard to that fact should have been asked.

2. While a witness named Simmons was being examined, the court said to him, "You understand that you are under oath, do you?" and of that the appellant complains. The witness was being examined for the state, and testified with evident reluctance. His answers showed clearly that he was disposed to equivocate, and even to testify falsely, for the purpose of concealing the truth and shielding the defendant. The suggestion of the court was in the nature of a caution, and was justified by the conduct of the witness.

3. Complaint is made of alleged misconduct of the attorney for the state in his argument to the jury. The only evidence of misconduct is contained in an objection made by the defendant. Whether that correctly represents the statements of the attorney is not shown. The attorney for the state, in response to the objection, claims, in effect, that he had only followed the attorney for the defendant in making the statements to which

objection was made. If that claim was well founded,—and, from the record submitted to us, we must presume that it was,—the defendant cannot complain of what was said.

4. It is insisted that the evidence was not sufficient to authorize a conviction. It appears that the defendant transacted business in a box car placed on a lot in the town of Quimby. Before he commenced business, he conversed with men of that place with regard to his plans, and gave them sufficient cause to believe that he intended to sell intoxicating liquors. While he was engaged in business, men bought and drank beer in the car; the odor of beer came from the car; and empty beer kegs, to the number of 20 or more at one time, were piled behind it. The facts established by the evidence, including the declarations of the defendant, show his guilt clearly, and his conviction and punishment were fully authorized.

Some attempt was made to show that the car was searched at one time without finding beer. Evidence to that effect was properly rejected. The fact that beer was not found in the car at the date of the search would not tend to show that it was not kept and sold therein at other times.

5. Questions to which we have not referred are suggested by counsel for the appellant. We have considered them all, but without finding any prejudicial error in the proceedings in the district court. The defendant was given a fair trial, the jury was properly instructed, and he has no just ground for complaining of the judgment. It is therefore affirmed

STATE v. HALL.

(Supreme Court of Iowa. April 7, 1896.)

CRIMINAL LAW—USE OF WITNESS NOT NAMED ON INDICTMENT—NOTICE—CORROBORATION OF ACCOMPLICE—LARCENY—INSTRUCTION—INDICTMENT—AFFIDAVIT FOR NEW TRIAL—SENTENCE.

1. A notice by a county attorney of the intention to use a witness whose name is not on the indictment is not rendered insufficient by the fact that it states, as one of the facts expected to be proved by the witness, that defendant stole the property charged in the indictment from a certain place, the connection showing that the word "stole" was used in the sense of taking and carrying away.

2. The testimony of accomplices to the stealing of property is sufficiently corroborated by other evidence that the property was stolen and secreted by some one, and that shortly afterwards the defendant and another went to the place where it was concealed in the night, with a team and wagon, with the evident purpose of removing it.

3. In a prosecution for larceny, the fact that the court does not define grand and petit larceny to the jury is not prejudicial error, where the question of the value of the property is submitted to the jury by a proper instruction, and they find its value to be greater than the limit of petit larceny.

4. Under Code, § 4302, providing that, when an offense is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the name of the person injured is not material, the fact that an indictment, in naming the receivers of a railway company, from whose custody property is charged to have been stolen, states one of the names incorrectly, is not fatal.

5. An affidavit for a new trial stated that defendant was prejudiced by the testimony of a confederate in the crime, who was brought from the penitentiary to testify for the state; that neither defendant nor his counsel was permitted to see or converse with the witness; that the witness had made certain statements which would tend to impeach his testimony, and which were unknown to defendant at the time of the trial. It further averred that defendant was prevented from having a fair trial by local prejudice, of which he was unaware. *Held*, that the showing was insufficient, there being no claim that defendant or his counsel attempted to see or talk with the witness named.

6. A sentence to imprisonment for three years and nine months, on conviction of the larceny of property of the value of $23, will not be reduced, where there is evidence in the record rendering it probable that the defendant was concerned in other thefts, and was one of an organization for such purpose.

Appeal from district court, Pottawattamie county; A. B. Thornell, Judge.

Indictment for larceny. Verdict of guilty and a judgment thereon, from which the defendant appealed. Affirmed.

Benjamin & Preston, for appellant. Milton Remley, Atty. Gen., for the State.

GRANGER, J. 1. The larceny charged in the indictment is of two kegs of brandy, and the testimony shows that it was taken from a railway car on the tracks of the Union Pacific Railway Company, at Council Bluffs. From the evidence it appears that, after the brandy was taken from the car, it was first placed under another car near by, then concealed under a culvert near Seventeenth street, and afterwards, the same night, taken some distance away to a field, and concealed, with other goods, under a hay barrack, and that defendant and one Rachwitz were arrested when they came with a team to remove the property. On the trial of the indictment the state used certain witnesses whose names were not indorsed on the indictment, and an assignment of error brings in question the sufficiency of the notices under which they were permitted to testify. It is not important to set out all the notices referred to, but we will refer to two of them. One, after stating the name, residence, occupation, etc., of the witness, recited that plaintiff expected to prove by said witness "the location of the tracks and buildings in the Union Pacific yard, in the vicinity of Seventeenth street, in the city of Council Bluffs. The plaintiff will also introduce and identify by said witness a plat of said locality which they have made." In another notice it is said that the plaintiff expects, by the witness, to "prove that the car or cars from which the two kegs of brandy described in the indictment were stolen were, with their contents, in the custody, control, and possession of the receivers of the Union Pacific Railway on the 29th day of April, 1894, at which time the brandy

was stolen." It is thought by appellant that these notices do not comply with the requirements of the statute, which are that the notices shall show the substance of what the state expects to prove by the witnesses; and a reference is made to State v. Kreder, 86 Iowa, 25, 52 N. W 658. In that case the facts expected to be proven were stated as follows: "I expect to prove by said witnesses that the nuisance has been kept and maintained as charged in the indictment." The notice was held insufficient, and it is there said, referring to the statute, "The provision refers to the matter to which the witness is expected to testify, and not to its legal effect." The notices in this case are a compliance with the rule of that case, in stating the matter of fact which it was expected to prove. Particular attention is called to another of the notices, in which it is said that the state expects to "prove that you and others stole the two kegs of brandy described in the indictment from a car in the yards of the Union Pacific Railway Company at Council Bluffs, Iowa, on the night of the 29th of April, 1894, and concealed the same near Lake Manawa, and also that the two kegs found in a hay barrack near Manawa were and are the two kegs stolen on the night of April 29, 1894, by you and others, and that both the said kegs were full at the time they were so taken." It is true that the words "stole" and "stolen" may indicate a legal conclusion, as distinguished from a fact to which a witness would be called to testify. The words are, however, often used to express the act of taking and carrying away, and the words in the notice, associated as they are with other facts, clearly indicate the facts intended to be proven by the witness. The witness referred to in this last notice was a confederate in the crime, and he stated the facts as to the taking of the goods from the car and putting them under the culvert, and then taking them from there in defendant's wagon; that witness and the defendant afterwards went into the timber, and unburied the brandy from where it had been buried, and took it to another part of the town, etc. These are but the facts in detail, the substance of which was stated in the notice. The notice clearly shows an intent to prove that the brandy was taken from a car and carried away for the purpose of stealing it. The proof of such facts involved all the details of doing the acts.

2. Limerick and Harris were witnesses for the state, and accomplices of defendant; and it is claimed that there is no evidence, other than their testimony, tending to connect defendant with the commission of the crime, but we think the corroboration is abundant. The property was taken to a field and secreted under a hay barrack by some one or more. The defendant, with Rachwitz, went there in the night, with a team, with the evident intention of removing it. It was recently stolen property, and these two men had knowledge and the practical possession of it. That the property had been stolen and secreted is clearly established. The presence of these men, in the night, to secretly take or look after it, certainly tended to show that they had secreted it, and also that they had stolen it; and, if so, it would be corroborative of the testimony of the accomplices. The fact of the presence of the defendant where the property was secreted is shown by the testimony of witnesses not accomplices, and is not to be doubted. The corroboration need only be by circumstantial evidence. State v. Miller, 65 Iowa, 60, 21 N. W. 181. It seems to be appellant's thought that the corroboration must be of the particular fact or facts testified to by the accomplice, but that is not the law. The language of the statute is, "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offence." Where the offense is shown to have been committed, and the testimony of accomplices shows the defendant the guilty party, there must be other evidence tending to show the fact that defendant did it. It is not necessary that there should be corroboration as to all material matters testified to, but evidence tending to show that any of such facts are true is corroboration, and the jury is to judge of the weight of such corroborative evidence. State v. Allen, 57 Iowa, 431, 10 N. W. 805; State v. Schlagel, 19 Iowa, 169.

3. The court did not, in its instructions, define grand and petit larceny, but submitted to the jury the inquiry as to whether the value of the property exceeded $20 or not. The court said to the jury that, if there was a reasonable doubt as to the value, it should be resolved in favor of the defendant. The jury returned the value of the property at $23.20. We think, in view of the finding, that there was no prejudice to the defendant. In this connection it may be said that we think the evidence is sufficient to support the finding of the jury as to such value.

4. The indictment charges the property as being in the possession and under the control of the receivers of the Union Pacific Railway, naming them. The real name of one is Oliver W. Ames, and in the indictment it is, by mistake, Oliver W. Mink. The mistake is not fatal to the indictment. In other respects it was abundantly certain to identify the act, and in such a case an erroneous allegation as to the name of the person injured, when the offense involves such an injury, is not material. Code, § 4302; State v. Emmons, 72 Iowa, 265, 33 N. W. 672.

5. To the motion for a new trial is an affidavit of the defendant, in which he states that he was prejudiced by the testimony of one Limerick, who was a confederate in the crime, and a witness for the state on notice served, which notice, as to its legal sufficiency, we have considered. It appears from the

affidavit that Limerick, since shortly after this indictment was returned, has been in the penitentiary at Ft. Madison, where defendant could not see him; that when brought back to be a witness he was in the jail, and neither defendant nor his counsel were permitted to see or converse with him. It recites threats made by Limerick in March, 1895, to send defendant to the penitentiary; that Limerick had said that defendant was not concerned in stealing the brandy mentioned in the indictment, but that he was going to swear that defendant was concerned in the stealing; that this was said to one Cuppy, and that defendant did not learn of it until after the trial; and that it could be proven on another trial. It further states that a strong prejudice existed against him in Council Bluffs at the time of the trial, but not then known to him. The affidavit also states that defendant did not have a fair trial, because of prejudice; that two of the jurors living away from Council Bluffs, beyond the prejudice, stood for his acquittal for 45 hours. There is no claim that there was an effort by either the defendant or his attorneys to see and talk with Limerick when brought back for the trial. In some respects this affidavit is a statement of conclusions based on information, rather than personal knowledge, and in some instances mere hearsay statements. Carefully considered, the affidavit is a feeble showing for a new trial. There is nothing in it to justify us in disturbing the holding of the district court on the question.

6. The sentence was to three years and nine months in the penitentiary, at hard labor, and there was a judgment for the costs. It is urged that the judgment is excessive. Viewed alone in the light of the particular articles taken, we might think so. But the record shows that on the night of the theft in question other articles were also stolen by the party, and there is much in the record to show that he was one of an organization for such purposes. His guilt is beyond question, and the judgment must stand affirmed.

STATE v. PATTY.

(Supreme Court of Iowa. April 7, 1896.)

FALSE PRETENSES—MEANING OF "PROPERTY."

Under Code, § 45, subds. 9, 10, making the word "property" embrace real and personal property, and including under personal property "evidences of debt," a nonnegotiable draft drawn on an insurance company by its authorized adjuster, in settlement of a claim, subject to the company's approval, is "property," within Code, § 4073, punishing any person who obtains money, goods, or property by false pretenses, though such draft be never approved or accepted.

Appeal from district court, Powshiek county; A. R. Dewey, Judge.

Defendant was indicted for the crime of cheating by false pretenses. At the close of the testimony for the state the defendant moved the court to direct a verdict of not guilty. The motion was sustained, and the state appeals. Reversed.

Milton Remley, Atty. Gen., and J. P. Lyman, for the State.

DEEMER, J. The indictment accuses the defendant of having obtained from one F. C. Overton, as agent of the State Insurance Company, a draft for the sum of $350, by falsely representing to him (Overton) that certain horses which were covered by policies of insurance issued by the State Insurance Company, and which horses had been destroyed by fire, were of a certain age, weight, and soundness, whereas, in truth and in fact, the said representations were false and untrue, and were well known by said defendant to be false and untrue at the time he made them. The evidence adduced in support of the indictment tended to show: That defendant held policies of insurance on his horses, which had been issued by the State Insurance Company. That the horses were destroyed by fire during the life of the policy covering the same. That F. C. Overton was the adjusting agent of the insurance company, and as such he called upon defendant for the purpose of ascertaining the extent of and settling the amount of the loss. That defendant then and there represented that his horses were of a certain age, were each and all without blemish, and were, with some other small items of property, worth the sum of $350. That the representations were false and untrue, in this: that the horses were not of the ages represented, but were in fact much older; that they were not sound and free from blemish, but were diseased, lame, and blind, and were not worth to exceed the sum of $90. That on the strength of defendant's representations, and believing in the truth thereof, Overton issued and delivered to defendant an instrument in writing, of which the following is a copy: "No. 1,625. Iowa State Insurance Company. The Oldest Company in State. Incorporated 1855. $350. Des Moines, Io., Apr. 5, 1894. Pay to the order of E. E. Patty three hundred fifty dollars, in full for loss and damage under policy Nos. 45,451–51,819, according to proofs this day made and sworn to, subject to the approval of the board of directors. Not negotiable. To Iowa State Insurance Co., Keokuk, Iowa. F. C. Overton, Adjr." On the face of this instrument appears the following: "Protested for nonpayment April 28th, 1894. C. C. Collier, Notary Public." On the back of said instrument appear indorsements as follows: (1) "E. E. Patty." (2) "Pay to the order of Davenport National Bank for collection for account of Citizens' Bank, Grinnell, Iowa. M. Snyder, Prest." (3) "For collection for account of Davenport National Bank, Davenport, Iowa. D. Bawden, Cash."

The defendant's motion was based upon

the following grounds: "First. The testimony is not sufficient under the law, to sustain a verdict of guilty. Second. The testimony fails to show that the defendant obtained anything of value from the insurance company, as stated in the indictment, for the reason that the undisputed testimony shows that the alleged draft alleged to have been obtained by the false pretenses is a nonnegotiable instrument. There is no proof that said draft has been approved by the board of directors of said insurance company, and said draft so states upon its face, that payment thereof is subject to the approval of the board of directors of said insurance company, and there is no proof that said board has ever approved the payment of said draft. Third. The undisputed testimony fails to show any false representations on the part of the defendant, made to the insurance company, which representations caused them to part with the alleged draft. Fourth. The undisputed testimony shows that the statements made by the defendant, E. E. Patty, to Overton, adjuster of the insurance company, were mere expressions of opinion, and not statements of existing facts."

The statute under which the indictment was found is as follows: "If any person designedly and by false pretenses or by any privy or false token, and with intent to defraud, obtain from another any money, goods or other property; or so obtain the signature of any person to any written instrument, the false making of which would be punished as forgery he shall be punished," etc. Code, § 4073. The statements regarding the value of the animals would not, as a general rule, be such as to justify a prosecution for the crime charged. But it is clear that the representations as to the age and soundness of the horses were statements of fact upon which the adjuster might rely, and, if false, were sufficient, in law, to predicate the crime charged upon them. This question remains, however, did defendant, by means of these false representations, obtain from Overton any money, goods, or other property? The indictment does not charge that he obtained Overton's signature to the written instrument. If it did, we would have no doubt of the error of the court. The question here is, is the draft, before its approval by the board of directors of the insurance company, "goods or other property," within the meaning of the statute quoted? It is well settled at common law that bonds, bills, or notes having no intrinsic value, and not imparting any property in possession, but only the evidence of property, could not be stolen or embezzled. And it is equally well settled that the acquirement of such instruments by false pretenses was not a crime; at least, not punishable until the money or property called for thereby was reduced to possession. But our Code provides that the word "property" includes personal and real property; and the words "personal property" include money, goods, chattels, evidences of debt, and things in action. Code, § 45, subd. 9, 10. Under this section, we have held that a draft against the government, upon which an action could not be brought, and which had not be indorsed by the payee, was property, under a statute which punished the embezzlement of "money or property of another." State v. Orwig, 24 Iowa, 102. There is no doubt but that the instrument in question would be the subject of larceny, under the broad terms of the statute defining such crime. The statute under consideration punishes an act which is kindred to larceny and embezzlement, and, in seeking for the meaning of the word "property" in the statute with reference to cheating by false pretenses, we may well look to the judicial interpretation of like words appearing in the statutes defining similar statutory crimes. It is said, however, that as the instrument was subject to the approval of the board of directors of the insurance company, and was never expressly approved or accepted by them, it had no value. This contention ignores the thought, however, that the instrument, as between the defendant and the insurance company, is an evidence of debt, although never accepted or approved. It was given by the duly-accredited adjuster of the company to the defendant, in a settlement between them, as evidence of the amount of his loss, and was an order on the insurance company to pay the same. True, it was nonnegotiable, and was subject to the approval of the board; but it was none the less prima facie evidence of the amount due the defendant, given after an adjustment of the loss by an agent with authority. The delivery of the paper to the defendant, and its transfer and negotiation by him, are conceded. So that none of these questions are involved. We reach the conclusion that the instrument obtained from Overton was property, and that the case should have gone to the jury. As bearing upon the question presented, see State v. House, 55 Iowa, 466, 8 N. W. 307; State v. Thatcher, 35 N. J. Law, 445; State v. Porter, 75 Mo. 171; People v. Reed, 70 Cal. 529, 11 Pac. 676; People v. Stone, 9 Wend. 182; People v. Galloway, 17 Wend. 540. As the status of the case, so far as the defendant is concerned, cannot be affected by anything we may do, we simply reverse it in order to establish a correct rule of law. Reversed.

STATE v. HARRIS.

(Supreme Court of Iowa. April 7, 1896.)

CRIMINAL LAW—EVIDENCE—REASONABLE DOUBT—CHARACTER OF WITNESS—ROBBERY—POSSESSION OF STOLEN GOODS—NEW TRIAL—APPEAL—ASSIGNMENT OF ERROR.

1. Instructions to the jury that if, after hearing all the evidence, their minds were brought to the belief in the defendant's guilt, they may be said to have no reasonable doubt,

and should convict, but if, after weighing all the evidence, their minds should be in a condition of uncertainty, they might be said to have reasonable doubt, in which case their verdict should be "Not guilty," and that a reasonable doubt is one that arises reasonably from the evidence, was not prejudicial to defendant.

2. Where defendant testified in his own behalf, and the court charged the jury that in considering what weight should be given to his testimony they might consider his interest in the case, and also consider the evidence offered of his bad moral character, such instruction, joined with the further statement that defendant should be presumed to be innocent until the evidence offered should convince them beyond a reasonable doubt that he was guilty, is proper, and in no way denies the defendant the presumption of innocence which the law creates.

3. In an indictment for robbery, where there was no direct evidence to connect defendant with the crime, but, among other circumstances, it was shown that he had the stolen property in his possession the following morning, and that his explanations of the possession were contradictory, it was not error to charge that the possession of the fruits of a crime recently after the crime is committed, if unexplained, becomes a strong circumstance of guilt.

4. Newly-discovered evidence is not sufficient to authorize a new trial in a criminal case.

5. Where it is assigned as error that the judge did not caution the jury when it was permitted to separate during the trial, as provided by Code, § 4435, such omission, being within the knowledge of the trial court, should have been set out in a bill of exceptions properly authenticated, and the assignment will not be considered when supported only by affidavits not made part of the record.

Appeal from district court, Lee county; A. J. McCary, Judge.

The defendant was convicted of the crime of robbery, and from the judgment which required him to be imprisoned in the state penitentiary at Ft. Madison at hard labor for the term of three years, and to pay the costs, he appeals. Affirmed.

Watson & Weber, for appellant. Milton Remley, Atty. Gen., for the State.

ROBINSON, J. The indictment charges that the robbery alleged was committed on the 9th day of November, 1894, by striking and putting in fear one Arnold Treuthardt, and by stealing from his person and carrying away a gold watch and chain of the value of $20. Treuthardt testified that in the evening of the day specified he was hit upon the back of his head by a person unknown to him, and that a watch and between six and eight dollars in money were taken from him. No one saw the robbery, and the evidence upon which the defendant was convicted was circumstantial. The watch was in his possession in the morning next following the robbery, and a few days later he transferred it to one Kennedy. He told different and conflicting stories in regard to the ownership of the watch and the source from which he obtained it. He claimed on the trial that he received it from Harry Marsh the morning of November 10th, and there is evidence which tends to corroborate this claim, although it was denied by Marsh.

1. The first instruction to the jury given by the court set out the offense charged by the indictment. The second instruction is as follows: "(2) To this charge the defendant pleads not guilty. This plea puts in issue every material fact involved in the crime charged, and before you can convict the defendant the state must establish beyond a reasonable doubt the guilt of the defendant. That is, if, after hearing the evidence of all the witnesses, your minds are brought to the belief in the defendant's guilt, then you may be said to have no reasonable doubt, and if you so find from the evidence you should find the defendant guilty; but if, after weighing all the evidence, your minds should be in a condition of uncertainty, then you may be said to have a reasonable doubt, and in that case your verdict should be 'Not guilty.'" The appellant complains of this instruction for various reasons, the first of which is that it uses the word "fact" as the equivalent of "allegation." The use made of the word was not accurate, but the meaning which was intended to be conveyed is reasonably certain, and prejudice could not have resulted from the error. A more serious question arises from the definition of a reasonable doubt which is contained in the instruction. That states, in effect, that if the evidence creates in the minds of the jurors a belief in the defendant's guilt, they would not have a reasonable doubt that he was guilty. That is not necessarily true. It is said that "belief admits of all degrees, from the slightest suspicion to the fullest assurance." Webst. Int. Dict. A person may entertain a belief in regard to a matter which is not sufficiently firm to exclude all reasonable doubt. But the statement to which we have referred is qualified by what follows. It is said, in substance, that if, after weighing all the evidence, the jurors are not certain that the defendant is guilty, they would have a reasonable doubt as to his guilt; and the next instruction states that "a reasonable doubt means a doubt which arises reasonably from the evidence, and is not a captious doubt, or a doubt which is raised as an excuse or opportunity to raise a discussion from unimportant and immaterial or trivial evidence." With these modifications, the error in the definition pointed out could not have been prejudicial.

2. The defendant testified as a witness for himself, and the court charged the jury as follows: "The defendant has the right to testify in his own behalf, and he has availed himself of that privilege. The character of the defendant as a witness has been attacked, and evidence offered tending to show his moral character is bad. You have a right to consider his evidence, but you have also the right, in determining what weight you give to the evidence, to consider his interest in the case, the temptation to shield himself from the consequences of crime. Also you may, in that connection, consider the evidence offered tending to show his bad moral character, and give to the evidence just such

weight as you may think the same entitled to." It is urged against this instruction that it assumes that the defendant is guilty of the crime charged, and denies him the presumption of innocence which the law creates. But the instruction must be read in connection with other portions of the charge, and when that is done it appears that the objection is not well founded. The jurors were instructed that the defendant was presumed to be innocent until the evidence submitted for the state should convince them beyond a reasonable doubt that he was guilty.

3. The seventh instruction was as follows: "The possession of the fruits of a crime recently after the crime, if unexplained to the satisfaction of the jury, becomes a very strong circumstance of guilt. In this case the witness Arnold Treuthardt was knocked down and robbed on the streets of Ft. Madison the night of November 9, 1894. The defendant is seen next day with the watch, and gives his explanation of his possession. A few days later he gives other explanations of his possession, and in his testimony here on the stand gives his explanation. The witness Marsh, from whom he claims, personally testifies, denying his having the watch; and it is for you to consider all these matters and determine whether the defendant has explained his possession of the watch in such a way as to raise a reasonable doubt in your mind as to his guilt. If he has not, then the law makes that possession a very strong presumption of guilt, and very justly so, for the reason that any one getting property honestly can usually present ample proof of it." This instruction is criticised on the ground that the presumption of guilt arising from the possession of property recently stolen applies to cases of larceny, and that it does not apply where a robbery is involved. The instruction must be construed in connection with the facts in the case. That Treuthardt was robbed as he claimed was shown without conflict in the evidence, and it is not denied that the defendant was in possession of the watch the next morning, and that he made contradictory statements in regard to it. Certainly, under these circumstances, his possession, unexplained, tended strongly to show that he was guilty of the robbery. As applied to the facts in the case, the instruction was not erroneous.

4. It is said that the verdict was contrary to the evidence. We have read the evidence with care, and conclude that it was sufficient to authorize the verdict. Certainly we should not be authorized to disturb the verdict for lack of evidence. Portions of the charge to which we have not specifically referred are criticised. It is undoubtedly true that the charge is not in all respects accurate, but, when considered as an entirety, and applied to the facts in this case, it is without error that could have been prejudicial to the defendant.

5. The defendant complains of the action of the court in overruling his motion for a new trial. The grounds of the motion insisted upon in this connection are that material evidence had been discovered after the cause was submitted to the jury, and that the court failed to caution the jury when it was permitted to separate during the trial, as required by section 4435 of the Code. It is only necessary to say in regard to the first ground that newly-discovered evidence is not sufficient to authorize a new trial in criminal cases. The evidence to sustain the second ground was in the form of affidavits only, and it is not shown that they were made a part of the record. But they are not, in any event, competent evidence of the facts to which they relate. The alleged omissions were within the knowledge of the trial court, and, if the statements in regard to them are true, they should have been set out in a bill of exceptions properly authenticated. Rayburn v. Railway Co., 74 Iowa, 641, 35 N. W. 606, and 38 N. W. 520. As that was not done, we must presume that the court discharged its duty in admonishing the jury as required by the statute. We find no sufficient ground for disturbing the judgment of the district court, and it is affirmed.

STATE v. PHILPOT.

(Supreme Court of Iowa. April 7, 1896.)

RAPE—JUROR—COMPETENCY—REMARKS OF COURT—IMPEACHING EVIDENCE—INSTRUCTIONS.

1. A juror who heard part of the evidence and of the argument on the trial of one who was jointly indicted with defendant is not disqualified to serve as juror on the trial of defendant, where he says he has no opinion as to the guilt of accused.

2. A witness who was jointly indicted with defendant for rape testified that, while he and defendant were at a certain picnic, prosecutrix, who was a stranger to them, approached and addressed them; that, shortly afterwards, witness asked her if she did not wish to take a ride, to which she assented; that he then asked her if she would submit to sexual intercourse, and she said she would; that the three drove to a certain place, where prosecutrix voluntarily alighted, and defendant and witness had intercourse with her. On cross-examination, witness was asked if, on the day of the picnic, he did not ask a certain person if he could not inform them (defendant and witness) where they could obtain sexual intercourse. The question was objected to by defendant. The court, after overruling the objection, said: "This witness has already testified that he was himself seduced, practically, according to his testimony; that this lady invited him out, or something to that effect. Now, if it can be shown on cross-examination, or by asking him impeaching questions, that this witness went there for this specific purpose, it is a contradiction of his testimony." *Held*, that the remarks of the court were prejudicial, as the effect of the testimony was solely for the jury, and that it was for the jury to say whether the evidence was susceptible only of the construction given to it by the court.

3. The question propounded to the witness was a proper one, as the answer would tend to show the purpose of the witness in going to the picnic grounds, and his object in meeting the prosecutrix.

4. Testimony of a witness, in rebuttal, that

defendant asked him if he (witness) could put them (defendant and his co-defendant) onto a girl on the grounds with whom they could have sexual intercourse, was proper for the purpose of impeaching defendant.

5. An instruction that where there is carnal knowledge, and no consent is directly or inferentially shown, there is, in the act itself, all the force necessary to constitute the crime of rape, is not approved, as its tendency was to place the burden of showing consent upon defendant.

6. On a trial for rape the jury may consider the mental capacity of prosecutrix, her age, and her demeanor, as exhibited during the trial.

Appeal from district court, Taylor county; H. M. Towner, Judge.

Defendant was jointly indicted with one Melville Philpot, his cousin, for the crime of rape. Melville was first tried, and acquitted. Defendant, upon his trial, was convicted of the crime of an assault with intent to commit rape, and was sentenced to the penitentiary for the term of five years. He appeals. Reversed.

Maxwell & Winter, for appellant. Milton Remley, Atty. Gen., W. M. Jackson, Co. Atty., and Jesse A. Miller, for the State.

DEEMER, J. Defendant and his cousin met the prosecutrix, a young woman about 19 years of age, by the name of Mary A. Winslow, at a picnic which was being held in a grove in Taylor county, Iowa, on the 30th day of August, 1894. At the request of defendant or his companion, they all entered a buggy belonging to the men, and drove south from the picnic grounds, on the highway, and from there turned into a clump of bushes or thick timber, where the men each had sexual intercourse with the prosecutrix. It is claimed by the state that the defendants, by force, pulled or dragged the woman from the buggy, and had connection with her against her will; that each of the men had intercourse with her while the other held her. On the other hand, the defendant, while admitting the intercourse, says that it was had with the consent of the prosecutrix. The jury found there was no rape, but found the defendant guilty of an assault with the intent to commit rape.

1. It is contended that the court erred in overruling a challenge interposed to one of the jurors. It appears that this juror heard a part of the evidence and part of the arguments on the trial of the case against Melville Philpot. But he said that he had neither formed nor expressed an opinion as to the merits of the case, nor had he any opinion as to the guilt or innocence of the defendant. The challenge was properly overruled.

2. Melville Philpot was a witness for the defendant, and, in his examination in chief, testified, in substance: That the prosecutrix came up to where defendant and he were standing, and, without any previous introduction, saluted them with the remark, "How do you do, boys?" That they entered into a commonplace conversation with her at first, which finally led to his asking her if she did not wish to take a buggy ride, to which she responded that she did, and that he then asked her if she would "do business" if they took a buggy ride, and she said she would. And, in response to an interrogatory as to whether both men should go or not, she said she did not care. That it was arranged that the two men should go ahead to where the buggy was standing, and that then she should follow,—this in order that they might not attract attention. That they went to where the buggy was, and that she and witness got in while defendant went down the road about 100 yards, where he stopped and waited until the buggy came up, and then got in. That they drove to where there were some scattered trees and saplings, and that after some conversation the prosecutrix voluntarily alighted from the buggy, and that all parties went to where there was some thick brush, and that defendant had intercourse with the woman while the witness kept watch, and that he (witness) afterwards had connection with the prosecutrix while defendant kept watch. On cross-examination the witness was asked what the object was in going to the picnic grounds, and he stated that they had no particular object; that they simply concluded to go; that they were acquainted with a few people there, and had frequently visited in the neighborhood. Witness was then asked if he knew A. J. Gordon, and he stated that he did. He was then asked this question: "Q. On the picnic grounds, on the day you say you were there, didn't you ask Mr. A. J. Gordon if he could not put you (meaning you and your cousin, the defendant in this case) onto some 'banging,' meaning by that to obtain information as to whether or not you could obtain sexual intercourse with some female?" To which defendant's counsel objected as immaterial, irrelevant, and not proper cross-examination, and for the further reason that the question was not proper as a foundation for impeaching purposes, because it called for a matter immaterial to the issues. Upon this objection the court made the following ruling and remarks: "The Court: The objections are overruled. This witness has already testified that he was himself seduced, practically, according to his testimony, by his statement that this lady invited him out, or something to that effect. Now, if it can be shown on cross-examination, or by asking him impeaching questions, that this witness went there for this specific purpose, it is a contradiction of his testimony." The defendant objected and excepted to the remarks made by the court, and now urges that they were erroneous, and prejudicial to the rights of the defendant. He also contends that the objection to the question should have been sustained. We think the question propound-

ed was a proper one, for the answer tended to show the purpose and intent of the witness in going to the grounds, and his object in meeting the prosecuting witness. Concede, for the purpose of argument, that it related to a collateral matter, and that the state would be bound by the witness' answer, yet it does not follow that the fact sought to be elicited was immaterial. It was legitimate cross-examination, under any theory of the case. The more serious question relates to the remarks made by the court in passing upon the objection. These remarks were made, it is true, in the heat of the trial, and were, no doubt, called out by something that was said by counsel, either in the objections interposed, or in the argument made in support thereof, and were not uttered with intent to prejudge the case, or prejudice the effect of the witness' testimony. But it is a matter of common knowledge that jurors hang tenaciously upon remarks made by the court during the progress of the trial, and if, perchance, they are enabled to discover the views of the court regarding the effect of a witness' testimony or the merits of the case, they almost invariably follow them. Turning now to these remarks, we find that the court said, in effect, that the witness had already testified that he (witness) was himself seduced, practically. While it may be true that this interpretation could well have been placed upon the witness' testimony, and while, perhaps, it may have been the more probable one, yet the effect of his testimony was solely for the jury. The court, under our system of procedure, is not allowed to express himself regarding the facts. What the testimony does or does not prove, and what deductions are to be made from it, are questions solely for the jury. But the court also said, "According to his testimony, by the statement that this lady invited him out, or something to that effect." We have carefully examined all the evidence to see if there was any testimony showing or tending to show that "the lady invited him either to go out buggy riding, or to get out of the buggy, or to go into the brush," and we do not find any. So that the court not only gave to the jury a statement as to the effect of the testimony, but it also appears that he was in some manner misled regarding what had preceded, and stated that the witness had said something which the record, as we have it, does not show that he did say. But the court further said that, if it could be shown that the witness went there for the specific purpose which an answer to the question might indicate that he did go, that this would be a contradiction to his testimony. Here, again, we think the court invaded the province of the jury. Doubtful it is to say the least, whether an answer to this question would be a contradiction of the witness' testimony. But concede that, to the mind of the court, such might or would be its effect, and that for this reason the objection was properly overruled; yet it does not follow that the court's conclusion respecting it was conclusive. It was for the jury ultimately to say whether such a statement would be a contradiction of what had theretofore been stated by the witness. The rule seems to be well settled that if the judge, during the progress of the trial, makes remarks in the presence of the jury which would be erroneous and prejudicial had they been embodied in the formal charge given by him to the jury, it will entitle the losing party to have a verdict to which they might have contributed set aside. It is perfectly manifest that the remarks of the court, had they been formulated into a paragraph of the instructions, would have been erroneous. We are constrained to hold that the remarks of the court were erroneous, and prejudicial to the defendant; and, although we are abundantly satisfied that they were unintentionally made, yet the rights of the defendant must be preserved and protected. Our conclusions are supported by the following, among other, authorities: Sharp v. State, 51 Ark. 147, 10 S. W. 228, and 14 Am. St. Rep. 27, cases cited in note; State v. Jacob (S. C.) 8 S. E. 698; Lumber Co. v. Smith, 71 Wis. 304, 37 N. W. 412, State v. Harkin, 7 Nev. 377; State v. Stowell, 60 Iowa, 535, 15 N. W. 417; Russ v. Steamboat, 9 Iowa, 374. The cases of Hall v. Carter, 74 Iowa, 368, 37 N. W. 956; Railway Co. v. Cowan, 77 Iowa, 535, 42 N. W. 436; Elwell v. Sullivan (Me.) 13 Atl. 901,—relied upon by the state, are not in point.

3. It is argued that the court erred in allowing the witness Gordon to testify in rebuttal that defendant asked him if he (witness) could put them onto a girl on the grounds with whom they (meaning defendant and his cousin) could have sexual intercourse. We think the testimony was proper for the purpose of impeaching the defendant. The matter was not collateral, but was material to the issues.

4. The seventh instruction is complained of. It, in effect, says that when there is carnal knowledge, and no consent is directly or inferentially shown, there is, in the act itself, all the force which the law demands as a necessary element in the crime of rape. This instruction was given with reference to the question as to whether the defendant had sexual intercourse with the prosecutrix by force, and against the will of the prosecuting witness. Taken in connection with the other instructions, it may not have been prejudicial, but it was liable to confuse the jury, and its tendency was to place the burden of showing consent upon the defendant. This is not the rule, as we understand it. Pollard v. State, 2 Iowa, 567. But, in view of the verdict returned, the instruction was clearly without prejudice; and we refer to it in order that we

may not, by silence, seemingly approve of the charge as being a correct abstract statement of the law.

5. In the fourteenth instruction the court submitted the question of the mental capacity of the prosecuting witness to the jury, and directed them to consider her age, appearance, and demeanor, as exhibited during the trial, in determining the question. It is insisted that this was error. We do not think so. The jury had the perfect right to consider these matters, although there may have been no other evidence on the subject. The appearance and demeanor of a witness are always proper matters for the consideration of the jury with reference to any question material to the issues. It was legitimate for the jury to consider the age and strength of mind of the prosecutrix, as exhibited at the trial, as bearing upon the question of consent.

6. Other instructions are complained of. We have examined each and every of them, and find no error.

7. Counsel strenuously and learnedly argue that the verdict is against the great weight of the evidence. In view of a retrial, we will not consider this question, for we do not know what evidence may be produced upon a future hearing. For the error pointed out in the second division of this opinion the judgment is reversed.

STATE v. DEYOE.

(Supreme Court of Iowa. April 7, 1896.)

LARCENY—EVIDENCE—SUFFICIENCY.

In a prosecution for cattle stealing, it appeared that defendant and prosecutor herded their cattle some 15 miles from each other; defendant, whose herd numbered some 2,700 head, having followed plaintiff to the herding ground. In driving to the grounds, a considerable number of defendant's cattle escaped from his herd, and about 80 were brought back by the herders. Defendant drove his cattle from the grounds first, and, while he was passing prosecutor's herd, prosecutor's cattle were placed in an inclosure. There was evidence that during that night a commotion was heard among prosecutor's cattle, and in the morning some cattle were missing, and the fastenings of the gate to the inclosure appeared to have been tampered with. The number missing was not so great as to induce prosecutor's herders to search for them for several days. Prosecutor testified that, a short while before defendant passed his herd, he had counted his cattle, which numbered 1,800, while scattered in an 80-acre lot, and found all present. Some 20 of prosecutor's cattle were found in defendant's herd, or with persons to whom he had delivered them. Defendant's explanation of his possession was that the cattle must have escaped from prosecutor's herd on the way to the herding grounds, and been unwittingly taken up by his herders while searching for his cattle which had escaped. *Held*, that the evidence was insufficient to sustain a conviction.

Appeal from district court, Osceola county; George W. Wakefield, Judge.

The defendant, with two others, was indicted for larceny. Defendant was tried, convicted, sentenced, and appeals. Reversed.

Carr & Parker, for appellant. Milton Remley, Atty. Gen., and Jesse A. Miller, for the State.

KINNE, J. The indictment charges that the defendant and two others did on or about the 20th of September, 1891, steal 102 head of cattle, the property of one Mathew McCabe, who owned and possessed them as a bailee for hire. It is earnestly contended that the evidence did not justify the conviction of the defendant, and we think this claim is well founded. We cannot go into a detailed discussion of all the evidence, but will state the substance of it and the facts which appear to be established by it. The following facts are not seriously controverted: McCabe, in the spring of 1891, gathered a herd of some 1,700 head of cattle in northwestern Iowa, and drove them to his herding ground, in southern Minnesota. In the herd he had some cattle of his own. On the way up he took in many head of cattle in Minnesota. He kept his herd in Minnesota until the fall of the year. The cattle were herded in the daytime, and kept in a yard at night. This yard contained from two to four acres of ground, and was inclosed with a barb-wire fence and a gate made of four boards and wire between the boards. It was a half mile from this yard to the nearest house. The gate was closed nights, and tied with a rope. McCabe was at the herding ground at various times during the summer, and was there about the 10th or 12th of September, 1891, at which time he claims to have counted the cattle, and to have ascertained that they were all there except some 20 head that had died. He swears that he counted the cattle himself while they were scattered over 80 acres of ground. He was riding a pony. He admits that he could not identify all of these cattle, but could a good many of them. On the 20th of September, 1891, the cattle were placed in the yard in the afternoon earlier than usual, as another herd belonging to one Fisher was being driven down past the McCabe herd, and the gate was fastened as usual. That night the cattle in McCabe's herd were noisy, and cattle were heard bellowing and going south. The next morning the fastening of the gate showed that it had been tampered with, and, when the cattle were turned out, some were missing, though it appears that at that time McCabe's men in charge of the herd only discovered that a few head were gone. It appears, also, that the number of cattle missed did not excite interest enough to induce the men in charge of the herd to make any effort to find them for two days after it was discovered that some were missing. Shortly after the 21st of September, 1891, McCabe's herd was driven back to Iowa; and, when he delivered them to the owners, he was short many head of cattle, and some 20 odd head were found in the possession of

parties to whom they had been delivered by the defendant. Defendant, in the spring of 1891, gathered a herd of cattle in Sioux and Lyon counties, in Iowa, numbering about 2,400. He drove them to his herding grounds, in southern Minnesota, about 15 miles distant from McCabe's grounds. On the way up, enough more cattle were taken into the herd to swell the number to 2,700 head. Defendant had cattle of his own in his herd. The balance of his cattle belonged to about 150 different persons. When defendant drove his herd up, he lost many cattle, and his herders went back and gathered up something over 80 head, and returned them to the herd. When defendant delivered his cattle to the several owners in the fall, a few head which belonged to McCabe's herd were delivered by defendant to his customers, to make up the number belonging to them. The defendant sold some cattle to different parties, and one sale which he made shortly after September 20, 1891, embraced some cattle which had belonged to McCabe's herd. The claim of the state is that the cattle lost by McCabe were taken by the defendant or his men from McCabe's yard on the night of September 20, 1891.

It must, we think, be conceded, that cattle were taken from or got out of McCabe's yard the night of September 20, 1891; but we fail to discover any evidence which shows that they were taken by defendant or his men. In fact, we think there is no evidence showing, or tending to show, the taking of McCabe's cattle by defendant or his men, save the fact that, shortly after, some of these McCabe cattle were in the herd of the defendant. We think, however, his possession of them can be very satisfactorily explained. It is claimed, and there is evidence from which the fact might well be found, that, when McCabe drove his cattle up in the spring, a number of his cattle were lost. It is undisputed that defendant drove his herd up very soon after McCabe's, and that he lost cattle, and sent his men back, and gathered up over 80 head. It is not improbable that these may have included some that McCabe lost. There is no evidence that the defendant had knowledge that he had in his possession at any time any of McCabe's herd, nor does it appear that he, at the time he delivered his cattle, knew that he had any that had belonged to McCabe's herd. We place but little reliance upon the count of the cattle which McCabe says he made when there were 1,700 of them spread over an 80-acre field. No one else pretends to have counted them, and it is clear from the evidence that neither McCabe nor the defendant, in view of the marks and brands on the cattle, and the fact that many of them were not branded at all, could identify any considerable number of them. The guilt of the defendant seems to be based largely on the fact of his having been found in possession of some of McCabe's cattle. While such possession, if recent and unaccounted for, furnishes a strong presumption of guilt, it can readily be understood that a man in possession of 2,700 cattle might have in his herd cattle not belonging there without having stolen them, and might be without any knowledge as to who was the owner of them. We do not think such a case was made as justified the conviction of this defendant. His possession of these McCabe cattle, so far as appears, was innocent and without any knowledge that they belonged to McCabe's herd. The identity of cattle is often a matter of much doubt, and, though it be conceded that some of McCabe's cattle were in defendant's possession, still, as we have said, there is no evidence showing that he or his men stole them, or that he knew they were McCabe's. Defendant ought not to be convicted and sent to prison for stealing these cattle when he has shown such facts as should be held, under all of the circumstances of the case, to rebut the presumption of guilt arising from the possession of the cattle.

After a careful consideration of this entire record, we are convinced that the defendant has not been proven guilty. So believing, we deem it unnecessary to pass upon other questions raised. The court should have granted a new trial. Reversed.

PALMER v. PALMER.

(Supreme Court of Iowa. April 8, 1896.)

COSTS ON APPEAL — BRINGING UP TRANSCRIPT — SECOND TRIAL—COSTS OF FIRST TRIAL—TAXATION.

1. Fees for the reporter's transcript, paid by plaintiff, appealing from a judgment for defendant which was reversed, may, after a judgment for defendant on second trial, be properly taxed against defendant, under McClain's Code, § 4152, providing that the clerk may tax as costs any sum for any matter which "the court may have awarded as costs in the progress of the case, or may deem just to be taxed," and are not governed by section 5029, providing that, when a transcript is desired in a civil case, "the fees therefor shall be paid by the party desiring the same."

2. Where a judgment for defendant is reversed on appeal, and on second trial judgment is again rendered for defendant, the trial court may properly tax the costs of the first trial against plaintiff.

Appeal from district court, Lucas county; T. M. Fee, Judge.

This is an appeal from an order taxing costs which accrued in an action between the parties. The defendant appeals because the sum of $145, the cost of the shorthand reporter's transcript of the evidence, was taxed to her. The transcript was ordered and paid for by the plaintiff, the same being used in presenting an appeal to this court from a former trial in the district court. Affirmed.

Stuart & Bartholomew, for appellant. J. C. Mitchell, for appellee.

ROTHROCK, C. J. 1. The case has once before been in this court upon an appeal by the

plaintiff. See 90 Iowa, 17, 57 N. W. 645. The action was originally brought at law to recover specific personal property. An answer and cross petition were filed, which set up alleged equitable claims on defenses. On the motion of the defendant, and against the objection of the plaintiff, the district court transferred the cause to the equity docket. A hearing was had on the merits, and a decree was entered against the plaintiff. It was determined by this court, on that appeal, that the motion to transfer the cause to the equity side of the court should have been overruled, and the decree was reversed. The cause was again tried in the district court, as an action at law, and by a jury, and there was a verdict and final judgment for the defendant. This motion was made to tax costs after the last trial was had in the district court. The decision of the court upon the motion was in these words: "The court holds, as a matter of law, that all costs of the first trial of this cause, as well as all the costs of this term, shall be taxed to plaintiff as the losing party, and judgment be entered against him therefor. To all of which plaintiff duly excepts. And the court further finds, as facts, that, to perfect his record in this court, so as to take an appeal to the supreme court from the first judgment and decree rendered in this court in this cause, the same being the judgment and decree that were reversed by the said supreme court January 27, 1894, it was necessary that plaintiff should procure a transcript of the shorthand reporter's notes of the evidence taken on said trial, and that said transcript should be filed in this court; that plaintiff did procure such transcript, and did file the same in this court as a part of the permanent records of this cause, prior to the taking of said appeal to the supreme court. And the court finds that for said transcript the plaintiff, C. H. Palmer, was compelled to pay, and did pay, the official shorthand reporter the sum of $145, which said sum was at the statutory rate of six cents per one hundred words in said transcripts. The court holds, as a matter of law, in view of the aforesaid reversal by the supreme court, the aforesaid $145 should be taxed as costs in this court to the defendant, V. M. Palmer. To which holding the said V. M. Palmer excepts."

The contention of appellant is that the fees paid for the reporter's transcript are not taxable costs, because there is no statutory authority for such taxation. Reliance is had upon section 5029 of McClain's Code, which provides that, "when such transcripts are desired in any civil case the fees therefor shall be paid by the party desiring the same." We do not think the question is to be determined by that part of the statute above quoted. It is quite plain that the language there employed is used in connection with the pay and per diem of the reporter, and his fees for transcripts, and what part of his compensation shall be paid by the county, and what part by parties to civil cases. No reference is made in that section to the question whether the fees for a transcript may be taxed as costs. The cost of the transcript was necessary to prosecute the appeal, and, although there is no section of the statute expressly providing that the cost thereof shall be taxed, yet it is within the general provision of the Code on the subject of costs, one section of which is as follows: "The clerk shall tax in favor of the party recovering costs the allowance of his witnesses, the fees of officers, the compensation of referees, the necessary expenses of taxing depositions by commission or otherwise, and any further sum for any other matter which the court may have awarded as costs in the progress of the case, or may deem just to be taxed." McClain's Code, § 4152. It surely was not unjust to tax the costs of the appeal to the defendant. She was the unsuccessful party in this court, and the amount paid for the transcript was as legitimate and proper an item of costs as the costs of the printed abstracts and arguments.

2. The plaintiff appealed from that part of the order of the court which taxed the costs of the first trial to him. The objection urged to the order is that the costs were unavailing, because the decree for the defendant was reversed by this court. We think it has always been the practice that, when one trial has been had, and the verdict is set aside by the district court, or the cause reversed in this court, and another trial is had in the district court, the costs of the first trial follow those of the last. In the case at bar, the final result showed that the plaintiff instituted and prosecuted an unfounded claim, and in the first trial, as well as the last, he was the defeated party, and the order requiring him to pay the costs which accrued in the district court is right. It is to be remembered that the costs of the transcript follow the costs in this court, because made upon appeal. The order as to both appeals is affirmed.

STATE v. KING.

(Supreme Court of Iowa. April 8, 1896.)

CRIMINAL LAW—FORCING DEFENDANT TO TRIAL—WAIVER OF RIGHTS—CONTINUANCE—ASSIGNMENT OF CASES—DISCRETION OF TRIAL COURT—NEWLY-DISCOVERED EVIDENCE.

1. Defendant's statutory right to three days after entering his plea to the indictment in which to prepare for trial is waived by requesting that the case be assigned for a particular time, and by insisting on a trial at a much earlier date than that at which the case was called.

2. Where notice of the introduction of additional testimony was served on defendant more than four days before the trial, a continuance on the ground that he had not time to investigate such testimony was properly denied.

3. The discretion of the court in assigning cases with a view to an orderly and timely disposition of the term business will not be controlled.

4. Newly-discovered evidence is not ground for a new trial in a criminal case.

Appeal from district court, Warren county; J. H. Appelgate, Judge.

Defendant was indicted, tried, and convicted of the crime of seduction, and he appeals. Affirmed.

Brown & Lacy, and H. McNeil, for appellant. Milton Remley, Atty. Gen., and Jesse A. Miller, for the State.

DEEMER, J. The defendant was arraigned on the 28th day of March, 1895, and he took the statutory time to plead. On the 5th day of April, 1895, he filed a motion for continuance, based upon the absence of a witness. The state was given until the 9th of April to make resistance to the motion. Upon the filing of the resistance, the case, at defendant's request, was assigned for trial on the 11th day of April, subject to the motion for continuance. On the 12th of April the defendant entered his plea of not guilty, and asked for three days' time in which to prepare for the trial. The case was called for trial when reached in its regular order on the assignment, to wit, on the 13th day of April, and defendant then objected to being put upon trial. Thereupon the court upon its own motion continued the case until Monday, the 15th, at which time the trial was entered upon. Before proceeding with the trial, the defendant's counsel filed a motion for continuance, based upon the grounds: (1) That they had not had time to investigate the testimony of certain witnesses which the state proposed to offer by virtue of a notice served upon the defendant on the 8th day of April; (2) that the court so controlled its assignment of cases as to allow the statutory time for the giving of notice to defendant of additional testimony to run. It is contended that the court erred in forcing the defendant to trial at the time he did, and in overruling his motion for a continuance. It will be noticed that the assignment of the case for the 11th was made at the request of defendant's counsel. The record also shows that defendant was insisting, up to the day of trial, upon a hearing at an earlier date,—manifestly to take advantage of the statutory requirement that four days' notice be given the defendant of the production of witnesses whose names were not indorsed on the back of the indictment. It also appears that defendant, in his motion for continuance, was complaining of the action of the trial court in so arranging his assignment as to postpone his case. We have repeatedly held that the statute giving the defendant a right to three days after entering his plea in which to prepare for trial may be waived. Conceding, then, for the purposes of the case, that defendant did not have his statutory time in which to prepare for trial, we think he waived it by requesting that the case be assigned for a particular time, and by insisting upon a trial at a much earlier date than that at which the case was called. State v. Jordan, 87 Iowa, 86, 54 N. W. 63; State v. Thompson (Iowa) 64 N. W. 419.

2. The motion for continuance was properly overruled. The notice of the introduction of additional testimony was served on defendant on the 8th day of April, 1895, and the defendant was not put upon his trial until the 15th. More than four days had elapsed after the giving of the notice before the trial was commenced. Moreover, the two witnesses referred to in the notice were not used by the state. The conduct of the court with reference to its assignment of cases was not erroneous. It appears that it assigned the cases with an eye to an orderly and timely disposition of the business of the term, and its discretion in this regard cannot be interfered with.

3. It is argued that the prosecuting witness was not of previously chaste character at the time the seduction is said to have taken place. There is a conflict in the evidence on this proposition, and the case is such that we cannot interfere with the finding of the jury.

4. Complaint is made of the conduct of counsel for the state in his argument to the jury. It is said that he commented upon testimony which had been withdrawn from the consideration of the jury. This is a mistake. The testimony referred to by counsel was yet in the record, and was a proper subject of comment.

5. Certain of the instructions are complained of because it is said that under them the jury might have found the defendant guilty even though the prosecutrix was of unchaste character. We do not so understand them. One of the instructions complained of (the sixth) expressly says that they, upon proof of certain essential facts, should find the defendant guilty, "unless you [the jury] find the prosecutrix was not of previous chaste character." Another (the fifth), in defining the crime, says that the woman must be of previous chaste character. We see no error in the instructions given.

6. The defendant asked two instructions, each of which was refused, and of this he complains. The second one asked does not state a correct rule of law, and was properly refused. The first, in so far as it announced the law, was given by the court in its charge. The instruction is quite similar to the one refused by the trial court in the case of State v. Hemm, which came to this court on appeal, and is reported in 82 Iowa, 609, 48 N. W. 971. We held in that case that the action of the trial court was correct.

7. Defendant filed a motion for a new trial, based, among other things, upon newly-discovered evidence. The motion was overruled, and in this there was no error. The witness whose testimony it is claimed was newly discovered was, at the request of defendant, ordered subpœnaed at the expense of the state. In addition to this, it affirmatively appears that defendant knew that the witness

whose testimony he claims is newly discovered was with the prosecutrix at the time the witness claims there was indecent conduct on her part. But, aside from all this, we have frequently held that newly-discovered evidence is not a ground for new trial in a criminal case. State v. Watson, 81 Iowa, 380, 46 N. W. 868; State v. Whitmer, 77 Iowa, 557, 42 N. W. 442; State v. Bowman, 45 Iowa, 418. We have examined the whole record, and discover no prejudicial error. The judgment is therefore affirmed.

STATE v. YETZER.

(Supreme Court of Iowa. April 8, 1896.)

COMPETENCY OF JUROR — OBJECTIONS WAIVED — CRIMINAL LAW — NOTICE OF WITNESSES FOR STATE — SUFFICIENCY — FRAUDULENT BANKING — RECEIVING DEPOSITS AFTER KNOWLEDGE OF INSOLVENCY — EVIDENCE.

1. A juror who has formed an opinion from reading newspaper accounts of the offense charged is not disqualified where he states that such opinion will not prevent his returning a fair and impartial verdict on hearing the evidence.

2. Defendant cannot complain that a challenge for cause was improperly refused, where he afterwards waives a peremptory challenge by which the objectionable juror might have been excused.

3. In a prosecution for fraudulent banking, a notice by the state that it would on the trial introduce certain witnesses whose names were not on the indictment stated that it expected to prove by such witnesses that a certain bank was on a certain day a bank of deposit, and defendant was a stockholder and director and managing party thereof, that it was insolvent; and that defendant permitted and connived at the receiving of deposits, etc. *Held*, that such notice complied with Code, § 4421, providing that the state shall not use a witness whose name is not indorsed on the indictment unless defendant is given notice in writing, stating the name, etc., of the witness, and the substance of what it expects to prove by him on the trial.

4. Code, § 4421, provides that the county attorney shall not use a witness whose name is not indorsed on the indictment, unless he shall have given defendant a notice in writing, stating the name, etc., of the witness, "and the substance of what he expects to prove by him on the trial," etc. *Held*, that the evidence of such witness need not be limited strictly to the matters stated in such notice, where the departure is not such as to be evasive of the law.

5. Const. art. 1, § 10, providing that in all criminal trials the accused shall have the right to have compulsory process for his witnesses, does not apply to witnesses beyond the reach of compulsory process of the court.

6. In a prosecution of a bank officer for receiving deposits after knowledge of the bank's insolvency, a witness testified that on a certain day he and defendant were together in the bank, examining bills receivable. Defendant, in his own behalf, as a witness, denied the facts testified to by such witness. *Held*, that it was not error to permit other witnesses to testify in rebuttal to having seen defendant and the former witness in the bank on the day stated.

7. It was within the discretion of the court to admit evidence not strictly in rebuttal, under Code Civ. Prac. § 2779, which is applicable to criminal cases (Code, § 4556), providing that the party having the burden must first produce his evidence, then the other party must produce his, and then the parties will be confined to rebutting evidence, unless the court, for good reasons, in furtherance of justice, permits them to offer original evidence.

8. In a prosecution for fraudulent banking, defendant, on cross-examination, was asked, as touching his expenditures, if there had not been a bastardy proceeding against him a few years before that cost him a great deal of money to settle. After the examination proceeded for some time, the court struck out the testimony as too remote. *Held* that, though the evidence should not have been offered, defendant was not prejudiced.

9. McClain's Code, §§ 1824, 1825, provide that if any bank shall receive or accept any deposit when insolvent, any officer or managing party thereof, knowing of such insolvency, who shall knowingly permit the receiving of any such deposit as aforesaid, shall be guilty, etc. *Held*, that an officer of an insolvent bank, who, knowing of its insolvency, permits or connives at the receiving of deposits, is guilty of the offense described, whether he is a managing party or not.

10. It is not necessary, to constitute a violation of such statute, that the deposit must be received in the bank building or rooms, but the receipt of money on deposit for the bank outside of its rooms is sufficient.

11. Nor is it necessary, to constitute a violation of such statute by an officer of the bank, who does not personally receive the deposit, that the person actually receiving it knows that the bank is insolvent, where such officer knows it, and allows such person to receive it for the bank.

12. Where an officer of a bank, knowing the bank to be insolvent, assists, advises, etc., the keeping of the bank open for the receipt of deposits, and while it is so kept open a particular deposit is received, such officer is guilty of a violation of such statute, though the money is actually received by another.

Appeal from district court, Cass county; Walter I. Smith, Judge.

Indictment for fraudulent banking. Verdict of guilty, and judgment, from which the defendant appealed. Affirmed.

Jacob Sims and John Hudspeth, for appellant. Milton Remley, Atty. Gen., H. M. Boorman, Co. Atty., and Swan & Bruce, for the State.

GRANGER, J. Haywood and Albert were jurors on the trial of the indictment. Mr. Albert, in answer to questions as to his qualifications to sit, said, "Have seen Mr. Yetzer; know him; but have formed no opinion about case. Could try it impartially without reference to anything I have heard about it." On cross-examination he said: "I take the Atlantic Telegraph. Read it." At this point counsel read to the jurors several articles published at Atlantic, where the Cass County Bank was located, with regard to which the fraudulent banking is charged. We copy two of the articles as fairly indicating the tenor of all. They are as extreme as any in their statements, and if we treat them as indicating the general tenor of the articles it is certainly fair to the appellant. They are as follows:

"Hold Fast to the Right. The Telegraph wants to add a word to what it has repeatedly said about the creditors of the Cass County Bank keeping right on their side, not violence. The dispatches which have recently gone forth from Atlantic to the metropolitan

dailies do injustice in presuming a strong desire to violence. They want their money or justice. Think of it! Hundreds of thousands of dollars belonging to an honest, hard-working people swept away,—worse than swept away. It has been squandered and sequestered by men in whom they placed a superb confidence. This crime has phases worse than robbery, worse than burglary, worse than the operations of the bunco bandit or faro dealer. These men feel that their money has been wrung away from them by the arts of thievery in the guise of friendship. The amount of these losses is startling, and the creditors feel that the money has been used in private schemes and extravagancies. This is exasperating. The amount of the loss is exasperating, the character of the loss is exasperating. But, still, these creditors, smarting under the method and extent of their robbery, want no violence. They want every cent available. They want justice. They'll have justice. One other thing: It has been said that this failure would hurt Atlantic and community for a long time. That is not so."—Atlantic Telegraph.

"Great excitement was created Saturday morning by the currency of the rumor that the president of the defunct bank, J. C. Yetzer, was preparing to leave the city. A mob of two hundred persons quickly gathered at the depot to intercept his escape. As the train was pulling out, the cry was raised that Yetzer had been smuggled on board. The train was stopped after it got out of the yards, and detained for ten minutes, while a search was made. It was the limited, and a great protest was made by the trainmen. Their search was fruitless, and Yetzer was shortly afterward found in a box car where he had concealed himself, and the crowd yelled to hang him."—Press Dispatch.

The juror was then examined as follows: "Q. You heard me read those newspaper articles to Mr. Ruggles, did you not? Albert: Yes, sir. Q. You read these articles then? A. Yes, sir; I read something similar to that. Don't know as they had any effect on me. I have known the editor of the Telegraph ten years. Would place as much reliance upon his word as upon that of any ordinarily truthful man. These articles did not cause me to think bank officials innocent. Q. You think you can read articles in newspapers in which men are charged with being robbers and despoilers of widows and orphans,—a paper you take into your family,—and read these things without having any influence on your mind? A. I felt sorry for them when I read them. Q. That is, you felt sorry for the widows and orphans? A. Yes, sir; and all the people who lost money. Q. When you read that women had lost money in the bank,—women who had churned in calico dresses, and carried eggs to town,—that aroused your sympathy, didn't it, for those women? A. Yes, sir; I felt sorry for them. I thought it was so at the time. My opinion at that time was inclined against all the officers of the bank. Nothing has occurred since to cause me to change my opinion. Re-examined by county attorney: I have no opinion as to whether Yetzer was president of the bank at time charged in indictment, or whether the bank was insolvent, or whether he knew it, or whether he is guilty of the crime of fraudulent banking. Have no prejudice against any of the bank officers. Wouldn't be influenced by anything other than the evidence. Recross-examination: Am 52 years old. It would take evidence to remove my opinion that there had been mismanagement or misappropriation in the bank, which I said I had formed. When I heard evidence, I could lay aside the impression. Re-examination: Q. Do I understand you to say that this impression relates to the guilt or innocence of the defendant in this case? A. Well, my impression is that I could do justice either way if I could hear the evidence. My impression relates to the Cass County Bank officers generally. Recross-examination: I think bank was insolvent when it went into hands of receiver." The court overruled a challenge to the juror, and complaint is made to the ruling. It was manifestly right. The ruling has undoubted support in several cases. State v. Munchrath, 78 Iowa, 268, 43 N. W. 211; State v. Smith, 73 Iowa, 32, 34 N. W. 597; State v. Vatter, 71 Iowa, 557, 32 N. W. 506; State v. Weems (Iowa) 65 N. W. 387. See, also, Basye v. State (Neb.) 63 N. W. 811. Of the cases we cite from Iowa there is not one that is not absolutely conclusive of this point. As to the juror Haywood, the showing in favor of his qualifications is not so apparent, but, under the authorities cited, there was no error in the ruling. However, for another reason, the ruling would not be prejudicial error. Defendant waived a peremptory challenge by which the juror Haywood might have been excused. It is said in argument that but one such challenge was waived, and that it was not sufficient to excuse both Haywood and Albert. But it was sufficient to excuse Haywood. As to Albert, the ruling is so conclusively right, and his competency so well established, that his retention could, in no proper sense, serve as an excuse for not excusing Haywood peremptorily. State v. Elliot, 45 Iowa, 486.

2. The state served on the defendant notice that it would, on the trial, introduce witnesses whose names were not on the indictment. Of such witnesses A. W. Dickerson was one, and it is said that as to him, as well as others, they were permitted to give testimony as to matters the substance of which was not stated in the notice. It is in fact contended that the notice stated only legal conclusions, so that facts could not legally be proven thereunder. The part of the notice relied on as stating the substance of the facts expected to be proven by the wit-

nesses is as follows: "That the plaintiff expects to prove by said witnesses and parties above mentioned that the said Cass County Bank was on and prior to December 27, 1893, a bank of discount and deposit located in Atlantic, Cass county, Iowa; that said defendant, and each of said defendants, were stockholders and directors in said bank, and were the managing parties thereof; that during the months of June, July, August, September, October, November, and December, 1893, the said bank sold to divers parties drafts which were not paid, but were dishonored and protested, and that during said months the said Cass County Bank was wholly insolvent, and was unable to meet and pay its current demands and liabilities in the usual course of business, all of which was well known to the defendants, and each of them; that when said Cass County Bank was insolvent as aforesaid, the said defendants, and each of them, permitted and connived at the receiving of deposits by A. W. Dickerson in said bank; that on the 27th day of December, 1893, Theodore G. Steinke was appointed receiver of said bank, and now has in his hands the assets of the same; and that on and prior to December 27, 1893, the liabilities of said bank were largely in excess of its assets." By Code, § 4421, it is provided that the county attorney shall not use such witness on the trial of an indictment "unless he shall have given to the defendant a notice in writing, stating the name, place of residence, and occupation of the witness, and the substance of what he expects to prove by him on the trial, at least four days before the commencement of the trial." We think the notice is a compliance with the statute. The county attorney was not required to state the details of the testimony to be offered, but the substance of what he expected to prove. The notice states the main facts towards which the testimony would be directed. The notice is not like that in State v. Kreder, 86 Iowa, 25, 52 N. W. 658. In that case the notice stated no particular facts to be proven, but, in effect, stated that it was expected to prove by the witness that the defendant was guilty. In this notice the defendant is informed that the witnesses will be used to show the existence of the bank, the character of the bank, who were its stockholders and officers, what the bank did, that it was insolvent, and that the defendant permitted and connived at the receiving of deposits, etc., acts upon which a verdict of "Guilty" might, to a greater or less extent, rest.

As to the question that the witness Dickerson and others were permitted to give testimony as to facts not included in the notice, we think the record does not sustain the claim. The notices unmistakably inform the defendant that the witnesses will testify to facts bearing upon the solvency or insolvency of the bank, which would involve minor details, such as its assets, their kind and character, the liabilities of the bank, the relations of the defendant to the bank, his doings in connection with it, and knowledge as to it, and knowledge of what others were doing. But if it be conceded that there was something of a departure from the notice, still there is no error involved. In State v. Rainsbarger, 74 Iowa, 201, 37 N. W. 153, it is said: "If the state were required to produce evidence conforming in every important particular to the notice, the statute would defeat justice, when a noncompliance in unimportant matters would not prejudice the rights of the accused." Later, in State v. Craig, 78 Iowa, 637, 43 N. W. 462, the court, on the trial of the indictment, permitted a wider departure from the fact stated in the notice, and we held, basing our conclusions on the holdings as to the right of the court to permit a witness to give testimony as to facts not disclosed by the minutes of his testimony before the grand jury, that the holding was not erroneous. It is thought by appellant that the same holding should not obtain in the two cases. It is difficult to see why. The purpose of returning the minutes of the testimony in the one case and stating the substance of it in the other must be for the same purpose as to the defendant. The minutes of the testimony to be returned means a memorandum or record of it, which is certainly as comprehensive as stating the substance of it; and if, on principle, the departure is authorized in the one case, it should be in the other. What might be the holding where, in either case, the departure was such as to be evasive of the law, we need not determine, for no such case is before us.

3. The point is made that appellant's motion in arrest of judgment should have been sustained because Haven, who made the deposit for the receipt of which the indictment was returned, knew the bank was insolvent, and hence was not deceived or defrauded. We need not determine what would be the effect of such knowledge when making a deposit, for the reason that no such fact appears in this case. It does appear that on the 19th day of December, 1893, Haven bought three drafts from the bank, which were afterwards returned protested, and were never paid, and that the deposit in question was made on the 27th day of the same month; but when the drafts were returned, so that he had knowledge of the insolvency, does not appear.

4. After the examination of Mr. Dickerson for the state, the defendant desired the presence of Mr. Julian Phelps for the purpose of contradicting some parts of the testimony of Dickerson. Mr. Phelps, although a resident of Cass county, where the trial was had, was then in Hot Springs, Ark., for his health, and the defendant moved the court to postpone the trial for two weeks for his return, which the court declined to do,

but suggested that the state should waive time for the taking of depositions, which was done, and his deposition was obtained, and read on the trial. It is now argued that, as Mr. Phelps was a resident of the county where the trial was had, and only temporarily absent, the state could not compel the defendant to proceed without the personal presence of the witness; the claim being based upon section 10, art. 1, of the constitution of the state, as follows: "In all criminal trials, the accused shall have the right * * * to have compulsory process for his witnesses." That constitutional guaranty was not denied, nor was it sought. The court had no power to compel the attendance of a witness from Arkansas, even though a resident of Iowa. The constitution nowhere guaranties to a defendant in a criminal trial a right to the personal presence of his witnesses on the trial that are beyond the reach of compulsory process. To what extent, or under what circumstances, he is entitled to such a right where witnesses are within the state, it is not now necessary to determine. It is easy to be seen how readily the administration of justice might be thwarted if the defendant in such a trial could rightly demand the presence of a witness whose presence the court had no power to compel. Appellant refers to some language in Trulock v. State, 1 Iowa, 515. Some argumentative language is employed in the case as expressive of the views of one member of the court touching the right of a defendant to the presence of his witnesses, but it does not appear that the witnesses were beyond the reach of process, nor is there an intimation, direct or remote, that in such case the right could be effectually claimed. We think the action of the court was manifestly fair to defendant, and that no legal right was denied.

5. To show defendant's knowledge of the condition of the bank, A. W. Dickerson, for the state, testified that on a certain Sunday in June, 1893, he and the defendant were together in the bank, examining the bills receivable. Defendant, in his own behalf, as a witness, denied the facts as testified to by Dickerson, and on rebuttal the court permitted Thomas Dickerson and Mrs. A. W. Dickerson to testify to having seen defendant and A. W. Dickerson in the bank on a certain Sunday in June of that year. The court, however, declined to permit them to testify as to what they were doing. It is urged that the testimony was not proper in rebuttal, and to test the correctness of the position the query is put: Would such evidence have been proper in chief on behalf of the state? We have no doubt that it would. But, conceding that the evidence was not strictly rebutting, the court did not exceed its proper discretion. It often happens on a trial that a party may reasonably suppose that a fact prima facie shown on the direct examination will stand as unquestioned on the trial, with other evidence at hand to sustain it. In such a case, if it is contradicted, the court may properly permit the other party to offer additional evidence. It is a discretionary matter. See Hess v. Wilcox, 58 Iowa, 380, 10 N. W. 847, and cases there cited. In the Code of Civil Practice (section 2779) the order of presenting evidence is prescribed. The party having the burden must first produce his, then the other party his, and it is then said: "The parties will then be confined to rebutting evidence, unless the court, for good reasons, in furtherance of justice, permits them to offer evidence in their original case." The same rules obtain in criminal cases as far as applicable. Code, § 4556. We think the court properly exercised its discretion. See, also, State v. Munchrath, 78 Iowa, 268, 43 N. W. 211; State v. Watson, 81 Iowa, 380, 46 N. W. 868.

6. On cross-examination of the defendant he was asked, as touching his expenditures, if there had not been a bastardy proceeding commenced against him a few years before, that cost him a great deal of money to settle. This examination was pursued at some length, until the court, discovering that the facts were too remote, struck out all such evidence on motion of defendant. We have read that part of the evidence with care, and, while we think it should never have been offered, we are satisfied that its presentation before the jury and its exclusion were without prejudice.

7. The following is the part of the indictment important for the consideration of the next question presented: "Being then and there engaged in the banking business as president of the Cass County Bank, the owners of said bank being to these grand jurors unknown, located and doing business as a bank of deposit in the city of Atlantic, in the county of Cass, and state of Iowa, did, as president of said bank, as aforesaid, unlawfully, willfully, knowingly, and feloniously permit, connive at, encourage, accept, and receive on and for deposit in the said bank known as the Cass County Bank, as aforesaid, a certain deposit in money, currency, bank bills, and United States treasury notes, a more particular description of which is to these grand jurors unknown, of and in the sum of seventy-one dollars, of and from one S. N. Haven, being then and there the property of the said S. N. Haven, and of the value of seventy-one dollars, the said bank being then and there insolvent, and the said J. C. Yetzer, defendant aforesaid, well knowing the said bank was insolvent." The sections of the Code (McClain's) under which the indictment is laid are as follows:

"1824. No bank, banking house, exchange broker, deposit office, or firm, company, corporation, or party engaged in the banking, broker, exchange or deposit business, shall accept or receive on deposit, with or without interest, any moneys, bank bills, or notes, or United States treasury notes, or currency or

other notes, bills or drafts circulating as money or currency, when such bank, banking house, exchange broker, or deposit office, firm or party, is insolvent.

"1825. If any such bank, banking house, exchange broker, or deposit office, firm, company, corporation, or party, shall receive or accept on deposit any such deposits as aforesaid, when insolvent, any officer, director, cashier, manager, member, party, or managing party thereof, knowing of such insolvency, who shall knowingly receive or accept, be accessory, or permit or connive at the receiving or accepting on deposit therein, or thereby, any such deposits as aforesaid, shall be guilty," etc.

It is thought that defendant cannot be found guilty under this indictment, because his guilt must depend upon his permitting or conniving at the receiving or accepting of the deposit by others, as it does not appear that he himself received or accepted it. Appellant then states his construction of the law as follows: "Appellant's contention is that the legislature used this word 'manager' advisedly, intending thereby to embrace within the enumeration of persons to be punished who might actually receive or accept the deposits all persons connected therewith, including the managers thereof, and that it intended to punish for permitting or conniving thereat only those who are 'managing parties' of the bank." Appellant was an officer, and it is as such that he is charged with the violation of the act. If we drop from the latter section such words as are evidently unimportant to the point we are considering, we can better discover the true import of the language, and the following seems to be the essential language to be considered: "If any bank * * * shall receive or accept on deposit any such deposits as aforesaid, when insolvent, any officer * * * or managing party thereof, knowing of such insolvency, who shall knowingly * * * permit or connive at the receiving or accepting on deposit therein, or thereby, any such deposit as aforesaid, shall be guilty," etc. The language is that any officer or managing party who shall permit or connive shall be guilty. Appellant's contention would make the law read as follows: "Any officer, being a managing party, who shall permit or connive at, etc., or any officer and managing party." The form of expression in the act is disjunctive. Appellant's construction would make it conjunctive. It is thought that the use of the terms "manager" and "managing party" aids appellant's view, as otherwise there is no purpose in the use of both terms. The legislative purpose was evidently to be comprehensive, so as to omit from the provisions of the act none who might be parties to the fraudulent acts, and in some cases there are persons entitled "manager" and in others persons doing the same duties, but not so entitled, and hence they would be embraced in the term "managing party." We think such to be the legislative purpose in the use of the two terms.

8. It is thought that the jury was swayed by passion and prejudice. The record does not so indicate. The bank was in the extreme of insolvency. The defendant was its president, and the fact of insolvency was known to him. He knew that the bank was receiving deposits, and of its inability to pay. The evidence to show that he permitted and connived at the receipt of deposits, including that for which he stands indicted, is so strong that no man, unprejudiced, could doubt his guilt. What might have been his individual purposes and motives is another question, and they may be considered in fixing the degree of punishment. But of the fact of his having permitted the receipt of deposits, knowing the bank to be insolvent, there is no doubt, and the verdict has abundant support.

9. The following is the second paragraph of the court's instructions: "Our statutes provide that no party, firm, or corporation engaged in the banking business shall receive or accept on deposit any moneys, bank bills, United States treasury notes, or currency when such party, firm, or corporation is insolvent; and that, if any such party, firm, or corporation be insolvent, every such party and every officer of such corporation who knowingly receives or accepts any such deposit, or is accessory to, or permits or connives at, the receipt or acceptance thereof, knowing of such insolvency, shall be guilty of felony. The defendant is indicted under this statute." There is a complaint of the instruction in that it does not state that the deposit must be received in the insolvent bank. We take this to mean that it must be received in the bank building or rooms. The law does not so define the crime. Referring to section 1825, it will be seen that the crime consists, as applied to a bank, or any other of the institutions named, in the deposit being received "therein or thereby." It is not to be thought that the receipt of money on deposit for the bank, if done outside its rooms, or what is usually termed "the bank," when speaking of the place, would not be an offense. The word "bank," as used in the act, is not thus limited. Under the language of the act, if the deposit is received by the bank, it is sufficient.

10. The same criticism is made as to the third instruction, and it is further said that it does not state that the person actually receiving the deposit must have known that the bank was insolvent. The law only requires such knowledge on the part of the party charged with the offense. If an officer of a bank, with knowledge of its insolvency, directs a clerk, without such knowledge, to receive deposits, and they are so received, the ignorance of the clerk does not affect the guilt of the officer who directs the act to be done. It is not the act of the clerk in receiving the deposit that constitutes the crime, but the act of the officer in directing it. The clerk does not commit the crime, and

hence the doctrine of accessories has no application, as appellant seems to think.

11. The following is the sixth instruction given: "It is not necessary for the state to show that defendant received the deposit in question. The evidence upon this point is sufficient if you find therefrom that the bank was insolvent to defendant's knowledge, and that it accepted said deposit while so insolvent to his knowledge; that at that time he was president of said bank, and as such did connive at, or was accessory to, the receipt of such deposit,—that is, *the evidence upon this point is sufficient if it appears therefrom that defendant, knowing the bank was insolvent, did aid, assist, advise, or encourage keeping it open for the receipt of deposits.*" The italicized language is said to involve error. It is said that the defendant was not charged generally with conniving at the receipt of deposits in an insolvent bank, knowing it to be insolvent. The argument takes no note of the first part of the instruction, wherein the rule of the instruction is made to apply to the particular deposit and the particular time; and nothing in the instruction warrants a conclusion that the defendant was being tried for conniving at the receipt of deposits generally. It is said that the jury was told that proof that the defendant aided or assisted, encouraged or advised, keeping the bank open for deposits generally, knowing that it was insolvent, would be sufficient evidence that he connived at, or was accessory to the receipt of, the deposit from S. N. Haven, upon which the indictment is based. The main thought of the instruction is that there can be a conviction without proof that defendant in person received the deposit. It then states as the law that if defendant, knowing the bank to be insolvent, did aid, assist, advise, etc., keeping it open for the receipt of deposits; and if, while it was so kept open for deposits, the particular deposit because of which the defendant is indicted was received, it would be sufficient to show the defendant guilty. We understand that to be the correct rule. It is not essential that the defendant should have had in mind the particular deposit, or that he should have known of it. If, as has been stated, he knew the bank to be insolvent, and with that knowledge he did any of the things specified as to receiving such deposits knowingly, he would be guilty, under the statute, even though he had no knowledge of any particular deposit. In such a case, he would aid or connive at the receiving of every deposit so received.

Some of the questions argued are not to be considered because of the condition of the record as to the evidence. There is a stipulation by which it appears that certain affidavits relied upon to sustain certain propositions argued were neither preserved by bill of exception nor certificate of the judge. Upon as full a consideration of the case as is warranted, in view of its importance and the judgment imposed, we are led to the conclusion that the case is free from reversible error, and the judgment is affirmed.

STATE v. GIBSON.

(Supreme Court of Iowa. April 8, 1896.)

LARCENY FROM BUILDING—WHAT CONSTITUTES BUILDING.

A corncrib 150 feet by 12 feet, having a roof, the only opening for entrance to which was a place where a board had been left off near the roof, and constructed upon heavy posts sunk into the ground, on which joists were nailed to support the floor, the sides being constructed by nailing fencing boards to the post, the boards near the bottom being close together, and the others about 1½ inches apart, is a building (Code, § 3894) in which valuable things are kept, so as to authorize a conviction under such section for breaking into the crib and stealing therefrom.

Appeal from district court, Fremont county; A. B. Thornell, Judge.

The defendant was convicted of the crime of breaking and entering a building, with the intent to commit a public offense; and from the judgment, which required that he be imprisoned in the state penitentiary at Ft. Madison at hard labor for the term of one year, and pay the costs, he appeals. Affirmed.

W. E. Mitchell, for appellant. Milton Remley, Atty. Gen., and Jesse A. Miller, for the State.

ROBINSON, J. The indictment charges that the defendant did on the 28th day of March, 1895, "willfully and feloniously break and enter a certain building, to wit, a corncrib, belonging to, and the property of, one M. U. Payne, said building being a place in which goods and valuable things, to wit, corn, were kept for use, sale, and deposit by the said M. U. Payne, with the felonious intent on the part of the said Dudley Gibson * * * then and there feloniously to take, steal, and carry away the said goods and valuable things of the said M. U. Payne, and then and there to commit a public offense, to wit, larceny." The evidence for the state shows that, at the time stated in the indictment, the defendant broke into a structure known as a "corncrib," and removed therefrom corn. The crib and contents were owned by one Payne, and the acts of the defendant were without authority, and in violation of law. The crib was about 150 feet long, 12 or 13 feet wide inside, 11 feet high on one side, 14 feet high on the other, and was nearly filled with corn. It was made by setting two rows of oak posts about 13 feet apart. The posts were from 6 to 10 inches in diameter, and were set 3 feet apart in each row. Each post was joined to the corresponding post in the opposite row by a joist 2 by 12 inches in size, and 14 feet long, which was nailed to the bottoms of the posts. On the joists were nailed boards an inch and

a half or two inches thick, and twelve inches wide, which made the floor of the crib. The sides and ends were made by nailing to the posts fencing boards, which were six inches wide and one inch thick. Those boards were placed close together from the floor, to a height of three or four feet, and above that were so placed as to leave spaces from an inch to an inch and a half wide between the boards. The crib was roofed with flooring, tongued and grooved and painted. The boards on one side of the crib were nailed in the manner stated, from the floor to the roof. On the other side the boards were nailed in like manner, excepting that a board was left out at a distance of about a foot and a half from the roof. The crib did not contain any doors or windows. The defendant, at the time stated, chopped off with an ax the end of a bottom board, then started the corn to running out, by pulling out some of it with his hands. He then brought his team to the crib, and commenced loading his wagon with the corn. When he had obtained about 18 bushels, he was arrested. There is no controversy in regard to any of these facts.

When the evidence for the state had been submitted, the defendant asked the court to direct a verdict of not guilty, on grounds which may be stated as follows: (1) That the building described in the indictment and evidence was not a building within the meaning of the statute under which the indictment was found; (2) that the indictment does not charge any crime; and (3) that the evidence was not sufficient to warrant a verdict against the defendant. The motion was overruled, and the grounds upon which it was based are urged against the validity of the judgment rendered. The indictment was found under section 3894 of the Code, which contains the following: "If any person, with intent to commit any public offense, * * * at any time break and enter any office, shop, store, warehouse, railroad car, boat or vessel, or any buildings in which any goods, merchandise or valuable things are kept for use, sale or deposit, he shall be punished by imprisonment in the penitentiary not more than ten years, or by fine not exceeding one hundred dollars and imprisonment in the county jail not more than one year."

1. The appellant contends that a corncrib is not a building within the meaning of that statute. Whether it is depends upon its construction. It cannot be said as a matter of law that a corncrib is not a building. The indictment alleges that the crib in question was a building, and does not contain any description which would justify a court in holding that it was not. Therefore, if there was evidence to sustain that allegation, the question as to its real character was properly submitted to the jury for its determination. See State v. Smith, 28 Iowa, 565.

2. A "building" has been defined to be "a fabric or edifice constructed for use or convenience; as a house, a church, a shop. It must be permanent, and designed for the habitation of men or animals, or the shelter of property." 2 Am. & Eng. Enc. Law, 601. It was said in Railroad Co. v. Vanderpool, 11 Wis. 121, that "the word 'building,' as a noun, has a common, well-understood meaning, * * * and including only those which have a capacity to contain and are designed for the habitation of man or animals, or the sheltering of property." We are not prepared to assent to the statement that a structure, to be a building, must be permanent; nor do we concede that the definition last quoted is sufficiently broad to include all structures which may rightfully be classed as buildings under the statute under consideration; but we are of the opinion that the jury were authorized to find that the crib in question was a building within the meaning of either of the definitions given. It was so constructed as to be of a permanent character, and was specially designed for the storage of corn, which is a commodity of value for use and sale. That the crib was a building within the meaning of the statute is so clear that the jury would not have been justified in finding that it was not. The appellant relies upon the cases of Wood v. State, 18 Fla. 967, and People v. Richards (N. Y. App.) 15 N. E. 371. An examination of these cases shows that they were determined upon grounds not applicable in this case.

The objections to the judgment of the district court are not well founded, and it is affirmed.

STATE v. THOMAS et al.

(Supreme Court of Iowa. April 7, 1896.)

LOST INDICTMENT—SUBSTITUTION OF COPY—SUFFICIENCY OF EVIDENCE.

On a motion to substitute an alleged copy of a lost indictment, the attorney who made the motion testified that he never saw the original nor a copy of it, nor consulted with the attorney who drew it as to its contents; and that he drew the proposed substitute after examining, and having returned to their custodian, the minutes of the evidence before the grand jury. The attorney who drew the original testified that the substitute contained substantially all the allegations in the original, but that he could not say it was a true copy; that it was more voluminous than the original, and contained allegations not in the latter; that there were descriptions as to instruments used by defendants in committing the offense charged which were not in the original; and that the latter did not contain the words "and of their malice aforethought," found in the substitute proposed. *Held*, that the evidence did not show that the proposed substitute was a substantial copy.

Appeal from district court, Allamakee county; A. N. Hobson, Judge.

At the September term, 1893, the defendants were indicted for the crime of assault with intent to commit murder. They were arraigned, and pleaded not guilty. The case was continued from term to term until the April term, 1895, when the state filed a mo-

tion as follows: "Comes now the plaintiff herein, and moves the court that the copy of indictment hereto attached, marked 'Exhibit A,' may be substituted for the original indictment herein, and as grounds therefor states: (1) That said original indictment has been lost; (2) that said Exhibit A is practically a copy of said original indictment; (3) that said Exhibit A, as to the statement of requisite and material facts and matters, such as names of the parties defendant, the name of the offense charged, the allegations of facts constituting the offense, the names of the witnesses, and the indorsement and signature of the foreman of the grand jury, is practically and substantially the same as the said lost original indictment. And in support of this motion the affidavits of E. M. Woodward, W. O. Beck, and Henry Dayton, and said Exhibit A, hereto attached, are herewith submitted, and made a part hereof." Upon application of the defendants, said affiants Dayton and Woodward were required to and did appear for cross-examination, and were examined. The court overruled said motion, and, finding that the state was unable to substitute a copy of the indictment, discharged the defendants. The state appeals. Affirmed.

Milton Remley, Atty. Gen., and E. M. Woodward, Co. Atty., for the State.

GIVEN, C. J. In State v. Rivers, 58 Iowa, 102, 12 N. W. 117, wherein this same kind of a motion was made, this court said: "We are prepared to hold that when a defendant has been arraigned upon an indictment, and it is afterwards lost or abstracted, the court may, upon motion, substitute a copy, and proceed upon the record thus made, the same as upon the original indictment." In that case the substituted copy was made from the original by the clerk of the district court, and properly certified. This court said: "There can be no question but that the copy was sufficiently proven to be correct." See, also, State v. Shank, 79 Iowa, 48, 44 N. W. 241. The evidence as to the substitute offered in this case is, in substance, this: Mr. Woodward, the county attorney, who filed this motion, testified that he came into office in January, 1895, and that he had never seen the original indictment, nor a copy thereof, nor consulted with the attorney who drew it as to its contents; that he got the minutes of the evidence taken by the grand jury from the clerk, and, after examining them, returned them to the clerk, and thereafter drew the proposed substitute. He says: "As to the statement of facts and all material allegations, I understand it to be the same case as the original indictment." That it is the same case there can be no doubt, but it is probable that Mr. Woodward intends to be understood as saying that he understands it to be the same charge as in the original indictment. Mr. Dayton, who drew the indictment in September, 1893, testifies, in substance, as follows: That he thinks the proposed substitute contains substantially all the allegations that were alleged in the indictment he drew, and that the indorsements are substantially the same, but cannot say that it is a true copy. He says the substitute "is more voluminous than the original. There are allegations here that were not in the original, but I am not able to state just what they are, all of them. I think there are some descriptions as to instruments used that were not in the original, so far as describing the handle of the knife and the caliber of the revolver; I think they were not in the original. I think the original did not speak of the number of blades the knife contained, and I think this does; and my impression is that the original did not contain these words, 'And of their malice aforethought,' but I will not be positive." In State v. Rivers, supra, this court held that, in case the indictment is lost or destroyed, an exact copy may be substituted, but it has never decided whether a substantial copy may be substituted. The evidence introduced in support of this motion fails to show with that certainty that should be required in such a case that this proposed substitute is even a substantial copy of the indictment for which it is asked to be substituted. Entertaining this view, and having no argument from appellees, we do not determine whether a substantial copy may be substituted. We think the motion was properly overruled. Affirmed.

FINDLEY v. TAYLOR.

(Supreme Court of Iowa. April 8, 1896.)

EXECUTORS — TAXES DUE BY ESTATE — PARTY ENTITLED TO ENFORCE PAYMENT — CLAIM — FILING UNNECESSARY.

1. Under Acts 20th Gen. Assem. c. 194, § 1, making taxes, after they become due, a debt of the person taxed, one who acquired title to land from a devisee may enforce payment of taxes, due thereon at the death of the testatrix, against the executor; and the fact that the executor is himself the devisee, and conveyed by deed of special warranty, under which he was not individually liable for claims for taxes, is immaterial.

2. Claims for taxes due by deceased, which Code, § 2420, requires the executor to pay, need not be filed.

Appeal from district court, Wapello county; W. I. Babb, Judge.

This is a proceeding in probate for an order requiring the defendant to pay taxes on certain real estate. From an order granted as prayed, the defendant appeals. Affirmed.

McNett & Tisdale, for appellant. McElroy & Heindel, for appellee.

ROBINSON, J. Juliette A. Taylor died in August, 1892, seised in fee simple of lots 59 and 60 in the city of Ottumwa. Her only heirs are the plaintiff and C. O. Taylor, who is the executor of her estate. She left a will, which was duly admitted to probate. It contained the following provision: "I will and di-

rect that all my just debts and funeral expenses shall be paid out of the estate of which I shall die possessed and seised." The will devised the lots described to C. O. Taylor, but the plaintiff, being dissatisfied with the provisions of the will, was preparing to contest it when she and Taylor entered into an agreement for the purpose of avoiding further controversy and settling the matters in dispute. That provided that the will should be duly probated, and that it should always have full force and effect as the will of the decedent, and that certain parts of the lots described, which included the residence of the decedent, should be conveyed to the plaintiff by a special warranty deed, to be executed by Taylor and his wife. The deed was executed, as required by the agreement, on the 22d day of September, 1892. At that time one-half of the taxes levied upon the lots for the year 1891 were due and unpaid, and this proceeding is prosecuted for the purpose of requiring the defendant to pay those taxes. The district court found that the plaintiff was entitled to the relief demanded, and ordered the payment of the taxes in controversy, to the amount of $74.79. A certificate of the trial judge which presents the questions in dispute is submitted for our consideration

The question is stated by the appellant as follows: "Was the plaintiff entitled to an order compelling the executor to pay certain taxes upon the real estate in question, which were a charge and a lien at the date of the death of the testatrix, where the plaintiff acquired her title, not from the testatrix, nor under her will, but under a deed of special warranty from C. O. Taylor individually?" The plaintiff has no claim against Taylor as an individual. The covenants of his deed required him to warrant and defend the premises conveyed only against the lawful claims of persons who should claim by or through him, and he is not personally liable for the payment of the taxes. But the will remains in force, and we are required to determine whether it is the duty of the defendant, as executor of the estate of the decedent, to pay them. Taxes in this state become due and payable in January of each year. Provision is made whereby a part of them may be paid before the 1st day of April, and the remainder before the 1st day of October, without incurring any penalty. But, if not paid within the time prescribed, the treasurer may make collections by distress and sale of the personal property of the person taxed. Provision is also made for the sale of real estate to enforce the payment of taxes. But, however the taxes are collected, they are a debt of the person taxed, at least from the time they become due. Acts 20th Gen. Assem. c. 194, § 1. See, also, City of Dubuque v. Illinois Cent. R. Co., 39 Iowa, 71.

The taxes in question were due when Mrs. Taylor died, and her estate is liable for their payment. The fact that no claim for them had been presented to the executor by the county treasurer, and that their payment could be enforced by the sale of the lots, did not affect the liability of the estate for them. When the executor of an estate is possessed of sufficient means, over and above the expenses of administration, he is required, first, to pay the charges of the last sickness and funeral of the deceased; then, any allowance which may be made for the maintenance of the widow and minor children, if any. After that is done, if the funds at his command are sufficient, he is required to pay debts entitled to preference under the laws of the United States: then, public rates and taxes; and afterwards, claims duly filed and proved, and legacies. Code, §§ 2418–2421. There is no requirement in regard to filing claims for taxes, and the failure to file them does not release the estate from liability.

The will of the decedent provided for the payment of all her debts, and that remains in force. The statutes relating to that subject also require the payment of her debts. Code, §§ 2822, 2386, 2387, 2420. It is therefore the duty of the defendant to pay the taxes in controversy, and the plaintiff, as the owner of premises on which they are a lien, is interested in having him perform that duty. The fact that he acquired the premises by virtue of the will, and then conveyed them to the plaintiff by a deed containing covenants of special warranty only, is immaterial, nor is it important that, as executor, he may not have been entitled to take possession of the premises. Our conclusion is based upon the fact that the taxes were due and payable when the testatrix died, and that they constituted a debt for which her estate is liable. The order of the district court appears to be right, and it is affirmed.

STATE v. PORTER.

(Supreme Court of Iowa. April 8, 1896.)

BURGLARY—INDICTMENT—OWNERSHIP IMMATERIAL—VARIANCES.

1. Under Code, § 4302, providing that, in prosecutions for offenses against the person or property, erroneous allegations as to the name of the person injured shall be immaterial, a mistake in an indictment for burglary as to the name of the owner of the building is immaterial.

2. Where, on a prosecution for burglary, the evidence showed that the building entered was a three instead of a two story building, as charged in the indictment, the variance was not fatal.

3. Where, on a prosecution for burglary, the evidence showed that the office entered, instead of being, as alleged, in the possession of a person individually, was in his possession as president of a corporation, the variance was immaterial.

Appeal from district court, Floyd county; P. W. Burr, Judge.

Indictment for burglary. Plea of not guilty. Jury trial. Verdict and judgment against the defendant, and he appeals. Affirmed.

Ellis & Ellis, for appellant. Milton Remley, Atty. Gen., for the State.

KINNE, J. The indictment in this case charges the crime to have been committed by breaking and entering a certain office in a room in the second story of a two-story building owned by L. Hecht, and that one E. M. Sherman had possession of said office. It is claimed—First, that it was not shown who owned said building; second, that the evidence showed that the building was a three-story, instead of a two-story, building; third, that it appeared from the evidence that the possession of the office or room was in the Sherman Nursery Company; and therefore there was a fatal variance between the allegations of the indictment and the proofs.

Under our statute (Code, § 4302), when an offense involves the commission or attempted commission of an injury to the person or property, and is in other respects described with sufficient certainty, an erroneous allegation as to the name of the person injured is not material. A reference to the following cases will show how the statute has been applied: State v. Emmons, 72 Iowa, 265, 33 N. W. 672; State v. Rivers, 68 Iowa, 615, 27 N. W. 781; State v. Short, 54 Iowa, 392, 6 N. W. 584; State v. Golden, 49 Iowa, 51; State v. Semotan, 85 Iowa, 57, 51 N. W. 1161; State v. Franks, 64 Iowa, 42, 19 N. W. 832; State v. Teeter, 69 Iowa, 719, 27 N. W. 485; State v. Jelinek (Iowa) 64 N. W. 259; State v. Lee, Id. 284.

It is contended, however, that the crime in this case is not in other respects sufficiently described. The fact that the building was charged to be a two-story building, instead of a three-story building, is not a fatal variance.

Nor is it a fatal variance that the proof showed that the office or room was alleged to be in possession of Sherman, when in fact it was rented by a corporation of which Sherman was president, and occupied by him and in his possession as such officer. See State v. Semotan and State v. Jelinek, supra.

The court instructed the jury on the theory that the claimed variances, if they existed, were not material, and would not authorize an acquittal of the defendant. There was no error in so doing. All of the objections raised impress us as technical and without merit. Affirmed.

STATE v. MUSHRUSH.

(Supreme Court of Iowa. April 8, 1896.)

MANSLAUGHTER—EVIDENCE—CONSPIRACY — PROOF —ACTS AND DECLARATIONS OF CO-CONSPIRATORS—RES GESTÆ.

1. There was evidence that, a few nights prior to the affray in which deceased was killed, one M. stated, in defendant's hearing, that he "had it in" for deceased, and suggested to defendant that they catch deceased on his way home, and that he (M.) lick him, while defendant stood off the other boys with M.'s revolver, to which defendant replied that he could stand them off with his fists; that on the night of the killing, while defendant, M., and several others were riding to the schoolhouse where the homicide occurred, M. remarked (referring to deceased) that there was "a big Dutchman coming there to lick him that night," and he "didn't want any help unless the whole family jumped in;" that some one else remarked that, if a mêlée occurred, they would all fight for each other; that, after arriving at the schoolhouse, defendant called a certain person aside, and told him there was liable to be trouble; that the affray began by C., one of defendant's party, addressing insulting language to B., a brother of deceased, which was unresented, whereupon defendant said B. was a coward and would not fight; that, immediately thereafter, deceased came out of the house, knocked C. off the porch, followed up the attack, and was stabbed by M.; and that defendant was soon after seen conversing with M. and C. in whispers. *Held* sufficient to warrant a finding that defendant conspired with M. to inflict personal injury on deceased, or at least, knowing of M.'s unlawful purpose, was present to aid and encourage him in it, thereby justifying a verdict of manslaughter.

2. Conversations had in defendant's presence and hearing, on the way to the place where the homicide occurred, were admissible to establish a conspiracy to kill deceased.

3. Evidence that, immediately before the affray in which deceased was killed, defendant's alleged co-conspirators whispered together and pointed to deceased, defendant not being then present, were properly admitted on condition that the state would thereafter show a conspiracy.

4. Declarations of defendant's alleged co-conspirators made shortly after the homicide, and evidence that they and defendant were subsequently seen whispering together, were admissible as a part of the res gestæ.

5. It was not error to permit a witness who sat as a juror on the trial of defendant's alleged co-conspirator to state what defendant testified to on that trial.

Appeal from district court, Audubon county; A. R. Thornell, Judge.

The defendant was jointly indicted with William McLaughlin, Walter Case, Charles Jones, and William Mushrush for the crime of murder in the first degree, in the killing of one Frank H. Leib. This defendant was separately tried, and convicted of the crime of manslaughter, and judgment of imprisonment in the penitentiary for a term of five years entered against him, from which he appeals. Affirmed.

H. U. Funk, for appellant. Milton Remley, Atty. Gen., and William Wonn, Co. Atty., for the State.

GIVEN, J. 1. On the evening of March 9, 1894, this defendant, in company with the other defendants and one Moon, went from the town of Audubon to a schoolhouse in the county, to a public meeting that was quite largely attended. Three brothers (Frank H., Leopold, and Otto Leib) were among those present. During the evening a quarrel arose between the defendant Case and Otto and Leopold Leib, on the porch in front of the schoolhouse. During the progress of the quarrel, Frank H. Leib came from the inside of

the house, and, after a few words, assaulted Case, knocked him off the porch, and was pursuing the assault, whereupon defendant McLaughlin stabbed him in the abdomen with a knife, inflicting a mortal wound, of which the said Frank H. Leib died in a few days thereafter. There is no evidence, nor is it claimed, that this defendant made any assaults or inflicted any injury upon deceased. The claims of the state are these: That this defendant and William McLaughlin and others had conspired and agreed that an attempt should be made to whip Frank H. Leib, or inflict some injury upon his person, or upon him and his brothers, and that the killing was done by McLaughlin in an attempt by him to carry out that unlawful purpose; that, before the killing, McLaughlin contemplated and designed to inflict some injury upon the person of Frank H. Leib, or upon him and his brothers, and that before Leib was stabbed by McLaughlin this defendant knew of such intention upon the part of McLaughlin, and advised, or encouraged or incited him to carry out said unlawful purpose; and that the wound which caused Leib's death was inflicted by McLaughlin in an attempt to carry out said unlawful purpose. The defendant, by his motion for a verdict and his motion for a new trial, which were overruled, and by exceptions to instructions given and refused, has preserved, and here presents, the question whether the evidence is sufficient to sustain either of said claims of the state.

2. The following is, in substance, the evidence tending to show defendant's connection with the affair: A few evenings prior to the affray at the schoolhouse, McLaughlin and this defendant were together at a dance at the house of a Mr. Seimsen. Frank H. Leib was also there. McLaughlin said, in the presence and hearing of this defendant, that he would like to hit Frank H. Leib, and, when asked what for, said "he had it in for that fellow." Later in the evening, when speaking of Frank H. Leib, McLaughlin said, in the presence and hearing of this defendant: "We will catch him as we go home. I will give you the revolver. You take the revolver, and stand the other boys off while I lick Frank." The defendant replied that "he didn't need the revolver; he could stand them off with his fists." In going to the schoolhouse on the evening of March 9, 1894, McLaughlin, Case, this defendant, and Winnie Moon traveled in one conveyance, and William Mushrush drove with them in a road cart. On the way they talked together, in the hearing of this defendant, in substance as follows: McLaughlin said, if more jumped onto him than he could handle, he would give them some steel. William Mushrush said: "If we get into any mêlée, he knew where he was going to get help; that we were all in the same crowd." And McLaughlin said, "Of course we are, if we are not in the same rigs." Some one said "that, if anybody picked up a fight with us out there, we would all fight for each other." Witness Moon asked McLaughlin who he thought was going to pick up a fight out there, and he said "there was a damned big Dutchman coming there to lick him that night, and he didn't want any help unless the whole family jumped on, because he had whipped him last winter or fall, easy, and he could do it again." It does not appear that this defendant said anything during these conversations. After arriving at the schoolhouse, and before this affray, this defendant said to G. H. Petty, whom he had called aside to take a drink of intoxicating liquor with him, that there was liable to be some trouble there. He was on the porch when the affray was commenced by Case using offensive language to Otto Leib, to which Otto replied, "That is all right," whereupon this defendant said, "That cowardly son of a bitch won't fight." It was immediately after this that Frank H. Leib came out and knocked Case off the porch, followed up the attack, and was stabbed by McLaughlin. After the stabbing, McLaughlin, in great excitement, was flourishing his knife, and bantering and threatening the people generally; and this defendant, standing near him, was calling to the people to stand back or they would get hurt. Soon thereafter he, McLaughlin, and Case were seen to converse together in a whisper. There can be no doubt but that McLaughlin intended that a quarrel should be provoked with the Leib brothers, or some of them, and that personal injury should be done to them, or any of them resenting the provocation. While this defendant's words and acts were few, we think the jury was warranted in finding therefrom that he had conspired with McLaughlin to aid him in his unlawful purpose. If this be doubtful, there surely can be no doubt but that, knowing of McLaughlin's unlawful purpose, he was present to aid and encourage him in it. That he did not expect such a result as followed, we think is true; but he joined in a conspiracy to commit an unlawful act, and was present, aiding and encouraging its commission, and must abide the consequences.

3. Defendant moved to strike out the testimony of the witness Moon, who testified to the conversations on the way to the schoolhouse, on the ground that no conspiracy had been proven. This evidence tended to show the conspiracy, and the motion was properly overruled. The state was permitted to prove, over defendant's objection, that after they came to the schoolhouse, and before the affray, McLaughlin and Case whispered together, and pointed to Frank H. Leib, when this defendant was not present. The ground of the objection was that no evidence of a conspiracy had been introduced, and therefore the acts of these men were not admissible against this defendant. This evidence was only admissible after a conspiracy had been prima facie established, or upon the promise of the state that such evidence would be introduced. State v. Grant, 86 Iowa, 216, 53 N. W. 120. The court admitted this evidence

expressly upon condition that the state would thereafter show a conspiracy. Other evidence of a similar character was properly admitted over defendant's objection. The state was permitted to prove, over defendant's objection, declarations of McLaughlin and Case made within a short time after the stabbing, and that they and defendant were whispering together. This evidence was admissible as part of the res gestæ. A witness who had sat as a juror on the trial of McLaughlin was permitted, over defendant's objection, to state what this defendant testified to as to certain matters on that trial. Defendant contends that this evidence was incompetent, the reporter's notes being the best evidence, and cites State v. Maloy, 44 Iowa, 104. In that case an unauthenticated transcript, purporting to be a transcript of the reporter's notes, was offered. This court held that the original notes must be produced, or a sufficient showing made why they were not, before a copy could be admitted. It was not held that one who heard and remembered the former testimony might not testify as to what it was. It is a common practice to have reporters, after refreshing their recollection from their notes of testimony, state what it was. Surely, it is no more hearsay or secondary for one who heard and remembers to state what it was, than for a reporter whose memory is refreshed by his notes.

4. Appellant's further contention is that the verdict is contrary to evidence. The controlling question of fact in the case is whether this defendant conspired to commit the unlawful act, as already stated, or advised, encouraged, or incited its commission. As already stated, we think the jury was authorized to find that he did both. We find no error in the record, and the judgment of the district court is therefore affirmed.

STATE v VAN VLIET.

(Supreme Court of Iowa. April 7, 1896.)

WITNESS—CREDIBILITY—EFFECT OF IMPEACHMENT.

That a witness' moral character and reputation for truth and veracity has been impeached does not require that the jury disregard his testimony if unsupported by corroborating evidence.

Appeal from district court, Marion county; A. W. Wilkinson, Judge.

Indictment for nuisance. Verdict of guilty, and the defendant appealed. Affirmed.

Warren & Van Vliet, for appellant. Milton Remley, Atty. Gen., for the State.

GRANGER, J. The defendant is charged with maintaining a place for the sale of and with selling intoxicating liquors. Testimony was introduced tending to impeach some of the witnesses for the state. The court, touching the question of impeachment, gave the following instruction: "No. 4. A witness may be discredited by impeaching evidence; that is to say, that his general reputation for truth and veracity in the neighborhood where he resides is bad, or that his general moral character in such neighborhood is bad. But you are not required to wholly disregard the testimony of a witness simply because he has been impeached by showing that his general reputation for truth and veracity and his general moral character is bad. *If the evidence of such witness is sustained by other corroborating evidence, or if for any other reason you believe that what such witness testified to is true, then you are not to wholly disregard it, and the degree of credit and weight to be given to the testimony of such witness, if any, as well as the credit and weight to be given to the testimony of each and all witnesses, are matters to be determined by the jury, and the jury alone, in view of all the evidence and all the facts and circumstances proved and established on the trial of the cause.*"

Appellant complains of the italicized portions of the instructions, and contends that the legal effect of an impeachment is to absolutely destroy the credibility of the witness and his testimony. We think the question has been definitely settled in this state. In Green v. Cochran, 43 Iowa, 544, this court held that an instruction to the effect that an impeached witness, unless corroborated, was entitled to no credence and weight with the jury, did not express the law; and the court said: "We think that an impeached witness may testify so consistently, and may deport himself in such manner, and may be so corroborated, as to material points, that the jury might feel justified in believing him upon some point in which he is not corroborated." This rule was followed in State v. Larson, 85 Iowa, 659, 52 N. W. 539; and see, also, McMurrin v. Rigby, 80 Iowa, 322, 45 N. W. 877. These cases so conclusively settle appellant's contention that there is no occasion for elaboration. We see nothing in the instruction not in harmony with the recognized rule on this subject. The judgment is affirmed.

STATE v. RUDD.

(Supreme Court of Iowa. April 7, 1896.)

CRIMINAL LAW—SUFFICIENCY OF JUDGMENT—ASSAULT WITH INTENT TO RAPE—EVIDENCE—SUFFICIENCY.

1. The record showed a trial and a verdict of guilty; that defendant's motion to set aside the verdict and for a new trial was overruled; that afterwards defendant, being present, was informed of the nature of the indictment, his plea, and the verdict of the jury; and that, no legal cause being shown against the same, it was ordered and adjudged that defendant be imprisoned, etc. *Held*, that the judgment was not open to the objection that it was insufficient because there was no finding of guilty by the court. State v. Cook (Iowa) 61 N. W. 185, followed.

2. Where a witness for the state, on cross-examination, denies having made a certain state-

ment out of court, and a witness for defendant afterwards testifies that such witness made such statement, it is not prejudicial error to allow the state's witness to again deny it.

3. A witness cannot testify as to what he understood by a statement of a person out of court, to which such witness has testified.

4. Where defendant's wife, on cross-examination, denied that in a conversation with the prosecutrix, in his presence, she said she and defendant had talked the matter over, it was not error to permit the prosecutrix to testify in rebuttal that defendant's wife made such statement.

5. Where prosecutrix testified that defendant took hold of her violently, and held her, despite her resistance, so as to inflict injury on her person, it was not error to charge that if the jury failed to find that defendant assaulted prosecutrix with intent to rape, but found that he had taken hold of her as she alleged, they should find him guilty of assault.

6. On trial for assault with intent to rape, prosecutrix testified that defendant seized her in the hog house, and tore her clothes; that his trousers were unbuttoned; and that she made a strong resistance. There was also evidence of complaints to her husband and others. *Held* to sustain a verdict of guilty.

Appeal from district court, Worth county; John C. Sherwin, Judge.

The defendant was convicted on an indictment charging him with an assault on Josephine Style, a female, with intent to commit a rape, on the 15th day of March, 1894. His motion for a new trial was overruled, and judgment entered against him, from which he appeals. Affirmed.

Cliggitt & Rule and W. H. Barnes, for appellant. Milton Remley, Jesse A. Miller, Ed. Collin, Frank Forbes, W. L. Eaton, and J. R. Smith, for the State.

GIVEN, J. 1. Appellant's first contention is that there is no proper judgment against him, for that "there is no finding by the court of guilty." The record shows a trial verdict of "guilty of assault with intent to commit a rape upon Josephine Style as charged"; that defendant's motion to set aside the verdict and for a new trial was heard and overruled, and that afterwards, on the same day, the cause came on for judgment; that the defendant, being present, was informed by the court of the nature of the indictment, his plea, and the verdict of the jury thereon, "and, no legal cause being shown against the same, it is therefore ordered and adjudged by the court that the defendant, Peter S. Rudd, be imprisoned in the penitentiary at Anamosa, at hard labor, for the term of one year." This judgment, so far as any finding of guilt by the court is concerned, is identical with that in State v. Cook (Iowa) 61 N. W. 185, which was held by this court to be sufficient.

2. Appellant assigns as error certain rulings of the court on the taking of the testimony. After the defense rested, the state called J. R. Smith, whose name was not on the indictment as a witness, and as to whom no notice had been given. Mr. Smith, having testified that he had a conversation with the defendant prior to the preliminary examination, was asked this question: "State whether or not in that conversation, at your office, Mr. Rudd said to you, in words or in substance, that he was there at Mr. Style's on the afternoon of the 15th of last March, being the day of the assault." The defendant objected on the ground that it was incompetent, and not proper rebuttal. The objection was overruled, and the witness answered that "he did." He was asked "whether or not, in that conversation, he stated to you that he saw Mrs. Style there on that afternoon." To this the defendant objected on the ground that it was incompetent, and calling for an admission of the defendant which was competent evidence in chief on the part of the state, and not proper in rebuttal, which objection was sustained. Appellant's complaint is that this was an effort upon the part of the state to introduce in rebuttal an admission which was competent in chief, and to thereby avail itself of the testimony of the witness of whom the defense had no notice. The defendant had testified that he was not at the place mentioned on the afternoon of the 15th, and had introduced evidence tending to establish an alibi. We are inclined to think that the conversation inquired about was admissible in rebuttal, but whether it was or not we need not determine, as it will be observed that under the rulings the witness did not state what the conversation was. Mrs. Style stated on cross-examination that she did not tell Mrs. Culbertson that she got her sickness from pumping. Mrs. Culbertson testified, on behalf of the defendant, that she did so state; and Mrs. Style was permitted, over defendant's objection, when called in rebuttal, to again testify that she did not so state. While it may have been unnecessary to have the testimony of Mrs. Style repeated, we fail to discern wherein it could have been in the least prejudicial to the appellant. Appellant complains that Mrs. Schrader was permitted to state that Mrs. Style told her about being assaulted by some one on the 15th day of March, in the hog house on her premises. The record fails to show that any objection was made either to the question or answer. The wife of the defendant testified that when Mrs. Style said to the defendant "something about, you know, what you had done to me in the hog house, why, I heard he said you are sick." She was then asked, "What did you understand by that?" to which the state's objection was sustained as incompetent and immaterial. We think it was for the jury, not the witness, to determine the sense in which the language was used. Mrs. Style was allowed to testify in rebuttal that in a conversation with defendant's wife, and in his presence, defendant's wife stated that they had talked about the matter before they came to see Mrs. Style. This was in rebuttal of the testimony of Mrs. Rudd on cross-examination in which she had denied so saying to Mrs. Style.

Surely, the state was not concluded by Mrs. Rudd's statement, and had a right to contradict it in rebuttal.

3. Appellant contends that the fifth instruction is not sufficiently specific, for that it does not define an assault, or assault and battery. The instruction is that: "If you fail to find that the defendant assaulted Josephine Style with intent to commit a rape, but do find that he, at the time and place, took hold of her as she alleges, then you should find him guilty of assault." Josephine Style alleged in her testimony that he took hold of her violently, and held her, despite her resistance, so as to inflict injury upon her person. If the jury found this to be true, then, clearly, the defendant was guilty of an assault, and it would have been difficult for the court to make it plainer to the jury than in this instruction. It is contended that in the sixth instruction the court assumes as a fact that the defendant had a struggle with the prosecutrix. The instruction, taken alone, will not bear such a construction, and surely not when taken in connection with other instructions given. Complaint is made of the refusal to give the seventh and ninth instructions asked by the defendant, for that the instructions given do not fully cover the ground. We think otherwise. We discover no error in the giving or refusing instructions.

4. Appellant further contends that the verdict is contrary to the evidence, and that there is no proper or sufficient corroboration of the prosecutrix to support the verdict. We will not set out nor discuss the evidence upon these questions. It is sufficient to say that there is some corroboration of the prosecutrix, tending to connect the defendant with the commission of the offense charged, and that the question of the sufficiency of the corroboration, as well as of the evidence, was properly submitted to the jury, and, under the record, their verdict should not be disturbed on either of these grounds. The court gave an instruction as follows: "You are instructed that, in order to find the defendant guilty of the offense of the assault with intent to commit rape, you must find from the evidence, and be satisfied from the evidence beyond a reasonable doubt, not only that he made an assault on the prosecutrix, according to the meaning and definition of 'assault' as given to you in other instructions, but you must be further satisfied, beyond a reasonable doubt, that in making such assault (if you find, beyond a reasonable doubt, that he made an assault) he had in his mind the particular and specific intent to accomplish the act of sexual intercourse upon her, even against her will, and against the utmost resistance the prosecutrix could make. For a mere assault, made with the intention of procuring her consent to the act of intercourse, or under the belief that she would yield to solicitation, and not intending to accomplish the act of intercourse against her resistance, you cannot convict him of the offense of assault with intent to commit rape." Appellant contends that the evidence does not show, beyond a reasonable doubt, the intent charged, and therefore the verdict is contrary to the law as given by the court, and to the evidence. These parties were both married, and they and their families had been neighbors and friends for several years. According to the testimony of the prosecutrix, the offense was committed in a hog house at her home on the afternoon of March 15, 1894. The hog house was about 40 feet long from east to west, with a door in each end, an alley 3 to 4 feet wide through the center, and pens on each side. The prosecutrix was in the alley, watering the hogs. As to the character of the assault, she testifies as follows: "He came to the hog house; asked me if my husband was at home. I told him no; that he was in Carpenter, cleaning flax. Then he passed inside hog house, in where I was; looked at the pigs; says, 'Is that all the fat hogs you got?' I says, 'Yes.' I turned around, went to the door, got another pail of water out to the swill cart, and turned around; was going to give that to the pigs. Just as I leaned over to water them in the trough, he grabbed me around the waist. We went along. The pail,—I had it in my hand,—that was turned on the floor. Don't know how long the hog house is. The alley was,—think it is forty feet. When he grabbed me I was pretty near in the middle of hog house. Wasn't to the door. I was to the second bin from the door. There are bins on both right and left sides of alley, and studding or posts running up to the roof from the floor along each side. Can't remember if he said anything when he grabbed hold of me. I got so excited. I tried to get away. I took hold around the joist running across. Put my hands up, and grabbed hold of it. He still kept hold of me. He tore me loose from there, and carried me a little further down. Carried me round my stomach, here, and had hold of my clothes. Carried me so to the next studding. I got hold of another studding. He kept on pulling on my chest, here, trying to get me to let loose, but I didn't let loose of that. He tore my clothes,—my dress and underskirt. Had on a red and black calico dress, and a half-woolen, half-cotton skirt. He tore the dress up here in two places in front. I told him to let go of me. He didn't make any answer that I can remember. I held for all my might, and hollered for help. When I hollered for help he let go. Then he went towards the door,—went to the front door. Then he turned around and came back. He did not take hold of me again. When he turned around and came back, I noticed his pants were unbuttoned. Then he asked me if I wouldn't say good-bye. I told him, 'No, sir.' I told him, if I got to the door, I was going to hit him. Had no further talk then. I guess he went away then." The evidence shows that up to that time the prosecutrix was in good health, and that thereafter she

suffered from female derangements, requiring medical treatment, such as might result from the kind of assault that she states was made upon her. The evidence also shows that she complained to her husband and to others, at the first opportunity, of the conduct of the defendant, and that the defendant and his wife came to her home to see her, when the occurrence was the subject of their conversation. There are other facts appearing which tend to corroborate the prosecutrix, not only as to the fact that an assault was made, but also as to the character of that assault. We think the jury was warranted in finding as it did. Affirmed.

STATE v. HELM.

(Supreme Court of Iowa. April 7, 1896.)

HOMICIDE — MURDER — EVIDENCE — REPUTATION — ERROR CURED BY INSTRUCTIONS — THREATS — IMPEACHING WITNESS — REMARKS OF COUNSEL.

1. On a murder trial, where it appeared that deceased and his friends formed one faction in a neighborhood feud, and that defendant and his friends formed the other, evidence that prior to the homicide there were frequent quarrels and fights between the factions was admissible, where it also appeared that defendant was present and took part.

2. Error in admitting evidence that before the homicide defendant's reputation as an orderly and peaceable man was bad, and that that of deceased was good, in the absence of prior evidence by defendant as to his good reputation, was cured by a special charge to "withhold applying the evidence in any way, as far as possible," when supplemented by a direction in a general charge to "disregard it, as having no weight whatever."

3. Where defendant had testified as to quarrels and fights with deceased and his friends before the homicide, but had denied making certain threats against deceased, as brought out by the state's evidence, it was proper cross-examination to ask him if he had not, in a conversation with a third person, made threats against deceased.

4. Where, from the whole record, it appears that evidence of threats by defendant prior to the homicide was admitted solely to impeach his testimony, it was not reversible error for the court to fail to charge, limiting its effect to impeachment.

5. Remarks of counsel are not available for reversal, unless incorporated in the bill of exceptions

Appeal from district court, Keokuk county; A. R. Dewey, Judge.

The defendant was indicted for the murder of Walter Clark. There was a trial which resulted in a verdict of guilty of murder in the second degree, and a judgment of imprisonment in the penitentiary for 18 years. Defendant appeals. Affirmed.

C. H. Mackey, Woodin & Son, and Hamilton & Donahue, for appellant. Milton Remley, Atty. Gen., and F. L. Goeldner, for the State.

ROTHROCK, C. J. 1. This is the second appeal by the defendant in this case. See 61 N. W. 246. It is not denied that the defendant killed Walter Clark by shooting him with a revolver. And it is not claimed that the shooting was accidental. In the trial from which this appeal was taken, as well as upon the former trial, the contention was that the killing was done in self-defense. The judgment was reversed upon the former appeal upon questions which are not now involved in the case. The tragedy occurred in the nighttime on a public road in Keokuk county, near the residence of one Oliver Helm. The deceased and his brother, Byron Clark, and the defendant are cousins, and for many years resided on farms in the same neighborhood. The defendant was about 33 years of age at the time he took the life of Walter Clark. He had been married for some years, and was the father of four children. Byron Clark was then about 23 years old, and Walter Clark was younger, and both were unmarried. It appears that these persons were not on friendly terms. For some time before the fatal occurrence there had been quarreling, and some fighting, in the neighborhood; and it is to be inferred from the testimony of many of the witnesses that the community was largely made up of families who were related to each other, as uncles, aunts, cousins, and other family connections. There was what is called "bad blood" among them. In the examination of the witnesses in chief, the prosecution was permitted to introduce evidence, over the defendant's objection, relating to quarrels, fights, and difficulties before the homicide, between what appeared to be two contending factions in the neighborhood. It is urged that it was not competent to prove the details of these fights and disturbances by direct testimony. We do not think there was error in overruling objections to this line of evidence. The defendant appears to have been present on the occasions referred to, and took part either as an adviser or as an active participant. It is always admissible, in a trial for murder, to show previous ill feeling on the part of the defendant toward the deceased. The authorities cited by counsel for defendant on this proposition do not involve the question under consideration. They relate mainly to the cross-examination of witnesses to good character, and they merely reiterate the well-known doctrine that, in cross-examination, particular acts indicative of bad character should be excluded.

2. The defendant did not introduce any evidence for the purpose of showing that his previous reputation as an orderly and peaceable man was good before the homicide. The state introduced a number of witnesses in rebuttal who testified that his reputation was bad. And a number of witnesses were introduced by the state who testified that the reputation of the deceased as a peaceable citizen was good. All this evidence was introduced over the defendant's objection, and the ruling of the court in permitting its introduction is claimed to be erroneous. If this were all that pertains to this question, the judgment of the court should be promptly reversed. The over-

ruling of the objection to the evidence was a palpable violation of one of the fundamental rules of evidence, which is now everywhere recognized and enforced, and to which there are no exceptions in trials for criminal homicide. 3 Greenl. Ev. §§ 25–27. At the close of the introduction of this evidence, counsel for the defendant moved to exclude it, and the motion was overruled. But immediately after the introduction of all the evidence in the case the following order was made: "Gentlemen of the jury: Referring to the evidence offered by the state tending to prove the reputation of deceased for good order, and of the defendant for being disorderly, the same is withdrawn from your consideration, and you will withhold applying the evidence in any way, as far as possible; and the motion of the defendant to strike same out is sustained." And in the general charge to the jury the following instruction was given: "Any and all evidence introduced by the state tending to prove that the reputation of Walter Clark for good order and peaceableness prior to the homicide was good, and also all evidence tending to prove that the reputation of the defendant for peaceableness and good order was bad before the homicide, is withdrawn, and you will disregard it, as having no weight whatever." It is strenuously contended in behalf of the defendant that the withdrawal of the objectionable evidence from the consideration of the jury did not cure the error in admitting it. It is said that the direction or order made at the close of the evidence (being an instruction to the jury), and the instruction given in the general charge, are in conflict, as being inconsistent with each other, and that, as it cannot be determined which instruction the jury followed, the judgment should be reversed; and we are cited to the cases of State v. Shelton, 64 Iowa, 333, 20 N. W. 459, and State v. Keasling, 74 Iowa, 528, 38 N. W. 397. These cases announce the rule contended for by counsel. But we think there is no conflict or inconsistency between the two instructions under consideration. The last is in exactly the same line with the first, and is couched in more emphatic language. When both are considered together, they constitute an absolute direction that the evidence erroneously admitted must be entirely disregarded, and excluded from any consideration by the jury.

3. It is further urged that the instructions did not cure the error, because it was impossible for the jury to disregard the testimony of the witnesses. We admit that there is force in this objection. But the general rule is that, where evidence has been erroneously admitted, it may be withdrawn from the jury, and thus cure the error. It is said, however, that the case presents an exception to the rule, because the error was so serious that it could not be recalled by instructions, and we are cited to the cases of Martin v. Orndorff, 22 Iowa, 505; Wicks v. Town of De Witt, 54 Iowa, 131, 6 N. W. 176; Hall v. Railway Co., 84 Iowa, 316, 51 N. W. 150; and Stevens v. Ellsworth (Iowa) 63 N. W. 683. It is true that in Martin's Case there was a reversal because the plaintiff's counsel, in his argument to the jury, read the evidence taken on a former trial, and which was not introduced in evidence on the second trial. Counsel for the defendant objected, and the court permitted the reading as a part of the counsel's argument. The court afterwards instructed the jury not to consider anything read from the minutes of the evidence at the former trial. Reference is made in the opinion to some peculiar circumstances in the case. It is not stated whether the reversal was upon the ground that the error could not be cured by proper instructions. The real ground for a reversal in that case was the misconduct of counsel. If one of the counsel for the state in this case had persisted in reading the evidence on the former trial "as part of his argument in the case," it might be good ground for reversal. In Wicks v. Town of De Witt the court not only refused to strike out the objectionable evidence, but did not, unless by the merest inference, instruct the jury not to consider it. The other cases do not appear to us to demand further notice. They are clearly distinguishable from the question under consideration. We conclude that it ought not to be held, in view of all the circumstances attending this trial, that there was prejudice to the defendant in the matter of this objectionable evidence. It is to be remembered that it is the general rule that evidence improperly admitted may be withdrawn from the jury, and the error thus cured. This court has many times so held. We need not cite the cases. In the trial of jury cases the court is required to pass upon the admissibility of evidence without time for much deliberation, and when an error occurs, and soon after a correction is made, the proper administration of justice does not require, unless it may be in extreme cases, that the court should grant a new trial because of the error. Knowledge of facts tending to show that a party charged with crime is guilty does not necessarily disqualify a person from being chosen as a juror in the case. The question in accepting him as a juror is, can he render a proper verdict upon the evidence submitted to him upon the trial? So, if, by errors of the court, improper evidence is admitted and ruled out, the general rule is that the juror is not disqualified by reason of the error from returning a true verdict, or, in other words, that the error is stricken from the record, and no longer remains in the case.

4. The defendant was a witness in his own behalf. He testified fully with reference to the whole transaction. And the facts related by him show that he was attacked and wounded by Walter and Byron Clark with pocket knives, and that he discharged his revolver at them to defend himself from great bodily injury. He also testified fully to the

previous altercations, quarrels, and fighting testified to by the witnesses in behalf of the prosecution. And he denied making threats as testified to by one of the state's witnesses. He stated that seven or eight of the young men in the neighborhood had been making threats against him; had drawn revolvers and shotguns on him. In short, the whole of his testimony was a vindication of himself, as an innocent and persecuted man. He was cross-examined by counsel for the state; and afterwards, but before the close of the introduction of the evidence in chief for the defense, the state recalled the defendant for further cross-examination, and propounded to him this question: "Q. Do you remember a talk in Helm's field with George and Lawrence McMickle, in July, in hay harvest, and did you say to them that some of the Clark boys would die with their boots on some of these days?" (Objected to as not cross-examination. Overruled, and defendant excepts.) The answer to the question was, "I did not have any such talk." It is urged that the ruling of the court was erroneous, because the question was not proper cross-examination of the witness. We have set out the substance of the defendant's testimony, for the reason that we think that the cross-examination was within the line of the examination in chief. There surely ought to be no question as to the right to interrogate the defendant, as a witness, on the subject of threats made against the deceased to any one.

5. Afterwards, and in rebuttal, the state called two witnesses who testified that the threat was made in their presence, as set out in the question. This testimony was objected to because the threat was not recent. It will be remembered that the threat, if any, was made in July, and the homicide occurred on the 1st day of October, following. This appears to be within the time that the neighborhood feud existed, and, if introduced in chief, there could have been no possible valid objection to it.

6. It is insisted that the court erred in not instructing the jury that this threat could be considered for the purpose only of impeaching the defendant as a witness. It is true that no specific instruction was given on this question. It was a matter of dispute on the trial, and no instruction was requested on the subject by counsel for the defendant. It is true, as urged in behalf of defendant, that it is the duty of the court to instruct the jury upon the material question of law in the case, whether requested to do so or not. We think, in view of the record, that it must have been understood that this evidence was to be considered as impeaching only. It is said that the case of Kuhns v. Railway Co., 76 Iowa, 67, 40 N. W. 92, is precisely in point on this question. We do not think this position is well taken. It is held in that case that as the record showed that the plaintiff used the evidence as a part of the transaction, when it was only competent for another purpose, the court should have sustained an objection to it, and excluded it, or instructed the jury for what purpose it could be considered. There is nothing in the record in this case showing that more was claimed for the evidence now under consideration than that it was for the purpose of impeachment.

7. It is contended with great earnestness that the verdict is not supported by the evidence. And in the printed argument and in the oral arguments on the submission of the appeal this question was fully discussed. We have given this feature of the case the most careful and exhaustive consideration. We have read and studied the evidence in connection with a plat of the road and surroundings where the conflict took place, and our conclusion is that we ought not to disturb the judgment of the district court. It is to be conceded that there is a decided conflict in the evidence as to whether the defendant was the attacking party. But two juries have concurred in finding that his act in taking the life of Walter Clark was murder in the second degree. We will not review the evidence, but deem it not improper to say that we doubt if any jury would ever find that the testimony of the defendant, or any other facts in the case, sufficiently accounts for his presence at the roadside where the encounter occurred, and at the time the deceased and his brother passed along on the way to their home.

8. A number of objections are urged against the correctness of the instructions given by the court to the jury. We do not think they require special consideration. A careful examination of them discloses no reversible error.

9. It is urged that the defendant was prejudiced by improper remarks made by counsel for the state in the closing argument to the jury. The indictment was for murder in the first degree, and the verdict was for murder in the second degree upon both trials. The main ground of the prejudice claimed consisted in making reference to the former verdict. It is said by counsel for the state that this was merely in reply to what was claimed by counsel for the defense as to the effect of the first verdict upon the question of lying in wait, and the deliberation and premeditation necessary to convict of murder in the first degree. We think, taking the whole showing, if the court had made any ruling as to what the facts were as to the alleged misconduct, we would be inclined to approve the finding that the remarks complained of did not authorize the granting of a new trial. But, however that may be, we cannot consider the question, because the remarks of counsel complained of do not appear to have been made of record. They cannot be made of record by affidavits, but must be shown by bill of exceptions. Rayburn v. Railway Co., 74 Iowa, 637, 35 N. W. 606, and 38 N.

W. 520; State v. Woodward, 84 Iowa, 172, 50 N. W. 885; Ford v. Easley (Iowa) 55 N. W. 336. The judgment of the district court is affirmed.

TUCKER v. ANDERSON.

(Supreme Court of Iowa. April 8, 1896.)

REVIEW OF QUESTION OF LAW — SUFFICIENCY OF CERTIFICATE.

A certificate of a question of law, under Code, § 3173, providing that no appeal shall be taken to the supreme court in a case involving less than $100, unless the trial judge shall certify that it involves a question of law on which the opinion of the supreme court is desired, must be complete in itself, and when it does not show that the question certified was one on which the rights of the parties depended, and fails to settle a disputed question of fact necessarily involved in the determination of the question of law, the case will be dismissed.

Appeal from district court, Lee county; J. M. Casey, Judge.

Action upon a written guaranty of payment indorsed on a promissory note. There was a trial to the court without a jury, and a judgment was rendered for the defendant for costs. Plaintiff appeals. Dismissed.

John E. Craig, for appellant. I. N. Waggonner, for appellee.

ROTHROCK, C. J. 1. This action involves less than $100, as shown by the pleadings, and the case is presented in this court upon a certificate signed by the judge within the proper time. The certificate is as follows: "I, J. M. Casey, district judge, First judicial district of Iowa, do hereby certify that upon the trial of the above-entitled cause the following question of law arose, upon which it is desirable to have the opinion of the supreme court of the state of Iowa, to wit: The note sued on bears the following indorsement by the payee, 'Pay to the order of G. M. Law, and I guarantee the payment of the within by April 15th, 1892. James H. Anderson.' This indorsement was made after the maturity of the note, and at the time of its transfer to indorsee Law. The time of the sale and indorsement by Law to plaintiff was before the expiration of the time fixed in above guaranty, and at that time plaintiff presented the note and guaranty to guarantor Anderson, and asked if that was his signature, and whether the note would be paid. Guarantor Anderson said it was his signature, and the maker would pay it by the time fixed in guaranty. Is the guarantor bound by the guaranty at the suit of plaintiff, an indorsee of Law, the immediate indorsee of guarantor Anderson? Which question being presented to the court in the proper way and in the proper time is hereby certified to the supreme court for its opinion. J. M. Casey, District Judge." It is provided by section 3173 of the Code that no appeal shall be taken to this court "in any cause in which the amount in controversy between the parties, as shown by the pleadings, does not exceed $100, unless the trial judge shall certify that such cause involves the determination of a question of law upon which it is desirable to have the opinion of the supreme court." It will be observed that the certificate above set out does not state that the question certified involves a question necessary to be determined as conclusive of the rights of the parties. The certificate is merely to the effect that a question of law arose upon the trial. Whether it was a mere collateral question, or one necessarily involved as affecting the merits of the case, does not appear.

2. The record shows that the parties introduced a number of witnesses who testified to the facts and circumstances under which the plaintiff became the owner of the note. And there was a dispute as to whether the plaintiff called upon Anderson and made inquiry of him as to his guaranty before the plaintiff purchased the note. There was a decided conflict in the evidence on this question. In the statement of facts in the above certificate it does not appear whether the court found that the plaintiff bought the note on the faith of the representations made by Anderson. We do not determine whether this question was material or not to the parties. It appears that it was regarded as important by the appellant. This court has repeatedly held that in appeals of this class of cases the certificate authorizing the appeal must be complete in itself. The question of fact necessary to be considered in connection with the question of loss involved must be decided by the district court, and not left for the determination of this court. See Riddle v. Fletcher, 72 Iowa, 455, 34 N. W. 290; Hudson v. Railroad Co., 59 Iowa, 582, 13 N. W. 735, and other cases to be found in our digests. The case demands no further consideration, and it is dismissed.

STATE v. TEETERS.

(Supreme Court of Iowa. April 8, 1896.)

OBSTRUCTION OF HIGHWAYS—INDICTMENT—ELECTION—ESTABLISHING HIGHWAYS—PRESCRIPTION—CONSTITUTIONAL LAW—EXCESSIVE FINES AND UNUSUAL PUNISHMENT.

1. Under an indictment averring generally the obstruction of a highway, a conviction may be had for obstruction of a highway established either by dedication or prescription.

2. Evidence that the owner of land lived thereon while a road was being used for 13 years by the public, over the land, and that he himself traveled the road, is sufficient to prove knowledge on the owner's part of the use of the road as a highway so as to establish a highway by prescription under the law prior to 1873.

3. In a prosecution for "willfully" obstructing a highway (Code, § 3979), the word "willfully" means "intentionally," and therefore an admission that defendant placed the obstruction across the road is an admission of a willful obstruction.

4. Code, § 3979, fixing the punishment for willfully obstructing any highway at imprisonment in the penitentiary not to exceed five years, or by fine not exceeding $500 and imprisonment in the county jail not exceeding one year, the minimum punishment not being fixed, is not unconstitutional as imposing excessive fines or unusual punishment.

Appeal from district court, Johnson county; M. J. Wade, Judge.

Indictment for obstructing a public highway. Verdict of guilty, and a judgment, from which the defendant appealed. Affirmed.

Remley & Ney and J. M. Cash, for appellant. Geo. W. Ball, S. R. Fairall, and C. S. Ranck, for the State.

GRANGER, J. 1. The highway charged to have been obstructed was established either by prescription or by dedication. There is no pretense that it was established by the statutory method of procedure. The court permitted the jury to find the fact of the existence of the highway either by prescription or by dedication, and the appellant claims that it was error for the court to submit both methods, and says the fact of the existence of the highway "should appear so clearly by one or the other of the methods that it excludes the propriety of submitting both." It is urged that on the trial the state was bound to elect on which method of establishment it would rely. It is thought that State v. Mitchell, 58 Iowa, 567, 12 N. W. 598, supports the claim, but we do not think so. That case treats only of how highways may be established by prescription or dedication, and how the fact may be shown. In State v. Robinson, 28 Iowa, 514, the indictment charged the obstruction of a public highway, as in this case, and it is there said that the state was not confined to documentary evidence in proving the existence of a highway, but was properly allowed to show its establishment by consent and user. The case is, in terms, distinguished from State v. Snyder, 25 Iowa, 208, wherein it was charged in the indictment that the obstruction was to a "county road" (meaning one regularly established), and the evidence was limited to show the facts as charged. It is not thought that the indictment is so framed as to make it necessary to prove that the highway was established by prescription or by dedication; that is, it does not charge the establishment in either one of the ways, but it avers, generally, the obstruction of a highway. Under such an averment the fact of the existence may be shown by any competent evidence. This rule is sustained by the authorities cited, and, we think, upon reason.

2. The law of 1873 somewhat changed the rule as to proving the existence of highways by prescription by providing that the fact of adverse possession shall be proved by evidence distinct from and independent of the use, and that the party against whom the claim is made had express notice thereof. There was evidence showing travel along the line of the road in question as early as 1843, and the court gave to the jury the rules of evidence as they existed before and after the law of 1873, and permitted it, if the evidence was sufficient under the former rule, to find that the highway was established before the change in the law; and of this appellant complains, saying that the evidence did not justify it. Reliance is placed on the holding in State v. Railway Co., 45 Iowa, 139. In that case there was an attempt to establish a highway by prescription through wild and uncultivated land, and the holding is that open and notorious use of a highway through such lands does not raise a presumption of notice of the existence of the highway to the owner. In that case it is said: "His knowledge thereof must be proved, or there must be sufficient ground for the law to raise a presumption that he had information of the use to which his land was devoted." It is also said in that case: "The fact that the owner for a long time permitted the public, under a claim of right, to use the land, authorizes the inference that such use was commenced and continued with his assent If the highway was opened and used with the assent or acquiescence of the owner, it will be presumed that he intended to dedicate the land to the public use." A conclusion of the case is stated in these words: "It is our opinion that the use of the land alone, if it be wild and uninclosed timber or prairie, will not raise a legal presumption of notice to the owner of the occupation of his land. We conclude, therefore, that the user alone of uninclosed and wild prairie or timber land will not support a prescription for a highway." It will be understood that we are now considering the case as it may affect the case at bar under the law as it existed prior to September, 1873. The notice spoken of in that case is simply that of the occupation of his land by the public. The reasoning of the opinion deals with such facts as the owner's nonresidence, his living at a long distance from the land, and other facts, because of which it would be unreasonable to infer knowledge or occupation from mere use. In the case at bar there is hardly room for doubt that the owners of the land, from before 1860 to long after 1873, knew of the use of the highway by the public across their land, so that the fact of knowledge of occupation appears. They resided on the land, saw, and traveled the road. It is a case in which the fact of knowledge is inferable from other facts than mere user. As to the effect of user with knowledge, see Onstott v. Murray, 22 Iowa, 457, which case seems to control the branch of this case we are considering.

3. It is a fact that the defendant admitted the placing of the obstruction to stop the travel across his land, and the court so said to the jury, and left it to find the fact as to the existence of the highway. It stated to the jury that the express admission narrowed

the issues to the question whether the way obstructed was a public highway. The obstruction, to constitute the crime, must have been willful, and the appellant now urges that it was error not to submit the question of "willfulness" to the jury. The language of the law is: "If any person * * * willfully obstruct or injure any public road or highway," etc. Code, § 3979. This seems no more than, "If any person intentionally does so, he shall be punished." The admission that defendant placed the obstruction across the road as traveled was an admission of an intentional or willful obstruction.

4. There is a complaint that the court rejected testimony offered by defendant as to acts of other parties along the line of road. The argument does not specify the acts, and we infer that reference is made to other obstructions, and, if so, they were on other roads, or so distant from the alleged point of obstruction as to be immaterial.

5. It is said that there was no evidence to justify submitting either the question of a highway by prescription or dedication to the jury. We need do no more than say that we cannot concur in that view. If it be said that there is room for some doubt on particular questions involved, it still remains that there is evidence of long-continued use on the part of the public, with knowledge and assent on the part of the owners, so as to make the findings of the jury conclusive on the fact of the existence of a public highway.

6. The indictment is laid under Code, § 3979, which provides penalties for various offenses in maliciously injuring, removing, or obstructing any bridge or plank road, or cutting, burning, or destroying any telegraph posts, or the wires or apparatus thereto belonging, as well as the offense in question, and the penalty is imprisonment in the penitentiary not more than five years or by fine not exceeding $500 and imprisonment in the county jail not exceeding one year. It is urged to us that the statute is unconstitutional, because it violates section 17 of article 1 of the constitution of the state, which provides that "excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted." While, under the act, an excessive fine might be imposed for a technical and practically harmless violation of the law, it could not be said that the law imposed it, for it comes near permitting the least possible punishment. If the law fixed arbitrarily the excessive punishment, the claim of the law being unconstitutional because of it would be more tenable. It is not to be said that the highest penalty possible under the statute would, in all cases, be excessive. Such obstructions might result in great loss of life or property or both, and be so intended. The safety of travel upon our public thoroughfares, including railways, is within the purview of the statute, involving, as we have said, life and property. It is not the statute that imposes the particular fines, but the court, in the exercise of a discretion authorized by the statute. If such a fine is excessive within the constitutional meaning, it is the judgment imposing it that is void, and not the statute. The fine in this case is $20, besides costs, and that is not excessive, and is not thought to be. We have considered all the questions presented that we deem important, and conclude that the judgment should stand. Affirmed.

TOWN OF MANNING v. WICHMER.

(Supreme Court of Iowa. April 8, 1896.)

CRIMINAL LAW—NOTICE OF APPEAL—RECORD.

Appeal in a criminal case cannot be entertained, the notice of appeal not being certified to or otherwise identified by the clerk of court, or shown to have been served on him.

Appeal from district court, Carroll county. Defendant was convicted under an information charging him with the violation of a town ordinance in reference to peddling. Dismissed.

B. I. Salinger, for appellee.

DEEMER, J. The case is submitted upon a transcript of the proceedings before the mayor of the town of Manning, and upon appeal in the district court. The transcript contains a copy of the information, the plea of the defendant, the judgment of the court, and the appeal bond. What purports to be a notice of appeal is attached to the transcript, but it is not certified to or otherwise identified by the clerk of the district court. Neither does it show any service upon the clerk. Owing to the condition of the record, we do not have jurisdiction of the case, and the appeal is therefore dismissed.

ROBERTS et al. v. PRESS et al.

(Supreme Court of Iowa. April 9, 1896.)

FRAUDULENT CONVEYANCES—ASSIGNMENT FOR BENEFIT OF CREDITORS — WHAT CONSTITUTES — INTENT—SECURING PARTICULAR CREDITORS.

1. A mortgage of a debtor's entire stock to secure the claim of a creditor who had assumed other bona fide indebtedness of his debtor for the purpose of procuring a loan for the latter is valid, notwithstanding a fraudulent intent on the part of the mortgagor, if the mortgagee had no knowledge of such intent, nor of facts which should have put him on inquiry.

2. Code, § 2115, providing that no general assignment by an insolvent for the benefit of creditors shall be valid unless made for the benefit of all, in proportion to the amount of their respective claims, uses the word "assignment" in its technical sense, and does not affect general transfers of the debtor's property.

3. Whether certain acts constitute a general assignment for the benefit of creditors is to be determined by the intent of the parties.

4. A mortgage of an insolvent debtor's entire property to secure particular creditors, thereby defeating other creditors in the collection of their debts, is not a general assignment for the benefit of creditors, within Code, § 2115, forbidding preferences in such assignments.

5. A mortgage of an insolvent debtor's entire stock to secure particular creditors, without any intent to make a general assignment, is valid, though a short time thereafter the debtor does in fact execute such assignment.

Appeal from district court, Clark county; W. H. Tedford, Judge.

Action in equity to set aside certain chattel mortgages as having been executed in fraud of creditors, or to decree them to constitute an assignment for the benefit of creditors. Decree dismissing plaintiffs' bill at their costs, and establishing the lien of said mortgages in favor of the defendants. Plaintiffs appeal. Affirmed.

Temple & Hardinger and W. H. Park, for appellants. T. M. Stuart and McIntire Bros. & Jameson, for appellees.

KINNE, J. 1. In March, 1892, the defendant B. S. Press opened a clothing store in the city of Osceola, Iowa. He had a capital of from three to five thousand dollars. Up to January, 1893, he was carrying a stock of from five to eight thousand dollars, for one-half of which he was indebted. At the later date he moved into a much larger room, and at the same time increased his stock, and added new lines of goods thereto, so that it reached in value from eighteen to twenty thousand dollars. The financial panic of 1893 overtook him, his sales fell off, some of his bills became due, and from time to time he borrowed of various parties large sums of money to meet them. In this way he had met the demands against him up to about the last of June, 1893. He then owed, for money borrowed, to H. D. Copeland, $500; to the First National Bank of Chariton, $3,550; to the Chariton Bank of Chariton, $750; to the Iowa State Bank of Osceola, Iowa, $3,000. Some of these obligations were due, or about to become due, and the defendant undertook to raise money with which to pay them, as well as to pay or secure such of them as would thereafter mature. Such arrangements were made that the First National Bank of Chariton agreed to loan said Press the further sum of $1,250, with which to pay the $750 due the Chariton Bank, and the $500 due to Copeland, and to extend time on the $3,550 which Press owed it, providing Copeland would sign all of the notes, including the $1,250 note, as a maker, and became personally liable to said bank on all of said notes; and on the further condition that Copeland should obtain a mortgage on the entire stock of goods and fixtures then owned by said Press to secure all of said indebtedness, as well as the $3,000 owing to the Osceola Bank, which Copeland was to and did assume. As a part of the arrangement Copeland was to take immediate possession of said stock of merchandise, fixtures, and accounts, and to sell the goods without sacrifice, and apply the proceeds, less the costs and expenses attending the sale, pro rata on said debts until they were paid. The total sum for which Copeland thus obligated himself was $7,800, which sum the mortgage was made to secure. Copeland took possession at once under the mortgage, and proceeded to sell the goods as agreed upon. When he took possession, the goods invoiced $16,170.80, including fixtures, and $686.50 of accounts. He sold goods amounting in the aggregate to about $9,000, and out of said sum paid about $2,000 in expenses. The difference—$6,891.49—he applied on the indebtedness which the mortgage secured. After the execution and delivery of the mortgage to Copeland, and on the same day, Press executed his note, due one day after date, to Ida Press, his brother's wife, for $1,500, securing the same by mortgage on the same goods. On July 3, 1893, at the suggestion of Simon Press, his uncle, he executed chattel mortgages on the same stock to plaintiffs, and to Meyer Engle & Co., creditors, to secure their claims, which mortgages were duly recorded. It appears that Copeland had no part in the execution of these two mortgages. At the time Press executed the mortgage to Copeland he was indebted to plaintiffs and to Meyer Engle & Co. in the sum of $6,000, or over, which sum was unsecured, except as above stated. Roberts, Butler & Co. refused to accept the mortgage made to them, and with some 17 other creditors proceeded to obtain judgments against B. S. Press upon their claims, which judgments, in the aggregate, amounted to about $7,000, exclusive of interest and costs. Several of these creditors caused attachments to issue, and garnished the defendant Copeland thereon. It appears, without conflict, that when Copeland took his mortgage he had no knowledge as to the existence of these debts of Press for goods purchased. October 9, 1893, said general creditors filed a bill in equity in this cause, making the mortgagor B. S. Press, the mortgagees Copeland, Ida Press, and Meyer Engle & Co., also Simon Press and E. M. Press, parties defendants. All of said defendants except Meyer Engle & Co., who were nonresidents, appeared, and filed answers in said cause. The bill charged a conspiracy between the defendant B. S. Press, Copeland, and the other defendants Press, for the purpose of incumbering and concealing the property of B. S. Press from plaintiffs, and for the purpose of defrauding them, and prayed that said mortgages might be decreed fraudulent, or, if they were found not so, then that said mortgages be decreed to constitute a general assignment for the benefit of all creditors. All of the defendants except Meyer Engle & Co., who were not served with notice, made full answers to said bill, denying any fraud or conspiracy, and averring that said mortgages were given to secure a bona fide indebtedness, and defendant Copeland fully stated the manner and circumstances under which he came to take the

mortgage on the goods. The pleadings cover 40 printed pages, but the foregoing is a fair statement of the substance of them, as also of some of the facts elicited upon the trial. The court entered a decree dismissing plaintiffs' bill, and adjudging that they pay the costs; also established the lien of the mortgages of Ida Press and Meyer Engle & Co. on the goods, subject to Copeland's mortgage, and providing that any balance remaining after satisfying said mortgages should be paid plaintiffs in the order of date of their garnishments of Copeland.

2. Plaintiffs first claim that the transfer of the goods by the mortgages was fraudulent and void as to them. It may be admitted that if the determination of this question rested alone on the evidence or acts of B. S. Press, it would be easy of solution. It is not enough to set aside these mortgages to show that B. S. Press intended in executing them to defraud his creditors. It must also appear that any fraud which was intended to be perpetrated by B. S. Press was known to the mortgagees. It may, we think, be conceded that B. S. Press has not satisfactorily accounted for the property he was possessed of. As to goods sold by him prior to the execution of these mortgages, it appears he has not accounted for the proceeds. The evidence in that respect is not such as to justify the belief that he has applied all the proceeds of such sales to his indebtedness, save what was necessarily expended in carrying on the business, and in the support of himself and family. What he did with the money thus received does not appear, but there is no evidence showing that these mortgagees or the other defendants ever received any of it, or were in any manner concerned in its disposition. We first direct our attention to the case of Copeland. Admitting that there was a fraudulent intent on part of B. S. Press, we inquire, what is there which shows that Copeland was a party to it? In what way, if at all, did Copeland unite in such intended fraud? What facts appear from which we would be justified in holding that he was an actor—a participant—in the fraud of B. S. Press, or that he had or should have had any knowledge of it? It very satisfactorily appears that Copeland had no knowledge whatever that B. S. Press was indebted to plaintiffs. It stands undisputed that every dollar of the indebtedness for which the Copeland mortgage was given was a bona fide debt of B. S. Press. Copeland had, prior to the execution of this mortgage, become obligated to pay the entire debt which his mortgage was thereafter made to secure. He was not an intermeddler in the transaction. He was himself a creditor of B. S. Press, and as such had a perfect right to secure himself and to borrow for Press the $1,250. Nor was his act in rendering himself liable to pay other legitimate indebtedness of B. S. Press indicative of any fraudulent intent. His acts in procuring the loan of the $1,200, in becoming obligated to the banks to pay the debts of B. S. Press, and in securing such liability by mortgage on the goods, were in and of themselves legal and proper, and in such a case fraud on his part cannot be assumed; it must be shown to have existed. Stewart v. Bank, 76 Iowa, 571, 41 N. W. 318. The law is well settled that such a mortgage will not be set aside when it is executed upon a consideration, unless it is shown that there was fraud on the part of the grantor, which was participated in by the grantee, to the extent at least, of knowledge on the part of the grantee of the grantor's fraudulent intent, or of facts and circumstances such as, in law, should put the grantee upon inquiry. Steele v. Ward, 25 Iowa, 535; Kellog v. Aherin, 48 Iowa, 299; Preston v. Turner, 36 Iowa, 671; Jones v. Hetherington, 45 Iowa, 681; Williamson v. Wachenheim, 58 Iowa, 277, 12 N. W. 302; Spaulding v. Adams, 63 Iowa, 437, 19 N. W. 341. Even had it been shown that Copeland, when he took his mortgage, knew of the existence of other creditors whose claims were not secured, and that the effect would be to postpone or defeat them, such facts would not affect the validity of his mortgage in the absence of any fraudulent intent on his part. Bryant v. Frink, 75 Iowa, 516, 39 N. W. 820; Rollins v. Carriage Co., 80 Iowa, 380, 45 N. W. 1037; Aulman v. Aulman, 71 Iowa, 124, 32 N. W. 240; Burtis v. Bank, 77 Iowa, 103, 41 N. W. 585; Stroff v. Swarford, 81 Iowa, 695, 47 N. W. 1023; Goodenow v. Friott, 89 Iowa, 671, 57 N. W. 437. In this case, however, it does not appear that when Copeland took his mortgage he had any knowledge that Press had other creditors. It is not necessary to pursue this subject further, so far as Copeland is concerned. His is a case of securing an indebtedness which was in all respects legal and just. He says that in so doing he had no fraudulent intent or purpose, and no intent to hinder and delay others in the collection of their debts. There is no evidence to the contrary. That his act resulted in an injury to plaintiffs is no reason for decreeing his mortgage void, inasmuch as it appears he acted in good faith, and with no wrongful intent. It is not made to appear that either E. M. Press or Simon Press, her agent, in any way conspired with any one touching the execution of either of these mortgages, or that they, or either of them, received the proceeds of the sales made by B. S. Press, or had any knowledge as to how they were appropriated. The burden is on plaintiffs attacking these mortgages for fraud to establish the fact of the fraudulent intent of B. S. Press; as also the further fact that the defendant knew of his fraud, if any, and participated therein, to the extent heretofore stated. As to all of the mortgages the proof in this respect has failed, and as to the mortgages of Ida Press and Meyer Engle & Co. there is no evidence whatever which can be held even to tend to overcome the presumption which the law raises in their favor.

3. Finally, it is contended that the legal effect of the transaction we have been considering is that of a general assignment with preferences, and hence in contravention of the provisions of section 2115 of the Code, which reads: "No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors shall be valid, unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims." We have held that this statute does not affect general transfers of the debtor's property, but relates only to general assignments, and uses the latter word in its technical sense. Lampson v. Arnold, 19 Iowa, 479. We are not called upon to review the many cases decided by this court touching what acts will constitute a transaction a general assignment for the benefit of creditors. It has often been held that whether or not certain acts would constitute such an assignment was a question to be determined by the intent of the parties. Kohn v. Clement, 58 Iowa, 589, 12 N. W. 550; Bank v. Crittenden, 66 Iowa, 237, 23 N. W. 646; Letts, Fletcher & Co. v. McMaster, 83 Iowa, 455, 49 N. W. 1035; Gage v. Parry, 69 Iowa, 605, 29 N. W. 822; Aulman v. Aulman, 71 Iowa, 124, 32 N. W. 240; Perry v. Vezina, 63 Iowa, 26, 18 N. W. 657; Farwell v. Cunningham, 86 Iowa, 69, 52 N. W. 1126. With this rule in mind, let us turn to the facts. There is an entire absence of evidence as to any intent on the part of B. S. Press to make an assignment for the benefit of creditors. It does not appear that such a proposition was ever thought of, much less discussed. It does not appear that B. S. Press intended to give a mortgage to Copeland or any one else. He went to Chariton on June 29th, for the purpose of obtaining an extension of time on his indebtedness to the banks, expecting thereby to be enabled to continue his business. So far as appears, the matter of giving a mortgage on his stock was never mentioned by him until he was told that he could not obtain the desired extension of his paper unless he did so. There is nothing in the instruments themselves to indicate that Press intended to make an assignment. The evidence is silent as to such an intent. His was a plain intent and attempt to secure certain creditors by placing mortgages on his stock of goods. That he was insolvent, and mortgaged his entire property to secure certain of his creditors, and by so doing other creditors were defeated in the collection of their debts, does not constitute such act an assignment for the benefit of creditors. Lampson v. Arnold, 19 Iowa, 485; Clement v. Johnson, 85 Iowa, 569, 52 N. W. 502. It is equally well settled that, where a debtor gives security to a part of his creditors without intending to make a general assignment for the benefit of all of them, the transaction is valid, even though, a short time thereafter, and on the same day, he concludes to and does execute such an assignment. Gage v. Parry, 69 Iowa, 605, 29 N. W. 822; Aulman v. Aulman, 71 Iowa, 124, 32 N. W. 240; Clement v. Johnson, 85 Iowa, 569, 52 N. W. 502. But it is not necessary to multiply authorities, as the facts of this case fail to show any intent to make an assignment for the benefit of creditors. A patient examination of all of the facts disclosed by the record in this case convinces us that the decree should be affirmed.

FINDLAY v. CARSON et al.

(Supreme Court of Iowa. April 9, 1896.)

INJUNCTION—DAMAGES—PRIMA FACIE CASE—LEASE—ASSIGNMENT.

1. Where a question presented by a party has been adversely ruled on by the trial court, an appeal must be taken from such ruling in order to present it for review.

2. In an action on an injunction bond, plaintiff makes out a prima facie case by establishing the dissolution of the temporary injunction, and the dismissal of the original suit, and the burden is on defendant to show that the injunction was rightfully issued.

3. A lease of a coal mine obligated the lessor not to lease to any other party any coal land to be operated during the life of the lease, and prevented the lessee from "dividing his time or attention with any other mine," for the reason that lessor's rent depended on the number of bushels mined. The lessee assigned his interests in the lease, and the assignees sought to restrain him from operating another mine, on the ground that he was still bound by the original lease. *Held*, that no right to insist on the obligation between lessor and lessee was transferred to the assignees, but that they acquired simply such rights as their assignor had under the lease, and were bound in his stead by its obligations.

4. An assignment of a lease of a coal mine, with the "good will of the trade," does not carry with it an obligation that the assignor will not again engage in the same business in the vicinity.

Appeal from district court, Van Buren county; W. I. Babb, Judge.

As originally commenced, this was an action at law upon an injunction bond made and executed in a certain suit wherein defendants herein secured an injunction against the plaintiff, restraining him from selling coal in a particular locality and to certain persons. The defendants filed an answer and a cross bill in equity, denying that the injunction was wrongfully sued out, and asking that they have in this action a decree permanently enjoining the plaintiff from selling coal in violation of a certain agreement, which they claim he made, not to sell the same in a particular locality. The cause was thereupon transferred to the equity calendar, and tried to the court. The district court rendered judgment against defendants for the sum of $306.05, and dismissed their cross bill, and the defendants appeal. Affirmed.

Wherry & Walker, for appellants. Sloan & Sloan and W. A. Work, for appellee.

DEEMER, J. The pleadings in the case are very voluminous, and we will not do

more than attempt to set out the substance of the issues. The action is to recover damages upon an injunction bond given by defendants in a suit brought by them against the present plaintiff in January, 1890. That action was to restrain the plaintiff herein from selling coal to any persons who were patrons of the mine owned by defendants in April, 1885, and from contracting or offering to contract with the Chicago, Rock Island & Pacific Railroad Company to furnish it coal at Doud's Station for its use, and from selling any coal to the country trade in the vicinity of his mine. A temporary injunction was issued to that effect, and served upon the plaintiff, January 6, 1890; but this injunction was subsequently dissolved, on motion of this plaintiff, by the judge who issued the same, and a short time thereafter defendants herein named dismissed their case. It was claimed in that case that in 1885 these defendants purchased of the present plaintiff all of his interest in a certain coal mine held by him under a lease, and with the exclusive right to sell coal in the vicinity of the mine; and that this plaintiff had, in violation of his contract, started up a new mine, and was contracting and selling coal, to the great damage of these defendants. They afterwards amended their petition by alleging that, at the time of their purchase, the present plaintiff agreed not to enter the coal mining business in that vicinity, which was, as they alleged, a part of the consideration of the sale. All of these matters were denied by the plaintiff, and, as before stated, the injunction was dissolved, and the case dismissed. In the case at bar the defendants, in answer to plaintiff's cause of action on the bond, plead substantially the same matters they had alleged in their original petition as amended, in which they sought to obtain an injunction against the plaintiff, and say that they were then and now are entitled to an injunction, and they pray that the same do issue, and that they have damages from plaintiff for the violation of his agreement. The plaintiff denied the allegations of the defendants' cross bill, pleaded an estoppel and various other matters, which are not necessary to be stated. Such were, in substance, the issues on which the case was tried, which resulted in the judgment and order appealed from.

We are met at the threshold of the case with a proposition from appellee's counsel that the dissolution of the temporary writ of injunction by the court, and the dismissal of the original injunction suit by these defendants, are conclusive upon the question of the wrongful issuance of the writ; that such facts constitute such a judicial determination of the controversy, and such a breach of the conditions of the bond, as to entitle their client to the damages he is able to show he has sustained; and that the question as to the rightfulness of the injunction cannot be relitigated in this case. There are some authorities which may seem to sustain them in their position, and it may be that their contention is sound, but the record is not in such condition that we may determine the question. The appellee presented the point to the court below in various forms, and it ruled against him, and from these rulings no appeal has been taken. Consequently we cannot consider the question presented, but must try the cases on the issues as made before the lower court. It must be conceded, then, that, if the defendants have shown that they were entitled to the writ at the time it issued, this constitutes a defense to plaintiff's cause of action on the bond. It does not follow, however, that we cannot consider the dissolution of the injunction and the dismissal of the suit as probative facts in the case, although they cannot, in view of the record made, be held to be conclusive. It is manifest that these matters make out a prima facie case for the plaintiff, and cast upon the defendants the burden of showing that the injunction was rightfully issued. Boden v. Dill, 58 Ind. 273.

We turn, then, to the question, was the injunction rightfully issued in the first instance? The following are some of the undisputed facts: On and prior to April 1, 1882, one McGrew was the owner of a large tract of coal lands lying in section 24, township 70, range 11, in Van Buren county, Iowa; and on the day named he leased to one Hugh Findlay, a brother of the plaintiff, his coal mine located on said section of land, for the term of five years from date. By the terms of the lease, Findlay was "not to divide his time or attention with any other mine," nor was McGrew "to lease any other party any coal mine to be operated during the life of this lease." On October 10, 1882, Findlay sold to William Carson, a member of the defendant firm, a one-half interest in this lease for the sum of $500; and these persons, under the name of Carson & Findlay, proceeded to work and operate the mine until about January, 1885, when Hugh Findlay sold his half interest in the lease to the plaintiff in this suit; and he, in turn, in less than a month thereafter, sold his half interest to defendant Matthew Walker. An extension of this lease for an additional five years, or until April 1, 1892, was procured from McGrew by some one, but by whom is a matter of dispute. The defendants proceeded to operate the mine up to the time of the institution of this suit. In the year 1885, Hugh Findlay opened up another mine upon the section of land that defendants' mine is on, and continued to operate it until the 13th day of April, 1888, when he sold the same to plaintiff, George Findlay, who continued to operate it until the injunction was served upon him, on January 6, 1890.

Claim is made by the defendants that, at the time they purchased plaintiff's interest in the McGrew lease, he (plaintiff) expressly

agreed that he would discontinue the mining of coal at said place, and would not engage in the same. Defendants also claim that by reason of the stipulations contained in the McGrew lease, and by virtue of the assignment by plaintiff of an interest he had purchased therein to the defendants, he placed himself under obligations not to engage in the mining of coal upon the section of land where defendants' mine is situated.

We will first dispose of this last claim made by the defendants. It will be seen that the original McGrew lease obligated the lessor, McGrew, not to lease to any other party any coal to be operated during the life of the lease, and prevented the lessee, Findlay, from "dividing his time or attention with any other mine." This last clause was made for the benefit of McGrew, for the manifest reason that he was to receive as rental one-half cent per bushel for all coal that should be mined. When plaintiff became one of the parties to the lease by virtue of his purchase from his brother, he, no doubt, became bound to McGrew, under this clause, to give his entire time and attention to the mine. But his obligation did not extend to any other person, and he was entirely released from it when he sold his interest to Walker, for Walker then became bound instead of plaintiff. Plaintiff was under no contract with Walker or the defendants not to operate another mine, simply because he sold his interest to Walker. He simply transferred what rights he had under the lease, and no obligation between him and McGrew was transferred to Walker or the defendants which would enable him or them to insist upon any rights that McGrew may have had under his lease with Hugh Findlay. Plaintiff did not need McGrew's consent to the assignment of the lease, and any agreement he may have made with McGrew based upon plaintiff's release was a nudum pactum. There was no privity as to these matters between McGrew and defendants. McGrew's contract was not made for their benefit, but for his own; and the defendants, after they acquired the whole interest of the lease, became bound instead of the Findlays. These propositions are so plain that further argument is unnecessary.

With reference to the other claim made by the defendants, the evidence is much in conflict. Walker claims and testifies that, when he purchased of plaintiff his interest in the McGrew lease, the plaintiff made an agreement substantially as claimed, while the plaintiff denies the making of any such agreement. We have gone over the testimony in the light of the well-established rule that, before a court of equity will be justified in acting in such a case, the contract itself must be certain and distinct, or such as, from the surrounding circumstances, may be construed with certainty, and be clearly established by the evidence. High, Inj. (3d Ed.) § 1178. And while we are satisfied there was some talk at the time about plaintiff's wanting to quit and get out of business, and defendants may have thought that plaintiff would not re-engage in the business, yet such talk never ripened into a contract or agreement between them. The very strongest language which it is claimed plaintiff used was "that he would not bother me [Walker] as long as I had the place, in the way of interfering with the bank and trade of the bank." It is very doubtful whether this, if true, would constitute an agreement not to re-engage in the business. The plaintiff, however, denies the use of any such language, and he is corroborated in such denial by some of the circumstances and other evidence in the case. We cannot set out all of the evidence on which we base our conclusions. It is sufficient to say that defendants have failed to establish the agreement as claimed.

Appellants argue that, as they purchased the good will and trade of the mine, a court of equity ought to protect them in it by restraining plaintiff from re-engaging in the business. It is doubtful, to say the least, whether plaintiff sold more than his interest in the McGrew lease; but concede that he also conveyed the "good will of the trade," or that this followed as an incident to the assignment of the lease, yet it does not follow that such an agreement carries with it the obligation not to again engage in the business in that vicinity. Even under such a contract the seller is at liberty to engage in the same business in the same locality, and he has the right to solicit business even though it may have the effect to lessen the trade of the purchaser. This seems to be the rule of the civil as well as the common law. See Hoxie v. Chaney, 143 Mass. 592, 10 N. E. 713; Bergamini v. Bastian, 35 La. Ann. 60; Bassett v. Percival, 5 Allen, 345.

The only remaining question is as to the amount of damages to which plaintiff is entitled. The lower court allowed him $104.20 as attorney's fees, $33.20 for expenses, $15 for loss of time, $113.75 for loss of profits, and $40 for interruption to his business. Both parties complain of this allowance. The plaintiff, however, has not appealed, and we cannot consider his objections. As to defendants' complaints, we have examined them all, and find no error. Had the damages been larger in some particulars, we would not have interfered. That this was a proper case for the allowance of profits as damages, see Willis v. City of Perry (Iowa) 60 N. W. 727, and cases cited. And, while many of the items cannot be determined with mathematical certainty, yet, on the whole, we feel that justice has been done. We reach the conclusion that the judgment is right, and it is affirmed.

HICKS v. SWAN et al.

(Supreme Court of Iowa. April 9, 1896.)

ATTACHMENT—NOTICE OF LEVY—NONRESIDENT—AMENDMENT OF RETURN—APPEAL.

1. The time for serving notice of a levy, required by Code, § 2967, to be given to defendant "if found within the county," is when the levy is made; and the fact that defendant came into the county 11 days after an attachment sued out on the ground of nonresidence had been levied did not invalidate the levy, because the return on the attachment showed nothing as to notice to defendant.

2. The sheriff had the right to amend his return by adding: "No notice on defendant of levy on stock, as he was not in Warren county, being a nonresident of Iowa."

Appeal from district court, Warren county; A. W. Wilkinson, Judge.

December 2, 1892, plaintiff brought this action against Thomas J. Swan to recover $5,000, with interest, on a promissory note executed to plaintiff October 3, 1890. Plaintiff caused an attachment to issue upon the ground that defendant Thomas J. Swan was a nonresident of the state, which attachment was levied upon 110 shares of the capital stock of the Warren County Bank, owned by said Swan. Said note shows that, at the time of its execution, 50 shares of said stock were deposited as collateral security. The Warren County Bank intervened, claiming a prior lien upon all of said stock, by virtue of the levy of a writ of attachment thereon October 4, 1892, in an action against said Swan, and also by virtue of a certain provision in the by-laws of the bank. In said action judgment was rendered March 10, 1893, in favor of the bank, and against Thomas J. Swan, for $8,524.66, and $124.24 attorney's fees, and special execution ordered. The bank, by way of cross bill, alleges that Thomas J. Swan is indebted to it upon other promissory notes executed by him, and asks judgment thereon for $21,350, and that, under its by-laws, all of said indebtedness be declared a first lien upon said 110 shares of stock. Frances E. Hale was made a defendant, and alleges that in January, 1893, she commenced an action, aided by attachment, against Thomas J. Swan, to recover $2,000 upon a promissory note, and that said attachment was duly levied upon said stock, wherefore she claims a prior lien. She also alleges that, long prior to any of these proceedings, she became the equitable owner of 10 shares of said stock, of which the bank had notice prior to the levy of its attachment; and that demand had been made upon it for the transfer of said 10 shares on its books, which it refused to do, wherefore she claims a prior lien on said 10 shares. Lewis J. Swan was also made a defendant, and alleges and shows that on December 14, 1892, he recovered a judgment against Thomas J. Swan; that he caused an execution to issue thereon, which was duly levied on said 110 shares of stock, of said 14th day of December, 1892, wherefore he claims a prior lien upon all of said stock. The Warren County Bank caused a special execution to issue upon its judgment for the sale of said stock. The plaintiff was granted injunctions restraining the defendant H. A. Stierwalt, sheriff, from selling said stock under said executions. The case was tried to the court as in equity, and decree entered establishing the liens of the claimants against the 110 shares of stock, as follows: The Warren County Bank, to a first lien under the levy of its attachment; plaintiff, to a second lien; Lewis J. Swan, third; and Frances E. Hale, to a fourth, on the 100 shares upon which her attachment was levied. It was decreed that Frances E. Hale had not acquired any interest in the 10 shares pledged to her as collateral; that the injunction be dissolved; that the stock be sold on execution under judgment in favor of the bank previously rendered for $8,524.66, and the proceeds applied, first, to the payment of said judgment, and the balance, if any, to the claims of the other parties, in the order already stated. The injunction was dissolved, and judgment rendered in favor of the bank, on its cross petition against Thomas J. Swan, for $23,048.70, in addition to the former judgment. Judgment was also entered against plaintiff and Frances E. Hale and Lewis J. Swan for costs. The plaintiff and the defendants Thomas J. Swan and Lewis J. Swan appeal. Affirmed.

Park & Odell and W. H. Berry, for appellants. H. McNeil, Gatch, Connor & Weaver, and Seevers & Seevers, for appellees.

GIVEN, J. 1. There is no question but that Thomas J. Swan was the owner of the 110 shares of stock, nor that he was indebted to the several parties as alleged. The levies other than that in favor of the bank were made in the manner required, and their regularity is not seriously questioned. The plaintiff claims nothing by virtue of the pledge of the 50 shares of stock to him, nor could he successfully do so, as the same was never transferred on the books of the bank, nor notice given to the bank of the pledge. The claim of Frances E. Hale to the 10 shares was properly rejected, as there was not sufficient evidence to support the allegation that notice of the transfer had been given to the bank, and demand made that the transfer be entered upon the books of the bank. No complaint is made against the order of priority given in the decree, except to that given to the bank; and appellants join in claiming that the levy of the attachment in favor of the bank was not a valid levy, for the reason that no notice therefor was served upon the defendant Thomas J. Swan, and therefore the bank acquired no lien under it. They also join in claiming that the bank had no lien upon the stock by

virtue of its by-laws. These are the controlling questions in this case.

2. Section 2967 of the Code required that notice of levies must be given the defendant "if found within the county, and also the person occupying or in possession of the property, if it be in the hands of a third person." The return on the attachment in favor of the bank as first made showed nothing as to notice to defendant of the levy, but during the progress of the trial of this case it was amended by adding these words: "No notice on defendant of levy on stock, as he was not in Warren county, being a nonresident of Iowa." The facts are that Thomas J. Swan was a resident of Wyoming, and, having business interests in Warren county, made occasional visits to that county. He was in Warren county on October 11, 1892, and on that day accepted service of the original notice in said case of bank against him, at the request of the attorney for the bank. He was there for about 24 hours, and then left the county. The attachment was levied on the evening of the 4th day of October, 1892. Appellants contend that, to constitute a valid levy, notice thereof must be served on the defendant "if found within the county," whether he be a nonresident or not; that it is the duty of the sheriff to search for and to serve the defendant if found, and to make return of all his doings under the writ; that this return, even as amended, fails to show that any search was made or notice served, when the facts show that Mr. Swan was in the county. It may be conceded that notice must be served on the defendant "if found within the county," whether he is a resident or not, and that such notice, when the defendant is found within the county, is requisite to a valid levy. The time for serving such a notice is when the levy is made. This levy was made October 4, 1892, and there is no pretense that Mr. Swan was then in the county. It was not until October 11th that he came into the county, seven days after the levy was completely made, and it does not appear that his presence was then known to the sheriff. Taking the return as originally made, in connection with the fact that the attachment was sued out upon the ground of nonresidence, the only inference that can be drawn is that defendant Swan was not served with notice of the levy, because not then found within the county. The sheriff had a right to amend his return according to the facts as they existed at the time of the levy. Appellants' levies must be held subordinate to these facts. The return, as amended, shows, we think, that all the search that diligence required under the facts was made; that Mr. Swan was not found within the county, and therefore notice to him of the levy was not required. We do not find that any of this stock was in the possession of W. H. Berry at the time this attachment was levied; therefore notice to him was not required. Our conclusion upon this branch of the case is that the bank is entitled to a first lien upon all the stock, by virtue of the levy of its writ of attachment, to the amount of its judgment rendered in that case.

3. The by-laws of the Warren County Bank contain the following: "The stock of the bank shall be assignable only on the books of the bank, subject to the restrictions and provisions of the act under which the bank is organized, and a transfer book shall be kept in which all assignments and transfers of stock shall be made. No transfer of stock shall be made without the consent of the board. by any stockholder who shall be liable to the bank, either as principal, debtor, or otherwise, and the bank shall have a lien upon all stock owned by any person as security for any indebtedness due the bank. Certificates of stock signed by the president and cashier shall be issued to stockholders upon the payment of the full value thereof." It is under this provision that the bank claimed to have a prior lien upon all the stock owned by Thomas J. Swan to the full amount of his indebtedness. The district court held against the bank on this claim. The bank has not appealed, and is therefore not complaining of this ruling; and, as it is in favor of appellants, they do not complain. With this state of the record, we are not called upon to consider this question.

It follows from what we have said that the decree of the district court should be affirmed.

WALLER v. VERMITT et al.

(Supreme Court of Iowa. April 9, 1896.)

FORCIBLE ENTRY AND DETAINER—NOTICE—PLEADING.

A petition in forcible entry and detainer, which alleges that, by virtue of a written agreement, defendants were to give up possession of the farm the "last of October, 1894," and that notice was served January 3, 1895, to quit the premises within 30 days, is not demurrable because the notice did not fix March 1st as the time to quit, as required by McClain's Code, § 3190, in cases of tenants occupying farms, since such section also provides that, where there is an express agreement, the tenancy shall cease at the time agreed upon, without notice.

Appeal from district court, Ringgold county; H. M. Towner, Judge.

This is a proceeding in forcible detainer, by which the plaintiff seeks to obtain the possession of a farm of 240 acres. There was a demurrer to the petition, which was sustained, and judgment was entered for the defendants. Plaintiff appeals. Reversed.

Askren Brothers, for appellant. Wright & Lee, for appellees.

ROTHROCK, C. J. The proceeding was commenced before a justice of the peace.

A formal petition was filed, from which it appears that the defendants were tenants on the farm of the plaintiff, the possession of which is in dispute, and on the 4th day of September a written agreement was entered into between the parties, by which the defendants were to deliver certain property to the plaintiff, and perform some labor on the land, and give up possession of the farm the "last of October, 1894." The plaintiff took no steps to obtain possession of the farm until January 3, 1895, when he caused a notice to be served upon the defendants to quit the possession within 30 days. After the expiration of that time, and on the 4th day of February, 1895, this action was commenced. Three days before the action was instituted, another notice was served on the defendants to surrender the possession. The defendants answered the petition, in which answer they admitted the execution of the written agreement set out, and that the lease "expired on or about the last day of October, 1894," but alleged that there was an oral agreement between the parties for the rental of the farm for the year 1895. A trial was had before the justice of the peace, which resulted in a judgment for the plaintiff, and a warrant of removal was issued, and the defendants were removed from the farm. An appeal was taken to the district court, and, when the parties appeared in that tribunal, the defendants filed a demurrer to this petition. It does not appear that the answer was withdrawn, but the demurrer was taken up and submitted to the court, and it was sustained. Thereupon the defendants filed a motion for a writ for the restitution of the property. The motion was sustained, and the writ issued, and the plaintiff appealed to this court.

In view of the proceedings before the justice and the averments of the petition, we are unable to understand upon what ground the demurrer to the petition was sustained. The demurrer was in these words: "Comes now the defendants, and demurs to the plaintiff's petition and the amendment thereof, for the reason that it does not entitle plaintiff to the relief demanded, or any relief whatever. For said petition shows upon its face—First, that these defendants held peaceable and uninterrupted possession with the knowledge of the plaintiff for more than thirty days after the cause of action accrued, if it ever did accrue; second, said petition shows upon its face that the notice alleged to have been served was not served to terminate the tenancy on the 1st day of March, as is required by section 3190 of McClain's Code, in cases of tenants occupying and cultivating a farm."

We have set out the demurrer and the substance of the pleadings because counsel for appellees in their argument seek to sustain the ruling of the court below upon the ground that but one of the defendants signed the contract terminating the lease; and it is insisted that one joint tenant or tenant in common cannot, by any written agreement, terminate the interest of his joint tenant. This record does not present that question. It is neither raised by the answer nor by the demurrer. The demurrer is based upon the ground that the motion to quit should have fixed the 1st day of March as the time to quit, as required by section 3190 of McClain's Code, because the defendants were occupying and cultivating farm land. But that provision of the law has no application to the facts presented by this record. The same section of the Code provides that, where there is an express agreement, the tenancy shall cease at the time agreed upon, without notice. See Kellogg v. Groves, 53 Iowa, 395, 5 N. W. 517, and Johnson v. Shank, 67 Iowa, 115, 24 N. W. 749. The demurrer should have been overruled. The judgment of the district court is reversed.

WOODCOCK v. HAWKEYE INS. CO.

(Supreme Court of Iowa. April 9, 1896.)

INSURANCE — ACTION PREMATURELY BROUGHT — PRACTICE.

Under McClain's Code, § 1734, prohibiting the bringing of an action to recover on an insurance policy within 90 days after notice of loss is given, where an action is brought before the expiration of such time the objection may be raised by motion in arrest of judgment, and is not waived because not sooner made.

Appeal from district court, Monroe county: W. I. Babb, Judge.

Action on a policy of fire insurance. Judgment for plaintiff, and the defendant appealed. Reversed.

J. B. Johnson and Geo. R. Sanderson, for appellant. T. B. Perry, for appellee.

GRANGER, J. To a part of defendant's answer there was a demurrer, which the court sustained, and from the ruling the defendant appealed. The cause then proceeded to trial on other issues, and a judgment was entered on a verdict returned for the plaintiff, from which the defendant also appealed. On motion in this court, the two appeals are consolidated for trial.

After verdict, the defendant moved in arrest of judgment, on the ground, among others, that the action was prematurely brought. The loss occurred May 30, 1894. The notice and proofs of loss were afterwards served, and the original notice was placed in the hands of the sheriff for service August 18, and served August 31, 1894. The action is said to be premature, because begun within 90 days after the notice of loss was given. The law provides for the giving of notice of loss in such cases, and that "no action shall be begun within ninety days after notice of such has been given." McClain's Code, § 1734. It is a fact that the suit was commen-

ced within the prohibited period, but it is contended that, because of appellant's course of procedure on the trial, the objection is waived. This contention is based on the facts as to the appearance, filing of motions, answers, demurrer, and rulings thereon, the first appeal, the trial on the merits and verdict, during which time no intimation was made that the action was premature. It is definitely settled in Taylor v. Insurance Co., 83 Iowa, 402, 49 N. W. 994, that such an objection may be raised by motion in arrest of judgment. In this proceeding, before verdict, there was nothing said or done with reference to the fact of the action being premature, so that appellee might understand, because of such action, that appellant waived such objection; but the complaint is because of silence as to that particular objection, while other questions were presented. A motion in arrest is to be presented before judgment, to prevent a judgment that would otherwise be entered on the record in the case. It is difficult to see how mere silence could operate as a waiver of the right to present such a motion. The fact which is the basis for such a motion was as well known to appellee as to appellant, so that there was no suppression of facts to mislead a party. Appellee's thought is that it is defensive matter, and should have been pleaded, or notice given of it pending the trial. No such a rule obtains to our knowledge. It would be a strange rule that would require a party to plead or give notice of facts before verdict which he intended to use, after verdict, as a basis of a motion in arrest. It is said in Taylor v. Insurance Co., supra, that the statute forbids the action to be brought before the prescribed time, and, as we have said, that, where it is done, a motion in arrest is the proper way to present the objection. In Wilhelmi v. Insurance Co., 86 Iowa, 326, 53 N. W. 233, it is held that the company cannot waive the provisions of the statute as to the time of commencing such an action. The cases are absolutely conclusive of the proposition we are considering. As the action is prematurely brought, it must be abated, and the judgment is reversed.

HINKLE v. SADDLER et al.

(Supreme Court of Iowa. April 9, 1896.)

INJUNCTION—MOTION TO DISSOLVE—EVIDENCE TO SUSTAIN—SCHOOL DISTRICTS—APPEAL TO SUPERINTENDENT.

1. On application for injunction, a hearing was had on petition and affidavits, and a temporary injunction was granted. Afterwards, upon a supplemental petition being filed, another temporary injunction was granted ex parte, after which defendants filed a motion to dissolve both injunctions. *Held*, that the hearing on the first petition was not equivalent to a hearing on a motion to dissolve, within Code, § 3402, providing that only one motion to dissolve or modify an injunction upon the whole cause shall be allowed.

2. In an application for an injunction to restrain a board of school directors from certifying a tax alleged to have been voted at a school meeting, it appeared from affidavits that the meeting was called for 2 p. m.; that a few moments before 4 p. m., when the ballot box was surrounded by people favoring the tax, the polls were declared open; that, as soon as these had voted, the polls were declared closed, not having been open more than 15 minutes; that there were at least 34 persons in the room who would have voted against the tax, thus defeating it, but their votes were refused; that, when the vote was counted, there were more ballots in the box than there were persons who voted. *Held*, that the facts established were sufficient to justify the granting of an injunction.

3. Where a board of school directors, by fraud and abuse of power, have declared the adoption of a vote levying a tax for building a new schoolhouse, such action is not a decision of the board, within Code, § 1829, providing that any person aggrieved by a decision or order of the district board of directors in matters of law or fact may appeal therefrom to the county superintendent.

4. Objections not raised on the trial of the cause will not be considered on appeal.

Appeal from district court, Van Buren county; W. D. Tisdale, Judge.

Wherry & Walker, for appellant. W. A. Work, for appellees.

KINNE, J. 1. Plaintiff, a taxpayer in the independent district of Iowaville, in Van Buren county, Iowa, presented his bill for an injunction to Judge Tisdale, wherein he alleged that said district then had a commodious two-story brick schoolhouse; that in March, 1894, certain citizens residing in Jefferson county, and in territory which they claimed to have been detached from a school district in said county, and annexed to said independent district, but which in fact had never been legally made a part of said independent district, did, by their votes, pretend to elect directors in said independent district, one of whom was a resident of said territory so attempted to be attached, and that the votes thus cast were illegal and void; that the directors thus elected constituted a majority of said board, and, against the wishes of the other director and of a majority of the citizens of said district, were proceeding to tear down said schoolhouse, and relocate and rebuild the same on a new site, more than a mile distant from the old one, and, unless restrained, would do so, thereby involving the district in a large expense; that the question of removal had not been submitted to a vote of the electors of said district; that said electors had not voted any money or tax to rebuild said house; that the act of the legislature legalizing the detaching of said territory from the district in Jefferson county, and the attaching of it to said independent district, was void, being a special act. The judge made an order for hearing upon affidavits, and the cause was thus presented on the petition and amendments and affidavits filed; and, after argument, it was ordered that a temporary writ of injunction issue on filing of bond. The bond was filed, and the writ

issued, restraining the defendants from tearing down, removing, and rebuilding said schoolhouse. About 20 days thereafter, plaintiff filed a supplemental petition in said cause, wherein it was alleged that, after service of the writ on defendants, they called a meeting of the electors of said independent district, for the purpose of voting a tax to rebuild said schoolhouse; that, at said meeting, persons were allowed to vote more than once; that the vote was taken by ballot, and the polls kept open but 15 minutes; that the meeting was called for 2 o'clock p. m., and between that hour and 3 o'clock p. m. 34 persons were present who had a right to vote, and who desired to vote against said proposition, whose votes were refused by the defendants; that only 31 persons in fact voted, and only 12 of them were then legal residents or voters in said district; that, under the law, defendants had no legal right to call said meeting for said purpose, and the electors had no power to vote such a tax at a called meeting; that there are two buildings in said district that can be had and used for school purposes until after the next annual meeting of said district, and said buildings are ample to accommodate all the pupils of the district; that, unless restrained, defendants will certify up said tax of 10 mills on the dollar, and, in anticipation thereof, will contract an indebtedness for said district to pay in rebuilding said schoolhouse, in violation of the wishes of the electors and taxpayers of said district. An injunction was prayed to restrain defendants from certifying or levying said tax, and from contracting any indebtedness in anticipation thereof, and from using or appropriating any of the material of the old building in the erection or rebuilding of a new building, and it was prayed that said election be decreed void. Without notice to the defendants, a temporary injunction was granted by Judge Traverse, which was served on the defendants on September 20, 1894 On the 24th of said month, defendants filed a motion to dissolve both of said injunctions, which motion was supported by affidavits. The grounds of said motion, in substance, were that at a meeting of the electors, called as provided by law, to vote on the question of a tax to build a schoolhouse, said directors were authorized to dispose of the old site and material, after completing the new house, and the funds arising therefrom were ordered placed in the schoolhouse fund of the district; that, for the purpose of building a new schoolhouse on the site selected, a tax of $400 or an equivalent, not exceeding 10 mills on the dollar of the taxable property of the district, was voted. On the hearing, each side filed affidavits, and the court made an order modifying the injunctions before granted to the extent of vacating them, except defendants were enjoined and restrained from selling or disposing of the old schoolhouse site, and from selling or disposing of the materials of the old house; and in case the new house be erected, at a cost not to exceed $300, the defendants were enjoined from building same otherwise than by contract, after receiving proposals, as by statute provided. The plaintiff excepted to the ruling, and appeals.

2. It is first contended by appellant that the action of the court in dissolving or modifying the injunction was in violation of section 3402 of the Code, which provides: "Only one motion to dissolve or modify an injunction upon the whole case shall be allowed." The argument is that, as the first injunction was granted after notice and hearing, it was equivalent to a hearing upon a motion to dissolve, and the motion thereafter made to dissolve was, in effect, a second motion. The claim is not well founded. There was but one motion to dissolve. Furthermore, a second writ was obtained, without any notice and hearing, and the motion to dissolve was directed to it, as well as to the original writ. Even if appellant's contention was sound, he could not be heard to urge it now for the first time in this court. No such question was made below.

3. It is said it was error for the court to dissolve the injunctions when no answer had been filed. We are not called upon to pass upon this question, as this matter was in no way brought to the attention of the district court. We have so often announced the rule that questions which have not been brought to the attention of the trial court, and are first argued here, cannot be considered, that we need not cite authorities in its support. It is a rule which commends itself as fair and just, not only to the trial court, but to the parties. The policy of the law is to afford the court hearing the case an opportunity to correct its errors, if any, without resort to an appellate tribunal; and, when a party to the litigation fails to point out to the trial court errors which he claims it has made, he must be held to have waived them. Any other rule would work a great injustice to the courts below, and permit parties on appeal to raise and discuss questions not taken into consideration by such courts in the determination of cases heard by them.

4. Several questions are discussed by counsel. We think the determination of one or two of them decisive of this appeal. Without determining as to the legality of the attempted addition of certain territory lying in Jefferson county to this independent school district of Iowaville, in Van Buren county, and without passing upon the legality of the proceedings leading up to the time the tax is claimed to have been voted, we proceed to a consideration of the question which is stated by appellant thus: "The gravamen of this action is fraud in the conduct of that election, by which it is claimed this extraordinary tax of ten mills on the dollar was voted." We cannot review all of the statements found in the affidavits touching this matter. In many respects they are in direct conflict. We shall only undertake to

state the substance of the more material parts of them, and our conclusions reached after a careful consideration of the evidence.

Plaintiff claims, and supports his claim by the affidavits of 34 persons, who swear that they were present between the hours of 2 and 3 o'clock at the place where the defendants had called a meeting of the electors of the district to vote upon the question of levying a tax on the property of said district for the purpose of erecting a schoolhouse therein, and on the day provided: "That each and all of them were residents and voters in said district; that all of them in good faith intended to vote against the levy of said tax; that they each asked and demanded the privilege of voting at said meeting; and that the defendants Burden and Hayden (who constituted a majority of said board of directors) refused them the privilege of voting, and would not permit them to vote; that the polls were not open to receive votes until a short time before 4 o'clock p. m., and were closed before 4 o'clock p. m.; that said defendants claimed affiants were too late, and would not receive their votes." Fifteen affiants swear that, of those who voted at said meeting, eighteen were residents of Jefferson county, residing in the territory sought to be attached to said district; that each of their votes was challenged on the ground that they did not reside in said district; that all of said challenges were ignored; that A. Hinkle and others demanded of the directors that the secretary of the board register the names of all persons voting at said election, but defendants Hayden and Burden would not permit it to be done; that said directors replied that they would run it to suit themselves. That, of all those who did vote at said meeting, only 12 resided within the district. That a motion was made to sell the old schoolhouse and material, and to build a new one on the proposed new site. The vote was taken then by a rising vote, out in the yard; and, before the result of it was announced, several persons came and asked to be counted as voting against the proposition, whose votes, if counted, would have defeated it. That Hayden and Burden refused to count said votes, and declared the motion carried. That the vote on the tax was by ballot. That all present began preparing their ballots. That, when defendants were asked at what time the polls would be closed, the defendants told them that "there is no polls open." Afterwards, in response to the same question, they said the polls would be closed "whenever they got ready." That after half past 3, soon thereafter, the defendants called out, "The polls are now open!" At this time the defendants were surroundled by men and women favorable to the tax, and, when their ballots had been cast, one of defendants asked if everybody had voted, and at once declared the polls closed. Not more than 10 or 15 minutes had expired since the first vote was cast. Those present who desired to vote against the tax asked to be permitted to vote, but were told that it was too late, that the polls were closed. Other voters came and desired to vote against the tax, and were not permitted to vote, and defendants at once began counting the votes. That soon thereafter the meeting broke up in a general fight. There is other evidence to the effect that, when the votes were counted, there were 42 ballots in the hat, and that, as that was more ballots than there were persons who voted, the defendants so fixed the record as to show that only 31 persons had voted. Also, that the proposition to sell the old schoolhouse was in fact defeated. The defendants claim, and supported their claim by the affidavits of 4 persons, that the disorderly conduct arose from the fact that persons voted on the first proposition who were not legal voters. They give the names of 8 of said persons, who they claim are included in the 34 counted by plaintiff as opposed to the tax; that plaintiff attempted to intimidate a legal voter, as they are informed. The two defendant directors swear that on this last ballot not a vote was refused, and no one made an effort to vote after the last ballot had been cast; that they were advised that it was the purpose of plaintiff and those he could influence to break up the meeting; that he incited disorder, and threatened to make up a mob and take the ballots; and that a majority of the residents of said district favor the action taken at said meeting. Eleven persons swear that the ballot was begun at about 5 minutes after 3 o'clock p. m., and the polls held open until after 4 o'clock p. m., and all electors had full opportunity to vote. The same parties and two others swear that no vote was refused either during the meeting or after it was adjourned. Four of the persons who had already made affidavits swear that, so far as they knew, there were not 34 persons at said meeting who were opposed to the action taken; that no vote was cast against the tax proposition, and that ample time was given all persons to vote who desired to do so; that some persons came after the meeting had adjourned. From other evidence it is made clear that there were 34 legal voters present at the meeting who were opposed to the levy of the tax.

We have recited the main facts as shown by the affidavits used in the hearing. We do not see how one can read this record without coming to the conclusion that this so-called "meeting" was a delusion and a farce. The evidence, we think, preponderates largely in favor of appellant's claim, and establishes these facts: (1) That there was a studied attempt, which was successfully carried into execution, to permit no votes to be cast which were opposed to the levy of the tax; (2) that more legal voters were present, and seeking to vote, and refused that privilege, than there were votes in fact cast; (3) that, had such legal voters been permitted to vote, the tax would have been defeated; (4) that the polls

were not kept open more than 15 minutes, and that none of these persons who were opposed to the levy of the tax had a fair opportunity to vote.

It is provided in Code, § 1789, that no district, township, or subdistrict meeting shall organize earlier than 9 o'clock a. m., or adjourn before 12 o'clock m.; and, in all independent districts having a population of 300 and upward, the polls shall remain open from 12 o'clock m. to 7 o'clock p. m. By Acts 18th Gen. Assem. c. 8, § 5, which relates to independent districts, it is provided that the polls shall be open from 9 o'clock a. m. to 6 o'clock p. m. It may be claimed that the section last above referred to was not intended to apply to special elections, like that had in this case. It is not essential that we determine that question, as, in any event, the law contemplates that a reasonable time and opportunity will be afforded electors in which to cast their votes.

It is conceded that this independent district has a population of less than 300 people. Appellees urge that 1,000 people could vote within 15 minutes. It is a sufficient answer to such a claim to say that in this instance only 31 voted, and more than that number of legal voters were arbitrarily, and without semblance of law or justice, deprived of their rights, and that in a case when the result, if it stands, will burden their property with a tax. It is apparent that these defendant directors, Burden and Hayden, were determined to have this tax levied; and, to accomplish that end with certainty, they conceived and executed a scheme whereby 34 persons were disfranchised. Their acts can find no support either in reason or authority. The refusal, under the circumstances disclosed in this record, to receive votes, cannot be characterized as other than a gross abuse of their powers,—an utter disregard of the rights of electors, which no court should sanction. As was said in State v. Wollem, 37 Iowa, 131: "That fair play and the frankness and liberality which the law intends shall characterize such meetings and elections were violated. Only forty minutes, when the law contemplates three hours, for such a meeting and election, when it was very apparent that all the electors had not voted, savors too much of the factional partisan caucuses to justify judicial sanction." See, also, Id., 39 Iowa, 380. Such meetings should be conducted fairly, and with due regard to the rights of all those entitled to participate therein. Holding the polls open for only 15 minutes, and refusing to permit electors to vote, and closing the polls before they could vote, are acts which merit the condemnation of every good citizen. Such an election is one only in name, and results in imposing burdens on the taxpayer without affording him the opportunity guarantied by law to all legal and qualified electors of giving effect to their opinions.

5. It is said by appellees that plaintiff's remedy was to appeal to the county superintendent. The contention does not seem to be seriously urged, and, indeed, it is inconceivable how it could be, in face of the facts disclosed by this record. Perkins v. Board of Directors, 56 Iowa, 478, 9 N. W. 356. The section of the Code relied upon reads: "Any person aggrieved by any decision or order of the district board of directors, in matter of law or of fact, may, within thirty days after the rendition of such decision, or the making of such order, appeal therefrom to the county superintendent of the proper county." Code, § 1829. The matter presented in this case is not such a decision or order as is contemplated by the statute. If, in such case, one was compelled to appeal to the county superintendent, the wrong sought to be prevented would always be accomplished, and a party would be practically remediless. Here is involved, not a matter of discretion, but of power, under the law, and of fraud practiced, whereby a tax is voted which will become a charge upon the taxpayers' property. Surely, such a case is not within the spirit or letter of the statute relied upon. We are satisfied that the learned district court exceeded its discretion in dissolving or modifying the injunctions. They should have been continued until a full hearing of the case could be had on its merits. Reversed.

LEACH v. FUNK.

(Supreme Court of Iowa. April 9, 1896.)

NEGOTIABLE INSTRUMENTS — INDORSEE AFTER MATURITY—FORGERY BY INDORSER OF SIMILAR NOTE.

An indorsee of a note after maturity, whose indorser, before transfer of the note, forged a similar note, which was negotiated by him, and paid by the maker of the genuine note without notice that it was not the genuine note, cannot recover from the maker.

Appeal from district court, Dallas county; A. W. Wilkinson, Judge.

Action at law to recover the amount appearing to be due on a promissory note. An answer to the petition was filed; a demurrer thereto was sustained; and, the defendant refusing to plead further, judgment was rendered in favor of the plaintiff for the amount of the note and costs. The defendant appeals. Reversed.

Albrook & Lundy and Robt. S. Barr, for appellant. White & Clarke, for appellee.

ROBINSON, J. The petition alleges that on the 25th day of February, 1890, the defendant made to Copeland & Holder his promissory note in writing; that subsequently the payee indorsed the note in blank, and transferred it to Fry Copeland; that thereafter he guarantied and transferred it to the plaintiff, by writing on the back thereof the following: "For value received, I hereby guaranty the payment of the within note at maturity, or any time thereafter, with interest at 8 per cent. per annum until paid, waiving

demand, notice of nonpayment, and protest. Fry Copeland." The petition alleges that the plaintiff is the owner of the note, and that it is wholly unpaid. A copy of the note is set out, and shows that the note purports to have been signed by the defendant; that it is for the sum of $286.66, with interest at the rate of 8 per cent. per annum; and that it was due on the 1st day of May, 1891. Judgment for the amount of the note is demanded.

The answer admits that the defendant, on the 25th day of February, 1890, made in favor of Copeland & Holder a note such as is set out in the petition, but avers that on the 11th day of November, 1892, there was presented to him a note of the same character and description, indorsed "Copeland & Holder" in the handwriting of Fry Copeland, the plaintiff's assignor, and that the defendant, believing the note to be genuine, and relying upon the good faith of Copeland in indorsing it, paid it in full to the holder thereof, the First National Bank of Iowa Falls, Iowa. The answer further alleges that the defendant is unable to state whether the note thus paid or that in suit is the one which he actually made, but avers that one of them is a forgery, and that, if the one in suit is genuine, it was fully paid November 11, 1892, in paying the note indorsed by the plaintiff's assignor in the firm name of Copeland & Holder; that Fry Copeland, by that indorsement, gave credence to the note, and, by that act and the receiving of the proceeds of the defendant's payment, was paid in full for the note defendant made, and the note in suit, if genuine, was fully paid before it was transferred to the plaintiff; and that it was so transferred long after it was due. The answer further avers that Copeland, after having indorsed the note paid to the Iowa Falls Bank as stated, placed it upon the market, and received the benefit of the proceeds thereof; that the defendant "now says that he believes the said note to be a forgery, and that the same was a forgery, and he is entitled to and does plead the said amount thus paid as an offset and a counterclaim against plaintiff's cause of action," with interest from the date of payment. The answer denies that the plaintiff is a holder of the note in suit in good faith, denies that he has any interest in it, and avers that the action is brought in the interest of Copeland. In an amendment to the answer, it is averred that Copeland, by indorsing the two notes and placing them upon the market, when the defendant had in fact made but one, perpetrated a fraud upon him; that, if the note paid was a forgery, it was so cunningly forged that the defendant was deceived, and, in connection with the fact that it had been indorsed, believed that it was his genuine note, and paid it without knowledge of the wrongful acts of Copeland, and without knowing that the note was a forgery; that by reason of the facts stated, Copeland would be estopped to recover on the note in suit; and that the plaintiff is also estopped to recover thereon. The demurrer is founded upon numerous grounds, which need not be set out at length.

1. It is the well-settled rule, not disputed in this case, that a promissory note transferred after maturity is subject in the hands of the assignee to all the defenses which were available against it before the assignment was made. Tied. Com. Paper, § 295. Section 2546 of the Code provides that, "in case of the assignment of a thing in action, the action by the assignee shall be without prejudice to any counterclaim, defense, or cause of action whether matured or not, if matured when plead, existing in favor of the defendant and against the assignor before notice of the assignment; but this section shall not apply to negotiable instruments transferred in good faith and upon valuable consideration before due." Promissory notes cease to be negotiable when not paid at maturity, and then fall within the provisions of the section quoted. Downing v. Gibson, 53 Iowa, 517, 5 N. W. 699. The demurrer in this case admits the allegations of the answer to the effect that the defendant paid to the Iowa Falls Bank the amount appearing to be due on the note which it held, under the belief that he had given it, and that such payment was made before the note in suit was transferred to the plaintiff. Therefore, if the facts pleaded would have constituted a defense to that note in the hands of Copeland, they are sufficient as a defense in this action. It appears from the pleadings that the defendant made but one note like that in controversy; that a similar one was forged, and both were indorsed by Copeland, and the forged one was treated by him as genuine; that the defendant paid one of them with the belief that it was the one he had made; and that Copeland received the proceeds of the payment so made with knowledge, necessarily, of the belief and purpose of the defendant in making it. If Copeland then owned both notes, he received the money charged with the duty to apply it, paying the note which the defendant had in fact given; and, as between them, the money received operated as a payment of it. The subsequent assignment of the genuine note would not have transferred any right of action against the defendant, and no liability on his part for the forged note ever existed. If the averments of the answer are true, it follows that the plaintiff has no meritorious cause of action against the defendant.

2. The appellee criticises the answer, and claims that it does not set out facts which show that either of the notes in question was forged, and that averments which are claimed to have that effect merely plead conclusions of fact. It must be admitted that the answer is not well drawn, and it may be

that it might have been successfully assailed by motion. The defendant states in one part of it that he is unable to state whether the note he paid or the one in suit was the one he actually gave, and in another part he states that the one he paid was forged, and there is serious lack of definiteness in different portions of the answer. But, taken as a whole, it shows that one of the two notes in question was forged; that the amount due on the genuine one was paid by the defendant in good faith, after it was due, to Copeland; and that he subsequently transferred the note in suit to the plaintiff. If those are the facts, they are controlling, and show that the plaintiff is not entitled to recover. The judgment of the district court is reversed.

GOODRICH v. BURLINGTON, C. R. & N. RY. CO.

(Supreme Court of Iowa. April 9, 1896.)

RAILROAD COMPANIES—CROSSING TRACKS—NEGLIGENCE—DAMAGES.

1. A person, in crossing the tracks of a railway company laid upon a street, is not required to use "extraordinary" care, but only such care as ordinarily careful and prudent persons would have exercised under the circumstances.

2. In an action by a father for injuries to his minor son, not wholly disabling him, an instruction fixing the measure of damages at the value of his services during his minority, instead of the "lessened value," is erroneous.

Appeal from superior court of Cedar Rapids; T. M. Giberson, Judge.

Action to recover damages for personal injuries sustained by plaintiff's minor son, Garfield Goodrich, alleged to have been caused without fault or negligence on the part of said minor, and because of certain specified acts of negligence on the part of the defendant. Defendant answered, denying generally, and the case was tried to a jury, and verdict and judgment rendered for the plaintiff for $1,766.66. Defendant appeals. Reversed.

Preston, Wheeler & Moffit and S. K. Tracy, for appellant. Rickel & Crocker, for appellee.

GIVEN, J. 1. On July 11, 1894, the plaintiff's son, then aged 14, when crossing one of the defendant's tracks in its switch yard in Fourth street, in the city of Cedar Rapids, caught his left foot between one of the rails and a guard rail, and, before he could extricate his foot, he was run over by cars being moved upon the track, and injured. The issues in dispute are whether the defendant was guilty of negligence as charged, whether the son was guilty of negligence contributing to his injury, and the amount of damages, if any, to be allowed.

The court instructed that plaintiff's son had a right to use Fourth street, where the accident occurred, "at all reasonable and proper times, and in a reasonable and proper manner, and had a right to cross the tracks of the defendant's road at any point along said street while using ordinary care in so doing." Appellant contends that, in going upon the tracks when he did, the plaintiff's son was bound to exercise extraordinary care to avoid injury, and that this instruction is erroneous in holding him to the exercise of ordinary care only. In a previous paragraph, the court instructed as follows: "And in relation to the care required of each party, you will only hold them to the exercise of ordinary care, which consists in doing everything which a person of ordinary care and diligence would do, and omitting to do everything which a person of like care and diligence would omit. Ordinary care, however, is no fixed and unalterable standard of care, but is to be determined by the facts in each particular case, and may be in proportion to the character of the act to be done, and the magnitude and extent of the injury which may result from the want of proper prudence." In going where he did, plaintiff's son was bound to exercise greater care than in going into a less dangerous place; he was bound to exercise the care that ordinarily careful, prudent persons would have exercised under the same circumstances. What would be ordinary care under one state of circumstances might not be under another, but still ordinary care is what is required under either. Appellant quotes from McAllister v. Railway Co., 64 Iowa, 398, 20 N. W. 488, to the effect that it is negligence to walk upon the track of a railroad, whether in the street or open field, except at crossings, and that "no prudent man would expose himself on that part of the road without keeping a constant and vigilant watch for the approach of trains." In addition, it is said: 'If a party will not exercise ordinary care for his personal safety, he ought to bear the consequences that may ensue." This case sustains the rule given in the instruction. Appellant also cites Richards v. Railway Co., 81 Iowa, 432, 47 N. W. 63, holding that "it is the duty of a person who voluntarily exposes himself on a railway track to danger from moving cars to be constantly on the alert to discover and avoid danger." To be other than constantly on the alert under such circumstances would not be ordinary care. In the second instruction asked by the appellant we find this language: "And in this case, if you find from the evidence that the locality of the accident was at a place which was dangerous by reason of the use of cars and vehicles on numerous tracks in said street, then greater care should be required to be used by all parties as and for ordinary care than would be required at a less dangerous place." The instruction given is in harmony with that asked, and there was no error in giving it.

2. Appellant complains in a general way that the instructions given, except the seventh, "are too vague and lack explicitness," and, in a like manner, complains of the refusal to give the fifth, sixth, seventh, eighth, ninth, tenth, and eleventh instructions asked by the defendant. Appellant contends that it is the right of each party to have the jury instructed upon the law of the case clearly, pointedly, and specifically. This, we think, was done in this case. The court laid down specifically the law as it was held to be by the court upon material issues involved. As to the instructions refused, we think the law, so far as therein correctly expressed, is sufficiently stated in the instructions given, except in one instance. Upon the measure of damage, the court instructed as follows: "In determining the amount of damages, if any, which you may allow plaintiff, you should take into consideration the value of the services of plaintiff's minor son during his minority, and expenses for which the plaintiff became liable or had paid for medical attendance or nursing, to the extent of the reasonable value thereof, as is shown by the evidence." Appellant asked an instruction as follows which was refused: "(13) If you find that the plaintiff is entitled to recover, the damages are the lessened pecuniary value of the child's earnings during his minority, and the value of expenses and nursing, if any, shown by the evidence." The instruction given allows "the value of the services of the plaintiff's minor son during his minority," while that asked allows "the lessened pecuniary value of the child's earnings during his minority." The evidence shows that, as a result of the injury, Garfield Goodrich's left foot was amputated above the ankle. He testifies that he was laid up three or four weeks, and then commenced to get around home. It does not appear that he suffered any other permanent disability than that which results from the loss of his foot, which, surely, will not totally disable him during the years of his minority; yet the measure of damage given by the court allows to the plaintiff compensation for the services of his son as though he would be totally disabled during minority. This, we think, was error prejudicial to the defendant.

3. Appellant moved for a verdict, upon the grounds that it was not proven that the defendant was negligent as charged, and that it did appear that Garfield Goodrich was guilty of contributory negligence, and now complains of the overruling of said motion. To consider these questions involves an examination and discussion of the evidence. As, for the error pointed out, the judgment of the district court must be reversed, and as a retrial may follow, we forbear from any discussion of the evidence upon the questions of negligence. Reversed.

RUSSELL et al. v. DISTRICT TP. OF CLEVELAND et al.

(Supreme Court of Iowa. April 9, 1896.)

SCHOOL DISTRICTS—SUBDISTRICT IN TWO TOWNSHIPS—EFFECT OF CODE.

Code, § 1713, by which it was enacted that each civil township and each independent school district theretofore organized should constitute a school district, had the effect of dividing subdistricts then extending across township lines, except those so organized because of natural obstacles, under Acts 1866, c. 143, § 16, which provision was retained as section 1797 of the Code.

Appeal from district court, Davis county; H. C. Traverse, Judge.

Action in equity to restrain the building of a schoolhouse. From an order of the district court granting a temporary injunction as prayed, the defendants appeal. Affirmed.

Ellsworth Rominger and John F. Scarborough, for appellants. Eichelberger & Taylor, for appellees.

ROBINSON, J. The order in controversy is based on facts shown by the pleadings and affidavits, which are substantially as follows: In the year 1855 a subdistrict was organized, by due authority, which included territory in Bloomfield (now Cleveland) township and in Drakeville township, in Davis county. The territory thus organized is known in the record as "Subdistrict Number One in the District Township of Cleveland, Davis County, Iowa." A schoolhouse was erected in the subdistrict during the year in which it was organized, on a site in Bloomfield township. Two years later the schoolhouse was moved to a new site in the same township. In the year 1870 that building was sold and removed, and a new schoolhouse erected on the same site, and is still in use. At a meeting of the electors of the subdistrict held on the first Monday of March in the year 1893, it was voted to raise the sum of $400 on the taxable property of the district for the purpose of building a new schoolhouse. That action was not certified to the district township meeting, nor was it ratified, or any tax voted by that meeting; but the board of directors of the district township has taken action preliminary to the erection of a schoolhouse in the subdistrict, to cost not more than $400, and has advertised for bids. This action is brought to restrain the board from opening bids, and from building a schoolhouse. The plaintiffs claim that section 1713 of the Code had the effect to divide the subdistrict, and separate from it all the territory in the township of Drakeville; that, notwithstanding that fact, electors of that township participated in the subdistrict meeting specified; and that in consequence the action taken was illegal. The trial court found this claim to be well founded. On a former submission of this cause an opinion was filed which reversed that order,

but a petition for a rehearing was filed and sustained, and the cause is again submitted for our determination. 62 N. W. 661.

Several questions are raised by the pleadings, but only one is presented by the arguments, and that is stated by the appellant to be "whether a district formed of parts of two civil townships is valid, since the enactment of the Code, where such district was not so formed because of natural obstacles." It is admitted that the subdistrict was legal when organized, and we are required to determine the effect upon it of the enactment of the Code. Section 1713 of the Code is as follows: "Each civil township now or hereafter organized, and each independent school district organized as such prior to the taking effect of this Code, is hereby declared a school district for all the purposes of this chapter, subject to the provisions hereinafter made." Among the provisions referred to is that contained in section 1797, for attaching territory of one township to that of another, for school purposes, "in cases where, by reason of streams or other natural obstacles, any portion of the inhabitants of any school district can not, in the opinion of the county superintendent, with reasonable facility enjoy the advantages of any school in their township." The original of that provision is found in section 16 of chapter 143 of the Acts of 1866, and it was said in Hancock v. District Tp. of Perry, 78 Iowa, 550, 43 N. W. 527, that the Code of 1873 was not designed to affect the territory of districts or subdistricts formed from territory situated in different civil townships, as contemplated by that provision. See, also, District Tp. of Magnolia v. Independent Dist. of Boyer, 80 Iowa, 495, 45 N. W. 907. But it is not claimed that it has any application to the subdivision in controversy. It was said in District Tp. of Union v. Independent Dist. of Greene, 41 Iowa, 32, that the school law "contemplates that school districts shall coincide in boundary with the civil townships. * * * The only exception which we are aware of, to this requirement, is created by section 1797 of the Code," setting out the provisions to which we have already referred. In Large v. District Tp. of Washington, 53 Iowa, 663, 6 N. W. 1, it was said that the revision of the school laws made by the Code had the effect to repeal all provisions not therein contained, and that "there is now no provision exempting subdistricts from the requirement that they shall be coterminus with the district township, except that contained in section 16, c. 143, Laws 1866 (section 1797 of the Code)." That case is in point, and the language quoted is applicable to this case. The appellants have not called our attention to any provision of the law which makes this case an exception to the general rule which section 1713 was designed to establish. The case of Hancock v. District Tp. of Perry, supra, is relied upon as sustaining a contrary conclusion, but it does not. It related to the effect the Code had on subdistricts of the character contemplated by section 1797, and what was said in the opinion had reference to districts and subdistricts of that kind, and is in harmony with the rule announced in Large v. District Tp. of Washington, supra, to which we adhere. It follows that the order of the district court is right, and it is affirmed.

HOWERY v. HOOVER.

(Supreme Court of Iowa. April 9, 1896.)

CHATTEL MORTGAGES—CONVERSION BY MORTGAGEE—DAMAGES.

1. Where the mortgagee, authorized to take possession of the mortgaged chattels on default in payment, and sell the same for the payment of the debt, takes possession, and, instead of foreclosing the mortgage, keeps the property, treating it as his own, he is liable as for a conversion thereof.

2. Where the mortgagee claims the absolute ownership of the property from the time he took possession thereof, the value of the property in estimating the damages may be considered as of the time he took possession.

3. Where, in an action for such conversion, the mortgagee does not claim that he was in possession for foreclosure, expenses incurred by him in the care of the property cannot be allowed in his favor.

Appeal from district court, Warren county; J. H. Henderson, Judge.

Action at law to recover for the alleged conversion of personal property. There was a trial by jury, and a verdict and judgment for the plaintiff. The defendant appeals. Affirmed.

McGarry & Brown, for appellant. Dewell & Parrish, for appellee.

ROBINSON, J. In November, 1889, the plaintiff made two promissory notes, each of which was for the sum of $88, due on the 2d day of November, 1890, with interest at the rate of 10 per cent. per annum. One was made payable to the defendant and the other to David Howery. To secure the payment of the notes the plaintiff executed to the payees a chattel mortgage on two horses, a wagon, and one set of double harness. The mortgage was duly recorded. At a subsequent time Howery transferred his interest in the note made to him and in the mortgage to the defendant. On the 17th day of November, 1890, the notes not having been paid, the defendant took possession of the mortgaged property, at the same time delivering to the plaintiff the notes and mortgage, and a month later a satisfaction of the mortgage, signed by both mortgagees, was entered of record. The plaintiff alleges that the defendant has converted the property taken to his own use, and demands judgment for its value after deducting therefrom the amount due on the promissory notes. The defendant denies the alleged conversion, and avers that the property was delivered to him

under a verbal agreement with the plaintiff in full payment of the notes; also that he took and now holds possession of the mortgaged property by virtue of a stipulation in the mortgage, a copy of which is as follows: "And I, the said W. H. Howery, do hereby covenant and agree with the said H. I. Hoover and David Howery that in case of default made in payment of the above-mentioned promissory notes, * * * or whenever the said mortgagee or his assigns shall choose to do so, then and in that case it shall be lawful for the said mortgagee or his assigns, by himself or agent, to take immediate possession of said goods and chattels wherever found, * * * and to sell the same at public auction, or so much thereof as shall be sufficient to pay the amount due or to become due, as the case may be, with all reasonable costs and attorney's fees pertaining to the taking, keeping, and advertising and selling of said property.' The defendant also claims that he has fed hay and corn to the horses, and performed labor in caring for them, to the value of $55. The answer contained other matters in defense, but, as nothing is claimed for them in argument, they will not be further considered. The jury returned a verdict for the plaintiff for $38.05, and judgment was rendered in his favor for that amount. The judgment entry, as set out in the abstract, seems to show that the plaintiff recovered judgment against the defendant for the further sum of "one hundred and sixty dollars and thirty cents and costs," but, as nothing in the record justifies such a judgment, and as nothing is claimed for it in argument, we assume that there is a clerical error in the record submitted, and that the amount last stated was for costs.

1. At the close of the evidence for the plaintiff the defendant filed a motion for a verdict in his favor. The motion was based on several grounds, which were, in substance, that the evidence showed that the defendant was entitled to the possession of the property in controversy when the action was commenced, and that he was not liable for a conversion of it. The motion was overruled, and of that ruling the defendant complains. His theory appears to be that it was his right, under the stipulation set out, to take possession of the mortgaged property, and that, having taken possession of it rightfully, he cannot be held liable as for a conversion of it. This might have been true had he taken possession under the mortgage, and then proceeded to foreclose according to its provisions. But the evidence introduced by the plaintiff tended to show that after the defendant took possession of the property he treated it as his own, without any attempt to foreclose the mortgage. That he had no right to do unless under an agreement which superseded the mortgage. In the absence of such an agreement, his acts were evidence of a conversion, and, as no agreement of the kind was admitted by the plaintiff, nor shown by his evidence, the district court properly refused to direct a verdict for the defendant.

2. The court charged the jury as follows: "The defendant, if liable at all, can only be liable for the conversion of the property to his own use. The defendant, under the chattel mortgage, had the right to take possession of the property described therein, and, if the debt had matured, had the right to sell the same in accordance with the law and the terms of said mortgage. He did not have the right to take possession of the property under his chattel mortgage, and, having obtained possession thereof, convert the same to his own use, and deprive the plaintiff of any interest in said property, or the proceeds or value thereof in excess of the amount due on the notes and mortgage; and if you find from the evidence that the defendant did take possession of said property, and that without a sale of said property under the mortgage, as provided by the law and terms thereof, he converted the same to his own use, claimed and exercised acts of ownership thereof, sold a portion, retained the proceeds, and holds the balance thereof as his own property, and denies the right of plaintiff to said property, or any interest therein, then he is held to have converted the property to his own use, and is liable to the plaintiff for the difference in value of the property included in the mortgage and taken by him, and the amount of the indebtedness that was due and owing on the said notes and mortgage, provided said value is in excess of the amount due on the notes and mortgage. The taking of said property under an agreement to and surrender of the said notes and mortgage in payment thereof to the plaintiff would not be such a taking and holding of said property as would constitute a conversion thereof." The defendant sets out in his argument portions of this paragraph, and criticises it upon various grounds. The first of these is that it stated that the mere holding of the property without a sale would be a conversion of it. The paragraph does not contain that statement in words nor in substance. It recites acts which it states would amount to a conversion. But it is said that, if possession was taken under the mortgage, the acts enumerated are not sufficient to constitute a conversion. We are of the opinion, however, that they are. The fact that the defendant may have taken possession of the property rightfully would not protect him from liability for refusing to proceed under the mortgage, and selling and otherwise treating the property as his own. It is further urged against the paragraph set out that the sale of a portion of the property for less than the debt, or its actual value, if fraudulent, would only transfer to the vendee the right of the mortgagee under the mortgage. The plaintiff was not bound to follow the property, even if wrongfully sold, but had the

right to treat it as converted by the defendant to his own use, and hold him responsible for the conversion.

3. The jury was instructed that, in case it found for the plaintiff, it should fix the amount of his recovery on the basis of the value of the property when it was taken by the defendant. It is insisted that the rule thus given is erroneous, because the defendant had the right to take the property under the mortgage, and could not have sold it on the day it was taken. The evidence shows that he claimed the absolute ownership of the property from the time it was taken, and the jury was properly instructed to compute the value of it as of that date.

4. Complaint is made because the defendant was not permitted to show the value of what he had fed to the team. There was no error in that respect. The defendant relied in the trial upon an alleged agreement by which the property was taken in satisfaction of a mortgage debt. He did not claim by his evidence that he held the property for the purpose of foreclosing the mortgage, and the value of the hay and grain he had fed the horses, and of the care he had bestowed upon the property, was wholly immaterial. We find no cause for disturbing the judgment of the district court, and it is affirmed.

DUPONT & CO v. AMOS, Sheriff (BARR, et al., Interveners).

(Supreme Court of Iowa. April 9, 1896.)

REPLEVIN—INSTRUCTION—ATTACHING CREDITORS.

1. Under Code, § 3228, providing that third persons, claiming property involved in replevin, may set up their claims by intervention, and section 2684, providing, in regard to intervention, that intervener has no right to delay, it is error, in replevin, after default has been entered against defendant, to permit a third person to intervene, the default not being set aside.

2. In replevin against a sheriff for attached property, the attachment plaintiff, his rights being dependent upon the validity of the attachment, after default judgment has been rendered against the sheriff, cannot, by intervention, enforce his rights under the attachment, the default judgment not being set aside.

Appeal from district court, Marion county; J. H. Applegate, Judge.

Action of replevin to recover the possession of certain blasting powder from the defendant, Amos. Norman Haskins, receiver of the Black Diamond Coal & Mining Company, and M. M. Barr, a judgment creditor of the mining company, intervened. There was a trial to a jury, resulting in a verdict and judgment for the intervener Barr, and plaintiff appeals. Reversed.

Geo. W. Crozier and S. C. Johnston, for appellant. Hays Bros. and Dudley & Coffin, for appellees.

DEEMER, J. On the 10th day of November, 1893, the plaintiff commenced this action in replevin against the defendant, Amos, as sheriff, alleging that it was the absolute and unqualified owner and entitled to the possession of certain blasting or mining powder, which the defendant wrongfully detained from it. A writ was issued on the 10th of November, and the property was taken and delivered to the plaintiff. On the 29th of November a default was entered against the defendant for want of appearance or answer. On the 5th of December M. Coffee and M. M. Barr obtained leave to file petitions of intervention. On the 12th day of December the cause was called for trial, and the attorney for the intervener Barr objected to going to trial at that time, and asked a postponement until a later day in the term, and that he have till a later day in which to file a petition of intervention on behalf of Barr, stating that he understood, when he took leave to file the petition, that he was to have a day later than the 12th in which to file the same, and that he had not been able to get his petition on file. Plaintiff's attorney objected to the postponement of the trial, but expressly stated that he did not controvert the statement of intervener's attorney as to his understanding of the time within which to file his petition of intervention, nor to the fact that he was not then prepared to go to trial, but insisted that the trial proceed, agreeing, however, that if, after plaintiff's evidence was taken, the intervener should not be ready to file his petition of intervention or produce his evidence, and the court should find that intervener was entitled to a postponement of the trial of the cause, such postponement should be treated and considered as though granted at the time it was asked; that is to say, that if the court should find, upon the conclusion of plaintiff's evidence, that, at the time of the commencement of the taking of plaintiff's evidence, the intervener was legally entitled to a postponement of the trial, the ruling of the court should be considered and treated by the parties the same as though made at the time the plaintiff commenced the taking of the testimony, and before any evidence had actually been taken, which agreement and understanding was made at the time the taking of the testimony on behalf of the plaintiff was begun, on the 12th day of November, 1893. Thereupon, on the 12th day of December, the case came on to be heard on its merits, and plaintiff introduced its testimony in support of its petition. After all the evidence had been taken, the defendant, sheriff, filed a motion to set aside his default, to which was attached an answer he proposed to file. On the 13th of December Norman Haskins, receiver, filed a motion to set aside the default of the defendant, and for leave to intervene, which was supported by an affidavit of his attorney excusing his delay in presenting the petition. To this motion plaintiff filed objections based upon the grounds. (1) That the case had been upon the docket since November 12th,

and had been regularly tried on the part of plaintiff, and no pleading or appearance had been made by the receiver; that the intervention would necessarily cause delay, and no good reason why the petition was not filed in time had been given. (2) Because the affidavit of intervener's attorney shows that he knew of the pending of the suit in sufficient time to have enabled him to file a petition before the case was reached for trial. (3) Because the petition shows that the receiver had no interest in the action or the subject-matter thereof. These objections were supported by affidavits. On the 14th day of December the court overruled the motion of defendant to set aside the default, and sustained the application of the receiver to be allowed to intervene, and gave the intervener 10 days in which to file his petitio , to which ruling the plaintiff excepted. On the 13th of December, Barr filed his petition of intervention, in which he claimed the right to the possession of the property in controversy, through the sheriff, by virtue of the levy thereon of a writ of attachment in a certain action in which he was plaintiff and the mining company was defendant; that the property, at the time it was taken, was the property of the mining company, and that plaintiff had no interest in or right thereto; that plaintiff's claim thereto was and is fraudulent, and made with intent to defraud intervener. On the 14th day of December plaintiff filed a motion to strike this petition from the files for the reason that, at the time of the filing thereof, this cause, on part of the plaintiff, had been tried, and evidence taken, and had been admitted to the court, and for the reason that intervener obtained leave to file a petition about the 5th day of this month, and was informed by the court that the petition would be in time if filed when the cause was called for trial, at which time no petition was filed or offered,—this petition having been drawn up and sworn to on the 13th day of December, and after the cause had been submitted on the part of the plaintiff,—and because the question of intervener's right to file the petition was argued on last night, being the 13th of this month, and immediately before adjournment, and was not determined until this morning, and because it necessarily delays trial of the case; which motion the court overruled, and plaintiff excepted. On the 14th day of December court adjourned until the 2d of January, 1894, upon which last-named day, the judge not appearing, court adjourned sine die. On December 22, 1893, Haskins, the receiver, filed a petition of intervention, in which he, as receiver for the coal company, claimed the right to the possession of the powder by reason of his appointment by the district court of Polk county to care for and receive the property in question. On May 11th plaintiff filed a motion to strike the petitions of intervention from the files because they were not filed in time. This motion was overruled, and exception taken. Thereupon plaintiff filed separate answers to these petitions of intervention. On the issues thus joined the case was tried to a jury, the trial commencing on the 16th day of May, 1894. The jury returned a verdict for the intervener Barr, fixed the value of his interest in the property at $751.75; and for intervener Haskins, and fixed the value of his interest in the property at $117.05. On this verdict judgment was rendered in favor of Barr, and against the plaintiff and the sureties on the replevin bond, for the sum of $751.75; and in favor of the receiver, against the same parties, for the sum of $117.05. The appeal is from the rulings of the court allowing the petitions of intervention, and from the judgments rendered in the action.

The first question presented raises the inquiry as to the right of the interveners to come into the case at the time they did. The proceedings with reference to intervention are wholly statutory; and by the provisions of our Code must we be governed in determining the case. Section 3228 is as follows: "If a third person claim the property or any part thereof, the plaintiff may amend and bring him in as co-defendant, or the defendant may obtain his substitution by the proper mode, or the claimant may himself intervene by the process of intervenor." The general statutes of intervention are as follows: Section 2683: "Any person who has an interest in the matter in litigation, in the success of either of the parties to the action or against both, may become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the petition or by uniting with defendant in resisting the claim of the plaintiff, or by demanding anything adversely to both plaintiff and defendant, either before or after issue has been joined in the cause and before the trial commences." Section 2684: "The court shall determine upon the intervention at the same time that the action is decided, and the intervenor has no right to delay; and if the claim of intervenor is not sustained he shall pay all the costs of the intervention." It will be noticed, from the statement of facts before given, that plaintiff took default against defendant, the sheriff, on November 29th; that on the 5th of December Barr, through his attorneys, took leave to file a petition of intervention; that plaintiff proceeded to trial, and introduced its testimony on the 12th day of December; and that the court, on the 14th day of December, refused to set aside the default entered against Amos. Plaintiff was then entitled to a judgment against Amos upon the pleadings and proofs adduced, and no doubt would have received it but for the petition of intervention which was filed by intervener Barr. The effect of the filing of this petition was to cause delay in the disposition of the case as between the original parties, and thus to set aside the express provisions of the statute. The court should have sustained the objections to the

petition filed by Barr, and should have stricken it from the files as soon as it became apparent that to allow it would cause delay in the trial and submission of the case. The court could not give the intervener such time to file his petition as would result in a postponement or continuance of the case. True, there is a showing made to justify the delay of Barr, but we do not think it is sufficient to warrant a postponement of the trial or a continuance of the case. The effect of the filing of the petition of intervention in the case was to delay and postpone the case to another term, against the express language of the statute.

There is another insuperable objection to the procedure in this case. Intervener Barr based his right to the possession of the property on a certain levy of attachment made thereon by the sheriff, and claimed through and under him, and not independent of the officer. If it should be determined that the defendant had no claim or right to the property under and by virtue of the attachment, then intervener Barr had no right to or claim against the property. Now, the court refused to set aside the default of the sheriff, and upon the proofs, as they stood at the time Barr was allowed to intervene, plaintiff was entitled to a judgment against the sheriff. The record, as it stands, shows that Amos, the sheriff, was not entitled to the possession of the property; for he was in default, and the evidence as against him was conclusive. But intervener Barr, who claimed through the sheriff, is given a judgment for the larger part of the property, when, as a matter of fact, he was not entitled to it, except he obtained it by sequestration proceedings through the sheriff. The error is so manifest that further elaboration is unnecessary. It may be that Barr, upon a proper showing, could have had the default entered against the sheriff set aside, and then, upon being substituted in place of the sheriff, could have made defense to the original suit. But he did not do this. He chose to intervene after default had been entered against the original defendant, and to claim through and under him. The only right he had, under such circumstances, if he had any, was to cross-examine plaintiff's witnesses, the same as if the default had been taken against him as a substituted defendant. There is no sufficient reason given for the time allowed the receiver to intervene. Permitting him to come into the case at the time he did manifestly caused delay, and resulted in postponing the trial until May, 1894. It may be that, if Barr's intervention was proper, the case was still open for the intervention of other parties; but we think the court was in error in allowing Barr to come into the case at the time he did, and in postponing the trial until a subsequent term of court. The judgment rendered in favor of Barr was erroneous by reason of the fact that the party through whom he claimed was in default. Other matters are discussed by counsel, but, in view of the disposition made of the case, it is not necessary that we determine them. For the errors pointed out the judgment is reversed.

HUMPTON v. UNTERKIRCHER et al.

(Supreme Court of Iowa. April 9, 1896.)

MASTER AND SERVANT—INDEPENDENT CONTRACTORS.

It appeared that defendants, desiring to erect a brick barn, contracted with certain mechanics for its construction; that the contract for the brick work was let to H., and provided that the scaffolding should be furnished by the brick layer, and that the work should be done under the direction of the architect and defendants and to their entire satisfaction; that the contract for the carpenter work was let under similar conditions to another mechanic; that defendants had no control over the employés of such contractors, or over the method in which the work should be performed; and that plaintiff was employed by H. as a brick layer on the building. *Held*, that the mechanics were independent contractors, and that defendants were not liable for injuries which happened to the servants of such contractors through negligence of the contractors or their servants.

Appeal from district court, Des Moines county; James D. Smythe, Judge.

Plaintiff was injured by the fall of a scaffold erected by his immediate employer in the construction of a certain brick building for the defendants Unterkircher & Sons in the city of Burlington, and he brought this action to recover damages, alleging that one Hummerum had the contract for doing the brick work, and defendant Hemphill for the carpenter work, all under the direction, supervision, and control of Unterkircher & Sons, or their superintendent employed for that purpose; that plaintiff, while engaged in laying brick in the wall of the second story of the building, received a fall, through the weakness of the floor upon which a scaffolding was erected to enable him to pursue his work, which resulted in a compound comminuted fracture of the bones of his lower right leg, necessitating the amputation thereof; and that defendants were negligent in not providing proper support for the floor on which the scaffolding was erected. The defendants George and Fred Unterkircher admitted that Unterkircher & Sons were engaged in the erection of a building, but claimed that it was being done by independent contractors,—one, Hemphill, having the contract for the carpenter work, and another, Hummerum, having the contract for the brick work; but they denied that they or their superintendent had any control or direction, or right of control or direction, of the manner in which the work should be done, of who should do it, or of the workmen or appliances to be employed in the accomplishment of their purpose; and they further alleged that, at the date of the accident, the work was unfinished and incomplete, and was under the control of the said

contractors, respectively; and further denied that they were guilty of negligence in any particular. They further alleged that plaintiff was in the employ of Hummerum, and that he was not in any sense their servant. They also alleged that plaintiff was guilty of negligence contributing to his injury. On these issues the case was tried to a jury, and, at the conclusion of plaintiff's evidence, the court, on motion of these defendants, directed a verdict for them. Plaintiff appeals. Affirmed.

Hedge & Blythe, for appellant. Blake & Blake and P. Henry Smythe, for appellees.

DEEMER, J. The motion to direct a verdict was based upon the grounds (1) that there was no evidence to show that defendants owned the real estate or the building which was being erected thereon, or that they were in any manner interested therein; (2) that no negligence was charged in the petition as against them; (3) that the evidence shows that the negligence, if any, was that of a fellow servant of plaintiff; (4) that the relation of master and servant did not exist as between plaintiff and these defendants; (5) that plaintiff knew of the alleged defects in the construction of the floor, and voluntarily remained in his employment, without complaint or promise of repair; and (6) that, by the exercise of ordinary care, he might have known of the defects, but that, notwithstanding, he voluntarily remained at his work, without complaint or promise of repair.

To determine the correctness of the ruling, a consideration of the facts as disclosed by the record is essential. The evidence establishes the following: In the year 1892, Unterkircher & Sons, a firm composed of P. F. Unterkircher, Fred L. Unterkircher, and George L. Unterkircher, desirous of erecting a brick livery barn upon a lot owned by P. F. Unterkircher, entered into contracts with certain mechanics, among whom were Austin Hemphill and J. Hummerum, for the construction of various parts of the work. Hummerum had a contract for the brick work, which, among other things, contained the following: "The entire work to be done in a good and workmanlike manner, under the direction of E. Kropp and P. F. Unterkircher & Sons, and to their entire satisfaction, approval, and acceptance. * * * In consideration of the faithful performance of the foregoing stipulations and agreements by said second party, the said P. F. Underkircher & Sons, party of the first part, agree faithfully to have said work duly and fairly estimated by E. Kropp, architect, as rapidly as the work is completed. * * * All the scaffolding to be furnished by the brick layer." The portions of the contract omitted relate to the work to be done, amount and terms of payment, and other matters not necessary to be here set out. Hemphill had a contract for the carpenter work, which, among other things, provided: "Said work to be commenced on or before the 12th day of December, 1892, and to be completed sixty days after the brick work is finished. The entire work to be done in a good, workmanlike manner, under the direction of E. Kropp, architect, and P. F. Unterkircher & Sons, and to their entire satisfaction, approval, and acceptance. In consideration of the faithful performance of the foregoing stipulations and requirements by second party, the said P. F. Unterkircher & Sons, party of the first part, agree faithfully to have said work duly and fairly estimated by E. Kropp, architect, as rapidly as the work is completed." Contracts for the stone work, painting, and every other thing needed to complete the building were made with other parties. The plaintiff is a brick layer, and was employed by Hummerum upon the building. At the time of the accident the rear and the two side walls of the structure were completed up to the square of the second story,—above the windows of the second floor where the joists were to be laid. The outside of the front wall was up to the level of the square, and the workmen were then engaged in backing it up; that is, filling up the inside course of the brick work. A scaffold had been erected so that the brick layers could reach and work upon this front wall. The floor of the scaffold had for its immediate support short pieces of scantling, one end of which was set into the wall, the other nailed to uprights, which rested on the floor of the second story of the building. As the second floor was to be suspended from a truss in the roof, a temporary support was made for the joists, which was to be removed, and rods from above substituted, after the building was completed. The joists of this second floor were laid on girders, and the girders were held up by posts, which, as we have said, afforded temporary support. The support for the girders referred to was two pieces of 2x10 or 2x12 joists put together and stood up on end under the girders. It appears that these temporary posts or supports were not of sufficient strength to carry the second floor with the material that was being used for the completion of the brick walls; that one of them gave way, and precipitated the whole of the second floor, with all of the material, scaffolding, and men at work thereon, into the cellar, resulting in the injuries complained of. The second floor, with its supports, was erected by or under the direction of Hemphill, the carpenter, with the knowledge, and implied consent, at least, of the defendants and their architects. The scaffolding on which plaintiff was working was built in the ordinary manner, on the inside of the building, by the brick layer, and no fault can be attributed to him, unless it be that he did not discover the condition of the supports, and did not notify plaintiff of the condition thereof, on the day of the accident. It appears, from the evidence, that Hummerum's attention was called to the fact that one of these supports

was bent on the day plaintiff was injured. It may be that it was his duty to notify the workmen of this fact; but this we need not decide, for no attempt is made to charge him personally in this action. And we will not consider the matter further than to determine whether defendants should be held liable for his neglect. It further appears, from the testimony, that the attention of Kropp, the architect, was called to the insufficiency of the support for the girders some days before the accident; and it also appears that plaintiff saw these supports, and knew how the floor of the second story was constructed and sustained. From these facts we are to determine whether either Hemphill or Hummerum was the servant of the defendants, or stood in such relation to them as that they should be held liable for the negligence of either.

Defendants contend that both the brick mason and the carpenter were independent contractors, for whose negligence they are not responsible; while plaintiff, on the other hand insists that they were servants of the defendants, engaged in doing the work, which they undertook to do, under the control, direction, and management of Kropp, the defendants' architect, and that defendants are responsible for the negligence of either. Many rules have been laid down for the determination of the question as to who are independent contractors. But the best definition we have been able to find is that given in Powell v. Construction Co., 88 Tenn. 692, 13 S. W. 691: "An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of his work." Applying this test to the case at bar, it will be seen that each of these parties was exercising an independent employment; that he contracted to do a certain portion of the work according to his own methods, and without being subject to the control of his employer, except as to the results of the work. It is true that each contract provides that the work was to be done under the direction of the defendants and their architect, and to their entire satisfaction, approval, and acceptance; but it is manifest that this direction, approval, and acceptance had reference to the time within which it should be performed, with reference to other parts of the work, and to the results to be accomplished, and not to the method or manner in which it should be performed. Defendants had no control over the men who should be employed by either of these contractors. They could not say who should be employed or who discharged. They had the right, under their contracts, to say what should be done, but not how it should be brought about, or who should do it.

Appellant relied largely upon the use of the word "direction," as employed in the contracts referred to. We do not regard this as in any sense conclusive. When we look at the whole contract, it is apparent that the only direction the architect or the owner could give was as to what should be done to accomplish the ends aimed at by the contract. He could not dictate the means or methods to be employed. This is the interpretation which has uniformly been placed upon such contracts. Hughbanks v. Investment Co. (Iowa) 60 N. W. 641; Callahan v. Railroad Co., 23 Iowa, 562; Nevins v. Peoria, 41 Ill. 502; City of Erie v. Caulkins, 85 Pa. St. 247; Eaton v. Railway Co., 59 Me. 520; Kelly v. Mayor, etc., 11 N. Y. 432; Miller v. Railway Co., 76 Iowa, 659, 39 N. W. 188. It is perfectly manifest that the defendants had no control over Hummerum in the building of the scaffold, for the contract expressly provides that he was to furnish it himself. As both of these mechanics were independent contractors, it follows that the defendants are not liable for any injury which may have happened to the servants or employés of such contractors through the negligence of said contractors or their servants.

The doctrine of respondeat superior has no application, as a general rule, to such a case, for the contractor is in no sense a servant of the employer. Kellogg v. Payne, 21 Iowa, 575; Waltemeyer v. Railway Co., 71 Iowa, 626, 33 N. W. 140; Wood v. School Dist., 44 Iowa, 27; Miller v. Railway Co., supra; Wood v. Cobb, 13 Allen, 58; Kelley v. Norcross, 121 Mass. 508; Fanjoy v. Seales, 29 Cal. 244. There are some exceptions to the rule above stated; for instance, if the injurious act complained of was contemplated by the contract, or if the work was necessarily dangerous or harmful per se, and in some other cases, the contractee is liable. Wood v. School Dist., supra. But this case is not claimed to come under any of these exceptions, and no further attention need be given them.

It is contended, on behalf of appellant, however, that it was the duty of the defendants to furnish him a safe place to work, and that, as they did not do so, they are liable, although the fault may have been originally with the carpenter, who was an independent contractor. This contention, if it has any merit, is based upon the assumption that the plaintiff was the servant of the defendants, and was in their employ as such. We have already seen that plaintiff was not a servant of the defendants. He was employed by Hummerum, and was subject to his orders and directions. The duty of furnishing him a safe place to work devolved upon his immediate employer, and not upon the defendants. To them he was no more than a stranger; and they owed him no other duty than to any one who might come upon their premises under an implied license or invitation. He was there rightfully, of course, in the prosecution of his work; but defendants owed him no special duty. Moreover, the contract between Hummerum and

the defendants expressly made it the duty of the contractor to erect and furnish the scaffolding. Defendants had no part or lot in it. There was no contract relation, either express or implied, between plaintiff and the defendants. As between them there was no relation whatever, other than that which springs from the common bond of society, which imposes upon every man the duty of so using his own as to do no injury to his fellow men. It follows, then, that the plaintiff cannot recover because of any breach of duty owing him by the defendants, unless it be the general one last above stated. But he does not rely upon this one as a basis for his action, and we have no occasion to consider whether he could recover under such a theory. It is essential, in any suit for negligence, that the particular duty neglected be declared upon. A recovery cannot be had for one breach on a petition counting on another. Railroad Co. v. Stark, 38 Mich. 714. The breach counted upon in this case was of the duty owing by a master to his servant. No other can be considered. It is well to note, in this connection, however, that the pleadings do not allege, nor does the proof show, that the defendants owned the real estate in question. Neither is there any evidence showing or tending to show that they had accepted the carpenter work. No part of the building had been completed or accepted by them at the time the accident occurred; so that there is no room for the application of the maxium, "Sic uteri tuo ut alienum non lædas."

Appellant relies upon the cases of Fink v. Ice Co., 84 Iowa, 322, 51 N. W. 155, and Haworth v. Manufacturing Co., 87 Iowa, 773, 51 N. W. 68, and 62 N. W. 325. Neither of these cases is in point. In the Fink Case, the defendant constructed the trestle work, and the plaintiff was in the employ of the defendant,—was its servant, engaged in its work. In the Haworth Case, plaintiff was in the employ of the defendants, in the erection of a building near its works, under the personal supervision of the firm, and defendants furnished the material upon which plaintiff was working, which proved unsound. The distinction between these cases and the one at bar is so manifest that we need not say more. The learned district judge correctly sustained the motion to direct a verdict. Our conclusions find support in the cases of Treadwell v. Mayor, etc., 1 Daly, 123, and Mercer v. Jackson, 54 Ill. 397. The judgment is affirmed.

STATE v. GRAFF.

(Supreme Court of Iowa. April 9, 1896.)

GRAND JURIES — STATUTES REGULATING IMPANELMENT—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. Act April 26, 1894, which amended Code 1873, c. 10, tit. 3, providing for the selection and drawing of jurors, and repealed all statutes in conflict with its provisions, was, by its express terms, not to take effect till July 1, 1895. *Held*, that grand juries legally organized under chapter 10 as it originally stood for the year 1895 constituted the grand juries for the entire year.

2. Newly-discovered evidence is not a ground for a new trial in criminal cases, since it is not made one by Code, § 4489, declaring the grounds for such new trials.

Appeal from district court, Dubuque county; Fred O'Donnell, Judge.

Defendant was held in jail to answer before the grand jury for the crime of larceny from a building in the nighttime. At the September term, 1895, he was brought before the grand jury for the purpose of exercising his right of challenge. He challenged the panel "for that said grand jury was not listed, drawn, and impaneled under the enactments of the 25th general assembly (chapter 70), nor was any notice published in accordance with said laws, and for those reasons said grand jury was of no legal existence, and had no right to indict." The challenge was overruled, and said grand jury returned an indictment charging the defendant with the crime of larceny from a building in the nighttime. Defendant pleaded not guilty to said charge, and was tried and convicted thereof. His motion for a new trial was overruled, and judgment entered that he be imprisoned in the penitentiary for the period of two years and six months at hard labor. Defendant appeals, assigning as errors the overruling of said challenge and said motion for a new trial. Affirmed.

W. J. Cantillon, for appellant. Milton Remley, Atty. Gen., for the State.

GIVEN, J. 1. This grand jury was selected, drawn, and summoned as provided in chapter 10 of title 3 of the Code of 1873, and under that statute constituted the grand jury of Dubuque county for the year 1895. April 26, 1894, chapter 70 of the Laws of the 25th General Assembly, entitled "An act to amend chapter 10, title 3, of the Code of 1873, relating to selecting and drawing jurors," was approved. Said chapter 70 provides a different mode of selecting jurors from that provided in said chapter 10; and appellant's contention is that the latter act repealed the former as to the mode of selecting jurors; therefore this grand jury, though legally selected under said chapter 10, had ceased to exist, by reason of said repeal. Said chapter 70 provides that "all statutes and parts of statutes in conflict with this act are hereby repealed, but this repeal shall not take effect before July 1, 1895." A grand jury could not be selected after July 1, 1895, for that year, in the manner provided in said chapter 70. We are in no doubt but that it was the intention of the legislature that grand juries selected under said chapter 10 for the year 1895 should continue to serve through the year, as provided in said chapter 10

Under chapter 70 there was no list from which to draw jurors until the assessor's returns for 1895 were made. The provisions of chapter 70 as to selecting grand juries are not in conflict with chapter 10, as to grand juries in existence when chapter 70 took effect; and therefore grand juries legally organized under chapter 10 for the year 1895 were legal grand juries for that year.

2. Defendant moved for a new trial, on the grounds of newly-discovered evidence, and that the verdict is contrary to the evidence. Newly-discovered evidence is not a ground for granting a new trial in criminal cases. Code, § 4489. The evidence fully sustains the verdict. We find no error in the record, and think the defendant received a fair and impartial trial. Affirmed.

NORTON et al. v. MELICK.

(Supreme Court of Iowa. April 9, 1896.)

CONTRACT — CONSTRUCTION — RETAINING TITLE — AGENCY.

1. A contract whereby plaintiff agrees to furnish defendant certain merchandise at a certain price, to be sold by him as agent for plaintiff, the defendant to purchase the merchandise remaining unsold at a certain time, title to remain in plaintiff until the price is paid, is a contract of agency, and not a sale of the goods to defendant, so as to render him absolutely liable for the goods if destroyed by fire without negligence on his part.

2. An agreement in such a contract on the part of defendant to keep the merchandise in "good order" does not render him liable therefor, if destroyed by fire without negligence on his part.

Appeal from district court, Dallas county; J. H. Applegate, Judge.

Action at law to recover damages for the alleged violation of a written contract. There was a demurrer to the petition, which was sustained, and judgment was rendered for the defendant for the costs of the action. Plaintiffs appeal. Affirmed.

Shortley & Haspel, for appellants. White & Clark and H. A. Hoyt, for appellee.

ROTHROCK, J. The following is a copy of the written contract upon which the action is founded: "This agreement, made this 1st day of September, A. D. 1893, between Willis Norton & Co., of North Topeka, Kansas, and G. R. Melick, of Perry, Iowa, witnesseth: The said Willis Norton & Co. agree to furnish to said —— the following merchandise, to wit: Two hundred 48-lb. sacks Diamond flour, at $1.70 per cwt., track Perry, Iowa; twenty-five 48lb. sacks Reindeer flour, at $1.55 per cwt., track Perry, Iowa,—to be sold by said G. R. Melick for them as their agent, at prices not less than those set opposite said articles, respectively. And said G. R. Melick agrees to receive and accept the above merchandise, as agent of said Willis Norton & Co., and to pay freight and charges thereon, and to keep the same in good order, and sell the same as agent of said Willis Norton & Co., at not less than the above-named prices; and thirty days after the shipment of said merchandise, and every thirty days thereafter while this agreement remains in force, to render to said Willis Norton & Co. a statement showing all said merchandise on hand, as well as all merchandise sold since the date of shipment or last preceding report; and, further, to remit with each such report the money for all merchandise sold since the date of shipment of last preceding report. And said G. R. Melick further agrees that, if any of said merchandise is unsold at the expiration of ninety days from the date hereof, he will buy the same at the above-named prices, and pay Willis Norton & Co. in cash therefor; but it is expressly agreed that the title, ownership, and right of possession of said property shall be in said Willis Norton & Co. until the same shall be paid for in full. In witness whereof, the said parties have hereunto set their hands, the day and year first above written. [Signed] Willis Norton & Co. G. R. Melick." The flour was shipped to the defendant, and was received by him about September 6, 1893. On the 24th day of the same month, it was totally destroyed by fire. It is not averred in the petition that the flour was destroyed because it was not stored in a proper place. It is alleged that the defendant "violated the terms of said contract, in that he failed to keep the said flour in good order, and permitted the same to be destroyed by fire on or about the 24th day of September, 1893," except such as he had sold before that time. There are no facts pleaded which show any negligence in reference to the manner in which the flour was stored and protected, and kept in good order, as required by the contract.

The whole controversy in the court below, as shown by the petition and the demurrer, was whether there was a sale of the goods by the plaintiffs to the defendant, so that the defendant was absolutely liable to pay for them, even though they were destroyed by fire without any negligence of the defendant. We think that there ought to be no question that the contract was a mere agency for the sale of the flour. It is expressly stated in the first paragraph that the flour was to be sold by the defendant for the plaintiffs as their agent. This stipulation is repeated again and again, and there is the express agreement that the transaction is not a sale, but "that the title, ownership, and right of possession of said property shall be in Willis Norton & Co. until the same shall be paid for in full." It is difficult to imagine how a contract of agency could be more strongly stated. It is even stipulated in the contract that, if any of the property "is unsold at the expiration of ninety days," the defendant will buy it, and pay cash therefor.

We are cited by counsel for appellant to a number of cases which, it is urged, support the claim that this contract is in effect a sale.

We must decline to review the authorities cited. They do not involve the construction of a contract in substance like that entered into by the parties to this case. The real inquiry is, what was the intention of the parties to the contract? And that intention must prevail, and when it is plainly and unequivocally expressed in the writing that it is an agency, and not a sale, and the title does not pass, there is no room for construction, and adjudged cases upon other contracts are of no aid in reaching a correct conclusion.

2. A party to a contract like this may, no doubt, bind himself by express stipulation that he shall be liable as an insurer of the property. Such contracts have been held to be valid. See David v. Ryan, 47 Iowa, 642. But in Seevers v. Gabel, 62 N. W. 669, this court held that a written contract of lease of personal property, containing a stipulation for returning the property "in as good condition as it now is, usual wear excepted," does not make the lessee liable in damages where the property has been destroyed by fire without fault on his part. The contract now before us does not contain any such a stringent stipulation. The undertaking to keep the flour in good order is not an absolute undertaking to respond in damages for its loss or destruction without the fault of the defendant. It is no more than a promise to put it in a reasonably safe place, to prevent damage to it by exposure to rain, dampness, or in any other way.

3. It is urged in behalf of appellants that the averments of the petition are sufficient to charge the defendant with negligence in keeping the flour in good order. It is sufficient to say in reference to this claim that negligence in caring for the flour, apart from its destruction by fire, is nowhere averred in the pleading. The judgment of the district court is affirmed.

COOK et al. v. PRINDLE et al. (SACKRISON et al., Interveners).

(Supreme Court of Iowa. April 9, 1896.)

MORTGAGEE—AFTER-ACQUIRED INTERESTS—LIMITATIONS—EFFECT OF RENEWAL—SUBSEQUENT PURCHASER.

1. Code, § 1931 (providing that, when a deed purports to convey greater interests than the grantor at the time possessed, an after-acquired interest inures to the benefit of the grantee), does not apply where a mortgagor holding an undivided four-sevenths of a tract of land, and intending to convey only his interests, it being so understood by the grantee, by mistake conveys the whole estate, and the title to the remaining three-sevenths is afterwards acquired by him.

2. Defendant gave to plaintiff's intestate a note secured by a mortgage upon certain lands. After the statute of limitations had run against the note, by indorsement on the back thereof he renewed his promise to pay, and continued the mortgage in force. Prior to this renewal, and before the statute had run, he conveyed a portion of the mortgaged premises to a third party; and, six years after the renewal, his grantee conveyed the same lands to intervener. Neither intervener nor his grantor had any knowledge or notice of the renewal. *Held* that, as to the tract so conveyed, the mortgage was barred by the statute of limitations. 63 N. W. 187, reversed.

Action in equity for judgment on a note, and the foreclosure of a mortgage securing it. A decree was entered granting a portion of the relief asked by plaintiffs, and denying them other relief, from which they appeal. Affirmed.

KINNE, J. 1. A rehearing was granted in this cause, and it has been again submitted to us for determination. The original opinion may be found in 63 N. W. 187.

April 1, 1870, Abial Prindle, Cordelia Prindle, Sarah A. Prindle, and Catherine Prindle executed to David W. Grimes their promissory note for $1,130.40, due two years after date, and drawing 10 per cent. interest, payable annually. August 1, 1870, the same defendants executed a mortgage to secure the payment of said note upon certain real estate. Said mortgage was duly recorded. This suit is brought for a judgment on said note, and for the foreclosure of said mortgage. February 15, 1882, the makers of said note and mortgage indorsed upon the back of said note the following: "We do hereby admit that this note, with interest, is unpaid, and renew the promise therein contained to pay the same, and the mortgage given to secure the same is to stand and continue in force for the security hereof." This was signed by all of the makers of the note. January 25, 1876, said Prindles conveyed to the defendant Lukenbill 40 acres of the land which was embraced in their mortgage to Grimes. Lukenbill took immediate possession of said land, and continued to occupy it until September 17, 1888, when he conveyed the same to intervener Sackrison, who has ever since been in possession of it. April 16, 1886, said Prindles executed their note to E. Rabb for $3,000, and secured the same by a mortgage embracing all the land included within plaintiffs' mortgage, and other lands, except that the Lukenbill 40 acres was not embraced therein. Afterwards the Rabb note and mortgage were assigned to the defendant J. J. Seerley, and by him to his wife, L. L. Seerley. April 28, 1887, said Prindles executed their note to L. L. Seerley for $1,000, and secured the same by a mortgage upon the lands in controversy, except the Lukenbill 40, and other lands. March 20, 1888, said Prindles executed their note to L. L. Seerley for $1,750, and secured the same by mortgage upon the same lands. November 5, 1891, defendant Worthington obtained three judgments in the district court of Des Moines county against the defendant A. H. Prindle. At the tax sale on December 2, 1889. C. C. Clark purchased the real estate in question, except the 40 acres, for the taxes of 1888, and thereafter assigned the certificates to the defendant J. J. Seerley, who received tax deeds for the land after the com-

mencement of this action, to wit, December 17, 1892. Defendants Prindle answered, averring that, at the time they executed the mortgage to Grimes, they only owned four undivided sevenths of the land described in the mortgage, and that, by mistake, said mortgage was so drawn as to cover the full title to said land. They asked that the mortgage be reformed. They also pleaded that, at the time the indorsement was made on the Grimes note, it was verbally agreed that the rate of interest should be 6 per cent. The other defendants joined in these allegations. Lukenbill answered, setting out the conveyance of the 40 acres by the Prindles to himself, and his conveyance of the same to Sackrison, and asking to be dismissed, with his costs. Sackrison intervened, and pleaded that he purchased the 40 acres of Lukenbill and wife in good faith, and without knowledge that there was a valid mortgage on the same; that plaintiffs' mortgage was barred; that the attempted renewal of said Grimes' note and mortgage was after the sale to his grantor Lukenbill, and after the grantors had parted will all their interest in said land, and was without effect as against him; that interveners had no notice or knowledge of said renewal when he made his purchase; and that Grimes knew of Lukenbill's purchase. He asks that said Grimes' mortgage be canceled as to his land, and that his title be quieted. Defendant Worthington answered, setting up her judgments, and joining in the allegation that the Grimes mortgage was only intended to convey four-sevenths of the land, and averred that A. H. Prindle had acquired title to the other three-sevenths of said land since the execution of the Grimes mortgage, and prior to the recovery of her judgments, and she claims a lien prior to said mortgage on said three-sevenths interest in said land. Plaintiffs contend that the three-sevenths interest acquired by A. H. Prindle inured to their benefit, under the Grimes mortgage. Defendant L. L. Seerley joins in the claim for the correction of plaintiffs' mortgage, and contends that said mortgage is junior to her mortgages, except as to the four-sevenths of the land owned by the Prindles. She asks a judgment and decree of foreclosure on her three notes and mortgages, and that her rights be decreed superior to those of defendant Worthington, and against plaintiffs, as to said three-sevenths of said land. Plaintiffs aver that J. J. Seerley and C. C. Clark, his partner, were attorneys in this case for the defendants Prindle, L. L. Seerley, and Worthington; that J. J. Seerley procured said tax title in secret trust, for the use and benefit of his said clients, and fraudulently seeks to use the same to defeat plaintiffs' prior lien on said lands. They offer to redeem from said tax sale, and ask to be permitted to do so, and that the deeds be set aside. The district court entered a decree for plaintiffs for the amount due on the Grimes note; for L. L. Seerley for the several amounts due on her notes and mortgages; and adjudged that J. J. Seerley had valid tax deeds to some of the real estate covered by the Grimes and L. L. Seerley mortgages, and that said mortgages were not liens upon said lands. As to other lands covered by the Grimes mortgage (not including the three-sevenths acquired by Prindle after it was executed), a decree of foreclosure was entered. The L. L. Seerley mortgages were also foreclosed as to certain lands. It was held that the renewal by the Prindles of the note to Grimes was void as to Lukenbill and Sackrison, and a foreclosure of the Grimes mortgage as to that 40 acres was refused. Plaintiffs were adjudged to pay the costs.

2. Upon the foregoing facts, the following questions are to be determined: (1) As to the alleged agreement for a reduction of interest on the Grimes note and mortgage. (2) Whether the showing is such as to justify the decree below finding that the Grimes mortgage erroneously embraced the entire title to the land described therein, when it should have conveyed only four-sevenths of it. (3) Whether plaintiffs' contention touching Seerley's tax titles is supported by the evidence. (4) Whether Lukenbill and Sackrison can successfully plead the statutes of limitation as against the lien of the Grimes mortgage on the 40 acres conveyed by the Prindles to Lukenbill, and by him to Sackrison.

There is no evidence establishing the alleged agreement for a reduction of the interest on the mortgage debt of the Prindles to Grimes; therefore judgment was properly rendered in plaintiffs' favor for the amount due on the Prindle note to Grimes.

The evidence established the fact that it was the intention of the parties, in executing the mortgage to Grimes, to have it cover only four-sevenths of the land therein described, it being also the interest then in fact owned by the mortgagors. It is certain that, by some oversight or mistake, the mortgage was so written as to embrace a full title to the land described rather than the four-sevenths as intended. Plaintiffs insist, however, that the defendants are now barred from having a reformation of the mortgage in this respect. If this be true, it is no reason for giving plaintiffs a greater interest under the mortgage than the mortgagors possessed, and especially so when it appears that there was no intent to convey an interest greater than that then owned by the mortgagors. A. H. Prindle, one of the mortgagors, some time after the execution of the mortgage to Grimes, acquired title to the other three-sevenths interest in this land, and plaintiffs insist that this after-acquired interest inures to their benefits. Code, § 1931, provides: "Where a deed purports to convey a greater interest than the grantor was at the time possessed of, any after-acquired interest of such grantor, to the extent of that which the deed purports to convey, inures to the benefit of the grantee." This statute applies to mortgages where there

are no intervening equities. Rice v. Kelso, 57 Iowa, 118, 7 N. W. 3, and 10 N. W. 335. Here we have a case where the mortgage, by mistake, conveyed a greater interest than the mortgagors possessed. The consideration was not based upon an interest in the property to be thereafter acquired. The entire arrangement between the parties was, as we have found, grounded upon the belief and intention to mortgage the undivided four-sevenths of the land. No other or greater interest was considered, but by oversight, the entire interest was pledged for the debt. Now, manifestly the statute was never intended to apply to a case where the grantee or mortgagee never had in contemplation or expectation the acquiring of any other or greater interest in the property than that then owned by the grantor or mortgagor, and when, by oversight or mistake, such greater interest was embraced within the terms of the instrument. The court below properly held that plaintiffs were not entitled to a lien as against the after-acquired three-sevenths interest in the land.

3. As to the tax title of Seerley: The gist of plaintiffs' complaint touching defendant Seerley's tax title is thus set forth in paragraph 6 of the amendment to their petition: "Plaintiffs charge the truth to be that said John J. Seerley procured said tax titles in carrying out an understanding had and agreed upon between himself and his said clients that he should procure said titles in his name or under his control, but in secret trust for the use and benefit of his said clients, and wrongfully and fraudulently use said titles to defeat the plaintiffs' prior lien on said lands; and that said tax titles are held by said Seerley not for himself, but in trust for the use and benefit of his said clients." Counsel for appellants has with great force and ability argued the question as to the validity of these tax titles. We have examined the matter with care, and reach the conclusion that there was nothing in Seerley's relations to the parties which should have precluded him, under the circumstances disclosed, from acquiring the tax titles. We cannot consider the evidence in detail, but may properly say that, when these titles were acquired, neither he nor his partner, Clark, was an attorney for the Prindles. The purchase at the tax sale was not made for the Prindles or for any other client, and Seerley acquired the certificates for himself only. He held them until the period of redemption had expired. After this suit was commenced, and no redemption having been made, he took his deed. The evidence falls far short of establishing any agreement, understanding, fraud, or trust, as is alleged by plaintiffs. Grimes died after this suit was commenced. He had ample opportunity to know the condition of this land and title. He made no attempt to ascertain the facts touching the tax sale, and without inquiry or investigation began this suit. The slightest diligence on his part would have disclosed the situation, and he could have redeemed from the sale, and thus protected his mortgage lien. We discover no reason for setting aside this tax title.

4. As to the defense of the statute of limitations: When Lukenbill acquired title to the 40 acres, the mortgage to Grimes was of record, and, upon its face, in full force, and not barred. When he conveyed to Sackrison, said mortgage was barred, and had ceased to be a lien upon this land, unless it was continued as a lien by reason of the renewal of the debt which it secured. Sackrison took title to the land in ignorance of the indorsement which had before that time been made by the Prindles on the note to Grimes. If the indorsement upon the note was binding as to Sackrison, and effectual for the purpose of extending the lien upon the land which he had purchased at a time when the mortgage on its face was barred, then he cannot successfully plead the bar of the statute.

We have, then, the question as to whether or not a mortgagor, after he has parted with the title to land which is pledged for the security of a debt, may, by complying with the provisions of our statute, revive the debt which is barred, so as to continue the lien of the mortgage in force as against one who purchased the land when the mortgage appeared to be barred, and without notice of the attempted revivor. In the former opinion it was thought that this question was ruled by the case of Bank v. Woodman (Iowa) 62 N. W. 28. That, we think, was not a proper view of that case. Clinton County v. Cox, 37 Iowa, 570, was a case where plaintiff sought to foreclose a mortgage executed by Cox. Everhart purchased the land from Cox. Butterfield filed a cross petition, alleging that Cox, on November 6, 1857, executed to him a deed of trust to secure certain notes, and that since June 1, 1865, said Cox had been a nonresident of the state. This cross petition prayed for the foreclosure of the deed of trust against the land. Everhart, the purchaser of the land, demurred to the cross petition, on the ground that the cause of action was barred by the statute of limitations. The demurrer being sustained, Butterfield appealed. It was held that the nonresidence of the debtor, Cox, arrested the operation of the statute, and that the remedy upon the indebtedness still existed, and the lien might be enforced to satisfy the debt. Mahon v. Cooley, 36 Iowa, 479, involved the question of the power of a husband, by reviving the cause of action, without the concurrence of the wife, to keep alive the lien of a mortgage on the homestead, and which secured the debt, after the period of limitation had expired. It was held that he could do so. Brown v. Rockhold, 49 Iowa, 284, involved the same question as did the Clinton County Case, and the holding was the same. In Kerndt v. Porterfield, 56 Iowa, 412, 9 N. W.

322, the facts were that the note and mortgage were executed October. 20, 1865, and due in three years. Before they were barred, Porterfield executed other notes, secured, by a mortgage, on the same property to one Howard. After the original debt was barred, and after Howard took his notes and mortgage, Porterfield revived the debt. It was held that the new promise revived the mortgage as against Howard, the junior mortgagee. In Palmer v. Butler, 36 Iowa, 581, the question was as to the effect of a revivor by a mortgagor which was made prior to the purchase of the land by another, and it was held that such revivor continued the lien as against the purchaser. In Day v. Baldwin, 34 Iowa, 384, it was held that one who purchases the interest of the owner of the land may set up the bar of the statute. In Palmer v. Butler, supra, it is said: "It has been held by this court that a new promise to pay a debt barred by the statute, made by the mortgagor after he had conveyed the mortgaged premises, will not revive the right of action for foreclosure against the grantee of the mortgagor, but that such grantee may protect himself against the foreclosure by pleading the statute, notwithstanding the new promise of the mortgagor. Day v. Baldwin, 34 Iowa, 380." In Kerndt v. Porterfield, supra, it is said: "It may be, but the point we do not decide, that one acquiring an interest in the mortgaged property after foreclosure of the mortgage is barred by the statute, and, before a new promise is made, would hold by a right superior to the mortgagee after his debt is revived by a new promise. But the case is different where one acquires such an interest before the action upon the mortgage is barred. and, after the period of limitation has run, the debt is revived by a new promise." In Bank v. Woodman, supra, it was held that, "In the absence of controlling equities, a second mortgagee, when a prior mortgage is uncanceled, must take notice of the fact whether or not the cause of action thereon has been revived." The question involved in that case, the right of a subsequent mortgagee to avail himself of the statute as against a claim apparently barred, is not the question we have to deal with. We have a case where one purchased the mortgaged premises at a time when the debt, as appeared from the mortgage, was barred, and without any notice that, after his grantor purchased the premises, the mortgagors had, by written promise, undertaken to revive the debt. We do not think that there is any decision of this court which has determined this question against the conclusion reached by the lower court. The doctrine of Day's Case, which we have shown has been recognized in at least two subsequent cases, is in harmony with the thought that one who purchases the mortgaged real estate at a time when the mortgage appears to be barred may successfully interpose a plea of the statute of limitations to the foreclosure of such a mortgage which the mortgagors have attempted to revive after they have parted with their title, he having no notice of said revivor. We are not disposed to extend the doctrine of Bank v. Woodman to a case where the facts are like those at bar. We are aware that this court has often said that the lien of the mortgage will continue so long as the debt exists; and, as a rule, that is so, but the language thus used is to be construed in view of the facts then under consideration.

There is no doubt of the right of the mortgagors in this case to revive the debt as against themselves, or so as to continue the lien as against property which was embraced within the mortgage, and which they then owned; but as to the land in question, which they had sold long before the attempted revival, and the title to which was acquired by Sackrison in reliance on the fact that the debt as evidenced by the mortgage was barred, and without notice of the revival, there can be no such revival. The law is well settled that, after the mortgagor disposes of the mortgaged premises by deed, he loses all control over them. He is then powerless to create or revive charges against such lands. As is often said, as to such premises he is a stranger, and his power to revive a mortgage does not exist if, under the circumstances, he has not power to give a new one which would be binding thereon. Zoll v. Carnahan, 83 Mo. 43; Lord v. Morris, 18 Cal. 482; Schmucker v. Sibert, 18 Kan. 104; Newbould v. Smith, 33 Ch. Div. 127; Wood v. Goodfellow, 43 Cal. 185; 13 Am. & Eng. Enc. Law, p. 761. The decree of the district court is in all respects correct, and it is affirmed.

FARMERS' LOAN & TRUST CO. v. CITY OF NEWTON et al.

(Supreme Court of Iowa. April 9, 1896.)

TAXATION — CORPORATIONS — ASSESSMENT — JUDGMENT VACATING—RIGHT OF CITY TO APPEAL—ESTOPPEL—COSTS.

1. Under McClain's Code, § 4392, giving the supreme court appellate jurisdiction over judgments of courts of record in special proceedings, an appeal will lie to the supreme court by a city, or its board of equalization in its behalf, from a judgment of the district court canceling an assessment rendered on appeal from the board of equalization under section 1312, giving parties aggrieved by assessments the right to appeal from the board of equalization, though the city or board had no right in the first instance to appeal to the circuit court.

2. The organization of a corporation to make and sell loans after its articles of incorporation had been filed, and blank applications for loans, notes, and mortgages had been procured for it by the promoters, was abandoned; no stock having been issued or other property than the blanks acquired. These were assigned in blank by the corporation, and divided among the promoters, who never became members of the corporation. *Held*, that the corporation was not subject to assessment, as the owner of notes and mortgages appearing in its name in the county recorder's

office, through the blanks being used by the promoters in their own business.

3. The corporation was not in such case estopped from claiming that the assessment was invalid.

4. Public officers impleaded in their representative capacity are not liable personally for costs.

5. It is within the discretion of the district court, on appeal from the board of equalization, to allow pleadings to be filed, though the statutes make no provision therefor.

6. Where the district court, on appeal from a board of equalization, has, in its discretion, allowed pleadings to be filed, copy fees therefor may be included in taxing costs.

7. In an action against a city and its board of equalization, notice of appeal served on the mayor or city clerk is a sufficient service as to both defendants when such persons are ex officio officers of the board.

8. Appellant is liable for costs for unnecessary notices of appeal served.

9. McClain's Code, § 1288, providing for the assessment of the average value of the moneys and credits which have been in the possession of a corporation making loans, has no application when loans were made in the name of the corporation by private persons, but the corporation never had in its possession or control any of the moneys.

Appeal from district court, Jasper county; A. R. Dewey, Judge.

This is an appeal from a decree of the district court canceling and setting aside an assessment for taxation made upon the property of plaintiff by the board of equalization of the city of Newton. Modified and affirmed.

H. S. Winslow, for appellants. McElroy & Northup, for appellee.

DEEMER, J. We are first confronted with a motion to dismiss the appeal, based upon the grounds: First, that appellants have no right to appeal; second, that plaintiff has not appealed; third, this court has no jurisdiction. The argument made in support of this motion proceeds upon the theory that, under the statute, no one but the person aggrieved (who, it is contended, must be the party against whom the assessment is made) can appeal. The statute conferring the right to appeal is as follows (McClain's Code, § 1312): "Any person who may feel aggrieved at anything in the assessment of his property may appear before said board of equalization in person, or by agent, at the time and place mentioned in the preceding section, and have the same corrected in such manner as to said board may seem just and equitable, and the assessors shall meet with said board and correct the assessment books as they may direct. Appeals may be taken from all boards of equalization to the circuit (district) court of the county where the assessment was made, within sixty days after the adjournment of such board of equalization, but not afterwards." It is well settled that the right of appeal is purely statutory, and, unless conferred by statute, it does not exist; and it may be that the statute quoted does not confer upon the city or its board of equalization the right of appeal to the district court. But we have another general statute (McClain's Code, § 4392), which provides that "the supreme court has appellate jurisdiction over all judgments and decisions of all other courts of record, as well in case of civil actions as in proceedings of a special or independent character." Other provisions of the Code provide how the appeal may be taken. We have, in effect, held that this last statute confers the right of appeal in all cases coming within the class named, unless there be another statute limiting the final jurisdiction to the inferior court or tribunal. Lampson v. Platt, 1 Iowa, 556. Again, we have said that "this court has appellate jurisdiction over all judgments and decisions of courts of record in the state"; and, this cause not having been shown to be an exception to the rule, jurisdiction of it must be assumed to exist." Farley v. Geisheker, 78 Iowa, 453, 43 N. W. 279. See, also, Davis v. City of Clinton, 55 Iowa, 549, 8 N. W. 428, which was an appeal by the city from the decree of the district court on appeal from the action of a board of equalization. The language used by Rothrock, J., in the case of Appeal of Des Moines Water Co., 48 Iowa, 332, has reference to appeals from the board of equalization to the (circuit) district court, and not to appeals to this court from the order of a court of record; and the same may be said with reference to the language of the court in Grimes v. City of Burlington, 74 Iowa, 126, 37 N. W. 106. Upon appeal to the district court, the city and board of equalization, acting for and on behalf of the city, become parties, and, as such, are empowered by the statute last quoted to prosecute an appeal to this court. The motion to dismiss is overruled.

2. The case comes to us for trial de novo, and it is for us to do as the lower court should have done on the evidence adduced. The record discloses the following facts: In the latter part of the year 1888, an attempt was made to organize a corporation under the name of the Farmers' Loan & Trust Company. Articles of incorporation were filed in the office of the county recorder and with the secretary of state, but it never issued any stock, nor did it have any property, except some blank applications for loans, notes, and mortgages, which it had printed. Its promoters expended some money in organizing the corporation and procuring blanks, but received no stock or other evidence of membership. When the corporation was organized, its main purpose was to "make and sell loans"; but this was abandoned, and the organization was never fully perfected. The blanks which were procured were divided among the promoters, and were used by them in their private business. In order to make the blanks available, assignments in blank were executed in the name of the proposed corporation, and these papers, when divided, all had blank assignments thereon. The promoters of the cor-

poration used these blanks, and the records of the county disclosed a large number of mortgages standing in the name of the corporation. The board of equalization made an assessment on the strength of these records, but it is shown affirmatively that the corporation had no interest in the notes and mortgages, copies of which were found in the county recorder's office. The corporation itself has merely a superficial life, for the purpose of releasing some of the mortgages which were taken on the blanks divided among the promoters. Under such a state of facts, it is apparent that there is nothing to assess to the corporation, and that the action of the board of equalization in assessing against it the sum of $35,000 was and is illegal, unless there be something in a claim made by the defendants that the plaintiff is estopped from questioning the assessment by reason of the fact that many loans appear to have been made by the corporation. It does not appear to us that there is anything in this claim. No estoppel was pleaded by the defendants, and there is no evidence showing, or tending to show, that any one charged with any duty with reference to the assessment of property was in any manner misled by the fact that these mortgages appeared upon the county records with plaintiff's name as mortgagee. There is no evidence that the moneys and credits represented by these instruments were not assessed to the proper parties. Moreover, it appears that there was an assignment of each and all of these mortgages, and of the notes secured thereby, to the real owners of the paper, and that this assignment was executed before the loans were made. The case lacks many elements necessary to constitute an estoppel. Authorities need not be cited on so plain a proposition.

It is said, however, that the assessment was authorized under section 1288, McClain's Code, which is as follows: "All taxable property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January, except moneys and credits of associations organized under the general incorporation laws of this state, * * * and others who have loaned money, bought notes, mortgages or other securities within the year previous to the time of assessing; in every such instance, the average value of the moneys and credits which have been in the possession or under the control of the person making the list, during the year previous to the time of making said assessment shall be listed for taxation." The evidence conclusively shows that appellee did not own or have in its possession or under its control any money or property of any kind; that it never, in fact, negotiated any loan, and never had any of the notes or mortgages in its possession or under its control. Consequently, the statute quoted has no application.

3. The court below rendered judgment against the individual members of the council of the city of Newton for the costs of the case. This was erroneous. It is doubtful, to say the least, whether they should have been made parties to the case. But, concede that they were properly in the case, yet they were impleaded in a representative capacity, and should not have been taxed with the costs. The city of Newton is alone responsible for them, and the judgment should have been against it alone. The plaintiff filed in the district court a paper called a "petition," containing 17 or more pages of typewritten matter, and a copy fee of $4.50 was taxed as part of the costs. Defendants moved to strike this paper from the files, and afterwards filed a motion to retax the costs in so far as the copy fee was concerned. These motions were each overruled, and it is insisted that the rulings are erroneous. Now, while the statute does not provide for any written pleadings in cases of appeals from the board of equalization, yet it does not follow that such pleadings, when filed, should be stricken from the files. Pleadings often tend to simplify and render certain the issues to be tried by the court in such cases; and the lower court may, in the exercise of its discretion, allow the same to be filed. They, no doubt, tend to expedite the trial; and, when allowed in the exercise of a wise discretion, copy fees may properly be taxed therefor. The motion to retax also asked that the cost of the service of all notices made upon defendants, except the city of Newton, be taxed to plaintiff. It is somewhat difficult to determine upon whom service of notice of appeal from the action of a board of equalization should be made, but we think, as the board acts through and on behalf of the city now (Kinnie v. Waverly, 42 Iowa, 437), that service upon the mayor or clerk is sufficient (Code 1873, § 2612). But if it be said that the board of equalization is in itself a corporation, and that service should be had upon it, then service upon the mayor or the clerk is sufficient, for they are ex officio members and officers of the board of equalization. See Code 1873, §§ 518, 522, 531, 829, and 2612. In either event service upon the mayor was sufficient, and all that was required to give the lower court jurisdiction. All costs made in the service of other notices should have been taxed to plaintiff. The decree and order of the district court, except in the particulars stated, was correct, and will be affirmed, except as to the taxation of costs. Modified and affirmed.

STATE ex rel. ROYCE v. WYMEN.

(Supreme Court of Iowa. April 9, 1896.)

MUNICIPAL CORPORATION — OFFICERS — ELECTION.

Code, § 509, provides that a town, on becoming a city of the second class, shall, at the regular annual election of municipal officers,

elect the officers to which its new grade entitles it, and that, on their election and qualification, the term of any former officer shall expire. Prior to 1886 mayors of second-class cities were elected annually. Acts 21st Gen. Assem. c. 141, provides that the terms of mayors, etc., of second-class cities, should thereafter be two years, and that the first election under the act should be held on the first Monday in March, 1887. *Held*, that on a town becoming a city of the second class in an even-numbered year, subsequent to Acts 21st Gen. Assem. c. 141, and prior to the annual election in such year, it was entitled to elect at such annual election a mayor for a term of two years.

Appeal from district court, O'Brien county; Scott W. Ladd, Judge.

Quo warranto to test the right of the defendant to hold the office of mayor of the city of Sheldon. Judgment for the relator, and the defendant appealed. Affirmed.

D. W. A. Perkins, for appellant. Boies & Roth, for appellee.

GRANGER, J. The city of Sheldon became such, from an incorporated town, just prior to the municipal election in March, 1894; and at the election in that year the relator was duly elected to the office of mayor of the city. At the municipal election in March, 1895, the defendant was elected to that office, and has assumed the duties thereof; and this proceeding is to test his right to exercise such duties by virtue of said election. The cause was submitted on a stipulation of facts, and the following, included therein, indicates the contentions in the case: "That the contention of the parties hereto is: The relator contends that the said city being a city of the second class, that he was on March 5, 1894, elected mayor thereof for the full term of two years, and that his term of office does not expire until the regular city election in March, 1896. The contention on the part of defendant is: That mayors of cities of the second class in this state are to be elected in odd-numbered years, unless the first election under the new organization of a city as a city of the second class occurs in an even-numbered year, and then the mayor so elected in such even-numbered year only holds his office for one year; and, consequently, the relator's term of office expired upon the qualification of the defendant, in March, 1895."

Section 509 of the Code provides that, when an incorporated town is changed into a city of the second class, such city "shall, at the regular annual period for the election of municipal officers, proceed to organize according to its new grade, by the election of officers properly belonging thereto, and on their election and qualification the term of service of any former officer shall expire." Prior to 1886, mayors of cities of the second class were elected annually. The 21st General Assembly, by chapter 141 of its Acts, so changed the law as to have them elected bienially, which is the law now in force. The language of section 2 of the act is as follows: "The terms of office for the mayor, treasurer, assessor, and solicitor, shall be two years, and the first election under this act shall be held on the first Monday of March, 1887." The act was passed in 1886, and took effect July 4th of that year, and the first election was fixed for the March following. There is no dispute but that cities of the second class may be organized so as to have their first election in the even-numbered year. That was done in this case. It is not true, then, that all elections for mayors shall be held in the odd-numbered years. The law nowhere contains any language to expressly change or modify the rule that mayors are to be elected bienially. The act fixes the time for the first election in 1887. That would control as to all such cities then in existence. The law then permits other cities to come into existence so that their first election will come in even-numbered years. Others may so come into existence after the year 1887 as that their first election will come in odd-numbered years. The biennial period is applicable to all such cities, and no exception is made for any purpose nor on any account; and we do not see why a second or third election in even-numbered years is not as valid as the first, and we have no doubt as to the legality of the first. We do not feel authorized to ingraft on the law, by construction, a provision not expressed in it, that would in some respects defeat its express provisions by changing, in particular cases, the tenure of office. We think the holding of the district court is right, and its judgment is affirmed.

DE GOEY v. VAN WYK et al.

(Supreme Court of Iowa. April 9, 1896.)

MORTGAGES—CONSIDERATION—PAROL EVIDENCE—WRONGFUL ATTACHMENT—DAMAGES—PRINCIPAL AND SURETY—RELEASE OF SURETY—TRIAL—EFFECT OF VERDICT.

1. In an action on a note, where defendant claimed to be surety only, and it appeared that the principal had given a mortgage to plaintiff covering the property for which the note sued on was given, the consideration stated in the mortgage not including the note in suit, it was proper to allow defendant, he not being a party to the mortgage, to show by parol that, as part of the consideration of the mortgage, it was agreed by plaintiff that he would release defendant from all liability on the note.

2. The admission of incompetent evidence as to speculative damages is harmless error, where the verdict for plaintiff is one for nominal damages.

3. In attachment, where defendant claimed damages for wrongful attachment, and the evidence showed that the grounds of attachment were true, an instruction as to exemplary damages was, in view of a verdict for defendant for one dollar, error without prejudice.

4. In an action on a promissory note aided by attachment, where defendant claimed to be merely a surety, and alleged further that under a contract between plaintiff and the principal he had been released from liability, there was evidence to show that defendant had, prior to the commencement of the action, stated to a third person that he was liable for a security note which he would not pay if he could avoid it; and that he wished to convey his property to his sister-in-law. *Held*, that it was not error to instruct the jury that if they found the facts to be true they should consider them only in de-

ining whether plaintiff had sufficient grounds he issuance of the attachment, and not as ng upon the question whether defendant been released from liability as surety.

5. In an action upon a promissory note, e defendant, claiming to be surety only, al- that, as consideration of a mortgage giv- y his principal to plaintiff upon property for purchase of which the notes in suit were giv- plaintiff had agreed to release him from his lity as surety, there was no error in an in- action that, if defendant was merely a surety, intiff could not release any of the property vered by said mortgage, or appropriate it to s own use, or to any purpose other than pay- ent of the claims secured thereby, without re- asing defendant from liability to the extent of the value of such property so released or appro- priated.

6. Where an instruction fails fully to state the law applicable to the facts, but the law is fully set forth in a subsequent instruction, the error is without prejudice.

7. In an action upon a note aided by attachment, where defendant alleges wrongful attachment, and denies the liability on the note, a general verdict for defendant for one dollar, with special finding that the attachments were wrongfully sued out, must be construed as a general verdict against the plaintiff on all the issues presented in the entire case.

Appeal from district court, Marion county; A. W. Wilkinson, Judge.

Action on three promissory notes. Trial to a jury. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

P. H. Bousquet, Hays Bros., and H. S. Winslow, for appellant. Earle & Prouty and G. W. Crozier, for appellee Uithoven.

KINNE, J. 1. Plaintiff commenced his action, aided by attachment, upon three promissory notes, which were signed by both of the defendants, and which, in the aggregate, amounted to about $1,200. The grounds alleged for an attachment against the property of the defendant Uithoven are that he "is about to remove permanently out of the state, and refuses to secure or pay the plaintiff," and "he is about to remove his property, or part thereof, out of the county, with intent to defraud his creditors." Defendant Van Wyk made no appearance, and judgment was rendered against him by default. Uithoven answered in three counts. In the first count he admits the execution of the notes, but says he is surety only for Van Wyk, of which fact plaintiff had knowledge; that they were given for property purchased by his co-defendant of plaintiff; that, after the notes had been given, the plaintiff, desiring to obtain a mortgage upon the property of Van Wyk to secure not only the notes sued upon for which he, Uithoven, was surety, but also other claims, agreed with Van Wyk, if he (Van Wyk) would execute such a mortgage, he (plaintiff) would release the defendant from all liability as a maker of said notes; and the said mortgage was so executed. The second count admits the execution of the notes, and alleges that plaintiff is estopped from collecting them of defendant because he (Van Wyk) entered into an arrangement under which Van Wyk purchased at a sale made by plaintiff a large amount of property, plaintiff agreeing that if defendant would become Van Wyk's surety upon the notes to be given therefor, he (plaintiff) would bear one-half of the liability with the surety, and would carry them equally with the defendant, until Van Wyk could make the money out of the rented farm and stock purchased with which to pay the debt: that afterwards, Van Wyk, fearing he could not pay the notes, proposed to transfer to plaintiff the property which he had mortgaged to secure them, and which mortgage had been taken contrary to the defendant's wishes; that plaintiff accepted and received the mortgaged property, and converted some of it to his own use; that he released a portion of it from the lien of the mortgage, whereby the defendant was damaged in a sum greater than the amount due on the notes, and is released from all liability. The third count seeks to recover for damages on the bond for the wrongful issuance and levy of the attachments, it being charged that the same were wrongfully and maliciously sworn out and levied, by reason of which he claims actual and exemplary damages. It is also averred that defendant was contemplating removing from Iowa to the state of Mississippi; that he had contracted to sell his Iowa farm, and by reason of the levy of said writs he was unable to comply with his agreement to convey, and was greatly damaged thereby. The mortgage referred to in the answer recites that whereas Van Wyk is indebted upon certain promissory notes, signed by himself and Uithoven, which are the notes in suit, two of which are held by certain banks, and upon which plaintiff is liable as an indorser, and Van Wyk is also indebted to plaintiff upon other notes, upon one of which he is about to bring suit, that as to it plaintiff agrees to extend the time of payment; that he has also extended a credit of $125 to Van Wyk, for which a note was that day executed. "Now, therefore, be it known that I, William Van Wyk, above named, for and in consideration of the extension of said promissory note originally payable to E. Bientema, and in consideration of the sum of one hundred twenty-five dollars to me in hand paid, and the receipt whereof is hereby acknowledged, have bargained and sold," etc. Here follows a list of personal property. "The conditions of this mortgage are that I shall pay or cause to be paid to the said John De Goey the said promissory notes above described [not those in suit], and shall pay or cause to be paid the hundred twenty-five dollar note, and that I shall save and keep harmless the said John De Goey from any and all damages and liability by reason of his having indorsed and assigned the promissory notes herein first above described as indorser thereof,"—then the conveyance should be void. To these answers the plaintiff replied, denying all averments save the admission of the ex-

ecution of the notes and the contemplated removal to Mississippi.

2. It is first contended that the evidence fails to establish that Uithoven was only a surety on the notes in suit. We shall not discuss the evidence touching this matter. We think it was such as to justify the jury in finding that Uithoven signed the notes as surety only.

3. It is urged that to permit Uithoven to show that the agreement between plaintiff and Van Wyk was that, if the latter would execute the mortgage, the plaintiff would release Uithoven from liability on the notes sued upon, was changing the written contract of the parties by parol evidence. Appellee contends that such evidence is admissible to show the actual consideration of the mortgage. In support of his contention appellee relies upon Scott v. Sweet, 2 G. Greene, 224, and Taylor, Thomas & Co. v. Wightman, 51 Iowa, 411, 1 N. W. 607. The first case cited was one where it was attempted to show as a defense to a promissory note that the consideration had failed, and this court held such evidence admissible. In the last case the consideration stated was one dollar, and it was held that it might be shown what the consideration in fact was. These cases are unlike that at bar. In this case the consideration is expressly stated to be the extension of a certain note, and the payment of another note given for money that day advanced to Van Wyk. There is much conflict in the authorities as to what may be shown regarding the consideration of a written instrument. Many authorities hold that the consideration may be shown by parol to be greater or less, other or different from, or something additional to that stated in the writing. Railway Co. v. Neafus (Ky.) 18 S. W. 1030; Fraley v. Bentley, 1 Dak. 25, 46 N. W. 506; 1 Pars. Cont. p. 430; Machine Co. v. Gaertner, 55 Mich. 453, 21 N. W. 885; 17 Am. & Eng. Enc. Law, pp. 438–442. Other authorities seem to go so far as to permit a consideration to be shown which is inconsistent with or contrary to that stated in the written instrument. Id. p. 441. In our own state, and in cases where the facts involved make the holdings applicable to the facts of the case at bar, the rule has been adhered to that when the considerations are expressed and fully stated in unmistakable language in the written instrument it is not competent or admissible to add to, change, or vary them by parol evidence. Courtwright v. Strickler, 37 Iowa, 386; Gelpcke v. Blake, 19 Iowa, 263; Blair v. Buttolph, 72 Iowa, 31, 33 N. W. 349; Lewis v. Day, 53 Iowa, 575, 5 N. W. 753; Bank v. Snyder, 79 Iowa, 195, 44 N. W. 356; Benson v. Haywood, 86 Iowa, 110, 53 N. W. 85; Railway Co. v. McCormick, 90 Iowa, 450, 57 N. W. 949. See Kracke v. Homin (Iowa) 58 N. W. 1056. If, then, the defendant Uithoven had been a party to the mortgage, this evidence would not have been admissible. While under our statute, Uithoven, if a party for whose benefit the mortgage was made, might avail himself of it (Code, § 2552), still he is in no legal sense a party to it so as to bring him within the rule which excludes the parties to such instruments from adding to or varying them by parol evidence. The rule excluding such parol evidence applies only to those who are parties to the instrument the effect of which may be sought to be changed. It cannot affect third persons, who, were it otherwise, might thereby be precluded from establishing the truth as to matters with regard to which they had nothing to do. 1 Greenl. Ev. § 279; 17 Am. & Eng. Enc. Law, p. 453; Johnson v. Portwood (Tex. Sup.) 34 S. W. 596. Inasmuch as the defendant was not a party to the mortgage, there was no error in permitting him to show that in fact there was a consideration other than that stated therein.

4. The defendant, having testified touching arrangements he had made for the purchase of property in the state of Mississippi, and for the disposition of his farm in Iowa, was asked and permitted to answer the following questions: "Have you been able to carry out that arrangement?" He answered: "I could not do that. The land is attached, and that is what holds me back. I had planned to go to Mississippi." He was then asked, "What obligations did you enter into down there?" He answered: "I bought four hundred forty acres of land down there. I was to have taken possession on the first of March, and pay for it. I was prevented because I did not have the money. I knew of the second attachment. We did not go as we expected to on account of the attachment. If it had not been for this attachment, I would have been in Mississippi, sowing oats. I think I would have gone about eight days ago. I think my time is worth two dollars per day." After testifying that some of his horses had been attached, he was asked: "Now, what was you about to do with these horses at the time they were attached?" He answered: "We wanted to put them in the car. I was going to send them to Mississippi." All of these questions were objected to as incompetent, irrelevant, and immaterial and speculative, and in each case the objection was overruled. The defendant's real estate and certain horses had been levied upon under the writs of attachment. The questions propounded sought to establish facts which were within the allegations of the defendant's answer. In Campbell v. Chamberlain, 10 Iowa, 339, it was held that the damages in such cases might embrace all losses and expenses incurred by the party in making defense to the attachment proceedings, and such losses as he may have sustained by being deprived of his property, and any injury thereto by its loss or depreciation in value; and that injuries to credit, character, or business were too remote and speculative to be considered. See Plumb v. Woodmansee, 34 Iowa, 119. In Lowenstein v. Monroe, 55 Iowa, 83, 7 N. W. 406, a stock of goods had been levied upon, and it was held that dam-

ages claimed for loss of profits, loss of business and custom and credit were not recoverable. It seems to us that such damages as it was sought to establish by these questions were too remote and speculative. It is not at all certain that the purchase in Mississippi would have been completed, and the defendant have removed there, even though no attachment had been levied upon his property. If the Mississippi arrangement had been finally consummated, it cannot be presumed that it would have inured to defendant's benefit. Whether or not the purchase would have proved a profitable investment is a matter purely speculative. So, also, the claim that defendant, if not prevented by these attachments, would have been sowing oats in the sunny south, is a matter so devoid of certainty as not to be a proper element of damages. We think the court erred in admitting this evidence. It is urged by appellee, however, that the ruling of the court was without prejudice, and in this view we concur. The jury found specially that both writs of attachment were wrongfully sued out, and returned a general verdict for the defendant in the sum of one dollar. Taking the special findings and general verdict together, we think it may properly be said that the jury must have found that the defendant was not liable upon the notes. Such being the case, it is apparent that the jury could not have allowed any damage based upon this improper evidence, as the amount allowed—one dollar—was merely nominal. The instruction of the court relating to damages was correct.

5. It is said that the court erred in instructing the jury as to exemplary damages, because the evidence showed that the grounds stated for the attachment were true. If that be conceded, still it would be error without prejudice, from the fact that the damages assessed clearly indicate that no exemplary damages were allowed. Under the circumstances it is impossible to conceive how any prejudice could have resulted from the giving of the instruction.

6. Error is assigned upon the giving of the fourteenth instruction to the jury. The evidence shows that Uithoven went to one Thomassen to have a deed made fraudulently conveying his property to his sister-in-law. He stated to Thomassen that he was liable for a security debt, which he would not pay if he could avoid it, and therefore wished to make the conveyance. This was prior to the commencement of these actions. The court told the jury that if such facts were found by them to be true, they should consider them only in determining whether or not plaintiff had sufficient grounds or reasons for the issuance of the attachments, and must not consider them as bearing upon the question as to whether or not the contract was made between the defendant and plaintiff for the release of Uithoven from liability on the notes sued upon. It is insisted that the evidence should have been considered as to both matters. There was no error in the instruction. It does not appear that at the time Uithoven made these statements he had any knowledge of the arrangement between plaintiff and Van Wyk for his (Uithoven's) release from liability upon the notes. It is certain, therefore, that whatever Uithoven said could not be considered as indicating that he considered himself liable on the notes to the extent of defeating the contract between plaintiff and Van Wyk, of which he was then ignorant. Again, there is no evidence that Uithoven admitted any liability upon these notes in suit. No particular debt was mentioned by him, and it is only by inference that it can be said he referred to the notes in controversy.

7. Complaint is made of the ninth instruction given by the court to the jury, in which they were told that, "after the taking of said mortgage [from Van Wyk to plaintiff] the plaintiff could not release any of the property covered by said mortgage, or appropriate it to his own use, or to any other purpose, other than in the payment of the claim secured by said mortgage, without releasing Uithoven from liability on said notes to the extent of the value of said property so released or appropriated, provided you find that said Uithoven was simply liable as surety on said notes." It is said that the instruction was misleading; that plaintiff had the right to apply the property taken under the mortgage to any part of the debt it secured; that the instruction in effect told the jury that the property taken must be first applied in payment of the Uithoven debt. We do not so read it. As we understand it, the jury were plainly told that if plaintiff took any of this mortgaged property, he must apply it upon the debt which the mortgage secured; not necessarily on the Uithoven debt, but upon the mortgage debt, which embraced two other notes aside from those which had been signed by Uithoven. The effect of the instruction was to tell the jury that, if plaintiff took the property, and disposed of or appropriated it to his own use, and did not apply it to the discharge of the debts which the mortgage secured, then, in case they found that Uithoven was only surety on the notes, he would be released to the extent of the value of the property thus taken and not applied on the mortgage debt. It occurs to us the instruction is not open to the criticism made by appellant.

8. Appellant claims that the verdict of the jury only covered the matters raised by the counterclaim, the demand for damages because of the wrongful suing out of the writs of attachment, and insists that judgment should not have been entered for plaintiff against Uithoven for the amount due upon the notes, less the attorney's fees allowed, and the one dollar verdict, and, possibly, a portion of the costs. The whole case

upon the notes as well as upon the counterclaim was properly submitted to the jury. They returned a general verdict for one dollar, with special findings that the attachments were wrongfully sued out. Surely, this verdict was a general one against the plaintiff upon all the issues presented in the entire case. The abstract of appellant recites that the court "rendered judgment against the plaintiff and in favor of the defendant in accordance with the verdict of the jury."

9. Complaint is made of the seventh instruction. In it the law as to the effect of, and appropriation, or release of the mortgaged property is not, perhaps, fully stated, but in the ninth instruction, as we have seen, it is correctly set forth, and we do not think any prejudice could have resulted from the giving of the seventh instruction.

10. Many errors are assigned and argued relating to the admission of the evidence. We cannot consider them in detail. We have examined all of them, and, while we think that the court did err in some of its rulings in that respect, we are satisfied that such error worked no prejudice to appellant.

Finally, it is said that the verdict is against the evidence. There was ample evidence to support it. On the whole record we discovered no reversible error. Affirmed.

KLATT v. N. C. FOSTER LUMBER CO.
(No. 294.)

(Supreme Court of Wisconsin. March 27, 1896.)

INJURY TO EMPLOYE — NEGLIGENCE — PROXIMATE CAUSE — ASSUMPTION OF RISK — EVIDENCE — ADMISSIONS AGAINST INTEREST — SPECIAL VERDICT.

1. In an action for personal injury, where defendant asked a special verdict whether negligence of defendant was the direct cause of the injury, the failure of the jury to find on such special verdict is error, not cured by general verdict for plaintiff.

2. In an action for personal injury, where defense pleaded assumption of the risks of the employment and contributory negligence, the refusal to give instructions to the effect that if the plaintiff, because of his age, understanding, and experience, knew and comprehended the dangers, or if, from all the circumstances, he ought to have known and comprehended such dangers, the jury should find that he assumed the risk of such injury as incidental to his employment, is error.

3. In action for personal injury, a statement made by plaintiff a few days after the accident, in presence of witnesses, which was reduced to writing, read to plaintiff, and by him pronounced correct, and signed, is, when properly identified, admissible in evidence as an admission made by plaintiff before controversy had arisen.

Appeal from circuit court, La Crosse county; O. B. Wyman, Judge.

This is an action brought by William Klatt, by his guardian, against the N. C. Foster Lumber Company for injuries alleged to be caused by the negligence of defendant. There was verdict and judgment for plaintiff, and defendant appealed. Reversed.

The action is to recover damages for personal injuries received by the plaintiff while working for the defendant in its sawmill. The complaint alleges two particulars in which the defendant was negligent: (1) In not warning the plaintiff of the dangers incident to the employment, and (2) in not keeping the machinery with which he worked in a safe condition. The answer was a general denial and the defense of contributory negligence. There was both a special and general verdict for the plaintiff. A motion, on the minutes, for a new trial, was denied, and judgment for the plaintiff was entered on the verdict, from which the defendant appeals. At the time of his accident the plaintiff was 18 years old. So far as appears, he was a boy of average intelligence. He had been to school between four and five years; had worked on a farm, in the pine woods, and had had some experience working about the mill. At the time of his accident his work was in the mill, removing edgings from the edger table. He had been at this work about a month. Passing under that part of the edger table at which his work was, and transversely to it, was a set of five chains, at some little distance apart, whose business and purpose was to remove the edgings from that table to another table at a little distance from it. They were called "carrier chains." They were endless chains, which lay, substantially, upon the floor. At the left-hand side of the table they were met by another similar set of chains, called "elevating chains," whose purpose was to elevate the edgings to another table, still further to the left. Both sets of chains were moved by sprocket wheels at their line of meeting, which were affixed to a shaft under the floor. The chains were in plain view, and moved at the rate of 50 feet a minute. The plaintiff's station was near the head of this extension of the edger table, and on the left-hand side. The sprocket wheels were on that side of the table, and fully within his view. His duty was to remove the edgings from the table in such way that the chains should take and remove them to the other table. At the time of his accident the elevating chain which was next to him had stopped running. While so at work, from some unexplained cause, his foot slipped, was caught in the sprocket, and was injured.

V. W. James and Losey & Woodward, for appellant. Doolittle & Shoemaker, for respondent.

NEWMAN, J. (after stating the facts). Many errors in the record are claimed. The more important and decisive will be considered. There was a special verdict. The defendant requested the submission, in the verdict, of certain questions which it proposed in writing. Among these proposed questions were the following: "(4) Was the injury sus-

tained by the plaintiff the result of being placed to work in the place and manner in which he was put to work, which the defendant might have reasonably expected might probably occur?" "(10) Was the plaintiff injured by the want of ordinary care on the part of the defendant, which was the direct cause of said injuries?" "(13) Was the injury sustained by the plaintiff the result of mere accident?" These questions, in effect, would require the jury to find whether the negligence of the defendant, if such was found, was also the proximate cause of the plaintiff's accident. It is well settled that negligence alone does not make the defendant liable. The defendant is liable only when its negligence is found to be the cause of the accident. And this negligence is the proximate cause only when it is of such character as that men of ordinary prudence, judgment, and experience ought, reasonably, in the light of the attending circumstances, to have foreseen such an accident as likely to occur. And unless this question of proximate cause is fairly and substantially answered by the special verdict, no judgment can be given on it. Atkinson v. Transportation Co., 60 Wis. 141, 161, 18 N. W. 764; Guinard v. Knapp, Stout & Co. Company, 90 Wis. 123, 62 N. W. 625; McGowan v. Railway Co. (Wis.) 64 N. W. 891; Deisenrieter v. Malting Co. (Wis.) 66 N. W. 112. This question of proximate cause is one of fact. It is the resultant fact or inference which is to be found from the testimony. It is the sum of all the testimony bearing on that point. It is familiar that, except in a clear case, this fact or inference is to be found by the jury. It is not considered that in this case the proper inference from the testimony was so plain as that the court might properly draw it. It was thought—at least by the defendant—that there was sufficient testimony to require the case to be submitted on all questions to the jury. While it was agreed at the bar, on the question of the plaintiff's contributory negligence, that there was little in the situation, considering the slow movement of the machinery involved, to suggest to the mind of the plaintiff that such an accident was probable, this same consideration would be entitled to some weight, it would seem, on the question whether the defendant ought reasonably to have foreseen that such an accident was likely to occur. On the whole testimony it was a question for the jury. But the special verdict contains no answer to this question. It does not find that the defendant's negligence was the proximate cause of the plaintiff's accident. This defect is not supplied by the general verdict for the plaintiff. For the defendant did not waive, by silence, its right to have a special finding on that issue. Davis v. Town of Farmington, 42 Wis. 425. It follows that the verdict does not sustain the judgment, and that a new trial is necessary. McGowan v. Railway Co., supra.

It may be of advantage, upon the new trial, if some others of the alleged errors be considered. The defendant requested the giving of a large number of special instructions. These were, in the main, correct and proper instructions, but were all refused by the court. Among the instructions so requested and refused were the following: "(2) In determining whether the plaintiff was of sufficient age, understanding, and experience to comprehend the dangers to which he was exposed in the discharge of his duties as an employé of the defendant, you must consider his age and the opportunity which he had to observe the apparent danger in discharging such duties, and determine from all the facts and circumstances whether or not he was of sufficient age and understanding that, even though he may not have fully comprehended the danger, yet that danger was so open and apparent, if you find it to be so, that a boy of his age, experience, and understanding ought to have known it, and ought not to have exposed himself to it. (3) If you find that the plaintiff engaged with the defendant in the duty which he was discharging at the time when he was injured, without at the time fully understanding or comprehending the dangers incident to his business, yet if you find that between the time of his employment and the time when he was injured he learned of these dangers, or in the course of his employment ought to have known of the liability of the accident by being entangled in the machinery, as he was, it is your duty to find that he assumed the risk of such injury as incident to his employment, and you cannot attribute the accident to the negligence of the defendant. (4) It was the duty of the plaintiff to look at the machinery about which he was employed to work, and apprise himself about any dangers offered by the machinery itself, and which he could have discovered, or ought to have discovered, by a proper examination thereof, or by the use of his sight and other senses; and if he failed during the course of his employment, and while engaged in the work in which he was employed, to apprise himself of dangers which he ought to have seen, then he was not in the exercise of ordinary care and prudence, and it is your duty to so find." These proposed instructions seem to be both accurate and pertinent to the case. The general instructions which were given cover most of the principles suggested by the proposed instructions. But one important element or principle seems to have been entirely omitted and overlooked. The court, in substance, charged that the test on the question of the plaintiff's assumption of the ordinary risks of the employment, and of his contributory negligence, is whether he knew and comprehended the danger incident to it. This omits one important consideration. The true test is whether he ought to have

known and comprehended it. The exercise of ordinary care includes the fair use of one's faculties and opportunities of observation in order to learn and comprehend the dangers which are naturally incident to the situation. He is chargeable with knowledge of such dangers as he might know and comprehend by the exercise of such ordinary care. Luebke v. Machine Works, 88 Wis. 442, 60 N. W. 711; Craven v. Smith, 89 Wis. 119, 61 N. W. 317. The defendant was entitled to have the instructions given.

A few days subsequently to the accident the plaintiff made a statement relating to the manner in which the accident had occurred, in the presence of Edward Lees and J. K. Knuth, which was reduced to writing by Lees, and read over to the plaintiff, pronounced by him to be correct, and then subscribed by him, and, as witnesses, by Knuth and Lees. Knuth testified to these facts, and identified the paper by his own signature. The paper was then offered in evidence by the defendant, and excluded. The objection was not that it was inadequately identified, but that it might have been misread to the plaintiff, or changed since. It must be conceded that such iniquity is possible. It is not probable. In most matters, and especially in the trial of causes, some faith must needs be reposed in the integrity of men. To act upon such suspicions when not fairly suggested by the appearance of the paper itself nor by facts in evidence, would exclude many competent and honest documents, and render the administration of justice in many cases impracticable. This paper was in the nature of an admission by the plaintiff of facts against his own interest. It also tended to show that he had made statement of the manner of the happening of the accident, before controversy had arisen, conflicting with the statement which he had made on the witness stand. For either purpose, it was competent evidence. It was sufficiently identified to entitle it to be received in evidence as substantive evidence. Hazer v. Streich (Wis.; not yet officially published) 66 N. W. 720; Lathrop v. Bramhall, 64 N. Y. 365; Flood v. Mitchell, 68 N. Y. 507; Abb. Tr. Ev. 319. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

KLATT v. N. C. FOSTER LUMBER CO.
(No. 295.)

(Supreme Court of Wisconsin. March 27, 1896.)

Appeal from circuit court, La Crosse county; O. B. Wyman, Judge.

Action by Christov Klatt against the N. C. Foster Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

V. W. James and Losey & Woodward, for appellant. Doolittle & Shoemaker, for respondent.

NEWMAN, J. This action grows out of the same accident as the case of Klatt v. Lumber Co. (herewith decided) 66 N. W. 791. It is the father's action for his damages for the loss of the services of his minor son. In this case there is a stipulation that, in case this court shall hold in Klatt's Case "that the circuit court did not err in denying the defendant's motion for the direction of a verdict in its favor in said cause, then the said judgment so appealed from (in this case) shall be affirmed." In that case the court did hold that it was not error for the court to refuse to direct a verdict for the defendant. So, by the terms of the stipulation, the judgment in this case should be affirmed. The judgment of the circuit court is affirmed.

GEER et al. v. HOLCOMB.

(Supreme Court of Wisconsin. March 27, 1896.)

REPLEVIN—JUDGMENT—WITHDRAWAL OF ANSWER—AMENDMENT OF COMPLAINT.

Under Rev. St. § 2886, providing that the relief granted plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint, where, in a replevin suit commenced in justice court, defendant, after appeal of plaintiff to the circuit court, withdrew his answer, and from the court room, plaintiff was not entitled to amend his complaint (which, by section 3739, is the affidavit) so as to increase the amount alleged therein as the value of property, and to judgment, in case of nondelivery of the property, to the amount of the amended complaint.

Appeal from circuit court, Waushara county; Charles M. Webb, Judge.

Replevin by Emmet Geer and others against Gilbert Holcomb. Judgment for plaintiffs. Defendant appeals. Reversed.

S. A. Corning and George W. Bird, for appellant. Cate, Jones & Sanborn, for respondents.

CASSODAY, C. J. This is an action of replevin commenced in justice's court to recover 200 bushels of potatoes, which the affidavit in behalf of the plaintiffs states were of the value of $100, and that the same had been unjustly taken and were unjustly detained by the defendant. The defendant answered by way of a general denial. The defendant having obtained judgment in the justice's court, the plaintiffs appealed to the circuit court, and after a change of the venue the cause came on for trial, whereupon the defendant filed a stipulation in writing to the effect that the plaintiffs take judgment therein against him without further proof; that the defendant then withdrew his answer, and from any further participation in the case, and from the court room. The cause was then called for trial, and the plaintiffs waived a jury, and the case was tried by the court. At the close of the testimony the court found, as matters of fact, in effect, that the plaintiffs were the owners and entitled to the possession of the potatoes; that their value was $150; that the defendant unjustly and unlawfully withheld the possession thereof, to the damage of the plaintiffs 6 cents.

Judgment was thereupon entered accordingly, and that in case a delivery thereof could not be had the plaintiffs should have and recover of the defendant the sum of $150, being the value of the potatoes, with 6 cents damages, and $80.71 costs and disbursements; and it was therein ordered and adjudged that the plaintiffs' complaint therein be, and the same was thereby, amended so as to allege that the value of said property described therein was $150, instead of $100. From that judgment the defendant brings this appeal.

Under the statute the affidavit was the complaint in the action. Rev. St. § 3739. The action is subject to the same usages, rules, and regulations as other cases before a justice's court, as far as the same are applicable. Id. § 3740. In such an action it is necessary for the plaintiff, whether the defendant be present or not, to prove all the allegations of his complaint. Id. § 3742. The defendant appears to have taken the property and given his undertaking as required by the statutes. Id. §§ 3759, 3760. The statute provides that "the relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue." Id. 2886. The defendant, having withdrawn his answer, and from the court room, left the plaintiffs in the same position as they would have been had there never been any answer in the case. Certainly, it cannot be that the relief subsequently granted was consistent with the case made by the complaint and embraced within the issue. McKenzie v. Peck, 74 Wis. 208, 42 N. W. 247, and cases there cited. It was error for the court to allow the complaint to be amended after the defendant had withdrawn his answer, and from the court room. The judgment of the circuit court is reversed, and the cause is remanded, with direction to enter judgment in favor of the plaintiffs and against the defendant, the same as if the complaint had never been amended.

GEER et al. v. BOOTH.

(Supreme Court of Wisconsin. March 27, 1896.)

Appeal from circuit court, Waushara county; Charles M. Webb, Judge.

Action by Emmet Geer and others against William Booth to recover personal property. From a judgment for plaintiffs, defendant appeals. Reversed.

S. A. Corning and George W. Bird, for appellant. Cate, Jones & Sanborn, for respondents.

CASSODAY, C. J. The facts in this case are the same as in the case of These Plaintiffs v. Holcomb (decided herewith) 66 N. W. 793. For the reasons given in that case the judgment of the circuit court is reversed, and the cause remanded, with direction to enter judgment in favor of the plaintiffs, and against the defendant, the same as if the complaint had never been amended.

JOINT SCHOOL DIST. NO. 8, TOWN OF HARMONY, v. SCHOOL DIST. NO. 5, TOWN OF HARMONY.

(Supreme Court of Wisconsin. March 27, 1896.)

SCHOOL DISTRICTS — APPORTIONMENT OF TOWN FUNDS — NEW DISTRICT.

A newly-formed school district, whose report, made under Supp. Rev. St. § 462, does not show it to have maintained a school, is not entitled to share in the town school fund, the apportionment of which, under Rev. St. § 558, can be made only to such districts as have maintained a school for at least six months during the year past.

Appeal from circuit court, Vernon county; O. B. Wyman, Judge.

Action by joint school district No. 8, town of Harmony, etc., against school district No. 5, town of Harmony. Judgment for defendant, and plaintiff appeals. Affirmed.

The complaint sets forth, by appropriate and sufficient allegations, substantially that the plaintiff school district, prior to February 27, 1892, constituted a part of several other districts, and among them school district No. 5 of the town of Harmony, defendant, on which date such proceedings were duly had that an order was made creating plaintiff school district, to take effect May 28, 1892. The district was duly organized June 11, 1892, by the election of officers, and thereafter the clerk, in July, made his report in due form pursuant to section 462, Supp. Rev. St., showing the number of school children therein between the ages of 4 and 20 years to be 27. No report was made in respect to the time school had been maintained, or the payment of money derived from the school fund to teachers, because the district had not yet existed for a sufficient length of time to enable a report to be made covering such matters. The districts from which the territory was detached to form the new district complied with all the conditions precedent to the right to share in the school fund under section 558, Rev. St. On the 9th of January, 1893, the town clerk of the town of Harmony apportioned the school fund to the several districts in his town except plaintiff district, in which apportionment he awarded to defendant $36.55 on account of the 27 persons of school age reported by the clerk of plaintiff district as residing therein, which sum was afterwards paid to the defendant by the town treasurer. Demand was made by the treasurer of the plaintiff on the treasurer of the defendant for the money so paid, which demand was refused, and thereupon this action was brought to recover the same. The action in form is for money had and received by defendant for the use and benefit of plaintiff. Defendant demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and plaintiff appealed.

C. W. Graves, for appellant. C. J. Smith, for respondent.

MARSHALL, J. (after stating the facts). The sole question is, does the complaint state facts sufficient to show that the $36.55 paid to respondent on account of the 27 children resident in the appellant district on the last day of June, 1892, belong to the plaintiff? By section 462, Supp. Rev. St., it is made the duty of the school district clerk between the 10th and 15th days of July in each year to make and transmit to the town clerk a report dated the 10th day of July of such year, showing, among other things, the number of children between the ages of 4 and 20 years residing in such district on the last day of the preceding June; the number of days' time any common school has been taught in the district, including holidays, and the whole number of days' time such school has been taught by teachers qualified according to the law, including holidays; and the amount of money received for the preceding year from the state school-fund income, and the manner in which the same has been expended. Section 558, Rev. St., provides that "the town clerk shall apportion all school money * * * raised by the town among the several school districts and parts of districts within the town in proportion to the number of school children between the ages of four and twenty years residing in each, taking such number from the last annual reports of the respective clerks"; that "if, after the date of such reports, any district shall have been changed or a new one formed, so as to render an apportionment founded on such annual reports unjust between any district, the town clerk shall ascertain the number of such children residing in each district thus altered and formed, by the best evidence within his reach, and apportion the school money to such districts in proportion to the number of such children residing therein at the time the apportionment is made. * * * No money shall be apportioned to any district, or part of a district, * * * unless the last annual report thereof * * * shall show that all school money received from the state during the year ending with the date of such report, has been applied to the payment of the wages of a legally qualified teacher, and a school has been taught in such district by such a teacher for at least six months during the year ending with the date of such report. * * *" From the foregoing it is obvious that the statute (section 558) makes no provisions for the apportionment of any part of the town school fund to any district, unless the report, required by section 462, Supp. Rev. St., for the year such apportionment is made, shows that the school money received from the state by such district for such year has been applied to the payment of the wages of a lawfully qualified teacher, and that a school has been taught in such district by such teacher for at least six months during such year. No such report from plaintiff district was or could have been on file when the apportionment of town school money was made. It follows necessarily that plaintiff has no statutory right to the $36.55 for which the action was brought. In Town of Cassville v. Morris, 14 Wis. 440, to which our attention is called, only the question of whether a district loses its right to share in the apportionment of school money by reason of the territory comprising such district being set off, with other territory, to form a new town, the district organization remaining the same, was involved,—a different question than the one here presented. Our attention is also called to Board of School Directors of Town of Pelican v. Board of School Directors of Town of Rock Falls, 81 Wis. 428, 51 N. W. 871, and 52 N. W. 1049, and Board of School Directors of Town of Eagle River v. School Dist. No. 1 of Town of Merrill, 81 Wis. 543, 51 N. W. 874, neither of which appear to have any bearing on the question here presented. The right of the school board in both cases was based on a statute, not on the application of equitable principles. It is conceded in this case, as we understand it, that the complaint does not state facts sufficient to show a right by statute to the money claimed. That being so, the rule of the common law governs; i. e. when a portion of the territory of one political subdivision is detached to form a new one, the former retaining its organization, in the absence of a statute providing otherwise, it retains all its property, powers, rights, and privileges. Town of Milwaukee v. City of Milwaukee, 12 Wis. 93; Town of De Pere v. Town of Bellevue, 31 Wis. 120; Crawford Co. v. Iowa Co., 2 Pin 368; Briggs v. School Dist., 21 Wis. 348. It follows from the foregoing that the order of the circuit court must be affirmed. Order affirmed.

O'CONNOR v. CHICAGO & N. W. RY. CO.

(Supreme Court of Wisconsin. March 27, 1896.)

PLEADING—AMENDMENT.

In an action against a railway company for damages caused by a fire started by an engine on its right of way, it is an abuse of discretion to allow an amendment of the complaint, three years after limitations would have run against the action, so as to include a recovery for damages from burning vegetation on other land than that included in the original complaint, and situated a mile therefrom.

Appeal from circuit court, Juneau county; O. B. Wyman, Judge.

Action by George O'Connor against the Chicago & Northwestern Railway Company. From an order allowing plaintiff to amend, defendant appeals. Reversed.

Winkler, Flanders, Smith, Bottum & Vilas, for appellant. H. W. Barney, for respondent.

CASSODAY, C. J. This action was commenced July 26, 1892. The original complaint alleged, in effect, that July 27, 1886, the defendant negligently and carelessly allowed sparks and coals of fire to escape from its engine hauling a freight train, while passing near the quarter post on the south side of section 16 in township 18 N. of range 2 E., in Juneau county, and set fire to the dry grass, rubbish, and combustible material which the defendant had carelessly and negligently permitted to accumulate upon its right of way, and from thence run across the intervening country, and set fire to the plaintiff's cranberry marshes on 240 acres of land belonging to him in section 25 in the same township and range, to his damage in the sum of $3,000. The defendant answered, and took issue with all the material allegations of the complaint. This is an appeal from an order made March 19, 1895, granting leave to the plaintiff to amend his complaint by inserting therein the N. E. ¼ of the S. W. ¼ of section 22 of the township and range mentioned, as additional lands and cranberry marshes injured by the same fire. The 40 acres so to be inserted are situated more than a mile from any of the lands mentioned in the original complaint. Neither the original complaint nor the proposed amended complaint was verified; and there is no affidavit nor statement under oath in support of any such cause of action; and the order was made apparently as of course and without terms. A complaint can only be amended as of course and without costs "before the period for answering it expires," or "within twenty days after the service of the answer or demurrer." Rev. St. § 2685. Otherwise, the court is only authorized to allow an amendment "in furtherance of justice, and upon such terms as may be just." Id. § 2830; Sweet v. Mitchell, 19 Wis. 524; Dole v. Northrop, Id. 249. It follows that, upon the showing made, the application should have been denied. But even if the application had shown that the plaintiff originally had a good cause of action, not only as to the alleged fire on section 25, but also on section 22, yet we think it would have been an abuse of discretion to have granted leave to amend under the circumstances. The action was not commenced until the last day to prevent the running of the six-years statute of limitation. Rev. St. § 4222, subd. 5. The application for the amendment was not made until nearly three years after the action was commenced, and nearly nine years after the alleged fire. The 40 in section 22 could not be properly added by way of amendment, unless the fire thereon was not only traceable to the same fire which communicated to and burned over the plaintiff's other lands, mentioned, but also that the defendant's negligence in starting such fire was the proximate cause of the injury complained of. Atkinson v. Transportation Co., 60 Wis. 156, 18 N. W. 764; Marvin v. Railway Co., 79 Wis. 143, 47 N. W. 1123; Jackson v. Telephone Co., 88 Wis. 250, 60 N. W. 430; Block v. Railway Co., 89 Wis. 378, 61 N. W. 1101. In these cases this court approved and followed the rule as sanctioned by the supreme court of the United States, to the effect "that, in order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." Railway Co. v. Kellogg, 94 U. S. 469. Such being the law applicable to such a case, it is manifest that to maintain the action as to the new 40 introduced by the amendment would require, at least, some new and independent evidence, and to some extent a new line of defense; and hence, practically, it was a new and independent cause of action. This being so, it would, under the circumstances, be a clear abuse of discretion to allow the amendment nearly three years after the statute of limitation would have run upon it as a separate and independent cause of action. The plaintiff and his agent and attorney knew all the facts. The rights of the defendant and its means of defense have been put in peril, if not wholly or partially lost, by the long delay; and hence the amendment should not be allowed. Cavanaugh v. Scott, 84 Wis. 93, 54 N. W. 328; Carberry v. Insurance Co., 86 Wis. 328, 56 N. W. 920. The order of the circuit court is reversed, and the cause is remanded, with direction to deny the application.

ALLIANCE ELEVATOR CO. v. WELLS et al.

(Supreme Court of Wisconsin. March 27, 1896.)

ACTIONS—JOINDER—DETENTION OF LEASED PREMISES AND CONVERSION OF PERSONAL PROPERTY.

Under Sanb. & B. Ann. St. § 2647, providing that actions, legal or equitable, or both, arising out of the same transaction, or transactions connected with the same subject of the action, may be united in the same complaint, actions for the detention of leased premises, and for conversion of personal property included in the lease by failure to surrender it at expiration of the lease, may be united, though the defendant, as lessee, is subject, under Rev. St. §§ 2185, 2186, to the liability of paying double rent, one-half of which at least is penal, for such detention.

Appeal from circuit court, St. Croix county; E. B. Bundy, Judge.

Action by the Alliance Elevator Company against George A. Wells and others for the wrongful detention of leased premises, and for the conversion of personal property included in the lease by failure to deliver it up when the lease expired. From an order overruling a demurrer, defendants appeal. Affirmed.

W. F. McNally, for appellants. S. N. Hawkins, for respondent.

CASSODAY, C. J. February 20, 1892, the plaintiff, by an instrument in writing, leased and let to the defendants, as co-partners, a certain elevator in New Richmond, and a grain warehouse at Ormes Station, and a grain warehouse at Deer Park, and a grain warehouse at Jewett Mills, property of the plaintiff; and it was therein expressly agreed that the defendants take thereunder all the right, interest, and privileges of the plaintiff in and to the premises on which said warehouses were respectively situated, and contiguous to the same, together with the good will of the plaintiff's business; also all scales, trucks, scoops, and other appurtenances then in said warehouses; the term of the lease to commence at the date thereof, and terminate September 1, 1892. But it was expressly agreed therein that the defendants should have the right and privilege to continue the lease in force from year to year after September 1, 1892, not exceeding in all two years, by giving notice in writing to the president or secretary of the plaintiff of their election to do so, 30 days in advance of the time that said lease would otherwise terminate. The defendants agreed therein to pay the plaintiff for the use of said property so leased the sum of $35.83 per month, the rental thereof, to the 1st day of April next thereafter, to be paid at the time of the delivery of said lease, and monthly thereafter during the continuance of the lease. And it was therein also further agreed that in case of failure of the defendants to pay the rent at the time and in the manner specified, then, and in that case, it should be lawful for the plaintiff to re-enter and take possession of the property thereby leased, by summary process, under the statute in such case made and provided. August 21, 1894, the plaintiff commenced this action, and the complaint, after alleging the terms of the lease, among other things alleged, as a first cause of action, in effect: That the notice of election to continue said lease in force for one year from September 1, 1893, was not given as required by the lease; but, on the contrary, the defendants notified the plaintiff, in August, 1893, that they would not so continue the lease and the hiring after September 1, 1893, and they gave notice to the plaintiff of their intention to quit the premises, and deliver the possession thereof to the plaintiff September 1, 1893. That the defendants did not deliver up the possession thereof at the time specified in their notice, but, on the contrary, unlawfully withheld the possession thereof, thus depriving the plaintiff of its rights therein, either of renting or hiring said warehouses to others, or of using them itself; and the defendants continued unlawfully to hold the possession thereof, except one house, until removed therefrom by the order of the court, in July, 1894, by reason of which the plaintiff was put to great expense, bother, vexation, and delay, and deprived of one year's rental of said warehouses. That the defendants had not paid the rent, nor any part thereof, since August, 1893, and that by force of section 2185, Rev. St., the defendants had become and were then indebted to the plaintiff in double the value of the rental, to wit, $860. And for a second and separate cause of action against the defendants the plaintiff further alleged, in effect, that by the terms of the agreement, the defendants agreed to deliver up to the plaintiff the said scales, trucks, scoops, and other such like articles, mentioned in the lease, September 1, 1893, but had failed and neglected so to do; and, on the contrary, had wrongfully and unlawfully converted said goods to their own use, to the damage of the plaintiff in the sum of $125.35. Wherefore the plaintiff demanded judgment for the amount due on both of said causes of action, to wit, the sum of $985.35. From an order overruling a demurrer to said complaint the defendants bring this appeal. A reversal is sought on the ground that the two causes of action have been improperly united. The first cause of action is for the unlawful withholding the possession of the several premises by the defendants after the expiration of the lease. The second cause of action is for the failure and neglect of the defendants to deliver up the scales, trucks, scoops, etc., at the expiration of the lease, and that they wrongfully and unlawfully converted the same to their own use. The unlawful act complained of in both counts is the wrongful withholding of the possession contrary to the express or implied agreements in the lease. In other words, the breach of the same contract is the foundation for each alleged cause of action. True, such wrongful withholding of the real estate, subjected the defendants, under the statutes, to the liability of paying double rent. Sections 2185, 2186, Rev. St. Such double liability is penal in its nature, at least for one-half the amount. Chase v. Dearborn, 23 Wis. 445. Counsel contends that that cause of action is ex contractu, while the other alleged cause of action is ex delicto. But, as indicated, the only sense in which either can be regarded as ex contractu is that each is based upon and grows out of the breaches of the same contract. Certainly, no good purpose could be served by requiring two separate actions to be brought by the same plaintiff against the same defendants, when each action would necessarily be based upon the same contract. Seemingly, to obviate such an anomaly, the statute provides, in effect, that the plaintiff may unite in the same complaint several causes of action, whether they be such as were formerly denominated legal or equitable or both, where they arise out of the same transaction or transactions connected with the same subject of the action. Section 2647, Sanb. & B. Ann. St., and cases cited in the notes. We are clearly of the opinion that

the case at bar comes within this provision of the statute, and hence that the two alleged causes of action are properly united. This sufficiently appears from numerous adjudications of this court. Whereatt v. Ellis, 58 Wis. 625, 17 N. W. 301; Gilbert v. Loberg, 83 Wis. 189, 53 N. W. 500; Van Oss v. Synon, 85 Wis. 661, 56 N. W. 190; Gilbert v. Loberg, 86 Wis. 661, 57 N. W. 982; Collins v. Morrison (Wis.) 64 N. W. 1000. Whatever is said in Lane v. Cameron, 38 Wis. 603, inconsistent with this ruling, must be regarded as overruled. The order of the circuit court is affirmed.

STATE ex rel. CREMER v. STEINBORN.

(Supreme Court of Wisconsin. March 27, 1896.)

ELECTIONS AND VOTERS—PAROL EVIDENCE—INADMISSIBLE TO VARY BALLOTS.

Where there are two men in a town bearing the same name, usually designated "C., Sr.," and "C., Jr.," and both are eligible to a certain office for which the senior was a candidate, parol evidence is inadmissible, in an action to contest the election, to show that certain ballots bearing the name "C., Jr.," were in fact intended for "C., Sr."

Appeal from circuit court, Monroe county; O. B. Wyman, Judge.

Action by the relator, Cornelius H. Cremer, against Casimer Steinborn, to determine the right to a town office. From a judgment in favor of relator, defendant appeals. Reversed.

This action was brought to determine the right to the office of town treasurer of the town of Jefferson, in Monroe county. At the annual town meeting in that town, in April, 1894, 255 votes were cast for the office of town treasurer. Of these 122 were counted for Cornelius H. Cremer, Sr., the relator. These included a few ballots cast for C. H. Cremer, without the designation of "Sr." or "Jr." Seven were for C. H. Cremer, Jr., and one hundred and twenty-six were for the appellant. The seven votes for C. H. Cremer, Jr., were, in the first place, counted as for the relator, and he was declared to be elected, and a certificate of election was given to him. Afterwards a recount of the ballots was had. The seven ballots which bore on their face the name C. H. Cremer, Jr., were not then counted for C. H. Cremer, Sr. The appellant was declared elected, and a certificate of election given to him. Both parties duly qualified for the office. The appellant took possession of the office, with the books and papers, and still retains it, and excludes the relator therefrom. The evidence discloses that there were two men in the town of Jefferson (cousins) named C. H. Cremer. The relator was commonly known and designated as C H. Cremer, Sr., while his cousin was known and designated as C. H. Cremer, Jr. Both were eligible to the office. The relator was a candidate for the office at that election. The other was not. The trial court permitted evidence of surrounding circumstances, in order to show for whom the seven ballots which bore the name of C. H. Cremer Jr., were intended to be cast. The jury found that they were intended to be cast for the relator. The relator was found to be elected, and was adjudged to be entitled to the office. The case comes to this court by appeal from that judgment.

Morrow & Masters, for appellant. D. F. Jones, for respondent.

NEWMAN, J. (after stating the facts). Doubtless, parol evidence was competent to show for which Cremer the ballots which failed to designate were intended to be cast. The evidence disclosed a latent ambiguity in them. But, clearly, there was no defect or ambiguity in the seven ballots which designated C. H. Cremer, Jr., as the person voted for; and the parol evidence failed to disclose any defect or ambiguity. On the contrary, it did disclose the pertinence and force of the abbreviation "Jr." in pointing out which of the two of the same name was intended. Instead of disclosing an ambiguity in the ballots, it showed that they were industriously accurate and free from uncertainty. Parol evidence to show the intention of the voter is receivable on the same general ground and for the same general purpose as parol evidence to explain written instruments is received. It is not receivable to explain what is already plain on the face of the instrument, and in no need of explanation; nor to contradict or vary the instrument. Attorney General v. Ely, 4 Wis. 420, 429; State v. Elwood, 12 Wis. 551, 558; State v. Goldthwaite, 16 Wis. 146. To find that these seven voters whose ballots read for C. H. Cremer, Jr., voted for C. H. Cremer, Sr., is in direct contradiction of the definite and unambiguous evidence of the ballots themselves. These ballots cannot be counted for the relator, unless it can be found, on competent evidence, that it was his name which was on the ballot when it was cast. The intention of the voter cannot be proved to contradict the ballot, nor in opposition to the paper ballot which he has deposited in the ballot box. A ballot which is unambiguous cannot be varied by parol proof. Nor can it be proved that the voter intended to vote for one man when his ballot was cast for another. McCrary, Elect. (2d Ed.) § 407; Cooley, Const. Lim. 611; People v. Seaman, 5 Denio, 409; People v. Pease, 27 N. Y. 45, 84. It is plain that there was no competent evidence to show that these contested ballots were cast for the relator. They were unambiguous, and it was not competent to vary their plain import by parol evidence; and without them the relator was not elected.

At the close of the testimony, the appellant moved for the direction of a verdict in his favor. The court denied the motion. This was error. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

GLOVER et al. v. WELLS & MULROONEY GRAIN CO.

(Supreme Court of Wisconsin. March 27, 1896.)

APPEAL—REVIEW—RECORD—RETURN.

1. An order reciting that it was made on certain papers, "and after considering other evidence offered by each of the parties," cannot be reviewed, the record not containing such other evidence, or showing of what it consisted.

2. Under Rev. St. § 3050, providing that on appeal from an order the clerk shall transmit the order and the papers used on application for the order, and shall certify that they are such papers, and are transmitted pursuant to the appeal, he should certify that the papers returned on the appeal are the papers "used on the hearing" of the motion, not that they are the "papers on file in my office."

Appeal from circuit court, St. Croix county; E. B. Bundy, Judge.

Action by John E. Glover and others against the Wells & Mulrooney Grain Company. From an order granting a temporary injunction, defendant appeals. Appeal dismissed.

This is an action for a permanent injunction, and a temporary injunctional order was granted against the defendant, upon motion, after hearing both parties, from which the defendant appealed. The order recites that it was made on the verified complaint, and the affidavits of William Johnston and George A. Wells in opposition, "and after considering other evidence offered by each of the parties, by consent of the other"; but there is nothing in the return, which embraces the complaint and affidavits, to show of what such other evidence consisted. The certificate of the clerk of the circuit court of the return is "that the papers hereto annexed are all the original papers on file in my office," and "that they are transmitted to the supreme court of said state of Wisconsin pursuant to an appeal taken in said action, notice of which has been duly served on me, and is hereto annexed."

Smith & Oakes, for appellant. W. F. McNally, for respondents.

PINNEY, J. 1. The respondents object that the return is insufficient to enable the court to review the order appealed from, in that it does not contain or show of what the other evidence offered by either of the parties consisted; and we are of the opinion that the objection is well taken. As was said in Bowen v. Malbon, 20 Wis. 491: "We must assume that the matters contained in such minutes amply justified the order granted." The rule is well settled that error will not be presumed, but must be made to appear affirmatively. This defect is necessarily fatal to the appeal. Bunn v. Lumber Co., 63 Wis. 630, 632, 24 N. W. 403.

2. It is proper to observe that the certificate to the return is radically defective in an important requirement. The statute (Rev. St. § 3050) provides that, "if the appeal is from an order, he [the clerk] shall transmit the order appealed from and the original papers used by each party on the application for the order appealed from," and that the court may direct copies to be sent in lieu of the originals. The statute requires the clerk to "annex, to the papers so transmitted, a certificate under his hand and the seal of the court from which the appeal is taken, certifying that they are the original papers or copies, as the case may be, and that they are transmitted to the supreme court pursuant to such appeal." In Carpenter v. Shepardson, 43 Wis. 406, 409, it was pointed out that under the statute the clerk "should certify that the papers returned on the appeal are the originals used on the hearing of the motion, or copies thereof, if copies are ordered to be returned," and that "this is indispensable, unless it appears from the record itself what papers were so used." There is nothing in the certificate to show what papers were used on the hearing, and the order is the only paper embraced in the return that contains any information on this point, but that is defective, as we have seen, as to the "other evidence." Section 6, rule 11, of the circuit court rules, provides that "all orders of the court or a judge, whether granted ex parte, by default or otherwise, shall briefly refer to all the records, petitions, affidavits, and other papers read or used by either party upon the application for the order"; and, if complied with, the order will show, for the purposes of an appeal, as the rule obviously intended it should, what papers were read or used upon the application for the order. After the full and explicit exposition of the practice in such cases, and in view of the rule, there is no reason why the law should not be complied with, and uncertainty and embarrassment avoided. For want of a sufficient return, the appeal must be dismissed. The defendant's appeal is dismissed.

BRAWLEY v. MITCHELL.

(Supreme Court of Wisconsin. March 27, 1896.)

JUDGMENT—IN ACTIONS AGAINST JOINT OBLIGORS—FORM WHERE ALL ARE NOT SERVED—PARTNERSHIP.

Rev. St. § 2884, authorizing a court, in an action against defendants jointly liable on a contract, but some of whom are not served, to enter judgment, in form, against all the defendants, so far as that it may be enforced against joint property, though permissive in form, becomes mandatory when required by the rights of a defendant; and, in an action against partners, one who is served has the right to insist on the entry of such judgment, so that it may be enforced against the property of the firm.

Appeal from circuit court, Portage county; Charles M. Webb, Judge.

Action by A. Brawley against J. S. Mitchell and D. H. Vaughn, as partners. Judgment against Mitchell alone, from which he appeals. Reversed.

Brawley brought this action, in the county court of Portage county, against D. H.

Vaughn and J. S. Mitchell, as co-partners of the firm Vaughn & Mitchell. upon two joint promissory notes, made by them, by their firm name. There was no service of process upon Vaughn, and he did not appear in the action. Property of Mitchell was attached, and he appeared and defended. There was judgment in favor of the plaintiff, and, in form, against both defendants. From this judgment, Mitchell appealed. In the circuit court he withdrew his answer. The court took the plaintiff's proofs, and gave judgment against Mitchell alone, and his sureties upon his appeal. This appeal is by Mitchell alone, from that judgment.

Raymond, Lamoreux & Park, for appellant. Cate, Jones & Sanborn, for respondent.

NEWMAN, J. The statute (section 2884, Rev. St.) provides that when the action is against persons jointly liable on a contract, and the summons is served upon some, but not upon all, of the defendants, judgment may be entered, in form, against all the defendants so jointly indebted, "so far only as that it may be enforced against the joint property of all and the separate property of the defendants served." The words of the statute are permissive only, in form. But the exercise of a statutory power which is only permissive in form is not discretionary where public interests or individual rights call for its exercise. In such cases it is peremptory. Cutler v. Howard, 9 Wis. 309; Bank v. Hogan, 21 Wis. 317; Dutcher v. Dutcher, 39 Wis. 651; Suth. St. Const. § 462. So, this statute must be held to be mandatory, because the individual right of the defendant served requires it. To enter judgment against the defendant served, only, is not a mere formal error, but it is matter of substance. This was so held in Bacon v. Bicknell, 17 Wis. 523. See, also, Nelson v. Bostwick, 5 Hill, 37; Stehr v. Ollbermann, 49 N. J. Law, 633, 10 Atl. 547. It changes the form of the execution. It can only go against the separate property of Mitchell; whereas it should go against the joint property of the firm. Mitchell has the right, as between himself and his co-partner, that the firm property shall be applied, first, to the payment of the firm debts. If the execution goes against his separate property alone, it may prejudice him in the collection of the money from his co-partner. The proper form of judgment in such case is pointed out in Blackburn v. Sweet, 38 Wis. 578. The judgment of the circuit court is reversed, and the cause remanded, with direction to enter judgment in accordance with this opinion.

KELLER v. TOWN OF GILMAN.

(Supreme Court of Wisconsin. March 27, 1896.)

PERSONAL INJURY—EVIDENCE—DAMAGES—ERROR.

1. In an action for damages for personal injuries, the husband and mother of the injured woman may testify to her apparent physical condition after the accident, and to her apparent ability to move about, and to do lifting and ordinary housework, for a stated time thereafter.

2. Testimony that the injured woman said that when she lay down she was dizzy, and that she complained of her lungs and her back hurting her, is within the rule that a narration of pains is inadmissible to show the extent of an injury.

3. In proof of damages for injuries to a wife, it is error to receive testimony of the husband as to how much her services were worth to him, the true rule being what they were worth generally.

4. Where competent, uncontroverted evidence on the subject of damages would justify a larger verdict than the one given, the admission of incompetent evidence on that issue is without prejudice.

Appeal from circuit court, Pierce county; E. B. Bundy, Judge.

Action by Joseph Keller against the town of Gilman for damages for personal injuries to his wife. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an action to recover damages resulting from an alleged defect in a highway in the defendant town. It appears that on the 1st of June, 1890, the plaintiff, with his wife, was riding along a highway in the defendant town, in a buggy drawn by a single horse. There was evidence tending to show that the traveled part of the highway contained deep gullies and large stones, by reason of which the buggy was tipped over, and the horse became frightened and ran away, throwing out and seriously injuring the plaintiff's wife. There was also evidence tending to show that the plaintiff's wife was entirely incapacitated from labor for two weeks, and unable to do much work for six months, by reason of her injuries. The evidence showed, without dispute, that the buggy and harness were destroyed, the horse damaged, and that the plaintiff had been obliged to expend $25 for medical assistance for the treatment of his wife. The entire amount of these practically undisputed damages was $109. It was claimed on the part of the defendant that the highway was not defective, but that the accident happened by reason of the breaking of a part of the harness. There are no exceptions to the judge's charge contained in the bill of exceptions. The jury returned a verdict for the plaintiff for $172.50, and from judgment thereon the defendant has appealed.

W. F. McNally, for appellant. A. P. Weld and Bleekman, Bloomingdale, Reid & Bergh, for respondent.

WINSLOW, J. (after stating the facts). The principal contention made by the defendant as a ground for reversal of this judgment is that evidence of the declarations and complaints made by the injured woman to her mother and husband from time to time were erroneously received in evidence. The rules with regard to the reception of this class of evidence in cases where the extent of an injury is under investigation are

quite well established. They may be briefly recapitulated as follows: First. The statements and declarations of a patient as to his pains and feelings, when made to a physician for the purpose of treatment, may be given in evidence. Second. Such statements are not admissible when made to an expert, after action brought, in order to enable him to testify as a witness at the trial. Stone v. Railroad Co., 88 Wis. 98, 59 N. W. 457, and cases there cited. Third. All persons may testify as to facts within their observation as to the physical condition of another with whom they have consorted; for example, whether such person appeared to be in good or bad health, sick or well, suffering from pain or disease, or enjoying health. Wright v. City of Ft. Howard, 60 Wis. 119, 18 N. W. 750; Smalley v. City of Appleton, 70 Wis. 344, 35 N. W. 729. Fourth. When bodily pain is in issue all persons may testify as to expressions, gestures, or exclamations indicating present pain, whether made at the time of the injury or afterwards. McKeigue v. City of Janesville, 68 Wis. 50, 31 N. W. 298. Fifth. Witnesses are not permitted to testify to complaints or statements of physical condition or feelings made by an injured person which were made in answer to a question, or which are narrative in their nature, and which are not a part of the res gestæ. Tebo v. City of Augusta, 90 Wis. 408, 63 N. W. 1045. At first sight, it might seem as if the last-above rule conflicts with the conclusions reached in Bridge v. City of Oshkosh, 71 Wis. 363. On page 367 of the opinion in that case (37 N. W. 411) it is said that "the admissibility of complaints made by the injured person, either to his attending physician or others, is clearly sustained by the following authorities." The cases which are then cited, however, do not justify the broad statement of the opinion. They are cases which lay down the principle laid down in proposition fourth, supra, viz. that, where the question of bodily pain is in issue, the exclamations, expressions, and gestures and complaints of the injured person, which usually and naturally indicate a present, existing pain, may be given in evidence, but that anything in the nature of narration or statement of symptoms is to be excluded. See a careful statement of the proposition in Bacon v. Charlton, 7 Cush. 581. This is undoubtedly the rule intended to be approved in Bridge v. City of Oshkosh, and it does not, when properly understood, conflict with either of the rules laid down. In the light of these rules, there was very little of the testimony introduced in the present case which was incompetent. It is unnecessary to state the questions and answers in detail. It is sufficient to say that the husband and mother of the injured woman were allowed, against objection, to testify to the apparent physical condition of the woman after the accident, and to her apparent ability to move about, and to do lifting and ordinary housework, for six months after the accident. All this was clearly admissible under the third rule above laid down.

There were two statements made by the mother which should have been excluded, under the fourth rule supra. They were to the effect that the injured woman said that when she laid down she was dizzy, and that she complained of her lungs hurting her, and her back, also. The admission of this evidence was error, as it seems to have been narration, rather than exclamations caused by present pain. There was also error in allowing certain questions to be asked on the subject of the value of the wife's services. In these questions the inquiry was put to the husband as to how much her services were worth to him. This was, of course, a wrong test. The question was as to the value of her services generally, not their value to any particular person. However, we do not regard either of these errors as working any prejudice, in any possible way, to the defendant. It stands as a verity in this case that the plaintiff suffered damages by reason of a defect in the highway, and is entitled to recover therefor. He has recovered but $172.50, of which $109 was for pecuniary damages to property, and money outlay, which was undisputed, thus leaving but $63.50 for the value of his wife's services during six months that she was disabled. It was shown by competent and undisputed testimony that she was strong and healthy before the injury; that she was unable to do anything for two weeks, and could not do her ordinary housework for six months. There were competent questions and answers on the subject of damages from loss of service which would justify a larger verdict than the one given, and there was nothing to controvert them. In this situation, we cannot regard the errors spoken of as in any way prejudicial, and hence they furnish no reason for reversal of the judgment.

The brief of the appellant is disrespectful to the trial court, and it will be stricken from the files, under rule 27. Judgment affirmed.

THOMPSON v. CALEDONIA FIRE INS. CO.

(Supreme Court of Wisconsin. March 27, 1896.)

INSURANCE—RISK ASSUMED—UNOCCUPIED DWELLING—PLEADING—AMENDMENT DURING TRIAL.

1. In an action upon a fire policy containing a provision that the company will not pay any loss on a dwelling which has remained unoccupied for seven days, where it appeared, without dispute, that the house was unoccupied at the time of the fire, and had been so unoccupied for over seven days continuously, a verdict for defendant was properly directed by the court.

2. In an action upon a fire policy containing a provision that the company will not pay any loss on a dwelling which has remained unoccupied for seven days, the court, in its discretion, can allow defendant, at the trial, to amend its answer, setting up an affirmative allegation of nonoccupancy.

Appeal from circuit court, Waupaca county; Charles M. Webb, Judge.

This was an action brought by Eliza Thompson against the Caledonia Fire Insurance Company to recover for the loss of plaintiff's dwelling by fire, under a policy of insurance issued by the defendant company. There was judgment for defendant, and plaintiff appealed. Affirmed.

F. C. Weed, for appellant. Goldberg & Hoxie and C. W. Felker, for respondent.

WINSLOW, J. This is an action upon a fire insurance policy issued by the defendant, a mutual town fire insurance company, upon the plaintiff's dwelling house, which was thereafter, during the life of the policy, destroyed by fire. The policy contained this provision, among others: "Sec. 17. This company will not insure any unoccupied dwelling house, nor will they pay any loss on a dwelling which at the time of the loss or damage has remained unoccupied seven days." Upon the trial it appeared, without dispute, that the house was unoccupied at the time of the fire, and had been so unoccupied for more than seven days continuously. Upon this fact the court directed a verdict for the defendant, and we do not see how any other course could have been pursued. The original answer did not contain an affirmative allegation of nonoccupancy, and the court allowed an amendment setting up such fact, upon the trial. This is claimed to be error, but the claim is untenable. The power of the court, in its discretion, to allow amendments to the pleadings even upon the trial, is too well known to require argument or authority in its support. There does not seem to have been any abuse of such discretion here. The court, as a condition of the amendment, offered the plaintiff a continuance, at the defendant's expense, in case she found that she could not proceed, but she chose to proceed with the trial. There are no facts in the case showing a waiver by the company of the defense. Judgment affirmed.

GILE v. COLBY et ux.

(Supreme Court of Wisconsin. March 27, 1896.)

MORTGAGE—FORECLOSURE—PLEADING AND PRACTICE—NOTICE OF LIS PENDENS—APPEAL—REVIEW—RECITALS IN JUDGMENT.

1. Under Rev. St. § 3187, providing that, in an action affecting title to real estate, plaintiff, at the time of filing the complaint, or any time thereafter before judgment, may file a notice of the pendency of the action, and that in a foreclosure of a mortgage such notice must be filed 20 days before judgment, the notice of pendency does not become operative until the complaint is filed, and a judgment of foreclosure rendered on the same day the complaint is filed, though more than 20 days after the filing of notice, is premature.

2. The recital in a judgment as to a matter of fact will not be *held* conclusive on appeal, where an inspection of the record shows that such recital was erroneous.

Appeal from circuit court, La Crosse county; O. B. Wyman, Judge.

This was an action brought by Abner Gile to foreclose a mortgage given by Christopher A. Colby and his wife, Eliza Colby. There was judgment by default for plaintiff, and defendants appeal. Reversed.

Skaar & Levis, for appellants. Fruit & Brindley, for respondent.

PINNEY, J. The only question in this case is whether the judgment should be reversed for the reason that the notice of the pendency of the action was not operative for a period of 20 days before the judgment was rendered. The action was commenced, and notice of the pendency of the action was filed in the office of the register of deeds, July 8, 1893, but the complaint was not filed in the office of the clerk of the circuit court until August 21, 1893, the day upon which the judgment was rendered. In all other respects the proceedings were regular. The judgment recites that "due notice of the pendency of the action had been filed in the office of the register of deeds for La Crosse county on the 8th day of July, 1893." No motion was made in the circuit court to set aside the judgment on the ground relied on for reversal. The filing of the notice of the pendency of the action, under Rev. St. § 3187, was inoperative until the complaint was filed; and the judgment rendered on the same day the complaint was filed was therefore rendered before the notice had been operative for the prescribed period of 20 days, and was premature. Dawson v. Mead, 71 Wis. 295, 37 N. W. 234; Flood v. Isaac, 34 Wis. 423; Olson v. Paul, 56 Wis. 30, 13 N. W. 868. In general, relief from irregularities in the entry of judgment should be first sought in the trial court. Keeler v. Jacobs, 87 Wis. 545, 58 N. W. 1107. And it would have probably been better, and more in accord with correct principles of practice, to have required that the objection under consideration should be made in that manner; but for a period of more than 30 years, in numerous cases, it has been held that it may be raised in this court in the first instance, on appeal from the judgment. This practice has been so long adhered to that we do not feel at liberty to change it. There is no good reason for supposing that any inconvenience will be experienced under it in the future. The judgment roll includes the original complaint, and we must regard the file mark which the complaint bears as showing the true date when it was filed. The recital in the judgment cannot be held conclusive on this appeal from the judgment, when an inspection of the record, of which the file mark on the complaint is a part, shows that the error relied on intervened in the rendition of the judgment, and that the judgment was premature. If it had been a question whether proof had been made that notice of the pendency of the action had been filed 20 days before the rendering of the judgment,—this being an ex-

trinsic matter, and no part of the judgment roll,—the recital, it would seem, would be conclusive, in the absence of a bill of exceptions showing that no sufficient proof had been made. Manning v. McClurg, 14 Wis. 379, 382; Webb v. Meloy, 32 Wis. 319. As the error relied on appears upon the face of the record, in accordance with the decision in Dawson v. Mead, supra, and cases cited, the objection is fatal. The judgment of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

SHARP v. CITY OF MAUSTON.

(Supreme Court of Wisconsin. March 27, 1896.)

CONTRACT WITH CITY — COMPROMISE — ACTION ON CLAIM AGAINST A CITY—WHEN LIES.

1. Where a claim is made against a city for injuries, and the city council, on report of a committee, allows the claimant a certain amount, less than the sum claimed, a demand by the claimant in writing, on the city treasurer, for an order, after such allowance, and before any proceedings are taken to reconsider the matter, constitutes an acceptance completing the contract by the city to pay the sum allowed.

2. Where the city afterwards refuses to pay the sum so allowed, an action by the claimant will lie against the city without any claim under the contract being first filed and disallowed by the council, though its charter provides that no action can be maintained against a city until the claim shall have been filed and disallowed, etc.

3. Though the city charter provides that no money shall be drawn from the city treasury except on an order signed by the mayor and clerk, and mandamus will lie to compel the proper officers to issue an order to the claimant for a sum so allowed on settlement of a claim, such remedy is not exclusive, and an action will lie againse the city on the contract to pay the sum allowed.

Appeal from circuit court, Juneau county; O. B. Wyman, Judge.

Action by Lucinda Sharp against the city of Mauston to recover a sum allowed plaintiff by defendant's city council in settlement of a claim for personal injuries caused by a defective sidewalk. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff received a personal injury by a fall on a sidewalk in the defendant city. She gave notice to the mayor of such city, pursuant to section 1339, Rev. St., of such injury, claiming that it occurred without fault on her part, by reason of the sidewalk being out of repair; and at the same time she filed with the city clerk a claim for $500, as compensation for such injuries. The claim was investigated by a committee of the common council, who ascertained from the plaintiff that the matter could be settled for $400; and they reported such fact to the council, and thereafter such council adopted resolutions allowing the claim accordingly. Thereafter, plaintiff, through her attorneys, demanded of the proper officers the issuance and delivery of an order on the city treasurer for the amount so allowed in settlement of such claim. They refused to comply with such demand, whereupon this action was brought, upon the theory that, by reason of the facts, a binding contract existed between the city and plaintiff requiring it to pay plaintiff the said sum of $400 in settlement of her claim. The foregoing facts and others requisite to make out a cause of action on plaintiff's theory were set forth fully in the complaint. Defendant demurred generally. The demurrer was overruled, and defendant appealed.

F. S. Veeder, for appellant. Barney & Beebe and Spooner, Sanborn, Kerr & Spooner, for respondent.

MARSHALL, J. (after stating the facts). It appears to be conceded by the appellant that if, after the common council allowed respondent's claim at $400, she accepted such action as a settlement, a binding contract was thereby made; and that, if such facts appear by the complaint, a good cause of action is stated. The demand in writing upon the city treasurer for the order, after the action of the council allowing the claim, before any proceedings were taken looking to a reconsideration of the matter, constituted an acceptance just as effectual as a writing in terms accepting the promise of the city to pay the sum allowed in settlement of the claim. Such demand was consistent with the theory of an unqualified acceptance, and inconsistent with any other; and, as the complaint states the facts in regard to such demand, all the facts appear requisite to show a complete and binding contract between the parties. Appellant's counsel states correctly the law that an accord must be followed by a satisfaction in order to be binding; but that does not mean that parties cannot, by an executory contract, liquidate a disputed claim, so that such contract can be enforced by either party to it. All that is required in such a case is that there be an unconditional acceptance of the promise itself, and not the mere performance of it in satisfaction of the disputed claim. Such acceptance of the promise, when made, operates at once to substitute the new contract made by the mutual promises of the parties for the old contract or claim; and, if such new contract is not performed, the remedy is by action for a breach of it, and not on the original claim. Such is the effect of modern cases both in England and this country. Good v. Cheesman, 2 Barn. & Adol. 328; 1 Smith Lead. Cas. 150; Evans v. Powis, 1 Welsb. H. & G. 601; 2 Pars. Cont. 194, 195; Story, Cont. § 982; Com. Dig. "Accord," B, 1, § 4; Billings v. Vanderbeck, 23 Barb. 546; Goodrich v. Stanley, 24 Conn. 613.

It is contended that the plaintiff does not state a cause of action under the contract, because, by the charter of the defendant city, no action can be maintained against such city till a claim shall have been filed and disallowed, or the council shall have neglected to act thereon for a period of 60 days, and that

it does not appear from the complaint that any claim under such contract was presented to the council before suit brought. We do not think the charter provision applies to this case. Here a claim had been presented to the council, which was compromised and settled by mutual promises between the parties, by means of which the defendant became obligated to pay plaintiff $400. The auditing body thereby had full opportunity to act in the matter, fully satisfying the provisions of the charter in respect to its having such opportunity before suit brought.

It is further contended that, as the charter provides that no money shall be drawn from the city treasury except on an order signed by the mayor and clerk, the only remedy of the plaintiff is to proceed against the officers to compel them to perform their ministerial duty by issuing the proper order. That such remedy might be resorted to is sustained by High, Extr. Rem. § 351, and State v. Martin (Neb.) 43 N. W. 244, cited by defendant's counsel. It is well settled that where, by the regulations of a municipal corporation, money in the treasury can only be drawn on an order signed by designated city officers, the duties of such officers are wholly ministerial, and the performance of such duties, upon refusal, may be enforced by mandamus. State v. Fiedler, 43 N. J. Law, 400; Danley v. Whiteley, 14 Ark. 687; High, Extr. Rem. §§ 17, 104, 105, 107, 351, 356, and cases cited. But the remedy by mandamus is not exclusive. The claimant may, if he sees fit, resort to a civil action against the municipality to recover the debt. State v. Fiedler, supra; Guilder v. Town of Otsego, 20 Minn. 74 (Gil. 59); People v. Flagg, 16 Barb, 503; Buck v. City of Lockport, 6 Lans. 251; Raymond v. Commissioners, 18 Minn. 61 (Gil. 40); Apgar v. School Dist., 34 N. J. Law, 308. In the last case cited, it was held that the claimant may proceed by suit at law against the corporation or by mandamus against the officers to compel them to perform their public functions, and that, in respect to corporations and ministerial officers, a party so circumstanced may elect to proceed either by mandamus or by an action at law. See, also, State v. Wilson, 17 Wis. 687.

It follows from the foregoing that the order of the circuit court must be affirmed. Order affirmed.

DONOHUE v. PADDEN.

(Supreme Court of Wisconsin. March 27, 1896.)

REAL-ESTATE BROKERS—COMMISSION.

Where a broker employed to sell defendant's farm on commission produces a purchaser who takes the property at a price fixed by defendant, the latter cannot withhold the commission on the ground that when the contract of employment was made the broker had, unknown to defendant, already found the customer, and was employed by him to buy a farm, but from whom he was to receive no commission.

Appeal from circuit court, St. Croix county; E. B. Bundy, Judge.

Action by Nicholas Donohue against John J. Padden to recover a broker's commission. From a judgment for plaintiff, defendant appeals. Affirmed.

Action to recover $300, as commission for selling lands for defendant. Plaintiff was a real-estate dealer. One David Sires, being desirous of purchasing a farm, procured plaintiff to show him several he had for sale. They started out for that purpose from plaintiff's place of business in New Richmond. Plaintiff informed Sires that, if he sold him a farm and located him thereon, there would be no charge for his services; that he always got his pay from the seller. On the trip, Sires' attention was attracted by a farm owned by defendant, which he said would satisfy him. Plaintiff said he would take Sires to the owner. They returned to New Richmond, stopping at plaintiff's place of business. Sires remained there while plaintiff, without Sires' knowledge, so far as appears, went to Padden, and, without plaintiff's informing him that Sires desired to purchase the farm, they made an agreement by the terms of which it was provided that if plaintiff sold the farm he should have all received over $3,400. He then returned to Sires, who was waiting to be accompanied by plaintiff to see defendant. Both then returned to Padden's place of business, where plaintiff introduced Sires as the man who wanted to buy the farm. Defendant and Sires then made a bargain by which the farm was sold the latter for $3,700, which bargain was thereafter fully consummated. Plaintiff thereafter demanded of defendant $300 as compensation for making the sale. Defendant refused to comply with such demand, and this action was brought to recover the sum mentioned. The foregoing facts being established on the trial, the court directed a verdict in favor of the plaintiff. Judgment was entered accordingly, and defendant appealed.

Baker & Helms, for appellant. A. J. Kinney, for respondent.

MARSHALL, J. (after stating the facts). All that is required, to entitle an agent to his commission for selling land, is employment, for a compensation, to make the sale, and the production of a purchaser ready, able, and willing to take the property at the price named. McArthur v. Slauson, 53 Wis. 41, 9 N. W. 784; Potvin v. Curran, 13 Neb. 302, 14 N. W. 400; Hopgood v. Corbin, 63 Iowa, 218, 18 N. W. 911; Cassady v. Seeley, 69 Iowa, 509, 29 N. W. 432; Van Gorder v. Sherman, 81 Iowa, 403, 46 N. W. 1087; Francis v. Baker, 45 Minn. 83, 47 N. W. 452; Barringer v. Stoltz, 39 Minn. 63, 38 N. W. 808. In the last case, as in this, the customer had been found before the broker received his appointment to sell the property. The recovery was sustained, though the employer was not informed by the broker, when the contract of

employment was made, that he had a customer ready to buy. The mere fact that Sires had expressed a desire to meet Padden after having been shown the farm by plaintiff did not constitute a fraud, so as to prevent plaintiff from recovering. It is claimed that plaintiff cannot recover because he was acting as agent for both parties. It was expressly agreed that he was not to receive any commission whatever from the purchaser. It was no part of his contract with the seller to fix the price. Defendant made the price, received the full amount stipulated for in the contract, and was to receive no more in any event. Under such circumstances, the fact that plaintiff rendered some service to the purchaser constitutes no defense to his action to recover compensation from the defendant. Orton v. Scofield, 61 Wis. 382, 21 N. W. 261. In view of the facts, it was of no importance whatever to the defendant whether plaintiff was in the employ of the purchaser, even for a compensation. Montross v. Eddy, 94 Mich. 100, 53 N. W. 916. The court properly directed the verdict in favor of the plaintiff. The judgment of the circuit court is affirmed.

BITTENHAUS v. JOHNSTON et al.

(Supreme Court of Wisconsin. March 27, 1896.)

CONSTITUTIONAL LAW — PROTECTION OF GAME — SPECIAL LEGISLATION—CLASS LEGISLATION—DUE PROCESS OF LAW.

1. Laws 1895, c. 221, providing for the protection of game and fish, though unconstitutional, as an ex post facto law, as affects acts prior to the passage of the act, is not unconstitutional as regards those after the passage of the act.

2. Laws 1895, c. 221, providing for the protection of fish, and making different regulations in regard thereto for the different waters of the state, not being included among the subjects in regard to which the legislature is prohibited from passing special laws, is not unconstitutional as special legislation.

3. Such act, in this respect, does not violate the provision of the federal constitution that no state shall make any law which shall deny to any person the equal protection of the laws.

4. Laws 1895, c. 221, providing for the protection of fish, and authorizing the game wardens to seize and destroy any nets found in the waters of the state in violation of the law, is not unconstitutional as depriving the owner of the nets of his property without due process of law.

5. Nor does such act in that respect violate the provisions of the state constitution that every person is entitled to a certain remedy in the laws for all injuries, and that no distinction shall be made between citizens and aliens, in reference to the possession and enjoyment of property.

Appeal from Winnebago county court; C. D. Cleveland, Judge.

Action by C. Bittenhaus against C. W. Johnston and others. From a judgment of the county court affirming a judgment for the defendants, plaintiff appeals. Affirmed.

W. W. Waterhouse and H. J. Gerphide, for appellant. Thompson, Harshaw & Thompson and C. E. Whelan, for respondents.

CASSODAY, C. J. This is an action of replevin, commenced August 9, 1895, before a justice of the peace in Oshkosh, to recover 12 gill nets, of the value of $60, alleged to have been unjustly taken and detained by the defendants. The defendants answered by way of denials, and justified the seizure and destruction of the nets as fish and game wardens of the state, under chapter 221, Laws 1895. On the trial before the justice the plaintiff proved the ownership and value of the nets, and admitted that he had placed the nets in the waters of Lake Winnebago for the purpose of fishing, and that the defendants were such fish and game wardens. The defendants admitted that they, as such fish and game wardens, took the nets from such waters and destroyed them. A trial by jury having resulted in a verdict in favor of the defendants, judgment was entered thereon accordingly, from which the plaintiff appealed to the county court. Upon the trial in that court it was stipulated that the case be decided by the court upon the record certified by the justice; and it was thereupon decided, accordingly, by that court, in favor of the defendants. From the judgment entered therein, in favor of the defendants, and upon the certificate of the trial judge as required by chapter 215, Laws 1895, the plaintiff brings this appeal. Chapter 221, Laws 1895, appears first on pages 367–396, inclusive, and again on pages 397–426, inclusive. There are some discrepancies between the chapter as thus first presented and as thus subsequently presented; but they both purport to have been approved and published on the same day, and they both have the same title, and are numbered the same, and are the same throughout, except in certain particulars, not material on this appeal, since the portions of the act here involved, are the same in both publications. Counsel contend that the act in question is unconstitutional and void upon several grounds.

1. It is claimed that certain clauses of the act are repugnant to the constitutional provisions which declare that: "No * * * ex post facto law * * * shall ever be passed." Const. Wis. art. 1, § 12. "No state shall * * * pass any * * * ex post facto law." Const. U. S. art. 1, § 9. "By an ex post facto law," said Field, J., "is meant one which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed, or changes the rules of evidence, by which less or different testimony is sufficient to convict than was then required." Cummings v. Missouri, 4 Wall. 325, 326. See, also, Medley, Petitioner, 134 U. S. 160, 10 Sup. Ct. 384; Duncan v. Missouri, 152 U. S. 377, 14 Sup. Ct. 570. This rule is uniformly recognized in all well-considered adjudications upon the subject. It is equally well settled that a general law for the punishment of offenses, which endeavors by retroactive operation to reach acts before

committed, and also provides a like punishment for the same acts in future, is void only so far as it is retrospective, and valid as to future cases within the legislative control. Joehne v. New York, 128 U. S. 189, 9 Sup. Ct. 70. In the case at bar the act complained of was committed nearly four months after the passage and publication of the law in question, and hence that chapter cannot be regarded as an ex post facto law, as to that act. This being so, we are not called upon to determine whether any provision of the chapter was thus retroactive, and hence, to that extent, an ex post facto law.

2. Counsel contend that the law in question is class legislation, and therefore void. This seems to be put on the ground that the act makes certain "regulations for the outlying waters of the state" (sections 12–15), and certain other "regulations for the inland waters" of the state (section 16), and certain "provisions applying to certain localities or waters only" (sections 33–38a), and particularly because "the waters of Rush Lake" are thereby "exempted from the provisions" of the "act relating to regulations upon the methods or times of taking, catching or killing fish" (section 36). We are referred to no clause of our state constitution which condemns such legislation as class legislation, and we have found none. It certainly does not belong to any of the nine classes of cases in regard to which "the legislature is prohibited from enacting any special or private laws." Const. art. 4, § 31. The constitutions of some of the states expressly prohibit every kind of local or special legislation. As indicated, such prohibition in this state is only partial. As often said, and always conceded, our state constitution is not so much a grant as a limitation of powers; and hence the state legislature has authority to exercise any and all legislative powers not delegated to the federal government, nor expressly or by necessary implication prohibited by the national or state constitution. State v. Forest Co., 74 Wis. 615, 43 N. W. 551; State v. Cunningham, 83 Wis. 146, 53 N. W. 35. The law in question is entitled "An act to revise, amend and consolidate the laws of the state relating to game and its preservation, fish and the preservation and propagation thereof." To legislate intelligently upon such a subject, there must be a legislative discretion as to the different kinds of fish, and as to the different waters in which they are or may be found. The exercise of such legislative discretion in the instant case does not seem to be condemned, as class legislation, by any clause of our state constitution.

3. But it is claimed to be class legislation within the meaning of the clause of the federal constitution, which declares that "no state shall make or enforce any law which shall * * * deny to any person within its jurisdiction the equal protection of the laws." Amend. art. 14, § 1. This clause was clearly intended to prevent hostile discrimination against any individual, or class of individuals, by the statutes of any state. Slaughterhouse Cases, 16 Wall. 36; Pembina Con. Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 188, 8 Sup. Ct. 737; In re Kemmler, 136 U. S. 448, 10 Sup. Ct. 930. "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if, within the sphere of its operation, it affects alike all persons similarly situated, is not within the amendment." Barbier v. Connolly, 113 U. S. 32, 5 Sup. Ct. 357. In speaking of that constitutional provision, it was said by Mr. Justice Field that it "does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." Hayes v. Missouri, 120 U. S. 71, 7 Sup. Ct. 350. There is no pretense that the act in question contains any hostile discrimination against any person, or any class of persons. True, it makes certain things unlawful, and prescribes certain penalties, forfeitures, and punishments for violations of the law, but they are alike applicable to any and all persons who violate the law. Under the authorities cited, it is very clear that the mere fact that the statute in question is applicable to certain localities and waters, and discriminates between different kinds of fish, does not make it class legislation, within the meaning of the clause of the federal constitution quoted.

4. Among other things, the statute in question provides that "the powers and duties of such fish and game wardens shall be * * * to seize, remove and forthwith destroy any net, pound or other device found in the inland waters of this state or in the possession of any person or persons intending to use the same for fishing, or having removed or being in the act of removing the same from any of the waters where the fishing with nets or devices or the setting of the same is prohibited or illegal under this act, or any law of the state, and which are declared to be public nuisances." Section 9, subd. 4. "No person shall be allowed to set, place or use any gill, fyke, pound, seine, dip or other net or snare, or trap, in any of the inland waters of the state of Wisconsin for the purpose of catching fish of any variety," except as therein otherwise provided, and which is not material here. Section 16. "Any net of any kind prohibited by law, while set or found in any waters when such net is prohibited by law from being set or used," is therein "declared to be a public nuisance.' Section 19, subd. 1. The illegal use of such net contrary to the provisions of the act forfeits the same to the state. Id. subd. 10. It is thereby made the duty of

such wardens to destroy the same forthwith, as a public nuisance, "when found or taken in the unlawful use * * * and no liability shall be incurred to the owner or to any other person for such destruction." Section 20. It is conceded that the plaintiff's nets were seized by the defendants, as such wardens, while they were in such unlawful use, and thereupon forthwith destroyed by them. Counsel for the plaintiff frankly admits that "the only issue involved is the constitutionality of said law." But, in addition to the grounds stated, they contend that the statute in question is repugnant to that clause of the federal constitution which declares, "nor shall any state deprive any person of life, liberty or property without due process of law." Amend. art. 14, § 1. "Due process of law," said Waite, C. J., "is process due according to the law of the land. This process, in the states, is regulated by the law of the state." Walker v. Souvinet, 92 U. S. 93. In other words, in matters of state jurisprudence the law of the state is the law of the land. "Legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is, by process or proceedings adapted to the nature of the case." Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. 231. "Due process of law, and the equal protection of the laws, are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government." Duncan v. Missouri, 152 U. S. 377, 14 Sup. Ct. 570; Leeper v. Texas, 139 U. S. 462, 11 Sup. Ct. 577. But neither that provision nor any other provision of the constitution of the United States "was designed to interfere with the power of the state, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." Barbier v. Connolly, 113 U. S. 31, 5 Sup. Ct. 357; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273; In re Kemmler, 136 U. S. 448, 10 Sup. Ct. 930; State v. Heinemann, 80 Wis. 253, 49 N. W. 818. "The police power of a state is as broad and plenary as the taxing power." Kidd v. Pearson, 128 U. S. 1, 9 Sup. Ct. 6. In the recent case of Lawton v. Steele, 152 U. S. 133, 136, 14 Sup. Ct. 499, affirming 119 N. Y. 226, 23 N. E. 878, Mr. Justice Brown, speaking for the court, has enumerated a great variety of cases which have been sustained under the police power, and adds, "Beyond this, however, the state may interfere wherever the public interest demands it, and in this particular a large discretion is necessarily vested in the legislature, to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." The decision in that case sustained the validity of a statute substantially like the one in question, and it was there held that such seizure and destruction of the nets was a lawful exercise of the police power of the state, and did not deprive the citizen of his property without due process of law; and such decision was put upon the ground that "it is within the power of a state to preserve from extinction fisheries in waters within its jurisdiction, by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish." The plaintiff, having voluntarily put the nets to an unlawful use, which made them public nuisances, under the statute, is in no position to recover damages from the defendants for having, as public officials, obeyed the law, in abating the nuisances by seizing and destroying the nets. Of course, the plaintiff had his right of action to determine whether the nets were or were not in such unlawful use. We must hold that the plaintiff has not been deprived of his property without due process of law.

5. The reasons given for holding that the statute in question is not repugnant to the federal constitution, in the particulars mentioned, make it sufficiently clear that it is not repugnant to that clause of our state constitution which declares that "every person is entitled to a certain remedy in the laws, for all injuries" to his property; nor that other clause, cited by counsel, which declares that "no distinction shall ever be made by law, between resident aliens and citizens, in reference to the possession, enjoyment or descent of property." Const. art. 1, §§ 9, 15.

It will be observed that we have confined our opinion to the validity of so much of the chapter in question as is applicable to the particular facts here present, and have carefully refrained from expressing any opinion as to the validity of the act in other respects. The judgment of the county court for Winnebago county is affirmed.

MERRIAM et al. v. HORNER.

(Supreme Court of Wisconsin. March 27, 1896.)

PRACTICE IN CIVIL CASES — SUBSTITUTION OF DEFENDANTS.

Under Rev. St. § 2610, which authorizes a substitution of parties defendant on a proper showing at any time before answer, a court may, in its discretion, grant such substitution after answer is filed, in a proper case, and for good cause shown.

Appeal from circuit court, La Crosse county; O. B. Wyman, Judge.

Action by A. S. Merriam and E. W. McClure, co-partners, as A. S. Merriam & Co., against Ernest Horner. From an order substituting George B. Early as defendant, plaintiffs appeal. Affirmed.

The respondent bought a quantity of pine saw logs from one George B. Early, for which he was indebted to him in a large sum. He sold the logs, and had the money in hand to pay Early. The appellants claim to own a one-half interest in the logs, and bring this action to recover its value. The sum claimed by them does not exceed the sum due from the respondent to Early. The respondent answered the appellants' complaint, denying their title, on November 2, 1894. On May 27, 1895, he moved for the substitution of Early as defendant in his stead, and for his discharge from further liability to the appellants upon his paying into court the sum which was due from him to Early, with costs. The court granted the order making the substitution. The appeal is from that order.

Bleekman, Bloomingdale, Reid & Bergh, for appellants. George N. Gordon, for respondent.

NEWMAN, J. No doubt, it is competent for the court to grant the order of substitution after answer, in a proper case, in its discretion, for good cause shown. Section 2831 of the Revised Statutes is ample authority. The power given is general and comprehensive. The statute is remedial, and to be favorably construed. The statute (Rev. St. § 2610)[1] which provides for the substitution of defendants in a proper case is also remedial, and is to be liberally construed, so as to bring within the remedy provided all cases, fairly within its terms, in which this remedy can be beneficially applied. The affidavit shows a case which is strictly within the terms of the statute; and, doubtless, the case is, in its facts, within the fair intention of the statute. In substance, at least, if not strictly in form, the appellants and Early claim the same debt from the respondent. The order of the circuit court is affirmed.

[1] Rev. St. § 2610, contains the following provision: "A defendant against whom an action is pending upon a contract, or for specific real or personal property, or for the conversion thereof, may at any time before answer, upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct; and the court may in its discretion make the order."

GRADY et al. v. CANNON et al.

(Supreme Court of Wisconsin. March 27, 1896.)

PARTITION—UNITING SEVERAL CAUSES OF ACTION.

One of several persons who together inherited from the same person two tracts of land may, without his complaint being open to the objection of improperly uniting several causes of action, maintain an action for partition of the two lots, against his co-heirs and persons to whom they have conveyed an interest in one or the other or both of the lots.

Appeal from circuit court, Waupaca county; Charles M. Webb, Judge.

Action by Michael J. Grady and another against James Cannon and others. A demurrer was sustained to the complaint, and plaintiffs appeal. Reversed.

The plaintiffs, Michael Grady and Mary Royal, brought this action against the defendants, James Cannon, Albert E. Dedolph, John Moloso, George Hazer (administrator of the estate of Isaac Brown, deceased), and Mattie L. Cottrell and Edmund H. Gibson (as executors of the will of Horton Cottrell, deceased), for the partition of lot 9 in block 6, and lot 3 in block 14, in Millerd & Taft's plat of the city of New London, Waupaca county, of which premises Michael Grady died seised, September 8, 1860, leaving a widow, Hannah Grady, surviving, who died in 1891, and eight brothers and sisters surviving, as his heirs at law, one of whom, John Grady, died in 1871, intestate, leaving the plaintiffs as his heirs at law; and it seems clear that the plaintiffs succeeded to an undivided one-eighth interest, at least, as his heirs, which descended to their father from the said Michael Grady, in 1860. The statements of the complaint as to the conveyances and the descent of their interests in the premises are extremely uncertain, obscure, and confusing. It is alleged, however, as a matter of fact: That the parties to the action have the following undivided estates in the premises: (1) The plaintiff Michael J. Grady, one undivided one-seventh; (2) the plaintiff Mary Royal, one undivided one-seventh; (3) the defendant James Cannon, an undivided five-sevenths of the west half of lot 9; (4) the defendant Albert E. Dedolph, an undivided five-sevenths of the east half of lot 9; (5) the defendant John Moloso, an undivided five-sevenths of lot 3. And that a mortgage was given by the latter, August 6, 1892, to Isaac Brown, now deceased, on lot 3, for the sum of $175, now held by the

defendant George Hazer, as administrator of the estate of the said Brown. That the defendant Albert E. Dedolph executed a mortgage on the east half of lot 9, but to whom is not stated, which was afterwards assigned to the defendants Mattie L. Cottrell and Edmund H. Gibson, as executors of the last will of Horton Cottrell, deceased. The plaintiffs prayed judgment for partition according to the rights of all the parties; and that the interest of the plaintiffs be set off freed from the lien of said mortgages; and that, if partition could not be had without material injury to the interests of the parties, then that a sale of said lots be made and a division of the proceeds be had between the parties, etc. The defendants John Moloso and George Hazer, administrator, etc., demurred, on the ground, among others, that several causes of action had been improperly united. Upon argument, the court made an order sustaining the demurrer on the ground thus assigned, giving the plaintiffs the right to amend on payment of costs, from which order the plaintiffs appealed.

F. C. Weed, for appellants. Phillips & Hicks, for respondents.

PINNEY, J. (after stating the facts). It is reasonably clear that the interest in the lots which the plaintiffs took by descent from their father, as one of the eight heirs, was not less than one undivided eighth part of the whole, and, whether one-eighth, one-seventh, or two-sevenths, they have ever since retained it. They, therefore, became seised with their co-heirs of the lots in question, as tenants in common; and they had an undivided interest and title, as such, in and to every part and portion of both lots, and, as against their co-tenants and others interested in said lots, or either of them, or any part of either of them, had a right to maintain an action for partition, and to have their share or interest set off to them respectively, in severalty; and they have this right still, as against all persons who have acquired an undivided interest in said premises, or any part of the same, as subsequent purchasers from any or either of their co-tenants. The plaintiffs and their co-tenants acquired their rights by descent from and under the same intestate. The complaint for partition in this case states but a single cause of action, and, though it relates to two lots, still it relates to matters of the same nature, and having a connection with each other, and in which all of the defendants are more or less concerned, though their rights in the general subject may be distinct; and the defendants who demur and who are interested only in lot 3 were, we think, properly joined as defendants in this action to set off to the plaintiffs in severalty their respective interests in both lots. As stated in Board v. Walbridge, 38 Wis. 179, 189: "All the matters are more or less connected, and all the defendants are more or less concerned or interested in them." The point in issue being the right of the plaintiffs to have their interest thus acquired in both lots set off to them in severalty, all the defendants have a common interest centering in this point in issue in the cause. Fellows v. Fellows, 4 Cow. 682, 701. The grounds upon which the action rests are not, for the reasons stated, entirely distinct and unconnected, by reason of the fact that partition is sought of two lots, and in one of them only the defendants demurring are interested as tenants in common with the plaintiffs. As was said by Mr. Justice Downer in Blake v. Von Tilborg, 21 Wis. 679: "According to all the authorities, a complaint does not improperly unite several causes of action which relates to matters of the same nature all connected with each other, and in which all the defendants are more or less interested or concerned, though their rights in respect to the general subject of the action may be different, and some may be directly interested only in a part of the general claim." In Brinkerhoff v. Brown, 6 Johns. Ch. 139, the subject is fully discussed by Chancellor Kent, and the same conclusion is maintained; and the case of Board v. Walbridge, 38 Wis. 179, 189, is really decisive of the question involved. Winslow v. Dousman, 18 Wis. 479. The precise point in question was decided in Parker v. Harrison, 63 Miss. 225, which was a suit for partition, where the complainant was a co-tenant of all the lands sought to be partitioned, and she brought before the court the grantees of her former co-tenant, so that their interests would be protected; and the court held that it is the right of one of several co-tenants to convey his interest in the whole or a part of the joint estate, but it is not allowable for a co-tenant to split the joint estate into fragments, and to necessitate as many suits for partition as there may be conveyances, and that he who has a joint interest in the several parcels may proceed as though no conveyance had been made by any of his co-tenants, and bring all the parties in interest before the court, which will do justice between the parties according to their several rights. The same rule, substantially, is stated in Story, Eq. Jur. §§ 656c, 657; Story v. Johnson, 1 Younge & C. Exch. 538, 2 Younge & C. Exch. 586. In Massachusetts and other states, where proceedings in partition are by petition with substantially the same scope as an action for that purpose, the same doctrine prevails; and it is held that a conveyance by one tenant in common of his interest in part only of the common estate will not authorize a co-tenant to enforce partition of such part against the grantee, leaving the residue unpartitioned. Barnes v. Lynch, 151 Mass. 510, 24 N. E. 783; Barnes v. Boardman, 157 Mass. 479, 32 N. E. 670; Bigelow v. Littlefield, 52 Me. 24. The statements as to the time of the deaths of some of the parties, and the

date of some of the conveyances, and in other respects, are so vague and uncertain that it is impossible to say, under the statute of descents governing the case, how much greater interest, if any, than one-eighth, the plaintiffs have in the two lots. The complaint ought to have been more definite and certain. The demurrer was improperly sustained. The order appealed from is reversed, and the cause is remanded for further proceedings according to law.

TURNER v. COUGHRAN.

(Supreme Court of South Dakota. April 7, 1896.)

JUDGMENT BY DEFAULT—VACATING.

Applying the rule enunciated in Oil Co. v. Lee, 47 N. W. 955, 1 S. D. 531, to the facts disclosed by the record in this case, it is *held* that appellant should be relieved from a judgment by default. Haney, J., dissenting.

(Syllabus by the Judge.)

Appeal from circuit court, Minnehaha county; Joseph W. Jones, Judge.

Action by Joseph H. Turner against Eugene W. Coughran and others. Judgment for plaintiff, and Coughran appeals. Reversed.

Aikens, Bailey & Voorhees, for appellant. Boyce & Boyce, for respondent.

FULLER, J. On the 21st day of May, 1895, a judgment in the above-entitled action for the foreclosure of a real-estate mortgage was entered, in which execution for a deficiency was decreed against the nonappearing defendant and mortgagor, Eugene W. Coughran. An order to show cause why such jugment should not be set aside, and the defendant Coughran be allowed to serve his proposed answer, or why the decree should not be so modified that said defendant would not be liable for a deficiency after a sale of the mortgaged premises, was obtained, and made returnable on the 26th day of June, 1895; and this appeal is from an order denying such application.

The complaint, in effect, alleges that appellant, 10 days after the execution of the mortgage, and in consideration of the amount thereby secured, sold the premises to his codefendants, Cooley and Kenefick, who assumed the mortgage, and, as a part of the consideration, agreed to pay plaintiff the entire amount represented by the notes in suit. Judgment is accordingly demanded against the defendants Cooley and Kenefick and appellant for any deficiency that may remain after a sale of the mortgaged premises. Appellant being in default, plaintiff entered into a written agreement with the defendants Cooley and Kenefick, who had appeared and answered his complaint, wherein it was stipulated that plaintiff should take judgment for the foreclosure of the mortgage, but that no personal judgment should in any event be taken against either of said defendants. In recognition of this stipulation to relieve these defendants from their assumed liability, judgment was by the court accordingly entered.

As the technical relation existing between these exonerated defendants and appellant is that of principal and surety, his counsel seek in this proceeding to invoke a rule by which appellant, as such surety, would be discharged by the foregoing stipulation with the principal debtors; but as this important question was not before the trial court at the hearing which resulted in the order before us, and is not essential to a determination of the appeal therefrom, we leave the question for adjudication in the court below. It is unnecessary to enter into a discussion of all the evidence before the court tending to show surprise, and to excuse appellant's failure to answer because he relied upon what appears to be a valid agreement with plaintiff, by which the former was to be relieved from a deficiency judgment or any liability whatever upon his notes, by obtaining for plaintiff a deed to the mortgaged premises, which agreement seems to have been fully performed upon the part of appellant.

From a careful examination of the entire record, we are convinced that some of the relief applied for ought, in the discretion of the trial court, to have been granted. For a full discussion of the law of this case, see Oil Co. v. Lee, 1 S. D. 531, 47 N. W. 955. The order appealed from is reversed, and the case remanded for such further proceedings, not inconsistent herewith, as may be found proper.

HANEY, J. (dissenting). After a careful consideration of the conflicting evidence before the trial court, I am unable to discover any abuse of discretion. On the contrary, I think the learned circuit judge was entirely justified in denying appellant's motion, and that the order should be affirmed.

BARNES v. CLEMENT.

(Supreme Court of South Dakota. April 7, 1896.)

VENDOR AND PURCHASER—CONTRACT—FORFEITURE OF PAYMENTS MADE.

A stipulation that the grantor may retain all payments made or secured, in case the grantee fails to perform a contract for the sale of land, containing covenants and conditions, the number and nature of which make it impracticable to fix the actual damage in case of a breach thereof, is not void under section 3581 of the Compiled Laws of this state.

(Syllabus by the Judge.)

Appeal from circuit court, Grant county; J. O. Andrews, Judge.

Action by James W. Barnes against Foster R. Clement. Judgment for plaintiff, and defendant appeals. Reversed.

H. H. Potter and Thomas L. Bouck, for appellant. John W. Bell and W. S. Glass, for respondent.

FULLER, J. To the complaint herein, which states a cause of action for money had and received by the defendant on the 15th day of September, 1891, to and for the use and benefit of plaintiff, the defendant interposed an answer which amounts to a general denial. There being no valid objection to the introduction of evidence, the parties, without amended pleadings, were allowed to establish the following state of facts: On the 15th day of September, 1888, they entered into a written agreement, of which time was expressly declared to be of the essence, and by which the defendant agreed to sell plaintiff a 640-acre farm for $8,100, payable in annual installments, October 1, 1889, 1890, 1891, 1892, and 1893. While plaintiff had permission to cultivate the land and occupy the premises for the purpose of carrying out his contract, it was mutually agreed that both the possession and the right to possession should at all times be and remain in the defendant. Each year, during the life of the contract, plaintiff was to cultivate and crop at least 400 acres of the land in a workmanlike manner, and to execute annually, and deliver to defendant, a chattel mortgage upon all crops grown thereon, to secure the payment of the amount due in October of each year, according to the terms of said contract. Plaintiff further bound himself to keep the buildings insured in the sum of $2,300 for the benefit of the defendant; to pay all taxes due, or that might become due during the life of the contract; to keep the fences, buildings, and other improvements at all times in good repair and condition; to permit no waste or cutting of timber; and to keep said land at all times free from wild mustard and other weeds or growth which might be injurious to the land; "that, in case said Barnes shall fail in performance of any of the stipulations and agreements herein by him agreed to be done and performed, all payments which shall have been made, and all sums which said Clement shall realize out of any crops which may then be upon said land, or upon which said Clement shall hold chattel mortgage at time of such default, shall be retained by said Clement as payment for the use of said premises up to the time of such default, free and clear of any claim or demand of said Barnes, whatsoever." In the year 1892, plaintiff having wholly failed to keep the buildings insured, or to pay the taxes for the years 1888, 1889, 1890, and 1891, and having made default in the payment of the purchase price as the same matured, or at all, except the sum of $2,600, the defendant herein, under a claim of ownership, brought an action in ejectment, and obtained a judgment by which plaintiff herein was, in effect, adjudged to be a trespasser and no longer entitled to occupy said premises. In his answer to the complaint in the ejectment suit, Barnes, the plaintiff in this action, denied that Clement, the plaintiff in the ejectment proceeding, and defendant herein, was the owner of the premises at any time, and alleged in said answer, and attempted to prove, a fee-simple title thereto in himself, and demanded judgment accordingly.

While it is clear, from the undisputed evidence offered under the complaint in this action, that plaintiff never actually paid defendant any money by virtue of the contract, the jury was reasonably justified in finding that wheat grown upon the premises, of the value of $2,600 over and above the amount of money which the defendant had advanced to plaintiff during the life of the contract for the purpose of paying current expenses, had at different times been delivered to and received by the defendant. Upon a verdict practically directed against the defendant, in plaintiff's favor, for $2,971.91, including interest, judgment was entered, and the defendant appeals. While there is nothing in the record to disclose the theory upon which the case was tried, and under which respondent, who had confessedly violated his contract in many particulars, was allowed to recover all that he had ever paid to appellant, together with interest thereon, his counsel maintain, in support of the judgment, that the contract between the parties, so far as the same relates to damages for a breach thereof, is void under the following statutory provisions: "Every contract by which the amount of damages to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided by the next section." "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damages." Comp. Laws, §§ 3580, 3581. If the detriment caused by the breach of the contract to purchase the land was the only element of damage which, by section 4587 of the Compiled Laws, "is deemed to be the excess, if any, of the amount which would have been due to the seller under the contract, over the value of the property to him," it might be urged that it would not be "impracticable or extremely difficult to fix the actual damage"; but when we examine the numerous provisions and conditions of the contract before us, and consider the various acts and omissions which would constitute a material breach thereof on the part of respondent, together with the further fact that so long as he complied with its terms he was to have, under the contract, the exclusive occupation and enjoyment of the premises for the purposes of care and cultivation, we conclude that the agreement to withhold the amount paid as compensation for the use of the premises is not within the statutory restriction, and that respondent, who alone had violated his contract, was not entitled under the cir-

cumstances, to recover all that appellant had rightfully received, by virtue of repondent's partial performance of a contract lawfully made and fully observed by appellant. Whether, under pleadings properly amended, respondent would, in any event, be entitled to recover the excess, if any, he had paid, beyond the actual amount of damage occasioned by a failure to perform his contract, it is not necessary now to determine. The judgment is reversed, and a new trial is ordered.

HANEY, J. (concurring). There should be a reversal, but I do not concur in the reasons assigned in the foregoing opinion.

FARRELL v. EDWARDS.

(Supreme Court of South Dakota. April 7, 1896.)

REAL ESTATE AGENT—AUTHORITY TO SELL LAND.

1. The power of an agent to execute a binding contract for the sale of land may be established by letters and telegrams received from his principal.

2. The facts and circumstances disclosed by correspondence between appellant and his purported agent examined, and *held* to be sufficient to authorize such a contract, and sustain a decree which binds the former to execute and deliver to respondent a deed upon payment of the purchase price according to the terms of said contract.

(Syllabus by the Judge.)

Appeal from circuit court, Brookings county; J. O. Andrews, Judge.

Action by May Farrell against J. Edwards. Judgment for plaintiff. Defendant appeals. Affirmed.

Alexander & Hooker and Mathews & Murphy, for appellant. Cheever & Hall, for respondent.

FULLER, J. At the trial of this cause to the court without a jury, plaintiff obtained a judgment decreeing the specific performance of a contract to sell and convey real estate, and the defendant appeals. The contract for a deed offered in evidence, and considered by the court, was in the usual form, and sufficient to justify a specific performance if H. A. Parsons was authorized to sign the same on the part of appellant. The evidence introduced to show the authority of Parsons to sell the property consists of numerous letters which passed between himself and appellant, from which it appears that after some talk between Parsons and appellant about a sale of the property, and in response to a letter from Parsons received at Ellsworth, Minn., concerning an offer to purchase, made by a third party, appellant, under date February 19, 1894, telegraphed and wrote appellee, in substance, that he had offered the land for $1,050, but had since changed his mind, and that he had decided to keep the property, unless it could be sold for $1,200. On February 24, 1894, Parsons wrote appellant in part as follows: "I have been to considerable trouble and some expense, and would like to make a deal of the land. Have seen my party again, and induced them to make another offer, of $1,100. Now, will you accept that amount, and give me $25 out of it as a commission. I could probably have sold for more than that if you had not made the break you did, but am unable to get any larger offer under the circumstances, and now, if a stranger comes in to buy, the first thing they tell him is, 'Why, the owner offered the land for $1,050.' If you wish to sell the land, better accept the offer made. Let me hear from you at once, and come to White if you can." The next letter of any importance is as follows: "Ellsworth, Minn., March 18, 1894. H. A. Parsons, Esq., White, S. D.—Dear Sir: I am going back to Washington Monday. I left all of the papers at Hall's office, notary public, Brookings. If you find a buyer, you can fix up the papers at any of the banks. I want 300 down, and my share of the crop; balance, 900, at 8 per cent. My address Sprague, Washington, Commercial Hotel. Yours, kindly, J. Edwards." On March 30, 1894, Parsons wrote appellant that he could sell the land for $1,200,—$200 cash, balance on time; no part of the crop to be reserved; if deal consummated, Parsons to reserve from cash payment a commission of $25. A few days later, appellant wrote Parsons, declining to accept the foregoing proposition, and adhering to the terms stated under date of March 18th. He concluded his letter as follows: "Can give clean title. You don't have to write me. You can go to Fishback Bank, and make out the papers, and send them to me to sign. Yours, kindly, J. Edwards." Ten days later, appellant wrote as follows: "Sprague, Wash., May 28, 1894. H. A. Parsons, Esq., S. Dakota—Dear Sir: I have decided to accept the proposition you made me a month ago this way: You pay cash payment of $300, and balance draw 8 per cent. until paid, to be made in two or three payments. If you make the deal, you better write me before making out the papers to send to me to sign. Fishback has the abstract. Yours, kindly, J. Edwards." During the time of this correspondence the mail service was greatly interrupted and impaired by reason of a strike upon Western railways, and many of appellant's letters are largely devoted to the strike, and the resulting delay in the receipt and transmission of letters. However, the following letter reached appellant at Spokane Falls, Wash., on the 26th day of July, 1894: "White, South Dakota, 6-23, 1894. Mr. J. Edwards, Sprague, Washington—Dear Sir: I have to-day completed sale of your land, S. W. ¼, 1-110-48, as per your favor of May 28; i. e. $1,200,—$300 cash, balance 8 per cent., in three payments, with full mortgage back; transfer to be made on or before 30 days from date. Will make deed, and send you for execution in a few

days. Your letter was not received by me until June 21. Send me order on Fishback for abstract. Resp'y yours, H. A. Parsons." With apparent satisfaction as to the disposition of the property on the terms he had last specified, and with an expression of regret that the letter informing him of the sale had not been received earlier, appellant immediately wrote Parsons that he would execute the deed as soon as possible, and send it to him, for the purpose of having the deal completed without unnecessary delay. Soon afterwards it was discovered that appellant had mortgaged the premises previous to the negotiations now under consideration for $350, due in 1899; but, notwithstanding this fact, respondent stood ready and willing to perform his contract, by assuming such mortgage, and by giving appellant a mortgage for $550, instead of one for $900, as stipulated in the contract for a deed. After being fully and frequently advised by Mr. Parsons of the necessity of closing the deal according to the contract of sale, the well-known terms of which appellant at all times authorized and acquiesced in, he executed the deed as directed, and forwarded the same to be delivered to respondent; and in response to several of Mr. Parsons' letters, by which he was advised that respondent would still perform his contract notwithstanding the incumbrance, and although the stipulated time had expired, he again wrote, on the 6th day of August, 1894, as follows: "H. A. Parsons, Esq., White, S. D.—Dear Sir: I have just got back to Spokane, which I didn't intend to do. I sign deed, and send it to Fishback, with instructions to give it to you, so you can pay the money over to Fishback, and the mortgage and note, and he will pay the expense of abstract. I think that will be all the expense there will be attached to make the deal. The balance, of $550, I ain't particular; any way to suit the purchaser. I will inclose all the papers belonging to the land. You must wire me at once if you don't make the deal after hearing from me or on receipt of this letter. I will wait a reasonable amount of time for you to complete the deal before I have the papers sent back to me; say, ten days will be sufficient I think. I have been running around so much that I haven't been able to get my mail regular; so let me hear from you on receipt of this letter. Wire, so I will know what to depend on. I ain't working, and don't want wait around here long, unless I know you have closed the deal, and run chances of losing another trade. Yours, very kindly, J. Edwards."

At the trial the court reserved its ruling upon an objection of appellant's counsel to the introduction of the written contract for a deed, executed by respondent and Parsons, as the agent of appellant, and afterwards, as shown by the findings of fact, admitted and considered the same, together with the other evidence in the case. As a copy of this contract was attached to, and made a part of, the complaint, and the execution thereof was clearly and explicitly admitted in the answer of appellant, neither its introduction nor a finding based thereon was in any manner essential or prejudicial to either party, and the assignment of error relating thereto is without merit. Anderson v. Alseth (S. D.) 66 N. W. 320.

Excusing the delay occasioned wholly by the fault or inability of appellant, respondent was at all times, and now is, ready and able to perform the contract upon his part as changed and ratified by appellant; and, from a regardful consideration of all the assignments of error relating to the findings of fact and rulings of the court upon questions of evidence, we are disposed to conclude that the decree for a specific performance, which carries with it the owner's share of the crop for the season of 1894, should not be disturbed. The letters which passed between Parsons and appellant were sufficient to constitute an agency in writing for the sale of the land, and there can be no question as to the particular tract intended. It was not claimed that appellant owned any other land, or that any one has been or can be misled by a failure on the part of Parsons to specifically describe the premises in each of his letters to appellant. Moreover, were the description defective, it was entirely competent to identify and locate the same by parol evidence. Ames v. Lowry, 30 Minn. 283, 15 N. W. 247; Tice v. Freeman, 30 Minn. 389, 15 N. W. 674; Hurley v. Brown, 98 Mass. 545; Todd v. Taft, 7 Allen, 371; Stout v. Weaver (Wis.) 39 N. W. 375; Easton v. Thatcher (Utah) 25 Pac. 728. An agency to execute a contract to sell real property does not, of necessity, imply authority to pass the title; and the question of power may be ascertained and settled from facts and circumstances disclosed by written correspondence between the owner and the purported agent, who, it is claimed, was thereby authorized to bind his principal by such an agreement. The conduct of appellant as disclosed by his letters, the execution and transmission of the deed as directed by Parsons, for the express purpose of completing the contract in question, the terms and conditions of which he had previously dictated, are facts and circumstances so expressively conclusive, both as to authorization and ratification, that there can be no doubt concerning the matter. Lyon v. Pollock, 99 U. S. 668; Jackson v. Badger, 35 Minn. 52, 26 N. W. 908; Peabody v. Hoard, 46 Ill. 243. "A power to sell land implies the power to bind the principal to convey with general warranty, and authorizes the agent to bind his principal by writing to make the purchaser a sufficient deed upon the purchase money being paid." Vanada v. Hopkins, 19 Am. Dec. 92; Lee v. Cherry, 85 Tenn. 707, 4 S. W. 835; Minor v. Willoughby, 3 Minn. 225 (Gil. 154); Ballou v. Sherwood (Neb.) 49 N. W. 790; Mann v. Higgins, 83 Cal. 66, 23 Pac. 206; Kennedy v. Gramling, 33 S. C. 367, 11 S. E. 1081. No

pretense is made that Parsons did not act in the utmost good faith, or that he induced his principal to accept an offer of anything less than the entire value of the property. It is quite evident that the transaction would have been closed had not the creditors of appellant, without any fault on the part of respondent, stood ready to seize, by virtue of legal process, the cash proceeds of the sale, as soon as delivered to the bank authorized by appellant to receive the same. Other questions presented have received merited attention, but their discussion is unnecessary. The judgment is affirmed.

PEART v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of South Dakota. April 7, 1896.)

TRIAL—MODIFICATION OF INSTRUCTIONS.

At the conclusion of all the evidence, certain specific instructions, consistent with the theory of the defense, were prepared and placed before the court, with a request that the same be submitted to the jury. Without writing on the margin thereof the word "Given" or "Refused," as required by section 5048 of the Compiled Laws, the court, without the consent of counsel, materially changed the language and import of each, and gave the same to the jury as coming from the defendant with a request that the jury be thus instructed. *Held*, reversible error.

(Syllabus by the Judge.)

Appeal from circuit court, Minnehaha county; Joseph W. Jones, Judge.

Action by Thomas Peart against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

H. H. Field and Winsor & Kittredge, for appellant. Joe Kirby, for respondent.

FULLER, J. This action, for damages occasioned by a fire which originated from a passing engine alleged to be improperly equipped and negligently operated, resulted in a judgment and verdict for plaintiff. The defendant appeals therefrom, and from an order overruling a motion for a new trial. Respondent's motion to strike from the record that portion of the abstract which contains all the evidence, for the reason that the same is unauthorized, unnecessary, and was not used upon the hearing of the motion for a new trial, and because the same contains no specification of errors relating to the insufficiency of the evidence to sustain the verdict, requires no attention, for the reason that a consideration of the evidence is in no manner essential to a determination of this appeal.

At the conclusion of all the evidence, counsel for appellant submitted the following, among other, instructions to the court, consistent with the theory of the defense, and requested that the same be given to the jury: "(1) The jury are instructed that there is no evidence in this case which will warrant you in finding that the defendant was negligent, at the time of said fire, in using what is known as the 'Diamond Stack,' nor is there sufficient evidence from which you can find that the defendant was negligent in failing to have its engine equipped at that time with what is known as the 'Extension Front End.' The plaintiff has failed to show that the Diamond stack was not a proper and approved appliance for the prevention of the escape of sparks at the time of said fire. (2) If you believe, from a preponderance of the evidence in this case, that the witness O'Herran has testified falsely as to the fact that John Daley was with him at the time he claims to have discovered the lump of coal referred to in his testimony, then you are at liberty to reject and disregard the testimony of said O'Herran as to the finding of said lump of coal at the time in question." The foregoing instructions were neither given nor refused, but were, without the consent of counsel, materially changed, and given to the jury as coming from appellant, as follows: "The defendant also requests the court to give you certain instructions, requested by it, which the court will give and read to you at the present time." Then follows instruction No. 1 as above quoted, down to and including the expression "extension front end," where, without hesitation or explanation, instead of the recital, "The plaintiff has failed to show that the Diamond stack was not a proper and approved appliance for the prevention of the escape of sparks at the time of said fire," the court gave, as a part of appellant's instruction, and in place of the eliminated portion thereof, the following: "Meaning by this instruction the style and device known as the 'Diamond Stack,' not meaning that the particular stack was in perfect condition. That is a question for you to decide." To instruction No. 2, above quoted, the court in the same manner added, and gave, as purporting to come from appellant, the following: "Unless you believe he is corroborated in regard thereto by other testimony and the circumstances of the case."

Section 248 of the Code of Civil Procedure (Comp. Laws, § 5048), provides that, "when instructions are asked which the judge cannot give, he shall write on the margin thereof the word 'Refused,' and such as he approves, he shall write on the margin thereof the word 'Given'; * * * and all instructions asked for by counsel shall be given or refused by the judge, without modification or change, unless such modification or change be consented to by the counsel asking the same." The mischief resulting from the giving of an adverse instruction as emanating from a litigant, the recitals and import of which have been changed without his knowledge or consent, so that, at a critical moment, when the lips of his counsel are sealed, it evidences an abandonment of the theory upon which his case was tried, is too obvious to justify comment. A case was before the territorial court in which it does not appear

that the modified instruction was given as that of the party making the request, and yet, in construing the statute, the court said: "A party is entitled to a direct response, in the mode provided by section 248 of the Code of Civil Procedure, to his requests for specific instructions to the jury; and the court failing to indorse the requests as either 'Given' or 'Refused,' but giving a part of such requests with modifications, held error, for which this court will reverse." Galloway v. McLean, 2 Dak. 372, 9 N. W. 98. The statute under consideration is clear, concise, and mandatory, and was enacted to prevent just what was inadvertently done in this case. Other points presented require no attention. The judgment is reversed, and a new trial is awarded.

CITY OF HURON v. BANK OF VOLGA.

(Supreme Court of South Dakota. April 9, 1896.)

ABATEMENT OF NUISANCE—JURISDICTION IN EQUITY.

A municipal corporation, in the exercise of a granted power to "restrain, prohibit, or suppress" a public nuisance, may, under proper circumstances, invoke the aid of a court of equity.

(Syllabus by the Judge.)

Appeal from circuit court, Beadle county; A. W. Campbell, Judge.

Action by the city of Huron against the Bank of Volga. Judgment for plaintiff, and defendant appeals. Affirmed.

T. H. Null, for appellant. A. W. Wilmarth, for respondent.

FULLER, J. The complaint in this action by a municipal corporation against a private corporation to abate a public nuisance alleges, and the specific findings of fact by the court conclusively show, that the Wright House, a large, three-story, wooden structure, owned by the defendant, and situated conspicuously upon a business street in the most densely populated portion of the city of Huron, was badly damaged and partially destroyed by a fire which occurred during the month of March, 1891, and that by reason thereof conditions arose and still exist in and about said structure which endanger the property and lives of the inhabitants of said city. As the existence of a public nuisance, extremely dangerous and unusually repulsive in character, may well be conceded from the undisputed evidence, further facts will not be recited. By the decree of the court defendant was directed to tear down and remove its ruined and dilapidated building, and upon failure so to do within 30 days the plaintiff was authorized to tear down and remove and abate the same. The defendant in the court below, and now upon appeal from the judgment, relies wholly upon the proposition that the corporate authority was without power to maintain the action. Unless a public nuisance is specially injurious to the private person, the statute authorizing a civil remedy therefor precludes him from maintaining an action, and counsel for appellant maintain that respondent's exclusive statutory remedy is by indictment or abatement. Comp. Laws, §§ 4688, 4690. Respondent's charter provides that "the city council shall have power to restrain, prohibit, and suppress nuisances at common law," and a proper regard for the peace and tranquillity of society, as well as the interests of the members thereof, suggests the advantages resulting in a doubtful case from the right of a municipal corporation to obtain a judicial determination of the existence of a public nuisance before proceeding to demolish and destroy a building lawfully erected, which, without fault of the owner, appears to have become menacing and harmful to the inhabitants of a city. In discussing the question Judge Dillon, says: "As there is in such cases a judicial remedy in favor of the citizen, so, on principle, the right of the corporate authorities to resort at their election to the courts in proper cases to aid them when the citizen is in the wrong, should, in the author's judgment, be also recognized." 1 Dill. Mun. Corp. (4th Ed.) § 379. Judge Woods observes, in his treatise on the Law of Nuisances, that: "Except in cases of great emergency, when the emergency may safely be regarded as so strong as to justify extraordinary measures upon the ground of paramount necessity, or when the use of property complained of is so clearly a nuisance as to leave no room for doubt upon the subject, it is the better course to secure an adjudication from the courts, before proceeding to abate it." Wood, Nuis. (2d Ed.) § 744. "A court of equity has jurisdiction to restrain existing or threatened public nuisances by injunction, at the suit of the attorney general, in England, and at the suit of the state, or the people, or municipality, or some proper officer representing the commonwealth, in this country." 3 Pom. Eq. Jur. p. 380. In the following cases it was expressly held that a civil action by the proper officers of a city would lie to abate a public nuisance: City of Denver v. Mullen, 7 Colo. 345, 3 Pac. 693; Village of Pine City v. Munch, 42 Minn. 342, 44 N. W. 197; City of New Orleans v. Lambert, 14 La. Ann. 244; City of Waterloo v. Union Mill Co., 72 Iowa, 437, 34 N. W. 197. See, also, 15 Am. & Eng. Enc. Law, p. 1184. While a private person is not authorized to maintain the action, unless specially injured, a city council, being the governmental agency to whom the inhabitants of a municipality have the right to look in a proper case for protection from the evil effects of a public nuisance, may, when authorized so to do, resort to an indictment, a civil action, or abatement, according to the exigencies of the particular case. In our opinion, section 4688 of the Compiled Laws, when considered with respondent's city char-

ter, reasonably construed, authorizes the corporate authorities to apply, in a case like the present, to a court of equity for aid in the enforcement of its granted power "to restrain, prohibit, and suppress nuisances at common law." The judgment appealed from is affirmed.

HILTON v. ADVANCE THRESHER CO.

(Supreme Court of South Dakota. April 7, 1896.)

APPEAL—HARMLESS ERROR—RESCISSION OF CONTRACT—AGENT OF NONRESIDENT CORPORATION.

1. Where the trial court was neither called upon to decide, as a matter of law, that an offer to rescind was made too late, nor to submit the question to a jury, a holding that such offer was made with sufficient promptness will not be disturbed, in the absence of an available exception thereto.

2. Whether a tender to an agent authorized, under the statute, to accept service of process, is equivalent to a tender to his principal, is a question not properly before us.

3. An action to rescind a contract may be brought at any time within the statutory limitation, by one who offered to rescind in the manner provided by statute, and with reasonable promptness after the discovery of facts which entitled him to a rescission.

4. In the absence of evidence to the contrary, the authority of a managing agent of a nonresident corporation to execute, in the name of his principal, a release and discharge of a chattel mortgage, will be presumed.

5. Where the right to rescind is based upon the wrongful act of one of the parties to a contract, by reason of which the consideration has failed in whole or in part, inability to restore such party to his former condition, when occasioned solely by such wrongful act, is not alone sufficient to defeat an action to rescind such contract and recover the consideration paid thereunder.

(Syllabus by the Judge.)

Appeal from circuit court, Lake county; Joseph W. Jones, Judge.

Action by Daniel L. Hilton against the Advance Thresher Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Bailey & Voorhees, for appellant. Farmer & Farmer, for respondent.

FULLER, J. Plaintiff, in his complaint, alleges, among other things, that on or about the 23d day of December, 1891, he purchased from the defendant two promissory notes, of $200 each, executed by L. C. and H. O. Bangs, which were amply secured by a chattel mortgage filed in the office of the register of deeds on the 9th day of October, 1890; that as consideration for said notes, and an agreement on the part of defendant to execute an assignment of said mortgage, and file the same in the office of the register of deeds, plaintiff paid to defendant $419.72; that defendant has at all times failed and neglected to assign said mortgage, but on the contrary, and on the 18th day of January, 1892, in violation of its agreement, said defendant wrongfully and fraudulently caused to be executed, in the usual form, a release thereof, by which said mortgage was discharged from the files of the register of deeds on the 1st day of February, 1892; that the makers of said notes, no part of which has been paid, are and were insolvent; and that, in the purchase thereof, plaintiff relied wholly on the chattel mortgage by which they were secured, and thereafter confidently believed that defendant had executed, and caused to be filed, an assignment thereof, until the 9th day of September, 1892, when, by taking steps towards the foreclosure of the mortgage, he learned that the same had been by defendant discharged from the files, and that the mortgagors had in the meantime sold and transferred all of the property described in said mortgage to bona fide purchasers, having no knowledge or notice of the existence of a mortgage thereon. The complaint concludes as follows: "That said plaintiff has at divers times prior to the commencement of this action, and especially on the 22d day of June, 1893, offered to return said notes to defendant, and does now offer to deliver and return to defendant said notes at any place it may designate, and brings the same to this court with the offer to deliver the same to defendant. The plaintiff further says that by reason of the promises aforesaid, and the failure of the defendant to perform its said agreement and promises aforesaid, and file its satisfaction and release of said chattel mortgage as aforesaid, plaintiff has sustained damages in the sum of four hundred and nineteen and $^{92}/_{100}$ dollars, and interest thereon from January 1, 1892, at the rate of eight per cent. per annum. Wherefore plaintiff demands judgment against the defendant for the sum of $419.92, and interest thereon from January 1, 1892, at the rate of eight per cent. per annum, and the costs and disbursements of this action." The answer of defendant put in issue all the material allegations of the complaint, and the evidence offered and received at the trial was submitted to a jury under instructions by the court, to which no exception was taken sufficient to present for review anything therein contained which might have been urged as error. This appeal is by the defendant from a judgment rendered upon a verdict in plaintiff's favor for the full amount claimed, and from an order overruling a motion for a new trial.

The theory of the defense, under which testimony was offered tending to prove the transactions between respondent and appellant to be a payment of the amount due, in satisfaction of the notes, instead of a purchase thereof, being, upon clearly conflicting evidence, submitted to and rejected by the jury, its verdict upon that point, which is found, from a careful examination of the record, to be substantially supported, cannot be disturbed. While it is quite clear that the property included in the mortgage, and in the hands of the mortgagors at the time their notes were purchased, was amply

sufficient to pay the amount secured thereby, and that said notes were rendered practically worthless by the discharge of the mortgage from record, and a subsequent sale of the horses described therein, counsel for defendant say that respondent is not entitled to rescind the contract, because he has neither acted promptly in the matter, nor offered to restore the notes to any one authorized to receive the same. The court was neither called upon to decide, as a matter of law, that the offer to rescind was made too late, nor to submit the question to the jury; and there is no available exception to the court's charge, wherein it is, in effect, held that the offer to rescind was made with sufficient promptness. Although it appears from the recitals of the complaint that respondent, after discovering that the mortgage had been released, waited about nine months before offering to rescind, and that no facts tending to excuse such delay are averred therein, counsel's objection to the introduction of any evidence thereunder, because "the alleged offer was discovered by plaintiff upon the 9th day of December, 1892, and that this action was not commenced until July 21, 1893, and there are no facts in the complaint which tend to explain the delay in bringing the action," was properly overruled, because, if the offer to rescind was promptly made when discovered, the action could be brought at any time within the statutory limitation.

Counsel's contention that the release filed immediately upon the receipt of the money, and delivery of the notes to respondent, was insufficient to operate as a discharge of the mortgage, cannot be entertained with favor. The instrument is in the usual form, executed in the name of the mortgagee, a corporation, and signed and acknowledged by the manager thereof. As managing agent, his authority will be presumed, in the absence of anything to the contrary. Chapter 83 of the Laws of 1891 authorizes the mortgagee, his assignee or agent, to release from record, and satisfy, a chattel mortgage, whenever the debt to secure which the same was executed has been paid, and requires the same to be done within 30 days thereafter. Under the statute, authorities which relate to the discharge and satisfaction of instruments under seal have no application to a chattel mortgage. It appears from the evidence that respondent was not advised of the release of the mortgage until the 9th day of September, 1892, when, upon inquiry, he learned the fact, and that a large portion of the property had been taken, since the discharge thereof, to West Superior, and sold by one of the mortgagors, rendering the notes under consideration, in the hands of respondent, of little or no value. It further appears that appellant afterwards, and at respondent's request, refiled said mortgage, and a fruitless effort was made to find the property described therein, and to collect from the mortgagors the money due upon the notes described in the complaint; that on the 22d day of June, 1893, respondent tendered said notes to J. S. Mason, who, it is conceded, was the authorized agent of appellant to accept service of process, under the statute, and from whom he demanded a return of the money received therefor, and by whom said tender and demand were refused. As respondent at the trial made an offer to return the notes, and thereby restore all that he had received for the money sought to be recovered, we are not called upon, under the present condition of the record, to determine whether a tender to Mason was equivalent to a tender to appellant.

From all the facts and circumstances in the case, we are disposed to conclude that respondent's inability to place appellant in the same condition that it occupied at the time the notes were purchased was due entirely to the act of the latter, in wrongfully releasing the mortgage, instead of assigning the same as agreed upon. The right to rescind is based upon the act of appellant in causing the mortgage to be released, and some time after the fact was discovered seems to have been necessarily spent in a correspondence with appellant, which resulted in a refiling of the mortgage. Afterwards an unsuccessful effort was made to collect the money due on the notes, from the makers thereof. Had these notes been collectible, or the mortgagees ready and willing to promptly pay the amount thereof, no injury would have resulted from the release of the mortgage; and, in order to entitle respondent to rescind, he must ascertain, and be able to show at the trial, that by reason of the act complained of, and through the fault of appellant, the consideration had failed in whole or in part. Comp. Laws, § 3589, subd. 2. Under the circumstances, and upon the record as presented, we cannot say, as a matter of law, that respondent did not proceed with reasonable diligence. Finding no reversible error in the record, further discussion is unnecessary. The judgment is affirmed.

LEWIS v. MILLS et al.

(Supreme Court of Nebraska. April 9, 1896.)

RES JUDICATA—ISSUES—PLEADINGS—ADMISSION AS EVIDENCE.

1. Where an officer holding an execution issued on a judgment against A., by virtue of such execution seizes the property of B., and the latter recovers a judgment against such officer for the value of the property seized, then, in a suit by B. against such officer and the sureties on his official bond to recover the amount of the judgment, such judgment is conclusive evidence against the officer and his sureties as to B.'s ownership of the property at the time it was seized by the officer, the amount of the damages and costs sustained by B. by reason thereof, in the absence of a showing that the court had no jurisdiction to pronounce the judgment, or that it was procured by fraud or collusion. Thomas v.

Markmann, 62 N. W. 206, 43 Neb. 823, followed.

2. And in the suit against the officer and his sureties it is immaterial that the officer was not designated as such in the pleadings or judgment of the suit brought against him by the owner of the property.

3. And the pleadings and judgment in the action brought by the owner against the officer, and competent and relevant evidence in the suit against the officer and his sureties, although such pleadings and judgment show that the owner's suit against the officer was prosecuted and judgment rendered jointly against him and another.

(Syllabus by the Court.)

Error to district court, Madison county; Allen, Judge.

Action by Frank Lewis against W. W. Mills and others on an official bond. There was a judgment for certain defendants, and plaintiff brings error. Reversed.

Wigton & Whitham, for plaintiff in error. Robinson & Reed for defendants in error.

RAGAN, C. The facts in this case are as follows: A judgment was recovered before a justice of the peace in Madison county against one Van Buren Lewis. Execution was issued on this judgment, and delivered to one W. W. Mills, a constable of said county. Mills thereupon levied the execution upon certain personal property in the possession of one Frank Lewis, who held the possession of said property, and claimed a lien upon it by virtue of a chattel mortgage executed to him by Van Buren Lewis. Mills sold the property to satisfy the execution. Frank Lewis subsequently brought an action in replevin in the district court of Madison county for this property against the constable and a man named Sesler, and in this action Mills was not named or sued as constable. The action proceeded as one for damages, and Lewis recovered a judgment against the constable and Sesler for the value of the property. Execution was issued on this judgment, and returned wholly unsatisfied, and thereupon Frank Lewis brought this suit to the district court of Madison county against Mills, the constable, and the sureties on his official bond, to recover the amount of the judgment and costs which he, Frank Lewis, had recovered against Mills and Sesler. Only the sureties of the constable filed answers to the action. These answers, in effect, admitted that Mills was a duly appointed or elected constable; that he, as principal, and they as sureties, duly executed said bond; that the property which he seized and sold under execution against Van Buren Lewis was the identical property for which Lewis subsequently recovered a judgment against the constable and Sesler. The sureties further pleaded as a defense to the action that the judgment of Lewis against Mills and Sesler was procured by fraud and collusion between Frank Lewis and the constable. That the property seized and sold by the constable was in fact and in truth the property of Van Buren Lewis, and known by Mills and Frank Lewis to be his property; that the mortgage held on such property by Frank Lewis was made by Van Buren Lewis to hinder, delay, and defraud his creditors to the knowledge of Frank Lewis and the constable, and that by conspiracy and collusion between Frank Lewis and Sesler and Mills the latter two neglected and refused to defend the action of replevin brought by Frank Lewis. When the case at bar came on for trial to a jury, Lewis, to maintain the issues on his part, offered in evidence the record of the judgment which he had obtained in the district court against Mills and Sesler. To the introduction in evidence of this record the sureties on the bond objected. The objection was sustained, and the offered evidence excluded. Lewis failing to produce any further evidence, the court directed a verdict for the constable and his sureties, on which a judgment dismissing Lewis' action was rendered, and he prosecutes to this court a petition in error.

The evidence offered was admissible, and the court erred in excluding it. The judgment of Frank Lewis against Mills and Sesler was conclusive evidence against the constable and his sureties as to Frank Lewis' ownership of the property at the time it was seized by Mills, the amount of the damages and costs sustained by Frank Lewis by reason thereof, in the absence of a showing that the court which rendered that judgment had no jurisdiction to pronounce it, or that it was procured by fraud or collusion. Turner v. Killian, 12 Neb. 580, 12 N. W. 101; Pasewalk v. Bollman, 29 Neb. 519, 45 N. W. 780; Thomas v. Markmann, 43 Neb. 823, 62 N. W. 206. The fact that Mills was not designated or described as constable in the pleadings in the action brought against him and Sesler by Frank Lewis was wholly immaterial. Dennie v. Smith, 129 Mass. 143. And the fact that Lewis' judgment in the replevin action was rendered against both the constable and Sesler did not affect the validity of the judgment as evidence against Mills and the sureties on his bond. The judgment rendered against Mills and Sesler was offered in evidence to show that Mills had wrongfully taken and converted the goods of Frank Lewis. The fact—if it was a fact—that Sesler assisted Mills in the wrongful conversion of these goods did not lessen the responsibility of Mills nor his sureties. City of Lowell v. Parker, 10 Metc. (Mass.) 309. The judgment of the district court is reversed. Reversed and remanded.

WHITCOMB et al. v. THOMAS.

(Supreme Court of Nebraska. April 9, 1896.)

APPEAL—WEIGHT OF EVIDENCE.

Where there was sufficient testimony to sustain the verdict, it will not be disturbed.

(Syllabus by the Court.)

Error to district court, Thurston county; Norris, Judge.

Action by Jacob Thomas against James Whitcomb and others. There was a judgment for plaintiff, and defendants bring error. Affirmed.

J. N. Curry, Barnes & Tyler, and Jay & Beck, for plaintiffs in error. T. M. Franse, for defendant in error.

NORVAL, J. James Whitcomb, Waldo Whitcomb, and Getty W. Donery are the proprietors of the Bank of Pender. Jacob Thomas commenced this action against them to recover the sum of $129.14, with interest thereon, which he alleges to be the balance due him upon his open account with the bank. In their answer they deny that they are indebted to the plaintiff in any sum whatever, and allege that he is indebted to them, upon account, in the sum of $13.85, and the further sum of $1,357.60 upon three promissory notes executed by the plaintiff, and which are set out in the answer. The defendants asked judgment against the plaintiff for $1,371.45, with interest. The reply denies that there is anything due from plaintiff to defendants on account, and pleads want of consideration as to a portion of the amount represented by the notes mentioned in the answer, and payment of the remainder of said notes. From a verdict and judgment for the plaintiff in the sum of $78.70, the defendants prosecute error.

The only complaint in this court is that the verdict is contrary to the proofs adduced on the trial. A careful perusal of the testimony discloses that it is conflicting upon every material issue presented by the pleadings. The evidence of the plaintiff, when considered without reference to that introduced by the defendants, fully supports the verdict. It is the province of the jury, and not ours, to pass upon the credibility of the witnesses, and to weigh the testimony. The verdict is not so manifestly contrary to the evidence as to show it to have been the result of either passion or prejudice. Hence it cannot be set aside, and the judgment must be affirmed.

GRISWOLD v. HUTCHINSON et al.

(Supreme Court of Nebraska. April 7, 1896.)

MALPRACTICE—LIABILITIES OF PHYSICIANS.

The law does not exact from physicians and surgeons the utmost degree of care or the highest attainable skill in the practice of their profession, although they, by virtue of their relation towards patients, impliedly engage that they possess ordinary knowledge and skill, and that they will, in the course of their employment, exercise such proper care and attention as may be reasonably expected from members of their profession. Hewitt v. Eisenbart, 55 N. W. 252, 36 Neb. 794.

(Syllabus by the Court.)

Error to district court, Madison county; Allen, Judge.

Action by John C. Griswold against William F. Hutchinson and D. F. Foote. Judgment for defendants. Plaintiff brings error. Affirmed as to Hutchinson, and reversed as to Foote.

Campbell & Wallis, H. C. Brome, and Clark Gapin, for plaintiff in error. John S. Robinson and W. E. Reed, for defendants in error.

POST, C. J. On the trial of this cause in the district court for Madison county, judgment was entered in favor of the defendants therein upon a verdict rendered in accordance with the peremptory instruction of the court, and which it is sought to reverse by means of this proceeding. According to the allegations of the petition below, the plaintiff therein employed the defendants, who are practicing physicians and surgeons, to treat his (plaintiff's) wife for an ailment pronounced by said defendants to be an ovarian tumor; that, acting upon the advice of the defendants, he accompanied his said wife from his home, in Madison county, to the city of Omaha, where, after an examination of her person, they (defendants) advised an operation for the removal of said supposed tumor; that, relying upon the knowledge and skill of defendants, and believing that they had made a careful and proper examination of the person of his wife, and believing such operation to be necessary in order to save her life, he entered into a contract whereby he agreed to pay therefor the sum of $200; that the defendants thereupon proceeded, in the absence of the plaintiff, to perform said operation, by making an incision in his wife's abdomen, and advising him and his said wife that such operation had been entirely successful, and that they had removed from the person of the latter an ovarian tumor of large size, whereupon he paid to the defendants the sum of $200, the agreed price for their services in that behalf; that he paid out and expended in caring for his wife, in consequence of said operation, the sum of $79; and that his own time thus necessarily employed is of the value of $40. He alleges, further, that, subsequent to the payment of the defendants' bill, he learned that his wife was not suffering from an ovarian tumor, and that the defendants had not removed from her person a tumor of any kind, but that her only ailment was a fibroid tumor of the uterus, which fact, although discovered by the defendants upon the opening of her abdomen, was by them fraudulently concealed from him until about the time of the commencement of this action; that, if the examination of his wife's person had been conducted with reasonable care and skill, the nature and extent of her ailment would have been disclosed; but that such examination was carelessly, negligently, and improperly made by the defendants; and that, in consequence of such wrongful and negligent acts of defendants, his wife has been permanently injured in health, to his damage in the loss of

her service, etc. The defendants answered separately; Dr. Hutchinson admitting that he is a practicing physician and surgeon residing in Madison county; that Elizabeth Griswold, mentioned in the petition, is the wife of the plaintiff; and denying the other allegations thereof. Dr. Foote, after an admission in substantially the same language as that employed by his co-defendant, admits the performance of an operation upon the person of the plaintiff's wife, and the receipt therefor of the sum of $200, as alleged, but denies the charge of negligence, and alleges that said operation "was skillfully performed, and that the same was necessary to a correct understanding of the ailment from which the said Elizabeth Griswold was suffering." The plaintiff, by way of reply, denied the allegations of new matter in the respective answers.

One proposition clearly established by the record is that the defendants were mistaken respecting the cause of Mrs. Griswold's affliction, which, according to their diagnosis, was an ovarian tumor, but which was, as alleged, during the operation mentioned, discovered to be a fibroid tumor of the uterus. The evidence bearing directly upon that subject was given by Dr. Sprague, who, by invitation of defendants, witnessed the operation, and who testified, in substance, that no tumor was removed from the person of the patient; also, by Mrs. Brown, proprietress of the hospital in the city of Omaha to which Mrs. Griswold had been taken for the purpose of the operation, who testified to a conversation with Dr. Foote shortly thereafter, in which the latter remarked that the only tumors discovered during the operation were immovable fibroid tumors of the uterus, and in which conversation he requested the witness to make no statement concerning the subject to Mrs. Griswold's friends. It is shown that Dr. Hutchinson made a superficial examination when first consulted upon the subject, which satisfied him respecting the cause of the illness from which Mrs. Griswold was suffering, and that the only other examination was made by Dr. Foote in the presence of his co-defendant, the day preceding the operation. As to what transpired at the time last mentioned, the plaintiff testified: "Dr. Foote made the examination. He first placed her (the patient) in his chair, and exposed the abdomen, and with his hands pressed in every way, pushing and working the abdomen in every possible way. Then he took one hand, and tapped, and then the other; then one side, and then the other; and then from below. That is all the external examination he made. Then, after that, he inserted his finger in the vagina, and seemed to be feeling of the uterus. * * * I think the first remark was made by Dr. Foote to Dr. Hutchinson. He said: 'Doctor, it is just as you said.' My wife next asked the question, 'What is it?' He said: 'It is an ovarian tumor; no doubt about it.'" The examination referred to by the witness did not consume to exceed 10 minutes, and was made without the assistance of instruments or of an anæsthetic of any kind.

The plaintiff called as witnesses several physicians and surgeons, who concur in the opinion that an operation should not be attempted for a suspected uterine or ovarian tumor without a most thorough examination of the person of the patient; and they agree that in all cases of doubt, where the theory of pregnancy is excluded, the uterus should be explored by means of a sound, in order to ascertain the depth of that organ. One witness, Dr. Crummer, testified as follows: "Q. Is there any case, except in which the tumor has attained such a size where the life of the patient demands its immediate removal, in which it can be said that the sounding of the uterus might be omitted from the diagnosis of the case, and still an attempt be made to perform an operation? A. No; I think there would be nothing to justify an operation in the case except something that would threaten the life of the patient. A complete and thorough examination of the case where an abdominal tumor is suspected would be by several methods: First, by palpitation, which simply means the use of the hands over the abdomen; a feeling of the parts by careful manipulation of the hands over the abdomen, and percussion or tapping of the parts with the fingers externally, or with some instrument to get the sounds elicited by percussion; an examination of the parts that can be reached through the vagina; by measurement of the abdomen as to the breadth and heighth of the mass; an examination with the vaginal speculum; and in many other cases, and in all cases of doubt, where pregnancy is absent, the use of the uterine sound. Q. Are the methods of examination you have suggested necessary and indispensable to a careful and proper examination of the patient where pregnancy does not exist, and the presence of a tumor is suspected? A. Yes, sir; of course, where there is a prospect of an operation, it always demands a more careful examination, if possible, than a man would make simply for the purpose of trying to tell the patient in a general way what the matter is. The very fact that a man is going to make an operation increases his responsibility in diagnosing the case, and he had better make a mistake where he is not going to operate than where he is." Dr. Summers, another witness, testified that the surgeon should be able, by means of conjoined manipulation—i. e. a digital exploration of the vagina with one hand, and the manipulation of the abdomen with the other—to determine, "to a tolerable certainty," the size and location of the tumor, and whether it is liquid or solid; that, if connected with the uterus, it is pretty certain to be solid, and, if connected with the ovaries, it is pretty certain to be a cyst.

It is not pretended that there was in this instance any suspicion of pregnancy, and no objection existed on that ground to the exploration of the uterus in determining the location and character of the tumerous growth. Nor can it, on the record before us, be contended that this case is within the other exception mentioned by Dr. Crummer, viz. where the condition of the patient is so critical as to require heroic treatment, and where an operation is justifiable as a last resort, without the precautionary sounding of the uterus. The testimony of the medical witnesses tends, therefore, directly to prove the wrong alleged, viz. negligence in the examination of the plaintiff's wife, and the consequent unfortunate result thereof.

We agree with counsel for defendants that physicians and surgeons are not required to exercise the utmost degree of care or to possess the highest attainable skill in their profession. They do, however, by virtue of the relation assumed by them towards patients, impliedly engage that they possess ordinary skill, and that they will, in the course of their employment, exercise such necessary and proper care and attention as may reasonably be expected from members of their profession under like circumstances. Barney v. Pinkham, 29 Neb. 350, 45 N. W. 694; Hewitt v. Eisenbart, 36 Neb. 794, 55 N. W. 252; Smothers v. Hanks, 34 Iowa, 286; Branner v. Stormont, 9 Kan. 51; Ely v. Wilbur, 49 N. J. Law, 685, 10 Atl. 385, 441; Small v. Howard, 128 Mass. 131; Ordr. Med. Jurisp. 42. The rule above stated is not limited in its application to physicians and surgeons, but applies with equal force to the members of all professions, including attorneys and counselors at law, who assume to possess technical knowledge or skill.

There being competent proof upon the vital issue of the case, and tending to sustain the cause of action charged against one of the defendants, a question was presented for submission to the jury, and the direction in favor of both defendants at the conclusion of the plaintiff's evidence was error, calling for a reversal of the judgment, so far, at least, as it applies to the defendant Dr. Foote. It remains to be determined whether the court erred in directing a verdict in favor of Dr. Hutchinson. Upon that question the conclusion reached from an examination of the record is that the engagement and responsibility of the last-named defendant terminated with the employment of Dr. Foote. When first consulted upon the subject, he advised the plaintiff to consult some physician who was a specialist in that line, saying that he did not consider himself qualified to perform the required operation. To the question, "Did Dr. Hutchinson say who you had better go to?" the plaintiff answered: "I don't think he advised any one very strong. The idea was to get the best doctor." He testified, further, that, just before the operation, he made inquiry respecting Dr. Foote's charges, to which the latter answered: "The ordinary fee for such an operation is from $300 to $500, but Dr. Hutchinson tells me you are a poor man, and work for your living. I have concluded, therefore, to make it $200." There was some talk at that time about security for Dr. Foote's bill, the plaintiff not being provided with ready money; but, before it was given, Dr. Hutchinson renewed an offer previously made to advance the necessary funds on the plaintiff's personal note, which offer was accepted; and the money thus advanced was a few days later, by the plaintiff, remitted to Dr. Foote at Omaha. Dr. Hutchinson's generosity in that regard, and the interest shown by him in the case, finds a ready explanation in the intimate personal and church relations existing between himself and the plaintiff's family. His attitude towards the case after surrendering the patient to the care and treatment of Dr. Foote was that of a friend and counselor only, and in no sense that of a physician or surgeon. The direction in his favor was accordingly right, and the judgment as to him will be affirmed. Judgment for defendant Hutchinson affirmed. Judgment for defendant Foote reversed. Judgment accordingly.

BEAVERS v. MISSOURI PAC. R. CO.

(Supreme Court of Nebraska. April 7, 1896.)

INSTRUCTIONS—OBJECTIONS TO VERDICT—APPEAL—ASSIGNMENTS OF ERROR.

1. To present for review errors alleged to have occurred during the trial of a cause, the assignment should, in apt words, set forth some matter for which a motion for a new trial is authorized by the Code of Civil Procedure.

2. An assignment of error that "the verdict is contrary to the evidence, and is so exceedingly small as to clearly appear to have been given under the influence of passion, prejudice, or undue means," does not raise the question of error in assessment of the amount of recovery by the jury independently or aside from the consideration of the influence of passion, prejudice, or undue means.

3. Neither is such question presented by the portion of the assignment quoted, contained in the following words: "The verdict is contrary to the evidence." Error in the assessment of the amount of recovery, whether too large or too small, has been specifically stated in the Code as one of the grounds of a motion for new trial (Code, § 314, subd. 5), from which it is clear that it was not included in either of the other causes.

4. *Held*, that a consideration of all the evidence discloses that the jury were not governed by passion, prejudice, or undue means in the assessment of the amount of recovery.

5. It is not error to refuse an instruction requested in behalf of either party to a cause, where the subject-matter of the instruction is fully stated and explained in the charge of the court to the jury.

6. It is not error, calling for a reversal of a judgment, to give an instruction which could not, and, it is clear, did not, prejudice the rights of the complaining party.

(Syllabus by the Court.)

Error to district court, Saline county; Hastings, Judge.

Action by Philip H. Beavers against the Missouri Pacific Railroad Company. There was a judgment for plaintiff in a less amount than that demanded, and he brings error. Affirmed.

Abbott & Abbott, for plaintiff in error. F. I. Foss, B. P. Waggener, J. W. Orr, and David Martin, for defendant in error.

HARRISON, J. This is an action instituted in the district court of Saline county to recover damages alleged to have resulted to plaintiff's residence property, some lots and his dwelling, situated in the city of Crete, from the location and operation, in proximity thereto, of defendant's railroad, its main line and a switch, and also its roundhouse, in the city named. Issues were joined, and a trial had to the court and a jury. A verdict in the sum of $100 was returned for plaintiff, and, after motion for new trial in behalf of either party was overruled, judgment was rendered on the verdict. The plaintiff brings the case to this court by error proceedings.

It is claimed that the amount of the recovery is too small; that the testimony shows damages to the property in a much larger sum than was allowed by the jury. The only assignment in the motion for new trial which can be said to have any reference to this point is as follows: "First. The verdict is contrary to the evidence, and is so exceedingly small as to clearly appear to have been given under the influence of passion, prejudice, or undue means." This does not raise the question of an error in the assessment of the amount of recovery unaffected by passion, prejudice, or undue means. If this was sought to be done, there should have been an assignment in apt words which would have set forth the fifth cause, for which it is stated in our Code of Civil Procedure a new trial will be granted, viz.: "Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property." Code, § 314, subd. 5; Barmby v. Wolfe, 44 Neb. 77, 62 N. W. 318. Error in the assessment of the amount by the jury is not raised by the portion of the assignment that the verdict is contrary to the evidence. Error in the assessment of damages must be assigned in the motion for a new trial; and, the Code having given this as one of the special grounds for a motion for new trial, it is clear that it was not included in either of the others. Coal Co. v. Holmes, 36 Neb. 858, 55 N. W. 255.

The only point that can be said to be presented by this assignment in the motion for new trial is that the verdict is so exceedingly small as to clearly appear to have been given under the influence of passion, prejudice, or undue means. It is true that there was evidence which would have warranted the assessment of a much larger sum as the amount of recovery. On the contrary, there was also testimony which tended to show that the damages were even less than the amount of the verdict; and, when viewed in connection with all the evidence adduced on the subject of the sum of damages, it is quite plain that the jury could not have been influenced by either passion, prejudice, or undue means in fixing the amount of the recovery. This being true, the portion of the attack on the verdict now under consideration must be overruled.

The plaintiff complains of the refusal of the court to give the third instruction requested to be read for him, which was as follows: "In estimating the value of plaintiff's property, you should not be governed by the price that it would bring at forced sale, or the price that could be obtained for it from a speculator who might buy it for the purpose of speculation; but you should consider what it is worth to the owner for the purpose for which he uses it, and desires to use it." The court charged the jury on the subject embraced in the instruction offered in the following language: "If you shall find for the plaintiff in this action, you should assess his damages at such sum as you shall find from the evidence that he has sustained by reason of the construction and ordinary operation of the defendant's railroad along and adjacent to plaintiff's property. The items to be considered by you in making your estimate of damages are the smoke, soot, and cinders which envelope or are thrown upon plaintiff's property, or the necessary approaches thereto, by passing engines, also the noise and jar of buildings caused by passing trains and engines, as well as the noise caused by ringing of bells, sounding of whistles, of engines used on the road, and also the inconvenience of ingress and egress to the property, if any, by being operated in an ordinary and proper manner proven. In short, you should consider every element arising out of the proper and ordinary operation of defendant's road that tends to diminish the value of plaintiff's property, so far as the same is shown by the evidence in this case." (2) In estimating the plaintiff's damages in this case, if you should find from the evidence that he has sustained any, by reason of the construction and operation of defendant's railroad, as alleged in the petition, you are at liberty to take into consideration the fair market value of plaintiff's property as it was before the road was built and in operation, and its fair market value after the road was built and in operation, and assess the plaintiff's damages at such sum as shall equal the difference between the two estimates, if you shall find there is any such difference; and, in ascertaining the fair market value of the property, you are not to determine that by what it would bring at forced sale, or from one that might buy it for speculative purposes, but what a reasonably

prudent and competent man would pay for it provided he wanted it where it is, and as it is, and for his own use, and was willing and able to buy." Without commenting upon the rule announced in the instructions asked and refused, as to whether correct or not, it is clear that the true doctrine on the subject was fully and thoroughly stated in the charge of the court in relation to the questions involved, and consequently it was not error to refuse to give the instruction requested.

The court, at request of defendant, gave the following, as a portion of its charge: "The mere fact that plaintiff and his family may sometimes be annoyed or disturbed by sound or noise occasioned by the blowing of locomotive whistles, or the ringing of locomotive bells, or by the rattling or rumbling of passing engines and cars, does not make out a case in his favor if it is an annoyance suffered by plaintiff in common with all others who happen to reside or be in the vicinity of railroads." It appears from the record that the trial court modified the instruction as originally prepared and tendered, but in what particular the record does not disclose, but, as modified, it was given. The plaintiff contends that the instruction was erroneous and misleading, in that it confined consideration to those who "may happen to reside or be in the vicinity of railroads," instead of, as it should, extending it to include the general public. We need not now determine whether the instruction is open to the objection urged against it. If it be conceded, for the sake of argument, that it is so, its only application could be to the question of whether the plaintiff had suffered any damages or not, and this question the jury solved in his favor. The instruction under discussion, it is very evident, could in no manner affect the jury in determining from the evidence the market value of the property before and after the building and commencement of the operation of the railway, and hence could not have prejudiced the plaintiff. It follows that the judgment of the district court must be affirmed. Affirmed.

DAVISON v. CRUSE.

(Supreme Court of Nebraska. April 7, 1896.)

BASTARDY PROCEEDINGS — SUFFICIENCY OF EVIDENCE—QUESTION OF FACT—WITNESS—IMPEACHMENT—CHASTITY.

1. To impeach a witness by showing a statement at variance with those made at the trial, it is necessary to call attention to such inconsistent statement, and inquire whether or not it was made by the witness at a time and place indicated.

2. Evidence of the unchastity of the complainant in a bastardy proceeding, outside the period of gestation, whether in the nature of proof of her improper conduct or of her general reputation for chastity, is irrelevant to the issues presented for trial.

3. The probable duration of the period of gestation is a question of fact, to be shown by proper evidence in each particular case wherein that question is material.

4. In bastardy proceedings, a mere preponderance of the evidence is sufficient to sustain a verdict of guilty.

(Syllabus by the Court.)

Error to district court, Douglas county; Davis, Judge.

Information on the prosecution of Lizzie B. Cruse against Alfred Davison in bastardy proceedings. There was a judgment of conviction, and defendant brings error. Affirmed.

Winter & Kauffman and A. D. McCandless, for plaintiff in error. John H. Grossman and J. B. Sheean, for defendant in error.

RYAN, C. On May 5, 1892, plaintiff filed and caused to be docketed in the district court of Douglas county a certain transcript of appeal from the justice of the peace. By her information on oath, which was certified in said transcript, Lizzie B. Cruse, an unmarried woman, on April 21, 1892, charged that she was then pregnant with a bastard child, of which Alfred Davison was the father. This cause, which was thus brought to the district court aforesaid, was therein continued till December 23, 1892, when it was called for trial. The defendant in the district court was found guilty as charged, and was adjudged the putative father of the complainant's bastard child, and charged with its maintenance in the sum of $2,088, payable in monthly installments of $12 each, until said child should attain the age of 15 years. To reverse these findings, and the judgment of the district court, the defendant has prosecuted error proceedings to this court. The questions presented will be considered in the order of their occurrence in the petition in error.

There is a recitation in the journal entry, of date December 23, 1892, that a motion of Davison for a continuance was overruled, and of this ruling there is now a great deal of complaint in the brief submitted on his behalf. It is unfortunate that there is not in the record a copy of this motion, and that the affidavit set out in the brief of plaintiff in error is to be found nowhere else than therein. It is equally unfortunate that no copy of the rules of the district court of Douglas county was offered in evidence, that we might ascertain how far, if at all, there was ground for complaint as to the action of the court in setting the case for trial at the time and on the particular docket on which the order for trial was entered. There was, in the record in the district court, a copy of the statements of the evidence of Lizzie B. Cruse given before the justice of the peace in respect to the averments contained in the information sworn to by her. This, in the district court, was not offered in evidence by either party.

The first error in the petition in error, alleged to have occurred during the progress of the trial, was the refusal of the court to permit cross-examination of the complainant touching her evidence given before the justice of the peace. She was at the time under cross-examination as to the date when she first informed Davison that she was likely to become a mother, when counsel for the plaintiff in error asked her if she was positive it was on the 23d of September, and she answered she was. This answer was followed by the question, "Then, why did you swear, in the police court, that it was not until the 1st of October?" To this question an objection was properly sustained, for several reasons, one of which was that there was in evidence nothing about a trial in police court, and another was that the question in no way tended to show that she did so testify in any court.

The next complaint in the petition in error is that the court refused to permit the defendant in the district court to introduce in evidence the cross-examination of Harry J. Hooper contained in his deposition. As to this offer plaintiff in error has quoted in his brief the following language from the record, to wit: "The deposition of Harry J. Hooper is offered in evidence. The portions marked on the margin are excluded. Exception. The cross-examination is not read in evidence by the defendant, and, after handing the deposition to counsel on the other side, and he refusing to read it, defendant offers to read that portion of the deposition which the court refused to allow the defendant to do, the part being in cross-examination." Upon this quoted part of the record, it is urged that there affirmatively appear two errors,—one, as to the portion of the direct examination excluded; the other, as to the entire cross-examination. The part of the direct examination excluded was devoted to the reputation of Lizzie B. Cruse for chastity, during almost two years, when she was, for the most part, a domestic in the hotel of the witness at Pawnee City, and to proof of improper conduct on her part. This period ended in September, 1891. It has been held by this court that evidence of unchaste conduct of the prosecutrix not confined to the probable period of gestation is incompetent. Masters v. Marsh, 19 Neb. 458, 27 N. W. 438. There was none of the direct examination excluded in which the misconduct of the prosecutrix was fixed more definitely than "June, July, or August." The only proof submitted as to the length of the period of gestation was by the testimony of Dr. Nickles, who stated that it was about 280 days, and this witness also testified that the child of Lizzie B. Cruse was born on June 8, 1892. If we assume 280 days as the period of gestation, it could only extend back to the 1st of September, 1891, in this case. Hence, evidence of the unchastity of the prosecutrix anterior to this time, whether established by reputation or proof of specific acts, was irrelevant. Because of language of Cobb, J., arguendo, in Masters v. Marsh, supra, the defendant in error's counsel say, in their brief: "And the period of gestation, as fixed by law of this state, was limited to August 13 and September 30, 1891." Lest there may be misapprehension on this point, we most emphatically deny this soft impeachment. This is not a question of law. It is a question of fact, to be determined upon the evidence submitted in each particular case; and in this respect it is quite analogous to the existence of negligence as contributing to personal injuries. The complaint as to the exclusion of the cross-examination of Mr. Hooper is in effect determined by what has been said as to the inadmissibility of the part of the direct evidence by which was called in question the chastity of Lizzie B. Cruse previous to September 1, 1891; for the cross-examination of Hooper was on this same line.

It is urged that, in admitting in evidence only the fourth interrogatory and answer thereto of the deposition of W. A. Spees, there was error prejudicial to the plaintiff in error. The interrogatory and answer referred to, which were read to the jury, fixed the months during which W. A. Armstrong boarded at the hotel in Wymore in which the prosecutrix was a domestic, as being the months of August and September, 1891; and this was the only matter at all relevant in this deposition. The testimony of H. W. Crowe was with reference to the improper conduct of Lizzie B. Cruse in 1888, and it was therefore properly excluded, under the rule already stated and applied.

Plaintiff in error requested the court to give instruction No. 1, and the refusal to give this instruction was, in the motion for a new trial, assigned as error, jointly with the refusal to give instruction No. 2, asked by the same party to this litigation. The aforesaid instruction No. 1 was in the following language: "You are instructed that the evidence of the plaintiff shows that she was not a resident of Douglas county, Nebraska, at the time this suit was commenced, and your verdict must therefore be for the defendant." There was uncontradicted evidence that the complainant was and had been a resident of Douglas county since April 1, 1892. The complaint was filed with the justice of the peace April 21, 1892, and whether or not, at that time, she had a legal settlement in another county, was immaterial. Clark v. Carey, 41 Neb. 780, 60 N. W. 78. This instruction was therefore properly refused, and this precludes an examination of instruction No. 2 grouped with it by the motion for a new trial.

There was, at most, conflicting evidence, and though the jury accepted as true that of the complainant, we cannot, on that account

alone, say its verdict was without proper support. Robb v. Hewitt, 39 Neb. 217, 58 N. W. 88; Dukehart v. Coughman, 36 Neb. 412, 54 N. W. 680. The judgment of the district court is affirmed.

STOVER v. HOUGH et al.

(Supreme Court of Nebraska. April 7, 1896.)

VACATION OF JUDGMENT — GROUNDS — PRACTICE — HARMLESS ERROR.

1. To entitle a party, under the provisions of section 82 of the Code of Civil Procedure, to open a judgment rendered against him upon service by publication, it must appear that he had no actual notice of the pendency of the action in time to appear therein and make his defense. Should he fail to establish the want of such notice by a preponderance of the evidence, the motion to open the judgment must be denied, although all other requirements of said section have been complied with.

2. On the hearing of an application to open a judgment under said section 82, the adverse party may present counter affidavits, to establish that the applicant had actual notice of pendency of the action a sufficient time before judgment to appear in court and make his defense.

3. A judgment will not be reversed merely for the admission of incompetent or irrelevant evidence in a cause tried to the court without a jury.

(Syllabus by the Court.)

Error to district court, Douglas county; Keysor, Judge.

Action by David M. Hough and another against James E. Stover and another, partners as James E. Stover & Co., in which there was a default judgment for plaintiffs. Defendant James E. Stover moved to set the same aside. There was an order denying the motion, and he brings error. Affirmed.

Andrew Bevins, for plaintiff in error. Wm. E. Healey and Henry P. Stoddart, for defendant in error.

NORVAL, J. This is a proceeding in error to review the action of the district court in refusing to open a judgment rendered therein against James E. Stover, upon service by publication alone. On the 4th day of October, 1888, David M. Hough and Charles P. Ford instituted an action in the district court of Douglas county against James E. Stover and Anna Stover, co-partners as James E. Stover & Co., on an account for boots and shoes alleged to have been sold and delivered by plaintiffs to defendants. An order of attachment was issued, on the ground of nonresidence of the defendants, and certain real estate was attached. Service of summons was made in the cause by publication only, and the defendants made no appearance. The default of James E. Stover was entered by the court on May 2, 1889; and, nine days later, judgment was rendered against him, and in favor of the plaintiffs, in the sum of $580.90, and it was further ordered that the attached property be sold. On the 21st day of June, 1892, James E. Stover filed a motion in said cause to open said judgment, under the provisions of section 82 of the Code of Civil Procedure, and permit him to defend. The motion was accompanied by an answer consisting of a general denial of the allegations of the plaintiffs' petition, also the affidavit of Mr. Stover setting forth that no service of summons was had upon him except by publication, and that he had no actual notice of the pendency of the suit in time to appear and defend before such judgment was rendered against him. Notice of the motion was duly given to the plaintiffs. A hearing was had upon affidavits and counter affidavits and documentary evidence, and the motion was overruled by the court, which order is before us for review.

By section 82 of the Code of Civil Procedure, a party against whom a judgment has been rendered upon service by publication merely is entitled, as a matter of right, to have the judgment opened, and be let in to defend, upon complying with the provisions of said section. The application must be made within five years after the entry of the judgment, and it must be made to appear that the defendant had no actual notice of the pendency of the action in time to appear in court and make his defense. The application in this case to open the judgment was timely made. The controverted question is whether Stover had actual notice of the pendency of the suit. Mr. Stover, in his affidavit, states positively that he had no such notice. Upon the hearing of the motion, there were read the affidavits of William H. Duffield and E. G. McGilten. The former deposed, in effect, that prior to the month of October, 1888, affiant received a conveyance from the defendant Stover for certain real estate, described in the affidavit by metes and bounds, being the same premises which were attached in this action; that in said month of October, or during November of the same year, which was after the publication of the summons, and more than five months prior to the date of the judgment, affiant had a conversation with defendant in the city of Chicago, during which "Stover stated to and informed the affiant that the real estate above referred to had been attached in a suit brought against him by Hough and Ford, and that the amount of the claim of said firm against him for which such suit was brought was about $500"; and, further, that such attachment proceedings had been commenced but a short time prior to the date of said conversation. E. G. McGilten deposed, substantially, that he is one of the attorneys herein; that in the month of April, 1889, about a week before the end of said month, he met Stover in the latter's place of business, located on Thirteenth street, between Harney and Howard streets, in the city of Omaha, and at that time and place deponent informed Stover of the pendency of this action against him, to which the defendant replied that he was aware of the fact, but

that plaintiff would never be able to collect a dollar, for the reason that he (Stover) had nothing, and that the property seized under the writ of attachment did not belong to him, but to his father-in-law; furthermore, that the defendant, in the same conversation, admitted the validity of the account upon which suit was brought, and that he was individually liable for the payment thereof. James E. Stover testified, in rebuttal, that he is not acquainted with the said E. G. McGilten, and never conversed with him upon any subject, and that defendant did not commence business at the place in which McGilten stated the conversation occurred, nor in that vicinity, until December 26, 1891. The defendant, in one particular (namely, as to the time he commenced business on South Thirteenth street, in Omaha), is corroborated by the testimony of two or more witnesses. The defendant, however, failed to deny having the conversation testified to by Mr. Duffield which occurred in Chicago prior to the rendition of the judgment in question. While the evidence adduced on the hearing in the district court was conflicting, it was sufficient to justify the finding that the defendant had actual notice of the pendency of the suit in ample time to have made a defense had he desired to do so. Having had such notice, the motion to open the judgment was properly denied. Merriam v. Gorden, 20 Neb. 405.

It is claimed that the court erred in admitting in evidence the affidavits of Duffield, McGilten, and Healey. The section of the statute above referred to expressly provides that the adverse party, on the hearing of an application to open a judgment, may present counter affidavits for the purpose of showing that the defendant had notice of the pendency of the suit in time to appear in court and make his defense. The affidavits objected to tended to prove that the defendant had actual notice of the pendency of the action; hence the court did not err in admitting them.

It is urged that there was error in admitting the transcript of the evidence of James E. Stover and Andrew Bivins, given in another action. A sufficient answer to the contention is that the hearing was to the court without a jury; therefore, the admission of incompetent or irrelevant evidence is not reversible error. Enyeart v. Davis, 17 Neb. 228, 22 N. W. 449; Richardson v. Doty, 25 Neb. 424, 41 N. W. 282; Ward v. Parlin, 30 Neb. 376, 46 N. W. 529. Excluding the evidence which is made the basis of this assignment, there yet remained sufficient competent evidence to sustain the order of the court.

It is stated in the brief that, more than six months after the suit was brought, the plaintiff voluntarily dismissed it as to all the defendants except James E. Stover, and the judgment sought to be opened was not rendered in the original action, but is a judgment against James E. Stover personally. The record fails to disclose a voluntary dismissal as to any defendant. It is true, judgment was entered against James E. Stover alone; yet if there was any error in rendering a judgment against one of the partners, conceding the action was against the firm, and not the individual members thereof, it cannot be reviewed in this proceeding, since such judgment was pronounced more than one year before the cause was brought to this court. Code Civ. Proc. § 592.

We discover no reversible error in the record, and the order is affirmed.

BARNHOUSE et al. v. VILLAGE OF ADAMS.

(Supreme Court of Nebraska. April 7, 1896.)

REVIEW ON APPEAL—FINAL JUDGMENT.

To entitle a party to a review by this court of the rulings of the district court, there must have been a final judgment rendered on the merits of the cause in the trial court.

(Syllabus by the Court.)

Error to district court, Gage county; Bush, Judge.

Action by William B. Barnhouse and others against the village of Adams. Judgment for defendant, and plaintiffs bring error. Dismissed.

J. C. Johnston and C. E. Bush, for plaintiffs in error. Geo. A. Murphy, for defendant in error.

HARRISON, J. This action or proceeding was commenced in the district court of Gage county, the object or purpose being to have disconnected from the village of Adams, in such county, certain pieces or tracts of land or territory described in the petition. The descriptions of the tracts of land and averments as to their ownership as stated in the petition, to the extent we need notice them, were as follows: "These applicants further aver that said Mrs. S. Disher owns the north half of the northeast quarter of said section 27, and also the northeast quarter of the northwest quarter of said section 27; that said Benjamin Harnley owns the northwest quarter of the northwest quarter of said section 27, and blocks 3 and 7 and the east half of block 2 of Harnley's division, which is a part of the south half of the northwest quarter of said section 27; that said Jacob Hildebrand owns the southwest quarter of said section 27; that said T. J. Iden owns the south half of the southeast quarter of said section 27; that said Mrs. Bryson owns the west 20 acres of the south half of the southwest quarter of said section 26; and that said Naomi and T. D. Moseby own the west 20 acres of the north half of the southwest quarter of said section 26; also, the west 20 acres of the south half of the northwest quarter of said section 26. These applicants further aver that said W. B. Barnhouse owns a part of the south half of the northwest

quarter of said section 27, which is described as follows: Commencing at the center of the south line of the south half of the northwest quarter of section 27, in township 6, range 8 east, running thence east eighteen rods, thence north 36 rods, thence west 18 rods, and thence south 36 rods; also commencing at same point, and running thence north 36 rods, thence west 6 rods, thence south 36 rods, and thence east 6 rods, to place of beginning, which is also upon the border and within the corporate limits of said village of Adams, and said Barnhouse is the sole occupant thereof."

An answer was filed for the village, to which there was a reply, and of the issues joined there was a trial to the court, with the following result, according to the record presented in this court: "And now, on this 3rd day of March, A. D. 1893, it being the twenty-third day of the term, this cause coming on to be heard, and all parties being present in open court, and after the introduction of the evidence and arguments of counsel, the court, being fully advised in the premises, finds that plaintiff Elizabeth Bryson is the owner of the west twenty acres of the south half of the southwest quarter of section twenty-six, mentioned in the petition, and finds generally in favor of the said Bryson. The court further finds for plaintiff Benjamin Harnley, and that he is the owner of the northwest quarter of the northwest quarter of section twenty-seven, mentioned in the petition. The court finds generally in favor of the plaintiff Jacob Hildebrand, and that he is the owner of the west half of the southwest quarter of section twenty-seven, and all of the southeast quarter of the southwest quarter of said section 27, except a strip recently sold off of the north side thereof. The court further finds for the plaintiff Thomas J. Iden, and that he is the owner of the south half of the southeast quarter of said section twenty-seven. The court further finds that all of the lands above mentioned are on the border of the village of Adams; and that all of the said lands are used for farming purposes; and that it is an injury thereto, and to the owners thereof, to have said lands retained within the corporate limits of said village of Adams, Nebraska; and that said lands were wrongfully taken into said corporate limits of said village of Adams, Nebraska. The court further finds, as to the balance and residue of the lands and real estate mentioned and described in said petition, for the defendant, to which latter finding plaintiffs, each of them, except. Whereupon, said plaintiffs generally, and plaintiffs Disher, Naomi Moseby, and Hildebrand each for himself and herself, having filed motions for new trial, it is ordered, considered, and adjudged by the court that said motions, and each of them, be, and the same are hereby, overruled, to which ruling said plaintiffs generally, and each of the above-named plaintiffs separately, except. Whereupon it is considered, adjudged, and decreed that the west 20 acres of the south half of the southwest quarter of said section twenty-six, in township six north, of range eight, and the northwest quarter of the northwest quarter of section twenty-seven, in township six north, of range eight, and the west half of the southwest quarter of said section twenty-seven, and all that part of the southeast quarter of the southwest quarter of said section twenty-seven not heretofore sold by Jacob Hildebrand, and all of the south half of the southeast quarter of said section twenty-seven, be, and the same are hereby, disconnected from and taken out of the corporate limits of said village of Adams, and that the same from henceforth cease to be a part of the corporate limits of said village. And now, on this 15th day of March, 1893, it being the thirty-first day of the term, this cause coming on to be heard further, and each party is ordered to pay his own costs." Separate motions for a new trial were filed on behalf of Jacob Hildebrand, Sarah Disher, and Mrs. T. D. Moseby, and a joint one filed for all the plaintiffs, the journal entry in regard to the disposition made by them being as follows: "And now, on this 17th day of March, 1893, it being the thirty-second day of the term, this cause coming on to be heard upon the motions for a new trial, and the court, being duly advised in the premises, overrules all of said motions, to which ruling of the court the plaintiffs except. Plaintiffs pray an appeal, which is allowed by the court, and forty days given to prepare bill of exceptions."

The complaint in the petition in error is in the following terms: "The appellants complain of the said defendant, for that on the 1st day of March, A. D. 1893, the appellee recovered a judgment against appellants herein in the district court of Gage county, Nebraska, dismissing appellants' cause of action in a case wherein William B. Barnhouse et al. were plaintiffs, and the village of Adams was defendant. A transcript of the proceedings containing said final judgment is filed herewith."

By referring back to the journal entry of the decree which was rendered, it will be ascertained that there was no such judgment as is alleged to be erroneous. There is a final decree as to the right of some parties to the action by which the territory belonging to them was disconnected from the village; but as to the rights of the parties who removed the case to this court, while there was a general finding adverse to them, there is no final disposition of them, nor is the action as to them dismissed. Being no final judgment, there is nothing which this court can affirm or reverse. The judgment for costs is not one from which appeal or error will lie. It follows that the petition in error must be dismissed, and such order is hereby made. Dismissed.

FITZGERALD v. McCLAY et al.

(Supreme Court of Nebraska. April 7, 1896.)

CONTRACTOR'S BOND—LIABILITY OF SURETIES.

1. P. and S. entered into a contract with the state to erect for it a building at a stipulated sum. The contract required, inter alia, that the contractor should pay for all labor performed or materials furnished, and a bond for the faithful performance of the contract was given. *Held*, that the sureties on such bond are liable to a subcontractor for materials furnished by him and used in the construction of the building.

2. *Held*, that the petition states a cause of action.

(Syllabus by the Court.)

Error to district court, Lancaster county; Hall, Judge.

Action by John Fitzgerald against J. H. McClay and P. H. Cooper. Judgment for defendants, and plaintiff appeals. Reversed.

A. G. Greenlee, for plaintiff in error. Saml. J. Tuttle, for defendants in error.

NORVAL, J. Thomas Price and J. N. Shoemaker, on the 4th day of March, 1889, entered into a written contract with the state of Nebraska, through the board of public lands and buildings, whereby they agreed to furnish all the labor and materials necessary for the construction of a brick building for an engine house on the grounds at the hospital for the insane at Lincoln, at the stipulated sum of $11,000. One-half thereof was to be paid when the roof was on, and the remainder when the building was fully completed. The contract contained this provision: "And it is further agreed that the first party [Price and Shoemaker] will pay off in full all laborers and material men for labor performed or material furnished, so that each and every person connected with this contract may receive his just dues." At the time this contract was made, a bond, in the sum of $11,000, for the faithful performance of the contract, was executed to the state by Price and Shoemaker as principals, and J. H. McClay and P. H. Cooper as sureties, which was accepted and approved by the state. The bond contained the same conditions as those considered in Sample v. Hale, 34 Neb. 220, 51 N. W. 837, and Hickman v. Layne, 47 Neb. —, 66 N. W. 298. This action was brought by John Fitzgerald against the principals and sureties upon the bond of indemnity already mentioned to recover for materials furnished the contractors, Price and Shoemaker, and used by them in the construction of said building. The sureties interposed a general demurrer to the petition, which was sustained, and as to them the court dismissed the action. To reverse the judgment, the plaintiff prosecutes error.

The petition alleges the execution and delivery of such contract and bond, and copies thereof are made parts of the pleading. It is also averred that, in pursuance of said contract, Price and Shoemaker purchased of plaintiff, for use in said building, 200,000 bricks, at the agreed price of $10 per thousand; that said bricks were sold, furnished, and delivered by plaintiff, and the same were used in said building; that no part of the purchase money has been paid, except the sum of $1,400, and that there is due the sum of $609, with interest at 7 per cent. from April 11, 1889; that by reason of the failure of said Price and Shoemaker to pay said balance, according to the requirements and stipulations of said contract, the conditions of said bond have been broken, and the defendant sureties have become liable to the plaintiff for the full amount so due for said bricks. The demurrer was doubtless sustained upon the ground that the bond was given alone to protect the state, and that third parties could not avail themselves of the stipulations. But, since the decision was rendered, this court has frequently held, in suits brought on bonds given for the faithful performance of a building contract similar to the one before us, that a person furnishing labor or materials for the principal in such bond may maintain an action upon the bond to recover the price of such labor or materials. Sample v. Hale, 34 Neb. 220, 51 N. W. 837; Habig v. Layne, 38 Neb. 743, 57 N. W. 539; Doll v. Crume, 41 Neb. 655, 59 N. W. 806; Heating Co. v. McClay, 43 Neb. 649, 62 N. W. 50; Kauffman v. Cooper, 46 Neb. 644, 65 N. W. 796; Lyman v. City of Lincoln, 38 Neb. 794, 57 N. W. 531. The petition shows a breach of the conditions of the bond, and, tested by the rule laid down in the foregoing authorities, it states a cause of action against the sureties. The judgment will be reversed, and the cause remanded for further proceedings. Reversed and remanded.

POST v. OLMSTED.

(Supreme Court of Nebraska. April 7, 1896.)

ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE — VERDICT.

1. Evidence in an action by an administrator for injuries causing the death of his decedent examined, and *held* sufficient to sustain the verdict.

2. A verdict of $2,400 in such a case *held* not so clearly excessive as to warrant a reversal, where the deceased was a boy 17 years old, a competent compositor, able to earn $4 a day, and his next of kin his father, 46 years old, a poor man, with four younger children, although there was no evidence that the son had as yet supplied his father with any considerable amounts of money.

3. Other questions raised, not being supported by any sufficient assignments in the motion for a new trial or petition in error, not considered.

(Syllabus by the Court.)

Error to district court, Douglas county; Scott, Judge.

Action by Robert H. Olmsted, administrator of William Allen Daniel, deceased, against Bernhard H. Post. There was a judgment for plaintiff, and defendant brings error. Affirmed.

M. V. Gannon, Martin Langdon, W. J. Clair, and Cowin & McHugh, for plaintiff in error. McCoy & Olmsted, for defendant in error.

IRVINE, C. This was an action by Olmsted, as administrator of William Allen Daniel, deceased, to recover from Post for injuries causing the death of plaintiff's decedent, alleged to be due to the negligence of the defendant. There were a verdict and judgment in the district court for the plaintiff for $2,400, which the defendant seeks to reverse. We designate the parties as they appeared in the district court. The defendant, in a very elaborate brief, urges a number of technical objections to the record, which he claims preclude us from an examination of any of the errors assigned. The points so raised are so numerous that we pass them over without a detailed consideration, inasmuch as a consideration of the case on its merits, so far as is permitted by already well-settled rules of practice, requires an affirmance of the judgment.

Complaint is made of certain rulings of the trial court on the admission of evidence. These we cannot consider, as there is no assignment in the petition in error presenting such questions.

Complaint is also made of certain instructions given by the court. In the motion for a new trial, and also in the petition in error, the only assignment with reference to these instructions is that "the court erred in giving instructions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11, which was duly excepted to at the time by the defendant." Under a well-established rule, this assignment can be considered no further than to ascertain that one of those complained of was correct. It is at once apparent from an examination of the charge that a number were free from error. So this assignment must fail.

Another assignment is that the court erred in not giving instructions 1 and 2, asked by the defendant. No such instructions appear in the record.

A further assignment is that the court erred in overruling the motion for a new trial. As the motion for a new trial assigns six grounds, and no one is designated in the assignment in the petition in error, this presents nothing for review.

The remaining assignments are that the verdict is not supported by sufficient evidence, and that it is contrary to law. It is not contrary to law if supported by sufficient evidence. The evidence tends to show that the defendant was a dairyman, using in his business a number of teams and wagons. In January, 1891, two of these wagons, loaded with malt, were being drawn along Seventeenth street, in Omaha, each propelled by three horses hitched abreast of one another. The plaintiff's decedent, a boy 17 years of age, was riding upon a hand sled attached to the rear of the foremost wagon. The horses attached to both wagons were walking, but the rear wagon was approaching the front wagon. It continued to draw nearer, until one of the horses attached to the rear wagon stepped upon the dragging coat of the boy, which pulled him from the sled. The horses and wagon then passed over him, inflicting injuries which resulted in death. There is evidence tending to show that, for some distance before the accident occurred, the horses attached to the rear wagon were close behind the boy; that the boy shouted to the driver to stop, and that bystanders also shouted to the driver, and warned him of the danger; that the driver kept on, regardless of these warnings, until the accident, and continued without stopping until bystanders interfered. Admitting, as argued by the defendant, that the boy's action in placing himself in such a position was negligent, still there is ample evidence from the foregoing facts that, notwithstanding such negligence on his part, the driver of the rear wagon ascertained his perilous position, and could have drawn his team aside, or stopped it, or slackened its pace, in time to have avoided the injury, and that ordinary prudence would have required such a course. There is ample in the evidence to show not only negligence causing the injury subsequent to the contributory negligence of the boy, but even wanton and criminal recklessness on the part of the driver. There is also sufficient to justify the jury in finding that this reckless disregard of the boy's safety continued after a period when, by reason of the near approach of the horses, it had become impossible for the boy to extricate himself from his dangerous position.

It is also claimed that the evidence is insufficient to sustain the amount of the verdict. Conceding, contrary to several decisions of this court, that this question can be raised under a general assignment of the insufficiency of the evidence to sustain the verdict, we do not think the verdict can be declared excessive. The boy was 17 years of age. He was a "sub." compositor on a daily paper, and stood next in line for a permanent position. Within a month before his death, he had earned in one night $6.16, in six nights $22.16, and in three nights $9.24. The foreman testified that his earning capacity was about $4 per night on an average. The evidence tends to show that he was not only a competent compositor, but that he was of naturally industrious and economical habits. His expectancy of life, as shown by the evidence, was more than 43 years. His next of kin was his father, 46 years old, with an expectancy of 24 years, a poor man, with four children younger than the deceased. While it is not shown that he had yet contributed any considerable amount to his father's support, we think that the legal relations and other facts in evidence were sufficient to sustain a verdict for the amount

rendered. The pecuniary damage to the next of kin is always more or less a matter of estimate, if not of conjecture; and, under acts similar to ours, similar verdicts have been often sustained under slighter proof of expectancy. Railway Co. v. Dunden, 37 Kan. 1, 14 Pac. 501; Johnson v. Railway Co., 64 Wis. 425, 25 N. W. 223. Judgment affirmed.

CHICAGO, B. & Q. R. CO. v. BEATRICE RAPID-TRANSIT & POWER CO.

(Supreme Court of Nebraska. April 7, 1896.)

RAILROADS—EASEMENT IN CROSSING—APPROPRIATION BY STREET RAILWAY.

1. An ordinance authorizing the crossing of the streets of a city by the tracks of a railroad company confers upon the corporation therein named no exclusive use of such crossing, but a use to be enjoyed in common with the general public.

2. A railroad company which has, by ordinance, acquired a permanent easement in the streets of a city, is not entitled to compensation from a street-railway company as a condition to the crossing of its tracks by the latter, under a grant of power from the city.

3. Calvert v. State, 52 N. W. 687, 34 Neb. 616, distinguished.

(Syllabus by the Court.)

Error to district court, Gage county; Babcock, Judge.

Petition by the Chicago, Burlington & Quincy Railroad Company against M. C. Steele, receiver of the Beatrice Rapid-Transit & Power Company, for an injunction. There was a judgment for defendant, and plaintiff brings error. Affirmed.

John H. Ames, A. Hazlett, and Marquett & Deweese, for plaintiff in error. J. E. Cobbey, for defendant in error.

POST, C. J. A question distinctly presented by this record is whether a steam-railroad company, which has, by ordinance, acquired a permanent easement in the streets of a city, is entitled to compensation from a street-railway company as a condition to the crossing of its tracks by the latter, under a grant of power from the city. Adjudications directly in point are by no means numerous, although the question appears, whenever presented for determination, to have been resolved in the negative as an independent proposition, unaffected by the inquiry whether street-car tracks are or are not an additional burden upon adjoining private property.

In New York, N. H. & H. R. Co. v. Bridgeport Traction Co. (Conn.) 32 Atl. 953, the identical question was presented upon the application of the plaintiff for an injunction to restrain the threatened crossing by the defendant of its tracks in the city of Bridgeport. In the opinion of the court, reversing the decree below for the plaintiff, this language is used: "It is further insisted that these special grants, if otherwise effectual, give the defendant no right to construct the crossing without first making compensation for the direct damage it will do to the plaintiff's property. The injunction was asked to prevent a threatened obstruction of the plaintiff's right of way. It is not alleged or found that it owns the fee of the highway. It has only a right to cross it at grade. The defendant's tracks are laid upon the highway by the authority of the state, and as a highway for public travel. We are not called upon to consider whether electric cars impose any additional burden upon land occupied for a highway, for which the owner of such land can claim compensation. The plaintiff is not in a position to raise that question. It claims that the proposed crossing at Fairfield avenue will affect the safe and beneficial use of its right of way at that point, and thereby impair the general value of its franchises and property. But it holds these subject to the police power of the state, under which the use of highways for all purposes of public travel is fully within the control of the legislature." The supreme court of Indiana, in Chicago & C. Terminal Ry. Co. v. Whiting, H. & E. C. St. Ry. Co., 139 Ind. 297, 38 N. E. 604, affirmed a decree of the circuit court restraining the defendant below, a steam-railroad company, from interfering with the construction of the plaintiff's street-car line across its tracks in the city of Hammond. Referring to the question of compensation, it is there said: "Appellant contends that this will be a burden and a hindrance to the free and unobstructed use of the appellant's steam railway, which, it is claimed, is a taking of private property without just compensation, in violation of the constitution. True, it is a hindrance and an obstruction to the use of appellant's steam railway. But, having obtained its right of way, subject to the burden of the easement in the public generally, and the street railway being entitled to the use of that easement, all the rights appellant obtained in the street for its steam railway were subject to the right of the street railway to use the street. In short, the appellant's rights, obtained in the use of the streets for its steam railway, were subject to the burden of the appellee's use thereof, in the ordinary and proper manner, for its street railway. The complaint shows that appellee was only proposing to use the streets at the crossings in the ordinary, and in a proper, manner for the construction of street-railway crossings, and that it had been hindered and obstructed therein by the appellant by the use of force. It would, therefore, not be a taking of private property without just compensation, because it does not propose to take from appellant anything it ever owned. It never owned its right of way over and across the street named free from the burden of the public easement, a part of which belongs to the appellee, the street railway." In Du Bois Traction Pass. Ry. Co. v. Buffalo, R. & P. Ry. Co., 149 Pa. St. 1,

24 Atl. 179, the supreme court approve of an opinion by the common pleas judge from which we quote the following: "There is, therefore, no such injury or damage done to the respondent's rights, as are the subject of compensation in damages. The crossing of its track by the passenger railway company gives no greater right to damages, in the view we take of the case, than it would have if the claim was made against an omnibus line." The same question was carefully considered by the supreme court of Illinois in Chicago, B. & Q. R. Co. v. West Chicago St. R. Co., 156 Ill. 255, 40 N. E. 1008, in which it is held that an ordinance of the city of Chicago, authorizing the plaintiff to lay and operate its tracks across certain streets, did not confer upon it an exclusive use of such crossings, but a use thereof to be enjoyed in common with the public; also, that a railroad company, which has acquired a permanent easement in the streets crossed by its tracks, is not entitled to compensation for the crossing of such tracks by a street-railway company, under permission from the city. Such easement being subordinate to the rights of the public, and the use of street cars being a legitimate exercise of the public right, it is in no sense a violation thereof.

There are to be found many cases which rest upon the same principle as the foregoing, and in harmony therewith, but involving controversies between railroad companies or between street-railway companies, claiming superior easements in public streets. See Kansas City, St. J. & C. B. R. Co. v. St. Joseph Terminal R. Co., 97 Mo. 457, 10 S. W. 826; Highland Ave. & B. Ry. Co. v. Birmingham U. Ry. Co. (Ala.) 9 South. 568; Market St. Ry. Co. v. Central Ry. Co., 51 Cal. 583; Omaha Horse Ry. Co. v. Cable Tramway Co., 32 Fed. 727. Calvert v. State, 34 Neb. 616, 52 N. W. 687, cited as opposed to the conclusion announced, is not in point, as that case turned upon an entirely different question. True, the subject here involved was there suggested, although incidentally, as shown by the following language of Maxwell, C. J., on page 632, 34 Neb., and page 687, 52 N. W.: "Whether the right exists to construct such a track across a network of railway tracks, where trains are being constantly made up, we do not decide, because the question is not presented." The doctrine of the cases cited, and which to us appears altogether reasonable and sound, is that a railroad company acquires no exclusive use of streets, crossed by its tracks, with the consent of the city or other municipal body, but must enjoy the right so conferred in common with the general public; that it is presumed to have contemplated the adoption of such improved means of travel as the exigencies of the case require in order to best subserve the public interest and necessities; and that any mere inconvenience suffered by it on account of the crossing of its lines by the tracks of street railways by permission of the proper authorities is damnum absque injuria.

There are other questions presented by the record, and other sufficient reasons for affirming the decree of the district court, but which, in view of the conclusion above stated, need not be noticed. Affirmed.

BURLINGTON & M. R. R. CO. IN NEBRASKA v. GORSUCH.

(Supreme Court of Nebraska. April 7, 1896.)

RAILROADS—LIABILITY FOR STOCK KILLED—EVIDENCE—INSTRUCTIONS—HARMLESS ERROR.

1. Evidence examined, and *held* to present a question of negligence on the part of the defendant in the action for the determination of the jury, and to support their finding on such question.

2. The giving of an instruction which is not applicable to the issues or evidence in a case does not call for the reversal of the judgment, when no prejudice resulted to the rights of the complaining party.

3. The refusal of the trial court to give certain instructions requested by plaintiff in error examined, and *held* not erroneous.

4. Where, in the trial of a cause, instructions are given which in substance are objectionable, and some of which are in conflict, but it appears that the jury were not misled thereby, and no prejudice resulted to the rights of the complaining party, there is no sufficient cause for a reversal.

(Syllabus by the Court.)

Error to district court, Adams county; Beall, Judge.

Action by E. C. Gorsuch against the Burlington & Missouri River Railroad Company in Nebraska. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Dilworth & Smith and Marquett & Deweese, for plaintiff in error. Tibbets, Morey & Ferris and S. H. Smith, for defendant in error.

HARRISON, J. The defendant in error instituted this action, in the district court of Adams county, to recover of plaintiff in error damages alleged to have accrued to defendant in error by reason of the agents and employés of plaintiff in error so negligently running one of its trains on and over its road and track as to kill, or cause to be killed, one dark brown horse, which belonged to defendant in error, of the value of $125. The petition in the case was based upon the statutory liability of the company for injury to live stock on its tracks or line of road, where there had been a failure to comply with the requirements of the statute in regard to building a fence along on either side of its line of road; also, on the negligent operation of one of the company's engines or trains. A trial of the issues resulted in a verdict in favor of defendant in error, and after a motion for a new trial filed in behalf of the company was heard

and overruled, judgment was rendered on the verdict. To obtain a review of the proceedings during the trial, the company has prosecuted error proceedings to this court.

It is contended by counsel for the company that the action was one predicated upon whatever liability might have arisen from the failure of the company to fence its right of way, coupled with the other facts and circumstances, incident to the occurrence, which resulted in an injury to the animal (a horse), by which it was rendered entirely useless, and not because of any negligence of the employés of the company in the operation of its train. To determine this, and, further, whether it was error to submit the question of such negligence to the jury, a knowledge of some of the salient points of the testimony becomes necessary. Hence we will, as briefly as may be, state them. The engineer in charge of the engine pulling the train testified, in part, as follows: "A. Well, when I pulled over the junction switch at Kenesaw I saw some horses on the track about a mile from Kenesaw,—four or five; I think, five. I pulled on up towards them, and they moved up. They were below a crossing,—a road crossing east of the road crossing. And when they came to the crossing they slowed up, and let me run within about twenty-five or thirty rods. I gave the alarm then, and the horses started, and run on. Q. Where did they start? Were they in the track? A. Some of them were in the track, and some beside the track,—two or three in the track,—but they changed. Q. State what you done. A. A mile from the crossing there is another crossing, and when they run up to that crossing I sounded the alarm again, and they slowed up until I came within probably 20 rods again; and somewhere near a mile from that crossing is a bridge. So I held back, and did not make any alarm or anything, until they run into the bridge? Q. How far was you from them when they run into the bridge? A. About 80 rods. Q. What is the condition of the track along there? A. Well, there is some places there is a little cut, and some places a small fill, and other places level. There is two road crossings between where I seen them." He said, further, that he had the train under such control, from when he sounded the stock alarm until he stopped near the trestle or bridge, that he could have stopped at any time before reaching or coming up with the horses, and in respect to the speed of the train said: "Q. About how fast was you running at any one time? A. Oh, I run probably 8 or 10 miles an hour until I gave the alarm the first time. Q. And from that on? A. I run probably 10 or 12 miles an hour. After the horses crossed the crossing, they run pretty lively, and got ahead quite a ways. I slowed up, and had to pull up again to catch up. * * * I wasn't any closer than 20 rods, and I think I could stop in that distance. Q. You wasn't closer than 20 rods at any time? A. Not until they got on the bridge." He also said that he knew of the existence of the trestle or bridge, and its location. "Q. Did you come to any stop from the time you started the horses until they came into the bridge? A. No, sir. Q. Could you have come to a stop? A. Yes, sir. Q. Easily? A. Yes, sir." The testimony of the fireman agreed in the main with that of the engineer; also, in substance, did that of the conductor.

The evidence on the part of the plaintiff tended to show that the train (a freight train) was running at about its usual rate of speed, as the witnesses had noticed similar trains on this line at this particular place, and, after pulling up near the horses, followed them along the track, about 10 rods behind them, for a distance of one mile or more, to where there was a cut, and 30 or 40 rods beyond the further end of the cut was located a bridge; that at this end of the cut the track was almost level with the ground or land on either side; that there was a fill or embankment comprising the approach to the trestle, which, at the bridge, was 4, 6, or 8 feet high; that the engine was about 6 or 10 rods behind the horse which was hurt, when he ran or jumped on the trestle. We infer that the legs of the horse went down into the spaces between the timbers of the trestle, although there was no direct evidence to such effect. All agree, however, that the train was stopped just before it reached the bridge, and the train men and some passengers rolled the horse off the bridge and that one of his front legs was broken, which rendered him entirely valueless. There was no fence on either side of the track at the point where the horses went upon it, or any portion of it on which they ran, up to and beyond the bridge where the horse was injured.

It seems clear that the testimony was mainly directed to an effort on the part of defendant in error to prove the want of ordinary care on the part of the men running the train, or to show acts by them which, when taken in connection with all the surrounding circumstances, showed negligence to a degree which rendered the company liable for any injuries to the horse; and, on the part of the company, to combating or controverting any such construction or belief, arising from the circumstances and acts which caused the injury to the horse. This being the theory upon which both parties tried the cause, the question of negligence or no negligence was, under the evidence adduced, one for determination by the jury. It was proper to submit it to them, and their answer to this question, upon the evidence, will not be disturbed.

Of the instructions prepared on behalf of the company, and requested to be read to the jury, paragraphs 1 and 2 were as follows: "(1) The court instructs the jury that, if they shall find that the horse of plaintiff

got on the track, and became frightened, and ran along the track, and ran into a bridge, and injured itself, and that neither the engine nor any part of the train struck the horse, then you will find for the defendant. (2) The jury are instructed that the evidence in this case will not warrant you in finding a verdict against the defendant. You will therefore decide for the defendant." The trial judge refused to give either of them, and such refusals are assigned for error. It was not error to refuse the first, for the reason it entirely omitted the element of negligence of the parties operating the train, and hence was improper and erroneous. The second was a direction to find the issues for the company, and, as we have concluded there was testimony which raised questions for the consideration of the jury, and which it was their province to answer, the first paragraph requested was wrong, and the refusal of the judge to give it in the charge to the jury was correct.

The trial judge, at the request of defendant in error, gave an instruction to the jury in which there was quoted from the statute the statement of the liability to the owner of any live stock injured, killed, or destroyed by their agents, employés, or engineers, arising against railroad companies from the failure to build fences along the sides of the track, followed by a further statement that, if the jury ascertained, from the evidence, that the company had neglected to fence its tracks at or along the place stated in the petition setting forth the cause of action, and that the horse was there injured, killed, or destroyed by the agents, employés, or engines of the company, or by the agents, employés, or engines of any other company running over and upon the road, the company became liable. It is urged that this was erroneous, there being no evidence that the horse was injured or killed by the agents, employés, or engine of the company, except as it was claimed to have been because of the negligence of the employés in charge of the engine and train following the horse closely along the track for a long distance, into the cut, and through it, and to the trestle beyond. The instruction was framed to apply to a case under the provisions of what is commonly known as the "Fence Law," and was only pertinent to the facts developed in this case in its reference to the failure of the company to build fences along the sides of its road; and, to make it fully applicable in view of the issues and the theory upon which the case was tried, it should have contained a further statement embodying the element of negligence as attributable to the parties in charge of the train, and the manner in which it was handled or run at the time in question.

Instructions requested by counsel for the company, and given, were in the following terms: "The jury are instructed that, if the jury find that the horse got on the railroad track for want of a fence such as the law requires the company to erect and maintain to inclose its track, and while on or near its track was frightened by a passing train, and in its fright was injured by falling through a bridge on the line of the railroad, and no negligence or willful misconduct is chargeable to the agents of this company in charge of the train at that time, and where no injury was done to the horse by any actual collision or contact with the engine or cars of the train, the railroad company will not be liable to the owner of the horse for the injury." "The true meaning of sections 1 and 2 of chapter 72, Comp. St., is that the injury to stock must be caused by the actual collision; that it must be done by the agents, engineers, or cars of the company, or the locomotive or trains of any corporation permitted and running over or upon the road, or the willful misconduct of the trainmen in the course of their employment to make the company liable." These were doubtless framed and presented by counsel for the company to meet and destroy any impression, erroneous or otherwise, which might have been created in the minds of the jury by the instruction on the same subject, given at the request of the counsel for the opposing party; and, if construed in connection with such instruction, they might be said to have effected the purpose. If construed together, they announced the rule, in favor of the company, which prevails when the duty to build fences has been performed, that there must have been acts negligently or willfully done. But it may be said that the errors, if any, in the instruction requested by defendant in error, in its statements of the law as applicable to the case on trial, could not and were not cured by giving other and further instructions on the same subject, framed with a view and purpose of adding to the former, and correcting its imperfections or supplying its deficiencies. This would be within a well-established doctrine with reference to instructions to a jury; but the jury were not misled, nor the rights of the complaining party prejudiced, by the giving of the instruction under consideration. Hence, there was no available error. Labaree v. Klosterman, 33 Neb. 150, 49 N. W. 1102.

Instructions Nos. 2 and 3, requested for defendant in error, and given, were excepted to by counsel for the company, and their giving is properly assigned as error. They were in regard to the duties of the parties in charge of the engine or train to stop it after seeing the horses on the track, if, by so doing, the injury could have been avoided, and submitting to the jury the question of negligence in the running of the train at the time and place of the injury. The judge modified the paragraph of instruction No. 3, and, as given, it informed the jury that the finding should be for the company unless the employés were proven to have been guilty of negligence and willful misconduct. This was

as favorable to the company as it could have been, if it had been shown that it had fulfilled the requirements of the statute as to building fences along its track. These instructions, when viewed in connection with all the facts and circumstances of the case, are not open to any of the objections urged against them in the argument contained in the brief filed for the plaintiff in error.

Some of the instructions which were given, and to which objections were made and have been here urged, should probably not have been given in form and substance as they were; but the jury were not misled by them, nor did any prejudice result therefrom to the rights of the complaining party. There was sufficient evidence to show a degree of negligence to render the company liable, and to sustain the verdict of the jury. Railroad Co. v. Pounder, 36 Neb. 247, 54 N. W. 509; Railway Co. v. McBrown, 46 Ind. 229. Railway Co. v. Vandeventer, 28 Neb. 112, 44 N. W. 93. It follows that the judgment of the district court must be affirmed.

TREAT v. PRICE.

(Supreme Court of Nebraska. April 7, 1896.)

COMPROMISE—WHAT CONSTITUTES—EFFECT.

1. The rule that, when a certain sum is due from one to another, the payment of a lesser sum is no discharge as to the remainder, notwithstanding an agreement to that effect, is founded upon the fact that the later agreement is without consideration. Such rule does not apply where the amount due is disputed or unliquidated.

2. The word "liquidated," when used in this connection, means that the amount due has been ascertained and agreed upon by the parties, or is fixed by operation of law.

3. The rule does not apply where there is a bona fide dispute between the parties as to the sum justly due.

4. The fact that the sum paid is in such case only the amount that the debtor concedes to be due does not invalidate the settlement.

5. If a consideration is necessary to sustain a settlement made by the payment and receipt in full satisfaction of the sum which the debtor admits to be due, it is found in the fact that the creditor, by accepting such sum, thereby avoids the delay, expense, and labor of an accounting, and avoids threatened litigation.

6. Where a certain sum of money is tendered by a debtor to a creditor on the condition that he accept it in full satisfaction of his demand, the sum due being in dispute, the debtor must either refuse the tender or accept it as made, subject to the condition. If he accept it, he accepts the condition also, notwithstanding any protest he may make to the contrary.

7. A., being indebted to B. in an uncertain amount, sent to the C. Bank the amount which A. conceded to be due, with instructions to pay the sum to B., but only in full settlement, and on his signing a receipt to that effect. B., protesting that more was due, accepted the money, and signed the receipt, but caused the bank to send back, accompanying the receipt, a letter declaring that he only received the money on account, and not in settlement. *Held* that, by receiving the money, he had accepted the condition on which it was tendered, and that his protest availed nothing.

8. *Held*, further, that the terms of the receipt, and the refusal of the bank to pay the money except upon his signing it, were notice to him that the bank had no authority to pay it except on the condition that it should be received in full settlement.

9. An obiter dictum, in conflict with some of the foregoing statements, in Price v. Treat, 45 N. W. 790, 29 Neb. 536, disapproved.

(Syllabus by the Court.)

Error to district court, Douglas county; Ferguson, Judge.

Action by Thomas Price against C. P. Treat. There was a judgment for plaintiff, and defendant brings error. Reversed.

Cowin & McHugh and Munger & Courtright, for plaintiff in error. Chas. O. Whedon and C. A. Baldwin, for defendant in error.

IRVINE, C. Treat sued Price, alleging in one count that he had performed, under a contract with Price, certain grading work for a railroad, and asking judgment for an unpaid balance on account thereof, and, in another count, alleging the conversion by Price of certain tools used in the work. The district court entered judgment for the defendant on the pleadings. The plaintiff brought the case to this court on error, and the judgment of the district court was reversed. Price v. Treat, 29 Neb. 536, 45 N. W. 790. The former report of the case contains a sufficient statement of the pleadings. After the cause was remanded, there was a trial to a jury, resulting in a verdict and judgment in favor of the plaintiff for $10,372.13. The defendant now brings the cause here by petition in error. Recurring to the former opinion, it will be found that one of the defenses pleaded was that the defendant rendered to the plaintiff a statement of the account, and that the parties fully settled and adjusted the same, finding due the plaintiff $6,532.27, which sum was paid by defendant and accepted by plaintiff, in consideration whereof Price executed and delivered to defendant the following instrument: "Received from C. P. Treat $6,532.27, in full settlement of the within contract, and in full of all demands. In consideration of said payment already received by me, I hereby release him, and also the Fremont, Elkhorn & Missouri Valley R. R. Co. and the Chicago & Northwestern Ry. Co., from all claims, actions, or causes of action which have arisen, or may or can arise, to me against any or either of them, by reason of any connection I may have had with them heretofore. [Signed] Thomas Price. Dated May 21, '86. Witness: C. W. Mosher." The reply, among other things, while admitting that plaintiff signed the receipt, denied that it was executed in full settlement, or that the money was received in settlement, and alleged that the money was paid and received merely on account, and with that agreement and understanding. Discussing these pleadings the writer of the

opinion, in 29 Neb., 45 N. W., expressed himself to the effect that, the acceptance of a portion of the undisputed claim not being a bar to an action for the remainder, this case fell within that rule, because, to the extent of the payment made, the defendant admitted the amount to be due, and that this part was therefore not disputed; and the fact that plaintiff claimed a greater amount did not render the claim a disputed one. In this respect, we think, the former opinion was obiter, and of no controlling force on the present hearing. The reply had put in issue the allegation that the money had been tendered and received in full satisfaction. Judgment had gone for the defendant on the pleadings; and the question before the court was only whether the written instrument set out was prima facie evidence alone, or a formal contract, the terms of which were not open to contradiction by parol evidence If the latter, then the reply, admitting the execution of the instrument, was in other respects immaterial. But if the instrument was merely a receipt, and open to contradiction, then the reply sufficiently traversed the answer, and the judgment, in the absence of evidence, was wrong. That the court recognized this as the only question decided may be inferred from the fact that nothing else appears in the syllabus, as well as from the general current of the opinion itself.

The issue presented by these portions of the pleadings has now been tried. An instruction relating thereto was given at the request of the plaintiff, and one requested by the defendant was refused. The giving of the one and the refusal of the other are presented for review by appropriate exceptions and assignments of error. These instructions present sharply the different contentions of the parties as to the law on the subject, and we quote them. That given was as follows: "The defendant claims in his answer that he has settled with the plaintiff, and that he has paid him the full balance due him, through the Capitol National Bank of Lincoln, Neb., and offers in evidence a receipt that was prepared by defendant, and forwarded by him to the bank, together with an amount of money to be paid plaintiff, with instructions to the bank that the money should be paid over to plaintiff when he signed the receipt so forwarded with the money, which receipt is signed by the plaintiff, and purports to be a receipt in full of all claim on the part of plaintiff against defendant growing out of the contract here sued upon. You are instructed that the receipt so offered by the defendant is prima facie evidence of the fact stated therein, but is not conclusive. It places the burden upon the plaintiff to show by evidence to your satisfaction, not only that the amount paid at the time the receipt was signed was not the actual amount due, but he must go further, and show that, at the time he signed the receipt and took the money, he did not accept, nor intend to accept, the sum named in the receipt as a full settlement of his claim, and that he so notified the defendant; that such notice was given by him without unreasonable delay." The instruction refused was as follows: "You are further instructed that if you find from the evidence that the defendant, Treat, sent the $6,532^{27}/_{100}$ to the Capitol National Bank at Lincoln for the plaintiff, Price, at the request of the plaintiff, Price; and that the defendant sent said money to said bank to be delivered to plaintiff only upon condition that the same should be accepted by him in full satisfaction and settlement of what was due from the defendant to plaintiff under the contract sued upon in this action; and that the plaintiff, Price, with knowledge of the fact that the defendant, Treat, so sent the money to be paid to him upon such condition, and thereafter, accepted said money,—that such acceptance would be a full and complete satisfaction, and he would not be entitled to recover in this action, notwithstanding he may, after receiving said money, have notified the defendant, Treat, that he did not receive or accept the same in full settlement, but only to be applied upon account."

A short statement of the evidence applicable to the issue will elucidate these instructions. There is evidence tending to show that Price had requested Treat to remit through the Capitol National Bank. Treat accordingly sent the sum named in the form of a draft to the bank, with a letter instructing the bank to pay the amount to Price "in full settlement of all demands, but only upon his signing the receipt which I have written out for him upon the inclosed contract." The original contract for the work, bearing the receipt pleaded by the defendant, was inclosed, together with the draft in this letter. Price had several conversations with Mosher, the president of the bank, and endeavored to get the money without signing the receipt; protesting all the time that a larger amount was due. He finally did, however, sign the receipt, and Mosher paid the money to him. But the same day he wrote the following letter, and delivered it to Mosher, with the request that he remit it to Treat with the receipt: "Lincoln, 21st May, 1886. C. P. Treat, Esq., Chadron: I have this day signed the receipt on the contract between you and me, and delivered same to Capitol National Bank. I sign this receipt subject to this condition: that any errors or mistakes in the classification of the work are to be corrected hereafter; also, any errors in measurements of the work or in the accounts you have sent me to be corrected hereafter. I have never seen the vouchers upon which you base your charges against me, nor any of the orders for goods which you have charged against me; and, if these accounts are not correct, I shall hold you for the balance due me. I wish you to

send these orders and vouchers to the bank here or to me, so I can examine them in connection with your accounts. If there are any errors in these accounts, they must be corrected. I am satisfied there is yet a large sum due me from you on account of wrongful classification of work, wrong measurements, and wrongful and unwarranted charges against me for goods and labor. I do not propose to be bound by any receipts unless I am paid all that is justly due me. Yours, truly, Thos. Price."

In view of this evidence, it will be observed that, by the instructions requested, both sides, notwithstanding the dictum in the former report, conceded that an acceptance of the amount tendered, in full satisfaction, would be a valid settlement and discharge of any claim; and this is right. The doctrine that a debt is not discharged by the receipt, even ostensibly in satisfaction, of a smaller amount, is based on the fact that there is in such case no consideration. Pinnel's Case, 5 Coke, 117; Cumber v. Wane, 1 Strange, 426. It does not apply to the case of a disputed claim. Slade v. Elevator Co., 39 Neb. 600, 58 N. W. 191; Tanner v. Merrill (Mich.) 65 N. W. 664; Bull v. Bull, 43 Conn. 455; McDaniels v. Lapham, 21 Vt. 222; Alvord v. Marsh, 12 Allen, 603; Easton v. Easton, 112 Mass. 438; King v. City of New Orleans, 14 La. Ann. 389; Donohue v. Woodbury, 6 Cush. 150; Hills v. Sommer, 53 Hun, 392, 6 N. Y. Supp. 469; Reynolds v. Lumber Co., 85 Hun, 470, 33 N. Y. Supp. 111; Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1034; U. S. v. Adams, 7 Wall. 463; U. S. v. Child, 12 Wall. 232. In some of these cases the old rule is stated to apply to liquidated claims, and the distinction is made between claims that are liquidated and those which are not. The term "liquidated," when used in this connection, means one where the amount due has been ascertained and agreed upon by the parties, or is fixed by operation of law. Hargroves v. Cooke, 15 Ga. 321. See, also, Anderson's, Sweet's, and Bouvier's Law Dictionaries, where similar definitions appear. In this sense this claim was not liquidated. The contract fixed different prices for excavating solid rock, loose rock, and earth; and, while the parties substantially agreed as to the total amount of excavating, the classification of the work was in dispute, so that the amount due was not settled or agreed upon by the parties, nor was it fixed by operation of law, but could only be determined by a future agreement, or by proof as to the amount of each class of work. Nor do the adjudicated cases support the dictum in the former opinion to the effect that, where only the amount admitted to be due is paid, so far the claim is within the rule as one liquidated or not disputed, notwithstanding the plaintiff claims a greater amount. In many of the cases cited, the amount tendered was precisely the sum admitted to be due. If a consideration is in such case necessary, it may be found in the fact that the payee receives immediate payment of so much as is paid, without the expense, delay, or labor of an accounting, in or out of court, and avoids thereby threatened litigation, which we think is always considered a valuable consideration.

It has been necessary to consider this broad question, notwithstanding the fact that both instructions seem to have been based on a similar theory of law, because, if the law were in accordance with the dictum referred to, the instruction given at plaintiff's request would be more favorable to the defendant than was warranted; and any erroneous statements therein would be, for that reason, without prejudice. The fundamental difference in the instructions was that that given permitted a recovery if a greater amount was in fact due, and if the plaintiff did not intend to receive the sum named in full settlement, and without the reasonable delay notified the defendant; while the instruction refused bound the plaintiff if he accepted the money knowing that it was tendered only upon the condition that it should be received in full satisfaction. The latter rule is correct. When money is offered on condition that it be accepted in full satisfaction of a demand, the person receiving it, if he receive it at all, must take it subject to the condition named. His acceptance of the money under such a tender is an acceptance of the condition, notwithstanding any protest that he may at that time or afterwards make to the contrary. Fuller v. Kemp, supra; Reynolds v. Lumber Co., supra; Donohue v. Woodbury, supra; McDaniels v. Lapham, supra. This principle is so clear and so well supported by authority that no discussion seems necessary. It was not, therefore, the defendant's intention, secret or express, when he received the money, which controlled the legal effect of the transaction; it was the condition attached to the tender of the money, which condition was accepted by the fact of his receipt. So that neither defendant's verbal protests to the bank nor his written declaration to the plaintiff could change the legal effect of his act.

It may be said that there is evidence tending to show that the bank or Mosher was plaintiff's agent for the purpose of paying the money, as there is also evidence tending to show that Mosher informed defendant that his signing the receipt would not affect his legal rights; that, therefore, Mosher's paying the money, in the face of defendant's protest that a larger sum was due, was a waiver of the condition. But the answer to this is that Mosher had no authority to waive the condition. His instructions were absolute to pay the money only in full settlement, and on the signing of the receipt. It is true that the evidence is conflicting as to whether plaintiff was shown this letter. But it is immaterial whether it was shown him or not, because the receipt itself and Mosher's requirement that it should be signed were sufficient

notice to the plaintiff that Mosher had no other authority, and could not waive the condition.

We think the instruction requested by defendant should have been given, and that requested by plaintiff refused. Reversed and remanded.

RIDER et al. v. MURPHY

(Supreme Court of Nebraska. April 7, 1896.)

MALICIOUS PROSECUTION — BURDEN OF PROOF — SUFFICIENCY OF EVIDENCE.

1. To render a prosecuting witness liable in an action for malicious prosecution, it must be alleged and proved that his conduct in the premises was inspired by malicious motives, and was without probable cause.

2. Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable man's mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. 14 Am. & Eng. Enc. Law (1st Ed.) 24.

3. Evidence examined, and found wholly insufficient to sustain the finding of the jury that the plaintiffs in error were inspired by malicious motives in causing the defendant in error to be prosecuted for the crime of embezzlement, and wholly insufficient to support the finding of the jury that such prosecution was begun and carried on without probable cause.

(Syllabus by the Court.)

Error to district court, Douglas county; Ogden, Judge.

Action by John H. Murphy against John Rider and another. There was a judgment for plaintiff, and defendants bring error. Reversed.

James W. Orr and Lee S. Estelle, for plaintiffs in error. Schomp & Corson, for defendant in error.

RAGAN, C. In the district court of Douglas county, John H. Murphy sued John Rider and Fred H. Glick, and one J. A. Rider, since deceased, for damages for malicious prosecution. Murphy had a verdict and judgment, and Rider & Glick prosecute to this court a petition in error.

It appears that, in the autumn of 1891, Rider & Glick were engaged in business in the city of Omaha, and dealing in butter, eggs, and poultry, and other farm products. On the trial of this case, the evidence of Murphy, so far as the same is material here, was in substance as follows: In November, 1891, at the instance of Rider & Glick, he went to Milford, in this state, to purchase butter and eggs and poultry. He purchased a considerable quantity which he shipped to Rider & Glick. Murphy paid his traveling expenses, and Rider & Glick furnished the money to pay for the products bought. These products Murphy shipped to Rider & Glick at Omaha, and they disposed of them. When Murphy returned to Omaha from the Milford trip, a difficulty arose between him and Rider & Glick as to the amount of money that was coming to him from them for the products he had bought and shipped them on this Milford trip. Murphy claimed that he was to have one-half the profits realized from the products purchased, and that those profits ought to be somewhere in the neighborhood of $300. Rider & Glick, on the other hand, claimed that the amount due to Murphy was $6.77. They made him out a statement from the books showing this fact, and offered him a check for that amount of money. Murphy became enraged, and refused to accept the check in settlement, threw it down, and left the office of Rider & Glick. He called at the office of Rider & Glick several times after that time, but the Milford deal was not talked of at all those visits. Early in December, 1891, Murphy, while at the office of Rider & Glick, was told by them that he could make some money by buying potatoes in Iowa for them; that they would furnish the money to pay for the potatoes, and pay 30 cents a bushel for all the potatoes (not exceeding a certain quantity) which he might buy, Murphy to have as compensation the difference between what he might pay for the potatoes and the 30 cents a bushel which Rider & Glick were to pay. He agreed to go to Iowa, and buy potatoes on these terms, and went to Glick, and said: "I will take that check now." Glick thereupon handed Murphy the check for $6.77. The check was dated the 8th of December, 1891; and Murphy, the next morning, presented this check to the bank on which it was drawn, and he then discovered that it had written across the back of it, "In full settlement of account," whereupon he erased that indorsement, and cashed the check. Murphy then went to Iowa, and contracted for some potatoes. He caused Rider & Glick to deposit $100 in a bank in Iowa to his credit with which to pay for the potatoes bought. He then came to Omaha, and told Rider & Glick that he had bought some potatoes for them; that they would be shipped in refrigerator cars, and would not arrive for about a week, and then demanded of them that they first settle up the Milford deal, according to what he claimed.

This, we repeat, is substantially Murphy's evidence. The record further shows that no part of the money which Rider & Glick furnished Murphy was ever returned to them, nor did they ever receive any of the potatoes bought with that money by Murphy. Very soon after the last interview described between Murphy and Rider & Glick, the latter ascertained that Murphy had used the money sent him in buying potatoes; that he had put them in a car, and consigned them to Hayden Bros., a firm doing business in the city of Omaha. Acting upon this information, Rider & Glick swore out a complaint charging Murphy with embezzlement. He was bound over to the district court. An information charging him with embezzlement was filed by the prosecuting attorney, on which he was tried and acquitted. This is

the prosecution made the basis of the present action. Does this evidence support the verdict?

In Dreyfus v. Aul, 29 Neb. 191, 45 N. W. 282, this court held that, "to entitle the plaintiff to recover in an action for malicious prosecution, he must prove a want of probable cause, malice of the defendant, and that the criminal prosecution is ended." This case was followed in Vennum v. Huston, 38 Neb. 293, 56 N. W. 970, and it was there held that, "to render a prosecuting witness liable in an action for malicious prosecution, it must be alleged and proved that his conduct in the premises was inspired by malicious motives, and was without probable cause." In Davie v. Wisher, 72 Ill. 262, probable cause is thus defined: "Probable cause is defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged." And in volume 14, p. 24, of the American & English Encyclopedia of Law, the authorities as to what constitutes probable cause are collated, and it is there said: "Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of a prosecutor, that the person charged was guilty of the crime for which he was prosecuted."

Now, let us examine the undisputed evidence in this case, and the evidence of Murphy himself, in the light of the rules and authorities quoted above. Rider & Glick prosecuted Murphy for the crime of embezzlement. They knew at the time they did so that he had been acting as their agent to purchase potatoes for them; that he had used the money they furnished him for that purpose in the purchase of potatoes; that he had shipped these potatoes to other parties; and that he had, in effect, according to his own evidence, demanded of them that they allow him some $300, which he claimed was due from the Milford deal, as a condition precedent to his delivering to them the potatoes which he had bought for them with their money, or the proceeds thereof. They also knew that, when he was first informed as to the amount coming to him from the Milford deal, he had refused to accept it; that subsequently he had undertaken to buy potatoes for them, and had voluntarily demanded the check which he had refused in settlement of the Milford deal; that he had received and cashed that check; and they had the right to believe from Murphy's conduct that the differences which had existed between them in reference to the profits of the Milford deal had by them been settled to Murphy's satisfaction, or that he had accepted the check in settlement. Treat v. Price, 47 Neb. —, 66 N. W. 834. It seems to us that these facts and circumstances, known to Rider & Glick, and on which they acted, were sufficient to excite the belief in their minds, they being reasonable men, that Murphy was guilty of the crime with which they charged him. But, whether Murphy accepted the check of $6.77 in settlement of the Milford deal or not, the evidence shows beyond all question that Rider & Glick thought he had; and the argument is now made here in behalf of Murphy that Rider & Glick had the books showing the profits of the Milford deal; that they had Murphy in their power; and that he (Murphy) felt and realized his position, and thought what he lacked in power he must supply by policy,—he must in some way get the firm of Rider & Glick to be his creditor, rather than his debtor. In other words, this argument is a concession by Murphy's counsel that at the time he accepted the check, not only did Rider & Glick believe that he accepted it in settlement, but that Murphy knew they so understood. But, if it be conceded that Murphy did not accept this check in settlement of the Milford deal, he was none the less the agent and trustee of Rider & Glick in the transaction of purchasing the potatoes. We think, therefore, that Rider & Glick had probable cause to believe Murphy guilty of embezzlement at the time they caused him to be arrested for that crime. There is in the record no evidence to support the finding of the jury that the conduct of Rider & Glick in causing Murphy to be prosecuted for embezzlement was inspired by a malicious motive; nor to support the finding of the jury that the prosecution was begun and carried on without probable cause. The judgment of the district court is reversed, and the cause remanded. Reversed and remanded.

ABBOTT v. BARTON et al.

(Supreme Court of Nebraska. April 7, 1896.)

EQUITY—DEMURRER—EXCEPTION.

To secure a review of alleged error in sustaining a demurrer to a petition an exception is indispensably necessary, even though the action is solely for equitable relief.

(Syllabus by the Court.)

Appeal from and error to district court, Saline county; Hastings, Judge.

Action by Lysle I. Abbott against John Barton and others. From a judgment for defendants, plaintiff brings error, and appeals. Affirmed.

Cowin & McHugh and Abbott & Abbott, for appellant. F. I. Foss and W. R. Matson, for appellees.

RYAN, C. This action was brought in the district court of Saline county by the appellant to enjoin the collection of a judgment rendered against him in the county court of Hall county. The appellee John Barton was made a defendant because, as sheriff of Sa-

line county, he was, as alleged, about to levy an execution for the collection of the aforesaid judgment upon the real property of the plaintiff, and Edward Hooper was made defendant because the said judgment was in his favor. The grounds upon which it was sought to prevent the enforcement of the aforesaid judgment were that it was rendered in favor of Hooper, who was not the real party in interest; that service of the summons issued by the county court of Hall county had been made upon the appellant, who at that time was within and a resident of Douglas county, and that there was a defense to the collection of the note sued upon; wherefore, as plaintiff claimed, the county court of Hall county was without jurisdiction to render the said judgment. It is said in argument that a general demurrer was sustained to this petition, and that, plaintiff having elected to stand thereon, his action was dismissed. This may be assumed to be true, though, as will hereafter appear, it is not very clear that a demurrer was overruled. There is, however, an insurmountable obstacle to our proceeding further in this matter, and that is that to the ruling of the court no exception was taken. The journal entry first recites the submission of the demurrer to the court, and immediately thereafter contains the following language: "On consideration whereof the court overrules said motion. Plaintiff not desiring to plead further, it is therefore considered by the court that the temporary injunction allowed herein be, and the same is hereby, dissolved, and this action is hereby dismissed, and that the defendants have and recover of and from the plaintiff their costs herein expended. Plaintiff gives notice of an appeal, and the supersedeas bond is fixed at the sum of two hundred dollars." There may be an appeal from the judgment of the district court in an equity case, and in this court the review will be had upon the evidence introduced in the district court, when properly preserved; but the requirement of an exception to a ruling whereby a demurrer is sustained to the petition is as indispensable in an equitable action as in an action at law. The judgment of the district court is affirmed.

LOMBARD INV. CO. v. SNOWDEN et al.

(Supreme Court of Nebraska. April 7, 1896.)

APPEAL—WEIGHT OF EVIDENCE.

This appeal involves only a question of fact. The record examined, and the conclusion reached that the decree of the district court is supported by sufficient evidence.

(Syllabus by the Court.)

Appeal from district court, Buffalo county; Holcomb, Judge.

Action by the Lombard Investment Company against Andrew J. Snowden and others. Defendant W. C. Tillson filed a cross petition, and obtained an affirmative judgment, and defendant A. B. Slater appeals. Affirmed.

William Gaslin, Warren Pratt, and Brome & Jones, for appellant. Gaslin, Newman & Hallowell, for appellee.

RAGAN, C. The title of this case is the "Lombard Investment Company against A. J. Snowden." But these parties have no interest in the matter in controversy here. The suit was brought by the Lombard Investment Company, in the district court of Buffalo county, against Snowden, to foreclose a real-estate mortgage. One A. B. Slater was made defendant, he having acquired Snowden's interest in the real estate previously mortgaged by the latter to the investment company. W. C. Tillson was also made a party defendant, and he filed a cross petition, and sought to foreclose a mortgage on the real estate described in the investment company's mortgage, claiming a lien subject to the lien of the investment company. Slater answered the cross petition of Tillson, admitting the execution and delivery by his grantor, Snowden, of the mortgage sought to be foreclosed, but pleaded, as a defense to Tillson's cross action, that the debt which it secured had been paid. Tillson had a decree as prayed, and Slater appeals.

The record involves only a question of fact, namely, does the evidence support the finding of the district court that Tillson's mortgage had not been paid? The evidence is very unsatisfactory, and in some cases self-contradictory; but we are constrained to say that there is sufficient evidence in the record to support the finding of the district court, and its decree is therefore affirmed.

J. F. SEIBERLING & CO. v. FLETCHER.

(Supreme Court of Nebraska. April 7, 1896.)

BILL OF EXCEPTIONS—AUTHENTICATION.

A bill of exceptions, though signed and allowed by the clerk of the district court in pursuance of the stipulation therefor required by statute, cannot be used in this court for any purpose, unless the clerk also certifies such bill of exceptions to be the original or a true copy. Martin v. Fillmore Co., 62 N. W. 863, 44 Neb. 719, followed.

(Syllabus by the Court.)

Error to district court, Sherman county; Holcomb, Judge.

Action by J. F. Seiberling & Co. against Anson L. Fletcher. There was a judgment for defendant, and plaintiffs bring error. Affirmed.

Paul & Templin, for plaintiffs in error. Nightingale Bros., for defendant in error.

RAGAN, C. J. F. Seiberling & Co. brought this suit to the district court of Sherman county against Anson L. Fletcher on a prom-

issory note. Fletcher had a verdict and judgment, and Seiberling & Co. prosecute here a petition in error.

1. The assignments of error argued in the brief are directed first to the action of the district court in the admission and rejection of certain evidence at the trial. These assignments of error cannot be reviewed, for the reason that the bill of exceptions is not authenticated as required by law. It is in precisely the condition that the bill of exceptions was in Romberg v. Fokken, 47 Neb. —, 66 N. W. 282; Martin v. Fillmore Co., 44 Neb. 719, 62 N. W. 863. The bill of exceptions is signed and allowed by the clerk, but there is nowhere in the record any certificate of the clerk that the bill of exceptions is either the original or a copy.

2. The second assignment argued in the brief relates to the action of the district court in giving and refusing certain instructions. On looking into the record, we discover that no exception was taken by any person to any instruction given or refused. This assignment, therefore, cannot be considered. The pleadings support the judgment rendered. It must therefore be, and is, affirmed.

MANKER v. SINE.

(Supreme Court of Nebraska. April 7, 1896.)

REPLEVIN — JUDGMENT — DISCHARGE OF RECORD.

1. The district court may, on motion and satisfactory proof that a judgment had been fully paid or satisfied by the act of the parties thereto, order it discharged and canceled of record.

2. The plaintiff against whom, in an action of replevin, judgment had been rendered, for the return of the property in dispute, or for the value thereof in case it could not be returned, paid the amount of costs assessed against him, also the damage awarded for the wrongful detention of the property, and thereupon made a sufficient tender of said property to the defendant. *Held* a discharge of the alternative judgment, and that satisfaction thereof should, on his motion, be entered of record.

(Syllabus by the Court.)

Error to district court, Cass county; Chapman, Judge.

Replevin by C. A. Manker against L. P. Sine, in which there was a judgment for defendant. Plaintiff moved to have the judgment discharged of record. The motion was denied, and he brings error. Reversed.

Allen Beeson, for plaintiff in error. Woolley & Gibson, for defendant in error.

POST, C. J. This cause was before us at a previous term, at which time a judgment for the defendant in error was reversed, with directions to the district for Cass county to enter an alternative judgment upon the verdict of the jury for a return of the property replevied, or for its value in case a return thereof could not be had. See Manker v. Sine, 35 Neb. 746, 53 N. W. 734. Judgment having been rendered in accordance with the mandate of this court, the plaintiff in error, who is also plaintiff below, tendered to the defendant the property in controversy at the place where it was taken from the latter, by virtue of the order of replevin. He also paid to the clerk of the district court the sum of $24.63, costs assessed against him, and the further sum of $1, being the damage awarded by the jury for the wrongful detention of said property, and thereupon, by motion, sought to have the alternative judgment against him discharged, and satisfaction thereof entered of record. The evidence upon which said motion was heard and determined is not made a part of the record, although the facts as found are substantially as alleged in the motion, judged by the following entry: "And now, on this 29th day of May, 1893, it being one of the days of the regular 1893 term of this court, this cause came on for decision on the motion of the plaintiff for a cancellation of the judgment herein; and the court, being well and fully advised in the premises, doth find that the plaintiff, after the judgment was rendered upon the mandate from the supreme court in this cause, tendered to defendant the property replevied in this cause, and made said tender at the place where said property was taken from the defendant under the writ of replevin, and that plaintiff offered to return said property to defendant, and that plaintiff has made a sufficient tender of said property to defendant; but, the court being of the opinion that there is no authority in this proceeding to cancel the alternative judgment, the court refused to interfere with said judgment, to which ruling and action the plaintiff and defendant each excepts." The object of this proceeding is to secure a reversal of the foregoing order, and for the remanding of the cause, in order that the judgment described may be satisfied of record, under the direction of the district court. The finding being in favor of the plaintiff as to the alleged tender of the property, and payment of the costs and damage for the wrongful detention of such property being undisputed, our investigation is confined to a single question of practice, viz. whether the judgment defendant may in such case proceed in a summary manner by motion for the satisfaction of the judgment against him, or whether his remedy is by bill in equity or other appropriate action.

It is by section 322, Code Civ. Proc., among other things, provided that, "whenever any judgment is paid off and discharged, the clerk shall enter such fact upon the judgment record in a column provided for that purpose." Courts of general jurisdiction have an inherent supervisory control over their judgments and decrees. They may award process for the enforcement of their judgments and orders, and may, whenever necessary in order to correct or prevent abuse thereof, stay or quash any execution

or other writ issued by their authority. The clerk is but the hand of the court, and whatever he is required to do in the discharge of his duties towards litigants or others may be enforced by the command of the court; and the duty to satisfy of record a judgment or decree upon full performance by the party bound thereby follows as a necessary incident of the power of the court to enforce its orders. See Briggs v. Thompson, 20 Johns. 294; Shaw v. Dwight, 27 N. Y. 244; Harper v. Graham, 20 Ohio, 105; Lough v. Pitman, 26 Minn. 345, 4 N. W. 229; Black, Judgm. par. 1014 et seq. That an action may, in a proper case, be maintained for the cancellation of a judgment after payment in full, or on account of facts amounting to an accord and satisfaction, is not doubted, although the remedy by that means is, at most, cumulative. The plaintiff in the case at bar has, according to the finding of the district court, satisfied the judgment by a return of the property replevied. True, it may be inferred from the record that the defendant, for reasons not disclosed, refused to receive the property when returned in obedience to the judgment in his favor; but that fact cannot, in view of the finding of the district court, be regarded as material. The question is not whether the defendant in a replevin suit may, upon any conceivable state of facts, refuse to accept the property in dispute when tendered pursuant to an alternative judgment in his favor, and afterwards assert a substantial right thereunder, but whether, upon the facts of the case before us, the return of the property operated to discharge the alternative judgment. That question must, as we have seen, be answered in the affirmative. It follows that the order complained of should be reversed, and the cause remanded, with directions to satisfy of record the judgment herein mentioned. Reversed and remanded.

STEELE et al. v. KEARNEY NAT. BANK et al.

(Supreme Court of Nebraska. April 7, 1896.)

PARTNERSHIP — FIRM AND PRIVATE CREDITORS — RELATIVE RIGHTS.

1. The assets of an insolvent partnership will, in equity, be treated as a trust fund for the payment of the firm creditors, and cannot be applied in satisfaction of the personal obligations of the individual partners, to the prejudice of those to whom it equitably belongs.

2. Evidence examined, and *held* to sustain the finding of the district court that the mortgage assailed was given to secure a partnership indebtedness.

(Syllabus by the Court.)

Appeal from district court, Buffalo county; Holcomb, Judge.

Action by Dudley M. Steele & Co. against the Kearney National Bank and others to set aside a conveyance. From a judgment for the bank, plaintiffs and the defendants other than the bank appeal. Affirmed.

Chas. B. Keller and Dryden & Main, for appellants. Marston & Nevins, for appellee.

POST, C. J. This is an appeal from a decree of the district court for Buffalo county. The proceeding below was in the nature of a creditors' bill by the appellants Dudley M. Steele & Co. to set aside a chattel mortgage executed by the firm of Hayden & Pargeter in favor of the appellee the Kearney National Bank, under date of July 13, 1891, covering a stock of general merchandise in the city of Kearney, to secure an alleged indebtedness of the mortgagors in the sum of $2,990. Meyer & Raapke and Groneweg & Schoentgen, attaching creditors of Hayden & Pargeter, were made defendants, and join with the plaintiffs in prosecuting an appeal from the decree of the district court in favor of the defendant bank. The mortgage above mentioned is assailed upon the ground that the amount therein named, $2,990, is largely in excess of the actual indebtedness of Hayden & Pargeter to the bank, and includes the sum of $1,300 and over of the personal obligation of Richard Pargeter, a member of said firm. We agree with counsel for appellants that the assets of an insolvent partnership will, in a court of equity, be treated as a trust fund for the payment of the firm creditors, and that one partner will not be permitted to divert such property to the prejudice of those to whom it equitably belongs. Ripley v. Commissioners, 3 Neb. 397; Sample v. Hale, 34 Neb. 220, 51 N. W. 837; Lyman v. City of Lincoln, 38 Neb. 794, 57 N. W. 531; Perkins v. Butler Co., 46 Neb. 314, 64 N. W. 975. But that question was distinctly raised by the pleadings and proofs, and the finding of the court upon the issue thus presented is entitled to the same consideration as would be accorded the verdict of a jury. Bank v. Morrison, 17 Neb. 341, 22 N. W. 782; Bickel v. McAleer, 35 Neb. 515, 53 N. W. 374. The circumstance chiefly relied upon in support of the appellants' claim is that the amount of a note for $1,000, executed by Mr. Pargeter to the bank January 4, 1888, and secured by mortgage upon certain lands in Sherman county was included in the alleged indebtedness of Hayden & Pargeter. It appears, however, from the testimony of Mr. Pargeter, given in behalf of appellants, that the $1,000 note represented money borrowed for said firm, and used in the partnership business; that it was, in short, not his individual indebtedness, but the debt of Hayden & Pargeter; and that the note and mortgage executed by him were intended as security for said firm,—in which he is corroborated by Mr. Tillson, cashier of the bank. This evidence is quite sufficient to sustain the finding of the district court. The decree will therefore be affirmed.

OMAHA & R. V. RY. CO. v. WRIGHT et al.

(Supreme Court of Nebraska. April 7, 1896.)

NEGLIGENCE—PLEADING—RAILROADS—STOCK KILLING—LIABILITY.

1. An allegation of negligence in a pleading is, like one of fraud, a mere conclusion. The facts from which the inference of negligence arises must be pleaded.

2. It is error to submit to the jury an issue of negligence not raised by a pleading of specific facts.

3. It is the duty of an engineer in charge of a train to exercise such a lookout as is consistent with his other duties to ascertain the presence of obstructions on the track, and if such a precaution would have revealed the presence of stock in time to have avoided their injury by the use of ordinary care, the railroad company is liable for injuries inflicted upon them, although they were not actually seen until too late to avoid striking them, and although they were not without the protection of the statute requiring tracks to be fenced.

(Syllabus by the Court.)

Error to district court, Saunders county; Wheeler, Judge.

Action by George M. Wright and another, partners as Wright & Allen, against the Omaha & Republican Valley Railway Company. There was a judgment for plaintiffs, and defendant brings error. Reversed.

J. M. Thurston, W. R. Kelly, and E. P. Smith, for plaintiff in error. R. S. Norval, for defendants in error.

IRVINE, C. The defendants in error brought this action against the railway company to recover damages on account of cattle belonging to them, killed and injured by a train of the railway company. The petition, while it is in one count, really alleges or attempts to allege three grounds of recovery: First, that a gate on one of the fences along the right of way was insufficient, and negligently permitted to be out of repair, and that, by reason of those facts, the cattle got upon the right of way; second, that after they got upon the right of way, their injury resulted from the careless operation of the train; third, that the railway company, after the stock was injured, took possession of the dead bodies and the injured cattle, and refused to permit the owner to retake them,—that is, a charge of conversion. The answer of the railway company was a series of denials,—some of them negatives pregnant, but the whole effect practically that of a general denial,—coupled with some affirmative allegations in regard to the security of the gate and negligence on the part of the plaintiffs. From a verdict and judgment in favor of the plaintiffs for $569, the defendant prosecutes error.

Many assignments of error relate to rulings on the admission of evidence, and to the refusal of instructions with regard to the character of the gate, and the duty and liability of the railway company concerning the gate, and flowing from its condition. The railway company is not, however, in any position to complain of these rulings. The statutes on the subject are found in Comp. St. c. 72, art. 1, §§ 1, 2. The court, after stating the issues, stated to the jury the substance of the statute, and then charged the jury that the duty was imposed by statute of erecting and maintaining gates, openings, or bars at private crossings, only with regard to adjoining proprietors, and that, if the cattle were upon the premises of an adjoining proprietor, without his consent, and escaped therefrom upon the right of way without negligence of the defendant, and were killed without its negligence, there could be no recovery. The evidence was uncontradicted that the cattle of the plaintiffs, about 340 in number, were in a corral north of the railway and west of the land of one Wallen, that they escaped from the corral upon the land of Wallen, and thence came through the gate in question upon the right of way. There was no evidence of any act of the railway company leading to their escape. Therefore, the effect of this instruction was to absolutely prevent a recovery on the ground of a violation of the fencing law. Whether or not the court correctly interpreted the statute we need not and cannot here consider, because the construction given it was so favorable to the railway company that, under the evidence, all question of liability thereunder was eliminated from the case. Nor need we extensively consider any questions raised by the pleadings and proof as to the defendant's taking possession of the dead and injured cattle, and converting them to its own use. On the trial of the case this issue was evidently a minor consideration.

We think there was error on another feature of the case, and the verdict not being of such a character that, on this issue, it was the only one which could properly be rendered, if not in direction, at least in amount, we pass over such assignments as relate exclusively to it.

It is quite clear, under the instructions of the court, that the verdict turned upon the negligence of the railway company in operating its train, whereby the cattle were killed and injured after they came upon the right of way. On this branch of the case, the allegations of the petition are that the defendant, "by its agents and employés, while running at a high rate of speed, carelessly and negligently, and without using due caution, ran the engine and train of cars connected therewith and attached thereto over and upon the cattle of these plaintiffs; * * * that the said defendant carelessly and negligently, by its employés and servants, in operating said train, ran their said engine and train in, over, and upon said plaintiffs' stock, when, by exercising proper care and skill in the management and handling of its engine and train, it could have stopped said train long before striking said plaintiffs' stock." An allegation of negli-

gence or want of care is like an allegation of fraud. It is a bare conclusion. A pleading is not sufficient which merely in general terms charges a want of due care or negligence. It is necessary to plead the facts from which an inference of negligence arises. Railroad Co. v. Grablin, 38 Neb. 90, 56 N. W. 796, and 57 N. W. 522; Malm v. Thelin, 47 Neb. —, 66 N. W. 650. The petition merely alleges that the defendant negligently ran over the stock, while by the use of proper care it might have stopped the train before striking the cattle. The evidence shows that there were about 340 cattle on the right of way. It tends to show that, while there was a curve in the road near the point where the cattle were struck, there were no cuts, grades, or other obstructions which would prevent a clear view of the track for a distance of half a mile. The accident occurred shortly after 7 o'clock in the morning of December 15th. Some of the witnesses testified that it was a clear morning, and quite light at that time. Others testified that it was misty and dark. The court submitted to the jury the question of the defendant's liability under instructions that, if the engineer saw the cattle, or by the exercise of due care should have seen them, in time to have stopped the train and avoided the accident, the company was liable for his not doing so. The railway company contends that the allegations of the petition were in these respects insufficient, and also that the duty of the railway company was only to exercise ordinary care to avoid injuring the cattle after those in charge of the train actually saw them.

On the first contention, we think the railway company was right; on the second, wrong. The second argument is based on those cases, respectable in number, if in nothing else, which hold that a railway company's duty to a trespasser is merely to avoid wantonly or recklessly injuring him after becoming aware of his presence. This is supported by the argument that the cattle were trespassers, and that the rules are the same as to liability for property unlawfully upon the track as for persons. We think the same general principle does apply. But the rule in this state is that it is the duty of the railway company not merely to avoid injuring a trespasser after his presence has been discovered, but that those in charge of a train must exercise reasonable care to avoid injuring all such persons who are or who may be anticipated to be upon the track; and the company is liable if the engineer, by keeping such a lookout as is consistent with his other duties, would have observed the trespasser in time to avoid the injury. Railroad Co. v. Grablin, supra; Railroad Co. v. Wymore, 40 Neb. 645, 58 N. W. 1120; Railroad Co. v. Wilgus, 40 Neb. 660, 58 N. W. 1125. Therefore, we think that there was no error in the statement that if the engineer, in the exercise of ordinary care, would have seen the cattle in time to have prevented the injury, it was his duty to do so, and the company was liable for a failure in that regard. But, applying the rule already stated in regard to pleading, it is not alleged that the cattle were seen, or that, by the exercise of such reasonable care as was consistent with the duties of the engineer, they might have been seen. While, from the evidence, we think it is a fair inference that an immediate stop of the train would have been dictated by ordinary prudence on discovering 340 head of cattle on the right of way, the failure to slacken speed is the only fact alleged in connection with the charge of negligence. Whether or not it was the duty of the engineer to stop his train would depend upon other circumstances which are not pleaded. Trains must run, and run at considerable speed, even on misty mornings, before daylight, and no inference of negligence can certainly be drawn from the fact that a train was running at a high rate of speed, and might have been stopped before trespassing cattle are injured, when there is not a showing of facts raising a reasonable inference that it was the engineer's duty to stop, or to exercise some other precaution. If, as plaintiffs' evidence tends to show, it was a clear morning, daylight, the track unobstructed for half a mile, and 340 head of cattle on the right of way, and the engineer failed to see these cattle in time to stop, or, having seen them, to stop, if he could, then the inference of negligence would be reasonable. But such facts, or similar facts, are not pleaded, and the proof cannot extend the scope of the pleadings. We think, therefore, while the instructions were correct as abstract statements of law, they submitted to the jury an issue not within the pleadings, and for that reason the judgment must be reversed, with directions to permit plaintiffs to amend their petition if they desire. Reversed and remanded.

PHILADELPHIA MORTGAGE & TRUST CO. v. GOOS et al.

(Supreme Court of Nebraska. April 8, 1896.)

MORTGAGE—FORECLOSURE—APPOINTMENT OF RECEIVER.

1. Although section 55, c. 73, Comp. St., provides that, "in the absence of stipulations to the contrary, the mortgagor of real estate retains the legal title and right of possession thereof," yet it does not abrogate the power of the court to appoint a receiver, in a proper case, to collect the rents and profits from mortgaged premises, notwithstanding the mortgage contains no stipulation as to the right of possession.

2. After a confirmation of sale of mortgaged premises, and an appeal from such order by the defendant, the trial court may, in a proper case, when necessary to protect the mortgagee's interest, appoint a receiver to collect the rents pending the determination of such appeal.

3. Banking Co. v. Mahoney, 61 N. W. 594, 43 Neb. 214, distinguished.

4. In an action to foreclose a mortgage, the plaintiff is entitled to the appointment of a re-

ceiver to take charge of the property and collect the rents, when it is disclosed that the mortgaged property is "probably insufficient to discharge the mortgage debt." Jacobs v. Gibson, 2 N. W. 893, 9 Neb. 380, followed.

(Syllabus by the Court.)

Error to district court, Douglas county; Ambrose, Judge.

Petition by the Philadelphia Mortgage & Trust Company, trustee, against Peter Goos and others, for the appointment of a receiver. There was a judgment for defendants, and plaintiff brings error. Reversed.

Wharton & Baird, for plaintiff in error. Cowin & McHugh, for defendants in error.

NORVAL, J. This is a proceeding in error to review the order of the district court refusing to appoint a receiver to collect the rents and profits of the mortgaged premises, pending an appeal to this court from an order of confirmation of sale. On the 23d day of June, 1894, a decree of foreclosure of the mortgaged premises was entered in the district court of Douglas county, in favor of the plaintiff, for the sum of $72,678.66, with interest on $67,000 at 7 per cent., and 10 per cent. interest on the remainder of the amount found due by the decree. The defendant John E. Izzard in due time filed a written request for a stay of the order of sale for the period of nine months. Subsequently, on the 29th day of March, 1895, an order of sale was issued, the premises were appraised, and the sale thereof advertised to take place on April 30, 1895. On motion of the defendant Izzard, the appraisement was set aside by the court, a second appraisement of the property was made by new appraisers, which likewise was vacated on motion of Izzard, and a third appraisement was ordered. The premises were again appraised by other appraisers, and advertised for sale. A motion to set aside this appraisement, and to remove the special master commissioner, was filed by Izzard; but the same was not heard or passed upon until after the day fixed for the sale of the real estate. The property was sold under the appraisement to the plaintiff for $68,100. Izzard filed objections to the sale, which, with his motion to set aside the appraisement, and to remove the special master commissioner, were overruled, and the sale confirmed on August 31, 1895. Thereupon Izzard prosecuted an appeal to this court, giving a supersedeas bond in the sum of $7,000, conditioned for the prosecution of such appeal without delay, and that, during the pendency of said appeal, he would not commit, or suffer to be committed, any waste upon the mortgaged premises. Subsequently, on the 30th day of September, 1895, plaintiff filed its petition for the appointment of a receiver to collect the rents, issues, and profits, pending the appeal, setting forth in the application, in addition to the foregoing facts, that the appeal was prosecuted for delay merely; that the amount due plaintiff on his decree was $79,455.45; that the value of the property is insufficient and grossly inadequate to satisfy said sum; that the defendants have failed and neglected to pay the taxes due and delinquent on said premises; that the accrued taxes and assessments for which the property is liable, and which the defendants have failed to pay, amount to about $3,300; and that they have neglected to keep the property insured, and the plaintiff, for the protection of its security, had been compelled to pay for premium and insurance on said property, since the rendition of the decree of foreclosure herein, the sum of $1,867.06. Notice of the petition was duly given, and, upon the hearing, the application was denied, and a receiver refused. A motion for a new trial was filed by the plaintiff, which was overruled.

The district court of Douglas county had jurisdiction to hear and determine the application for the appointment of a receiver herein, notwithstanding such application was not made until after the decree of foreclosure had been entered, the sale confirmed, and the cause appealed to this court. Eastman v. Cain, 45 Neb. 48, 63 N. W. 123. There is no controversy over the facts in this case. But the question is whether sufficient facts existed at the time the application was presented to the court below to authorize the appointment of a receiver. Section 266 of the Code of Civil Procedure provides for the appointment of receiver in either of the following cases: "* * * Second. In an action for the foreclosure of a mortgage, when the mortgaged property is in danger of being lost, removed, or materially injured, or is probably insufficient to discharge the mortgage debt. Third. After judgment, or decree to carry the same into execution, or to dispose of the property according to the decree or judgment, or preserve it during the pendency of an appeal. * * * Fifth. In all other cases where receivers have heretofore been appointed by the usages of courts of equity." It is obvious the application for a receiver was not made to carry the decree of the district court into effect, nor to dispose of the property according to the decree. That had already been done. The second subdivision of section 266 of the Code authorizes the appointment of a receiver in an action to foreclose a mortgage when the mortgaged property "is probably insufficient to discharge the mortgage debt." In other words, the inadequacy in value of the premises to pay the mortgage lien thereon is alone sufficient ground to entitle the mortgagee to the appointment of a receiver to take charge of the property and collect rents accruing therefrom. Jacobs v Gibson, 9 Neb. 380, 2 N. W. 893; Ecklund v. Willis, 42 Neb. 737, 60 N. W. 1026.

Our attention has been called to section 55, c. 73, Comp. St., which provides that

"In the absence of stipulations to the contrary the mortgagor of real estate retains the legal title and right of possession thereof." It is argued that, under the foregoing provisions, the mortgagor, except as otherwise stipulated in the mortgage, is entitled to the rents and profits, and the possession of the mortgaged premises, until final confirmation of the sale. The mortgage under which the foreclosure in this case was made is not before us. Hence we are not advised of its provisions. Assuming that it contained no stipulation as to the right of possession of the property, it does not follow that a receiver may not be appointed to collect the rents and profits, in case the premises are insufficient in value to satisfy the lien of the mortgage. That such power exists was held by this court in Jacobs v. Gibson, 9 Neb. 380, 2 N. W. 893. Lake, J., speaking for the court in that case, said: "In the absence of an agreement to the contrary, we suppose no one would contend but that a mortgagor is entitled to the rents and profits of mortgaged premises until condition broken, or, in other words, until such time as the mortgagee is authorized to proceed, by action on the mortgage, to subject the property to the payment of his debt. Such, doubtless, is the law. On the other hand, it is equally clear that, on a condition broken, by which the mortgagee is authorized to commence foreclosure proceedings, if the property be inadequate security, he has thenceforward an equitable lien upon the rents and profits, or so much thereof as may be necessary to the security of the mortgage debt, which he may enforce by proper proceedings." See High, Rec. § 666; Schreiber v. Carey, 48 Wis. 208, 4 N. W. 124; Pasco v. Gamble, 15 Fla. 562; Mahon v. Crothers, 28 N. J. Eq. 567; Hyman v. Kelly, 1 Nev. 179; Lowell v. Doe, 44 Minn. 144, 46 N. W. 297. The last case cited was an appeal from an order appointing a receiver of mortgaged real estate pending foreclosure proceedings. It was urged that, under a statute of Minnesota (Gen. St. 1894, § 5861) which declares that "a mortgage of real property is not to be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure," the court had no power to appoint a receiver to dispossess the mortgagor. The court overruled this contention, saying, after quoting the foregoing section of the statute: "The mortgagee is no longer entitled to the possession of the mortgaged premises before foreclosure by reason of his having any title or estate in the land. The mortgagor, having the legal title, may without doubt remain in possession until his title is divested, unless, in the application of the established principles of equity, and consistently with the legal title remaining in the mortgagor, the court shall find it necessary to lay its hand upon the property for the protection of the equitable rights of the mortgagee. The exercise of this power by courts of equity in the past was not based upon the ground that the legal title had passed from the mortgagor to the mortgagee, but upon the equitable right of the mortgagee to have his security preserved so that it should be adequate for the satisfaction of the mortgage debt. * * * The jurisdiction of equity in the appointment of receivers, long exercised upon grounds peculiar to courts of equity, is not to be deemed to have been taken away by the statute unless that is its necessary effect, or, at least, its obvious purpose. Such is not the obvious purpose or necessary effect of the statute. It is to be read in harmony with the existing principles of equity jurisprudence, if the intention to do away with the application of such principles is not manifest. * * * It is very clear, from the language of this statute, the meaning of which is plain, precise, and impossible to be misunderstood, that it was intended to abrogate the common-law doctrine that a mortgage created an estate upon condition in the mortgagee, which, upon default in the performance of the condition, became absolute, entitling the mortgagee to recover possession. But the language of the act expresses no more than this, and it cannot be fairly construed as abrogating, also, the power of courts of equity to afford to mortgagees such remedies for the protection of their equitable rights as upon equitable grounds those courts had always been accustomed to afford, and the granting of which did not rest upon the doctrine of the legal title or right of possession being in the mortgagee." The reasoning is sound, and is equally applicable to our statute. We might cite many other cases to the same effect. Indeed, the general current of authority sustains the exercise of the power to appoint a receiver to collect rents of mortgaged premises in a proper case, though there is no stipulation in the mortgage giving the mortgagee the right of possession of the property. The case of Yeazel v. White, 40 Neb. 432, 58 N. W. 1020, is plainly distinguishable, and not in the least in conflict with the foregoing authorities. There are decisions, rendered under statutory provisions similar to ours, which deny the power of a court to appoint a receiver to collect the rents, in the absence of such a stipulation in the mortgage. While we entertain the greatest respect for the opinions of the courts asserting the doctrine last stated, we are satisfied the reasons advanced in them are insufficient to justify us in overruling our prior adjudication on the question, especially since it is in line with the general current of authority in this country.

It is insisted that no power exists to appoint a receiver after decree, under the second subdivision of said section 266, but that

it merely authorizes one to be appointed while the case is pending and undetermined in the district court. The case of Banking Co. v. Mahoney, 43 Neb. 214, 61 N. W. 594, is cited by counsel to sustain this contention. That case lacks analogy. Here the petition in foreclosure prayed the appointment of a receiver to collect the rents pending the action, but no hearing was had on the application for receiver until the final decree was entered, when one was appointed before an appeal was taken or an application was made for a stay of the order of sale. It was held, and we think rightly, there was no occasion for making the appointment, and the order was reversed. Irvine, C., speaking for the court, observed: "But this order was made a part of the final decree. No appeal had been taken. No steps had been taken towards instituting an appeal. It is possible, though this we do not decide, that in some cases a receiver might be appointed pending a stay of execution; but no stay had been asked for. For all that appeared when this receiver was appointed, the mortgagees might have proceeded in twenty days [the time fixed for redemption] to sell the property." In the case at bar no application for the appointment of a receiver was filed or presented to the court until the defendant had prosecuted an appeal to this court from the order confirming the sale. The appeal had at that time been perfected, and a supersedeas bond given, so that the plaintiff could not reap the benefit of the decree. When this application was made there existed sufficient reason why the appointment should be made. The property was insufficient to pay the mortgage, and there will be a large deficiency judgment. The cause was then pending and undetermined on appeal, and, according to the rules and practice which obtain in this court, such appeal could not be heard on its merits for two years. In the meantime the mortgage debt increases, the defendant collects the rents, amounting to $5,000 per annum, which he pockets, and refuses to insure the mortgaged premises, or pay the accruing taxes against the property. It will be observed that section 266 of the Code does not provide when the application for a receiver may be made, whether before or after judgment, except that the third subdivision provides for the appointment of a receiver, after judgment or decree, for certain purposes. As has already been stated, we have decided, in Eastman v. Cain, 45 Neb. 48, 63 N. W. 123, that the district court possesses jurisdiction to appoint a receiver in a foreclosure case to collect the rents, although the application therefor is made after an appeal has been taken on the merits to this court. Had no appeal been prosecuted from the order of confirmation, doubtless, a receiver could not be appointed merely to collect the rents; but, an appeal having been perfected, the action must be regarded as still pending for the purpose of appointing a receiver of the rents and profits of the mortgaged property. Brinkman v. Ritzinger, 82 Ind. 358; Connelly v. Dickson, 76 Ind. 440; High, Rec. § 110; Merrill v. Elam, 2 Tenn. Ch. 513; Moran v. Brent, 25 Grat. 104; Adkins v. Edwards, 83 Va. 316, 2 S. E. 439; Schreiber v. Carey, 48 Wis. 208, 4 N. W. 124; Beard v. Arbuckle, 19 W. Va. 145; Hutton v. Lockridge, 27 W. Va. 428; Astor v. Turner, 11 Paige, 436. The fact that the mortgaged premises are of insufficient value to pay the amount of plaintiff's claim and costs, coupled with the further facts that the order confirming the sale may possibly be reversed, that the defendant is collecting the rents and refuses to apply the same on the decree, or in payment of the taxes and assessments against the property, or to keep the premises insured, and the liability of the real estate being sold for the nonpayment of said taxes, justify the appointment of a receiver. As was aptly said by Taylor, J., in delivering the opinion of the court in Schreiber v. Carey, supra: "We think the facts in this case show that the mortgagor, by his willful neglect in not paying the taxes, is casting a burden upon the mortgaged estate which equity demands he should discharge. It is clearly a want of good faith on the part of the mortgagor to neglect to pay the interest on the mortgage debt, or to pay the taxes upon the mortgaged property, and yet remain in possession, and appropriate all the profits of the use of the estate to his own purposes." The cases already cited fully sustain the right of the plaintiff to have a receiver appointed.

It is argued by the defendant that the plaintiff is protected against any possible damages, by reason of the nonpayment of the taxes, by the supersedeas bond given in the appeal taken from the order of confirmation. This bond is conditioned that appellant "will not, during the pendency of such appeal, commit or suffer to be committed any waste upon such real estate." Authorities are cited to the effect that nonpayment of taxes constitutes waste. If we accept the reasoning of the decisions relied on by counsel, the defendant Izzard had committed waste upon the mortgaged premises; and it is clear the commission of waste is sufficient ground to authorize a court of equity to appoint a receiver to take possession of the mortgaged property pending an appeal. Even though the supersedeas bond is broad enough to cover the nonpayment of taxes, which we do not determine, still that is no reason for refusing a receiver. The plaintiff is entitled to have his debt satisfied out of the property pledged as security for its payment, without being forced to resort to other remedies he may have. The statute authorizes the appointment of a receiver in an action of foreclosure when the mortgaged premises are "probably insufficient to discharge the mortgage debt." In the case at bar there is no room for doubt that the

property is wholly inadequate to pay the amount of the decree. We must not be understood as holding that the plaintiff would be entitled to the rents and profits accruing from the property pending the appeal from the order of confirmation, in case such order should be affirmed. What we do decide is that the rents should be impounded and retained to await the further order of the lower court in the premises.

It was suggested on the argument that the real estate in controversy was Izzard's homestead. Whether, in any case, a receiver can be appointed to take possession of the mortgagor's homestead, pending foreclosure proceedings, it is unnecessary to decide, since that question is not presented by this record. The order refusing a receiver is reversed, and the cause remanded, with directions to the district court to appoint some suitable person receiver to collect the rents and profits of the mortgaged premises. Reversed and remanded.

FARMERS' & MERCHANTS' INS. CO. v. PETERSON.

(Supreme Court of Nebraska. April 7, 1896.)

INSURANCE—ACTION ON POLICY—PLEADING—ADMISSIONS.

1. A policy of insurance is prima facie an admission by the insurers of the title of the insured to the property embraced in the policy. Insurance Co. v. Scheidle, 25 N. W. 620, 18 Neb. 495, followed.

2. In an action on a policy of insurance, a breach of the contract thereof, as incumbering the property, is matter of defense, to be pleaded and proved by the company; and it is not incumbent upon the insured to negative the fact in the first instance, either in pleading or proof.

3. The reply in this case *held* to admit that the provision for forfeiture of the insurance if the property should be incumbered was one of the stipulations of the contract of insurance, but that it did not admit the signing of the application alleged in the answer, nor the mortgaging of the property by the insured.

(Syllabus by the Court.)

Error to district court, Cuming county; Norris, Judge.

Action by Jacob Peterson against the Farmers' & Merchants' Insurance Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

J. C. Crawford, for plaintiff in error. C. C. McNish and A. R. Oleson, for defendant in error.

HARRISON, J. On the 8th day of October, 1892, the defendant in error commenced this action against the plaintiff in error in the district court of Cuming county, to recover the sum of $1,250, alleged to be his due by reason of the destruction by fire of property of which he was the owner, and covering which, and insuring him against such destruction, he held a policy issued by plaintiff in error (hereinafter referred to as the "company"). An answer and a reply were filed, whereby issues were joined, and a trial thereof had before the court and a jury. The defendant in error was sworn and testified. The issuance of the policy, and the insurance thereby of the property, had been established by the pleadings. During the time the defendant in error was testifying in his own behalf, it was admitted on the part of the company that the premium or consideration for the contract of insurance had been paid by defendant in error; that, of the property insured, there had been destroyed by fire, of date January 29, 1892, sufficient to aggregate in value $1,097; that due notice of the loss had been given, and demand made for payment. It was proved that no payment had ever been made. At the close of his own testimony, with the facts as just indicated either admitted or proved, the defendant in error rested his case. For what further occurred at this stage of the proceedings, we will quote from the record: "At this time the defendant moved that the case be dismissed, for the reason that it is incumbent upon the plaintiff to prove, as alleged, that he has kept and performed his part of the agreement, which they haven't attempted to prove. Motion overruled, to which ruling defendant excepts; whereupon defendant rests. At this time plaintiff asked the court to instruct the jury to return a verdict for plaintiff for the amount of $1,097, and interest from the 29th day of January, 1892. At this time the defendant asked the court to instruct the jury that they cannot bring in a verdict for the plaintiff exceeding the amount defendant offered to admit, $190.63. Instruction asked for by plaintiff given, to which instruction defendant excepts. Instructions asked for by defendant denied, to which ruling defendant excepts." The jury, in accordance with the instruction of the court, returned a verdict for plaintiff in the sum of $1,132.20, being the $1,097 and interest thereon; and, after motion for new trial heard and overruled, judgment was rendered for such sum. The case is presented here by error proceedings in behalf of the company.

It is urged that the defendant in error did not prove his ownership of the insured property, either at the time of its insurance or of its destruction by fire. On this point it may be said it has been held by this court: "A policy of insurance is prima facie admission by the insurers of the title of the insured to the property embraced in the policy." Insurance Co. v. Scheidle, 18 Neb. 495, 25 N. W. 620. And in the text of the opinion in that case it was observed: "The mere fact of the contract of insurance being effected should, we think, be enough prima facie to prove the ownership of the property. If the contract was procured by fraud, and such ownership did not exist, or if the insurance was simply a wager policy, it was proper matter of defense, and, if relied upon, should be pleaded as a defense. The same may be said of the second objection, that it is not

alleged that defendant in error was the owner of the horse at the time of his death."

It is insisted that, the defendant in error having pleaded in his petition that he kept and performed all and singular the conditions of the policy on his part to be kept and performed, and this allegation being denied in the answer of the company, it devolved on plaintiff in error to prove that there had been no breach of the condition of the policy by which it was stated that it was avoided if the property was mortgaged or incumbered while insured. This was matter of defense, and it was for the company to allege it and prove it; and it was not the duty of the insured to, in the first instance, negative the fact that the property had been mortgaged, in either pleadings or proof, or to prove it under the general allegations in respect to the conditions of the policy hereinbefore set forth. Butternut Manuf'g Co. v. Manufacturers' Mut. Fire Ins. Co. (Wis.) 47 N. W. 366; Perine v. Grand Lodge (Minn.) 53 N. W. 367; Price v. Insurance Co., 17 Minn. 497 (Gil. 473); Bank of River Falls v. German American Ins. Co. (Wis.) 40 N. W. 506.

For a thorough understanding of the further question discussed in the briefs, it will be necessary to know fully certain allegations of the answer of the company, and the reply thereto. In the answer it was alleged: "This defendant, for further answer to plaintiff's petition, says: That, prior to the issuance of the policy of insurance to the plaintiff by this defendant, the plaintiff made a written application for said insurance, in which he stated that none of said property was incumbered in any way, together with various other statements therein contained, a copy of which application is hereto attached, and made a part hereof, and marked 'Exhibit A.' That, relying upon the truth of the statements therein contained, the defendant issued the policy, insuring the property in said application described. (8) That the said policy of insurance sued on in this action contains the following conditions: 'This insurance is based on the representations contained in the assured's application, of even number herewith, on file in the company's office in Lincoln, Nebraska, each and every statement of which is hereby specifically made a warranty and a part hereof; and it is agreed that, if any false statements are made in said application, this policy shall be void; * * * or if the property be or shall hereafter become mortgaged or incumbered, or upon commencement of foreclosure proceedings or in case any change shall take place in the title, possession, or interest of the assured in the above-mentioned property, or if this policy shall be assigned, * * * then, in each and every one of the above cases, this policy shall be null and void.' That notwithstanding the representations made by the plaintiff in his application, on the faith of which said policy was issued, and notwithstanding the conditions contained in said policy, the plaintiff did not own the stock mentioned in said application and policy at the dates of said application, and at the time the said property was insured by defendant, but had conveyed the same, or a portion thereof, by chattel mortgage, to Jurgen Peterson, on March 17, 1891. That, in violation of the conditions contained in said policy of insurance, plaintiff conveyed the live stock described in said application and said policy of insurance to one Soren Anderson, of Thurston county, Nebraska, by chattel mortgage, on the 1st day of October, 1891; and on the 21st day of July, 1891, plaintiff conveyed four of the horses described in said policy to the Beemer State Bank, whereby said policy became void, and of no force or effect. (9) Defendant, for further answer, says that the said plaintiff obtained the said policy of insurance by fraud and misrepresentation, in that he represented that, at the time said application was made for said insurance, none of said property was incumbered in any way, whereas a large portion of said property was incumbered by chattel mortgage; and the statement of the said plaintiff that the same was not incumbered was false, and was known to be false by the plaintiff at the time he made the same." The reply was as follows: "The plaintiff, for reply to the defendant's answer in the above-entitled cause, denies each and every allegation of new matter therein set forth, except such matter and facts as are hereinafter expressly admitted. (2) The plaintiff admits that he signed an application for insurance to the said defendant, through their agent W. H. Fleming, but that he signed such application for insurance upon the reliance placed in the representations of said W. H. Fleming; that the said agent did not read, nor cause to be read, nor make known to this plaintiff, any of the interrogatories or representations in said application to this plaintiff, the said agent having the said plaintiff believe at the time he signed such application that it was a matter of form; that the said plaintiff was unable to read the English language, and therefore could not inform himself as to the contents of said application, and did not know the contents thereof; and that the said W. H. Fleming did not, at the time he delivered the policy of insurance to said plaintiff, make known any of the conditions therein, other than stating to said plaintiff that the fine print therein contained would not affect his insurance in any manner; and the plaintiff, being unable to read the same, relied upon those representations, and was wholly unacquainted with the contents thereof, except believing that the said W. H. Fleming truly represented the effect of said application and policy at the time the same were made and delivered."

It is contended for the company that the reply was, in effect, a plea in confession and avoidance, and that, by it, there was admit-

ted the making of the application and its statements, also the requirements of the conditions of the policy quoted in the portion of the answer which we have set forth herein, and the further facts of the existence of the mortgage on the property at the time it was insured, and the execution of the other mortgages covering it, or portions of it, as stated in the answer; that, these facts being thus admitted, it established the defense in favor of the company, and hence it was error for the court to instruct the jury to return a verdict for defendant in error. Counsel for defendant in error strenuously insist that the reply is not, and cannot be considered or construed as, an admission to the extent it is claimed to be by counsel for the company; and in this connection attention is directed to the statement in the reply in respect to the application, whereby it is said, "The plaintiff admits that he signed an application," and it is argued that this is not an admission of the existence of the application pleaded in the answer; that, by the use of the word "an," the pleader merely admitted the fact of signing an application, without reference to any particular one, or the one attached to the answer; that the denial in the reply of all new matter contained in the answer applied to the application therein included, and the fact of its making, and the burden was upon the company to identify or prove the application pleaded in the answer to be the one signed by defendant in error. The ordinary meaning or force of the words employed in the reply was not to admit the signing of any special application, or the application set forth in and made a part of the answer, but to admit the signing of one or some application; and, the fact of the making of the one a part of the answer having been denied, it was for the company to prove it.

But there was pleaded in the answer a clause in the policy by which all rights under it were forfeited if the property insured was mortgaged or incumbered at any time during the existence of the policy, and in the reply matter was pleaded in avoidance of this condition. This clearly admitted it as one of the stipulations of the contract of insurance. Did the plea of avoidance in the reply also admit the mortgaging of the property? We do not think so. "Where the answer contains new matter, the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him; and he may allege, in ordinary and concise language, and without repetition, any new matter not inconsistent with the petition, constituting a defense to such new matter in the answer." Code Civ. Proc. § 109. The plea of new matter in the reply, if a good plea (a question which was not raised or discussed in the briefs, and which we will not discuss or determine), contained matter in avoidance of the operations of all the conditions of the contract of insurance printed in small type, and its effect was to admit the existence of the stipulations in all their requirements; but, as we view it, it did not extend further, and necessarily admit the making of mortgages upon the insured property, or breaches of any of the conditions. These facts were denied in the reply, and the issue thus raised was not one inconsistent with the admission of the existence of the conditions and their avoidance; and the defendant in error was entitled to have his denial of the giving of the mortgage stand, and rely upon it, and the company should have introduced proof of such traversed facts. Had the plea of avoidance in the reply, instead of being general, as it was, been a special one, and directed against the particular conditions pleaded in the answer, and applied the avoidance to the particular alleged breach, of mortgaging the insured property, in terms, then it would have been an admission of the facts relied upon as constituting the breach. The plea of avoidance, if good and sustained, would, it is true, have been as effectual against the condition providing for a forfeiture of the contract of insurance if a mortgage was given as it would have been as to any other; but it was framed to apply generally, and its existence and force as a plea would not be inconsistent with the force or existence of the general denial of the execution of the mortgages, and the defendant in error could, of right, insist on both

The conclusions herein reached are such as to show a condition of the issues in the case, upon the pleadings and proofs before the trial court at the time it directed a verdict for defendant in error, which warranted such direction, and the judgment must be affirmed.

LITTLE et al. v. GAMBLE.

(Supreme Court of Nebraska. April 7, 1896.)

APPEALABLE JUDGMENTS.

A mere judgment for costs in favor of the defendant, in whose favor a verdict has been returned without a final disposition of the cause in the district court, cannot be reviewed in the supreme court.

(Syllabus by the Court.)

Error to district court, Buffalo county; Holcomb, Judge.

Action by Little, Maxwell & Co. against Ross Gamble. There was a verdict for defendant, and a judgment for costs, and plaintiffs bring error. Dismissed.

Marston & Nevins, for plaintiffs in error. R. A. Moore, J. M. Easterling, and W. D. Oldham, for defendant in error.

RYAN, C. This action was brought by the firm of Little, Maxwell & Co. for the purchase price of certain goods of the value of $469.20, and upon a trial had in the district court of Buffalo county there was a

verdict for the defendant. Whether or not this verdict was justified by the proofs, we cannot determine, for the record shows no final judgment. Just after the recitations showing the overruling of a motion for a new trial and the allowance of time to settle a bill of exceptions, the language of the final journal entry is as follows: "Defendant demands judgment on the verdict, and, in pursuance of the verdict rendered herein it was ordered by the court that the defendant, Ross Gamble, recover of and from the plaintiffs Little, Maxwell & Co. his costs herein expended, taxed at $31. Judgment on the verdict." This was not a final disposition of the case in the district court. Nichols v. Hall, 5 Neb. 194; Gapen v. Bretternitz, 31 Neb. 302, 47 N. W. 918; Smith v. Johnson, 37 Neb. 675, 56 N. W. 323. The petition in error is therefore dismissed.

BUFFALO COUNTY NAT. BANK v. GILCREST et al.

(Supreme Court of Nebraska. April 9, 1896.)

APPEAL—WEIGHT OF EVIDENCE.

The only question presented being one of fact, as to which the evidence is conflicting, and apparently evenly balanced, the finding and judgment of the district court should not be disturbed.

(Syllabus by the Court.)

Error to district court, Buffalo county; Holcomb, Judge.

Action by the Buffalo County National Bank against Clem V. Gilcrest and others. There was a judgment for defendants, and plaintiff brings error. Affirmed.

H. M. Sinclair, F. G. Hamer, and Dryden & Main, for plaintiff in error. R. A. Moore and Marston & Nevins, for defendants in error.

POST, C. J. This was an action by the plaintiff in error in the district court for Buffalo county on the following instrument: "$9,875.00. Kearney, Neb., Sept. 14th, 1889. Ninety days after date, for value received, I promise to pay to the order of the Buffalo County National Bank, ninety-eight hundred seventy-five dollars, at the Buffalo County National Bank, Kearney, Nebraska, with interest at the rate of ten per cent. per annum from maturity until paid. Interest paid to December 20th, 1889. Clem V. Gilcrest." On the back of said note are the following indorsements: "F. H. Gilcrest." "A. T. Gamble." "E. B. Jones." "$5,775.00 paid December 21st, 1889." "$3,300.00 paid December 30th, 1889." The defendants Jones and F. H. Gilcrest joined in an answer, which is here set out: "That on or about the 1st day of July, 1888 the defendants F. H. Gilcrest and E. B. Jones, upon the representations and at the solicitations of their co-defendant, A. T. Gamble, then an officer and cashier of the plaintiff bank, and upon his representations that the capital stock of the Central Nebraska Live Stock Insurance Company that subsequently they, with the said A. T. Gamble and others, hereinafter named, became the owners of the whole of the capital stock of said company. That under the laws of the state of Nebraska the insurance company were required to have $50,000 of paid-up capital stock before commencing business. That after the purchase of said stock it became necessary to reorganize said company, and take up the old stock, and pay in the said sum of $50,000 as the amount required of paid-up capital stock. That to make up said required amount the defendants F. H. Gilcrest, E. B. Jones, together with their co-defendant, A. T. Gamble, and one B. H. Goulding, deposited with the plaintiff their notes as follows: One of the said A. T. Gamble for $12,500, one of the said E. B. Jones for $12,500, one of B. H. Goulding for $12,500, one of F. H. Gilcrest for $12,500, each and every one of which said notes the said plaintiff gave to the said insurance company a credit of $50,000 on the books of the plaintiff as the amount necessary to show paid-up capital stock in compliance with the law. That subsequently, and as soon thereafter as the necessary arrangements could be made, there was substituted for the said notes deposited as aforesaid first mortgage securities to the amount of about $40,000, and the said note sued on in this case was then given to make up the balance of the said $50,000. That no money was ever advanced by the plaintiff upon the said note, or was it ever intended or expected by the plaintiff or the makers of said note that any money should be paid thereon, but that, as fast as first mortgage securities belonging to these defendants should be deposited with the treasurer of said company, their amounts should be indorsed upon said note, and, when sufficient had been deposited, as aforesaid, to equal the face of said note, the note should be delivered up to the makers thereof, and canceled. That in pursuance of said arrangement and agreement there was indorsed upon said note on December 21, 1889, $5,775, and on the 30th day of December, 1889, there was paid, and should have been indorsed upon the said note, the sum of $4,200, but there was only indorsed, as appears by copy of said note, the sum of $3,200 on that date. And these defendants aver that there was no consideration moving from the plaintiff to the makers of said note, nor did either of the makers thereof ever receive any money or value thereof, except as above set out." To the foregoing answer a reply was interposed, which is in substance a general denial. Upon the issues thus joined there was a trial to the court, a jury being waived, resulting in a finding and judgment for the defendants therein, which it is now sought to reverse by means of this proceeding. Practically

the only contention at this time on the part of the plaintiff in error is that the finding is unsupported by the evidence. By a close scrutiny of the answer it will be observed that the substantial defense—indeed, the only defense—there stated is that the indebtedness to the bank had been extinguished by means of mortgage securities delivered to and accepted by the latter in payment of the note in suit. We have carefully read over the evidence, which is, to say the least, conflicting, and apparently evenly balanced, but which is quite sufficient, under the rule often recognized by this court, to sustain the finding complained of. The judgment of the district court is affirmed. Affirmed.

GIBSON v. McCLAY, Sheriff, et al.

(Supreme Court of Nebraska. April 9, 1896.)

CONTRACT—INTERPRETATION—INJUNCTION AGAINST BREACH—ESTOPPEL—WAIVER—DECREE.

1. The agreement in this case, quoted in full in the opinion, construed to be one by which the judgment creditor bound himself to first make levy, or cause it to be made, on the property of a designated one of the judgment debtors, within the jurisdiction of the court in which the judgment was rendered, and to sell or exhaust the property of this particularly specified debtor, for the satisfaction of a balance of the judgment remaining unpaid, before resorting to or causing levy of execution to be made on property belonging to either of the other debtors.

2. *Held*, that injunction was the appropriate and proper remedy for an attempted violation of the agreement, consisting of a levy and proposed sale of the property of one of the debtors favored by its terms, when it appeared, at the time, there was property of the debtor, from whose property the judgment was first to be satisfied, within the jurisdiction of the judgment court, subject to execution.

3. Certain acts and statements of one of the favored debtors reviewed, and *held* not to constitute a waiver of his rights under and by virtue of the agreement, or to estop him from asserting them.

4. The decree *held* not to be objectionable, as restraining the levy and enforcement of the execution in the par. thereof with reference to the costs of the case in which the judgment was rendered.

5. The decree and injunction thereby accorded *held* too broad, in that it restrained the sale of any of the property of the one debtor until all the property of the other was exhausted, and that it should have been confined to restraining a levy or sale under the execution herein involved, and to this extent it is modified, and, as modified, affirmed.

(Syllabus by the Court.)

Appeal from district court, Lancaster county; Tibbets, Judge.

Action by Benjamin A. Gibson against Sam McClay, sheriff, and another, for injunction. From a judgment for plaintiff, defendants appeal. Modified and affirmed.

E. R. French, for appellants. Woolley & Gibson, for appellee.

HARRISON, J. On or about the 20th day of July, 1890, Alexander S. Porter, of appellants herein, recovered a judgment in the district court of Douglas county against Benjamin A. Gibson, appellee in the case at bar, Jonathan Chase, and Joseph M. Beardsley, in the sum of $15,000. September 25, 1890, appellee paid, on the judgment mentioned, the sum of $5,055, and at the time of such payment an agreement was entered into which was as follows: "Received on this judgment, from Benjamin A. Gibson, the sum of five thousand and fifty-five dollars ($5,055), being a third of the principal sum and interest to date. Also, received of Joseph M. Beardsley the sum of five thousand two hundred and sixty-two and $^{25}/_{100}$ dollars ($5,262.25), the same being a certified check payable April 28, 1891, the same to be credited on said judgment when said check is paid. The said defendants to pay the costs to the clerk. In consideration of said payment, plaintiff agrees to stay and not issue any execution on said judgment, or file any transcript thereof in any county prior to the 1st day of February, 1891, at which time it is agreed that Jonathan M. Chase's third part of said judgment, the sum of five thousand dollars ($5,000), principal sum, and interest to that date, shall be paid; and if the same is not then paid, execution may issue for that sum, but no more, until the 28th day of April, 1891. All parties to said judgment hereby sign and agree to this agreement, and all error and appeal from the aforesaid judgment is hereby waived by both plaintiff and defendants. If execution is issued for Chase's part of said judgment, it shall first be levied off of or from his property, and next off from the property of Benjamin A. Gibson, before Beardsley's property is levied upon and exhausted; and in case Beardsley's said check and share shall not be paid, and execution is issued, the same shall be made off his property before that of the other defendants is levied upon and sold." December 16, 1891, an execution was issued to enforce the judgment, and directed and forwarded to the sheriff of Cass county, where Jonathan Chase resided, which was returned: "No property of Jonathan Chase found whereon to levy." Subsequently, or of date March 8, 1892, another execution was issued, and forwarded to the sheriff of Lancaster county, ordering a levy to be made on the property of Gibson, which order was obeyed, and a levy made on some real estate belonging to appellee; and to obtain an injunction restraining the sheriff and defendant Porter from selling appellee's property until the property of Jonathan Chase should be first resorted to and exhausted, the present action was instituted. It was stated, in one portion of the petition filed, that Jonathan Chase was the owner, at the time, of an undivided one-half interest in a tract of land in Lancaster county, of sufficient value to satisfy the balance remaining of the judgment. A temporary injunction was granted, and, after a motion to vacate was heard and overruled, issues were joined, and, as the

result of a trial, the following findings were made, and decree rendered and entered on the journal: "This cause having been heretofore, on a former day of this term of court, to wit, March 17, 1893, tried and submitted to the court, now comes on for final determination; and after due consideration, and being fully advised in the premises, the court finds in favor of the plaintiff and against the defendants. The court further finds that the plaintiff and defendant Alexander S. Porter entered into the written agreement, set forth in the petition herein, wherein it was agreed, by and between the said plaintiff and defendant Alexander S. Porter, in consideration of the payment of one-third of a certain judgment, interest, and costs obtained by the said Alexander S. Porter against the said Benjamin A. Gibson and one Jonathan Chase and Joseph M. Beardsley, in the district court of Douglas county, Nebraska, that the said defendant Alexander S. Porter was not to cause an execution to be issued against the property of the plaintiff, Benjamin A. Gibson, until the property of the said Jonathan Chase was exhausted. The court finds that the said Alexander S. Porter, in violation of said agreement, caused an execution to issue upon the judgment described in the petition herein, and a levy was duly made upon the property of the said plaintiff, without previously exhausting the property of the said Jonathan Chase, as the said Alexander S. Porter had agreed to do in said agreement. The court finds that the said Jonathan Chase was, at the time of the commencement of this action, and now is, the owner of property in Lancaster county, Nebraska, subject to execution, and that the said defendants should be, and hereby are, restrained and enjoined from levying upon the property of the said plaintiff under said judgment until the property of said Jonathan Chase shall have been exhausted. It is therefore considered and adjudged by the court that the said defendants be, and they hereby are, enjoined from levying upon the property of the said plaintiff, Benjamin A. Gibson, for the satisfaction of the judgment obtained by the said defendant Alexander S. Porter as above set forth, until all of the property of the said Jonathan Chase subject to execution shall have been exhausted, and that the said plaintiff do have and recover of and from the said defendants the costs of this action, taxed at $21.85."

The agreement herein quoted may fairly be said to evidence a contract on the part of the judgment creditor to first collect any balance of the judgment from Jonathan Chase, of the debtors, to the extent that the issuance, levy of execution, and sale thereunder might become necessary in the enforcement of its collection; and we think it not straining the terms of the agreement beyond their fair import to say it contemplated that any property belonging to Chase within the jurisdiction of the court, and available by the proceedings mentioned, should be exhausted before recourse should be had to levy of process on property of the other debtors. This being, as we consider, a reasonable construction of the agreement, the issuance of an execution which, by its terms, was directed to be levied on the property of Gibson, as was the one the further effect of which it is herein sought to restrain, and its levy on the property or the belongings of Gibson, and the contemplated sale thereof under the levy, at a time when there existed property of the debtor Chase within the county wherein the levy was made on that of Gibson, was a violation of the rights of the latter raised by the contract referred to, warranting the equitable remedy of injunction to stay its further progress. The evidence introduced established the fact that Chase was the owner of property in Lancaster county subject to execution, and the trial court made a finding to this effect.

It is claimed, however, that appellee, by actions and statements in relation to the judgment and its enforcement, had estopped himself from insisting on the fulfillment of the agreement. Mr. Gibson wrote some letters to the attorney for the appellant Alexander S. Porter, in one of which, February 1, 1891, he remitted $3,000 to apply on the balance due on the judgment, and in this he said: "Mr. Chase has failed to come to time with his payment on the judgment; and I inclose you herewith my check for $3,000, for which receipt me, and also receipt on the docket, and satisfy judgment to that extent. Chase promises me that he will pay the balance in course of a week or two, and I propose to let him if he will. I hope this will be satisfactory all around. I will pay the balance of $5,000 if I can't make Chase do it. It will be something of an accommodation to me if execution does not issue for balance at once, as I want Chase to pay it if he can. If execution should issue under the circumstances, I should be hot under the collar, of course; and Mr. Porter wouldn't get his money nearly as quick." February 19, 1891, Gibson sent the attorney $2,000 to apply on the judgment, $1,000 of which was by draft which was dishonored, or not paid when presented. There were some other letters from Gibson to the attorney for the appellant Porter, in reference to the balance due on the judgment, and the filing of a transcript of it in Lancaster county, and some protestations against any attempts being made to collect the balance in any manner other than as stated in the agreement. There was also testimony from which it appeared that Gibson was in Omaha on or about June 10, 1891, and, while there, met the attorney for the judgment creditor, and, in a conversation which then occurred, stated that Jonathan Chase, his co-defendant, had no property in Lancaster county. There was also evidence to the effect that Gibson informed the attorney, when in Omaha, on the

date last mentioned, or soon thereafter, and prior to the issuance of the execution, against the service of which an injunction is sought in this action, that Chase owned an interest in some real estate in Lancaster county. There is other and further testimony on this same subject; but, from an investigation of all of it, we are satisfied that it was sufficient to sustain the findings of the trial court, and that there was nothing shown from which it can be said that the appellee waived his right to insist on the fulfillment of the agreement in regard to the enforcement of the judgment, or estopped himself from demanding such fulfillment.

It is insisted by counsel for appellants that the execution in question was for the balance due on the judgment, and for the costs, and that its further enforcement should not have been restrained, to the extent it was, for the collection of the costs; that the agreement did not include an execution for the costs, and hence the levy of this one was proper, and should have been allowed to prevail for the amount of the costs. The agreement was that if execution issued for that part of the judgment which remained for Chase to pay, it was first to be levied upon his property. This we think broad enough to include any execution issued for the purpose indicated, notwithstanding there might be also stated in it the costs, and a levy directed for their collection along with the balance due on the judgment. The execution levied, and against which the injunction was granted and became operative, was for an amount due of the judgment, and which, by the actions and agreement of the parties, was known as "Chase's part of said judgment," that Chase was to pay, or it was first to be collected from him, or his property subjected to its payment; and, as such, it should have been first levied upon his property for all purposes. And, further, from an examination of the decree, it appears that the parties were only "enjoined from levying upon the property of said plaintiff Benjamin A. Gibson, for the satisfaction of the judgment obtained by the said defendant Alexander S. Porter as above set forth, until all of the property of the said Jonathan Chase subject to execution shall have been exhausted."

It is further urged by counsel for appellants that the decree rendered in the case was too broad, in that it restrained any levy of execution against Gibson's property until such time as all Chase's property should be exhausted, and that it should have been confined in its scope to the matters in issue in the present case, and more particularly to stopping the sale under the then existing execution and levy thereof. In this contention we agree with counsel, and the decree will be modified so that the appellants will be enjoined from further enforcing the execution or levy thereof against the property of Benjamin A. Gibson, for the purpose of applying the proceeds thereof in satisfaction of the balance due on the judgment in favor of Alexander S. Porter, and against Benjamin A. Gibson, Jonathan Chase, and Joseph M. Beardsley, and, as thus modified, it is affirmed. Judgment accordingly.

GUTHRIE v. HESTER, Treasurer.

(Supreme Court of Nebraska. April 7, 1896.)

SCHOOL DISTRICTS—RIGHT TO LICENSE FEES—MANDAMUS.

1. Moneys arising from a license granted by a village for the sale of intoxicating liquors belong to the school district in which such village is located, and must be applied to the support of the common schools in said district.

2. Mandamus will lie to compel a village treasurer to pay such moneys to the proper school district, even before the expiration of the municipal year for which such license was issued.

(Syllabus by the Court.)

Error to district court, Sioux county; Bartow, Judge.

Action by G. W. Hester, treasurer of school district No. 7, against Grant Guthrie. From a judgment sustaining a demurrer to the answer, defendant brings error. Affirmed.

H. T. Conley, for plaintiff in error. D. B. Jenckes and C. H. Bane, for defendant in error.

NORVAL, J. On the 1st day of May, 1893, the proper municipal authorities of the village of Harrison, in Sioux county, issued a license to one Isador Richsten to sell intoxicating liquors within the corporate limits of said village for the municipal year ending May 1, 1894. The applicant paid to Grant Guthrie, the respondent, as treasurer of said village, the license moneys required by ordinance, to wit, the sum of $500. The relator, school district No. 7 of Sioux county, is located and embraced within the corporate limits of said village of Harrison, and is the only school district located within the limits of said village. On May 12, 1893, the school district demanded said license moneys from respondent, and upon his refusal to pay over the same an application for a mandamus was presented to the court below. From an order granting a peremptory writ, the defendant prosecutes error. Section 5, art. 8, of the constitution of this state declares that: "All fines, penalties and license moneys, arising under the general laws of the state, shall belong and be paid over to the counties respectively where the same may be levied or imposed, and all fines, penalties and license moneys arising under the rules, by-laws, or ordinances of cities, villages, towns, precincts, or other municipal subdivision less than a county, shall belong and be paid over to the same respectively. All such fines, penalties and license moneys shall be appropriated exclusively to the use and support of common schools in the respective sub-divisions where the same may accrue." Fre

quently the foregoing provisions have been before us for consideration, and in an unbroken line of decisions it has been held that all moneys arising from licenses granted by cities or villages for the sale of intoxicating liquors since the adoption of the present constitution belong to the school district in which the municipality granting the license is situated, and must be appropriated exclusively to the support of the common schools in said district. State v. McConnell, 8 Neb. 28; City of Hastings v. Thorne, Id. 160; School District No. 2 v. Saline Co., 9 Neb. 403, 2 N. W. 877; State v. Wilcox, 17 Neb. 219, 22 N. W. 458. And where parts of more than one district are within the limits of the municipality issuing such license, the license moneys will be divided in equal parts between such districts. State v. Brodboll, 28 Neb. 254, 44 N. W. 186; State v. White, 29 Neb. 288, 45 N. W. 631. The constitution and these authorities alike settle the right of school district No. 7 to the moneys in controversy.

The only proposition urged by the respondent in opposition to the granting of the writ is that the license moneys do not belong to the school district as soon as paid into the village treasury and the license is issued, but that the licensee retains an interest in the unearned portion of the moneys, and hence the respondent would not be justified in paying the same to the relator faster than the money is earned. This argument is based upon the fact that this court has held that, where a liquor license is canceled or revoked through no cause or fault of the licensee, he is entitled to a repayment pro tanto of the amount paid therefor for the unexpired term of the license. State v. Cornwell, 12 Neb. 470, 11 N. W. 729; Lydick v. Korner, 15 Neb. 501, 20 N. W. 26; State v. Weber, 20 Neb. 473, 30 N. W. 531; Chamberlain v. City of Tecumseh, 43 Neb. 221, 61 N. W. 632. With these cases we find no fault, but they are not applicable to the case under consideration. There is no claim here that Richsten's license has been annulled for any cause, nor has it been made to appear that there is even a remote possibility of its being canceled through any cause not the fault of the licensee. Had such a showing been made, it is probable that the court below, in the exercise of a sound discretion, would have denied the writ. We cannot anticipate that the license will be revoked. On the contrary, the presumption must be indulged that the license was legally granted, and that it will not be annulled. In case the respondent had paid the money to the relator, and the license had been subsequently revoked, the respondent would be protected. He would not be liable for the repayment of the money to the licensee. This was held in Lydick v. Korner, 15 Neb. 501, 20 N. W. 26. So soon as the respondent received the money, and the license was granted, no appeal therefrom being taken, it was his duty immediately to pay the money over to the treasurer of the school district. The decision of the district court is affirmed. Affirmed.

NELSON et al. v. MILLS.

(Supreme Court of Nebraska. April 7, 1896.)

REVIEW ON APPEAL—CONFLICTING EVIDENCE.

A judgment rendered on a verdict reached upon consideration of merely conflicting evidence will not be disturbed where there is presented on error proceedings no question other than the sufficiency of the evidence to sustain the verdict.

(Syllabus by the Court.)

Error to district court, Phelps county; Beall, Judge.

Action by Nelson & Little against W. H. H. Mills. Judgment for defendant, and plaintiffs bring error. Affirmed.

J. R. Patrick, for plaintiffs in error. C. H. Roberts and Hall, St. Clair & Roberts, for defendant in error.

RYAN, C. In this action in the district court of Phelps county the firm of Nelson & Little sought to recover judgment for goods sold W. H. H. Mills. The answer contained a general denial, and a claim of set-off on account of merchandise sold to the plaintiff. By reply the right of set-off was put in issue, and on a trial of the issues joined there was a verdict in favor of the defendant upon and in accordance with which judgment was rendered for defendant in the sum of $28.35 and costs. The matter in this court specially contested is whether clothing of the value of $19, sold by plaintiff to one Lindsey, was properly charged to the defendant. There was evidence that Lindsey, when he purchased the aforesaid clothing, was in the employ of Mills, and that Mills directed that the clothes sold Lindsey should be charged to himself. In his testimony Mills explicitly denied that he ever gave any authority to charge against him the clothes purchased by Lindsey. The jury, on conflicting evidence, found in favor of Mills, and we cannot disturb this verdict. There was no assignment of error which can be considered independently of the mere tendency of the evidence to prove or disprove the liability of Mills for the clothes sold to Lindsey. There is no fault found with the instructions given, but it is complained that the jury ignored them. The question submitted by these instructions was whether the promise of Mills was one to answer for the debt of another, or was an indebtedness contracted by Mills for clothes purchased for Lindsey. There is no complaint of the correctness of the principles stated in these instructions as applied to the evidence upon which the jury was required to act, but it is urged that the jury arrived at a conclusion which, in view of these instructions, they should not have reached. In brief, this argument is that the jury should have found that the promise of Mills was

really to pay an indebtedness contracted by himself, and not that of Lindsey. This contention is, therefore, simply that the verdict was contrary to the weight of the evidence, and thus we are brought back to the first proposition herein considered, and held adversely to the argument of the plaintiff in error. The judgment of the district court is affirmed. Affirmed.

KITCHEN v. CARTER.

(Supreme Court of Nebraska. April 7, 1896.)

NEGLIGENCE — DANGEROUS BUILDING — LIABILITY OF OWNER.

1. The owner of real property, in exercising his own tastes and inclinations as to the character of a building he will erect thereon, has no right to build and maintain a structure which, by reason of defects or inherent weakness either in material or construction, is liable to fall and do injury to an adjoining owner or the public.

2. If a building falls because of defects in material and workmanship reasonably within the knowledge of the owner thereof, and thereby inflicts injury upon adjoining owners or their property or any person lawfully in its vicinity, the owner is liable for the damages ensuing therefrom.

3. A party is only answerable for the natural, probable, reasonable, and proximate consequences of his acts; and where some new, efficient cause intervenes, not set in motion by him, and not connected with, but independent of, his acts, and not flowing therefrom, and not reasonably in the nature of things to be contemplated or foreseen by him, and produced the injury, it is the proximate and dominant cause.

4. The question of the proximate cause of an injury is one for the jury; but, when their decision thereof is clearly and manifestly wrong, it will be set aside.

(Syllabus by the Court.)

Error to district court, Douglas county; Doane, Judge.

Action by Delia Carter, administratrix of the estate of Michael Carter, deceased, against James B. Kitchen, to recover for the death of plaintiff's intestate. There was a judgment for plaintiff, and defendant brings error. Reversed.

Geo. E. Pritchett and J. C. Cowin, for plaintiff in error. Connell & Ives, for defendant in error.

HARRISON, J. The plaintiff in error, during the year 1886, and prior and subsequent thereto, was a part owner and had control of the premises known as the "Paxton Hotel Property," in the city of Omaha. In 1886 the southwest portion of the building was what was called an "annex" to the main body of the building, and this annex was 50 feet long, 22 feet wide, and 2 stories high. During the year stated, the plaintiff caused an additional or third story to be built upon the annex. For this third story there were no plans and specifications made, and no architect was employed to superintend its construction. A pencil sketch of the desired improvement was made, and given by plaintiff in error to an experienced contractor and builder, with directions to furnish the material and perform the labor, or have the necessary labor performed; the payment to be the reasonable value of the labor and material, or such sum as could be agreed upon between the parties. During the early part of the night of April 12, 1891, fire was discovered in the southwestern lower room of the annex, then being used as a kitchen. A fire alarm was turned in, and was promptly responded to by some of the organizations or companies belonging to the fire department, the members of which, as soon as they reached the premises, took active measures for stopping the fire, some of them discovering, as they believed, evidences of fire in the upper northwest corner or room in the third story of the annex. A ladder was raised from a vacant portion of an adjoining lot, and placed so that the upper end reached or rested against the window sill of the room, and some of the firemen, among them Michael J. Carter, started up the ladder with a line of hose. They had proceeded but a short distance when a portion of the brick wall against and by which the ladder was supported fell outward, and struck and injured the firemen who were upon the ladder. From the effect of injuries so received, Michael J. Carter soon afterwards died; and this suit was instituted by Delia Carter, his wife and the administratrix of his estate, to recover damages, under the provisions of our statute, for the pecuniary loss resulting from his death. The right to recover in the action was predicated upon the alleged negligence of plaintiff in error in procuring or allowing the use of poor, inferior material in the building of the third story of the annex and its faulty and defective construction in certain particulars, specifically designated in the petition. These statements, all and singular, of the petition, in relation to negligence imputed to plaintiff in error, and defects of any nature in the construction of the additional story to the annex, were denied in the answer. The result of a trial in the district court was a verdict and judgment in favor of defendant in error in the sum of $5,000, and, to secure a review of the proceedings in that court, the case has been removed to this court by petition in error.

Counsel for plaintiff in error, in a reply brief, state, or assume it to be proven, that the deceased fireman was in or on the premises or building of plaintiff in error, and was there as a mere licensee, and hence the plaintiff in error owed him no duty, and, even conceding that negligence had been shown, yet no liability accrued; that a licensee, in entering upon property, assumes the risks of injury resulting to him from any defective, imperfect, or dangerous conditions of the premises. But this we need not discuss or decide, as we do not think the question is raised by either the pleadings in the case or the facts. It was alleged in the petition that the fireman, when injured, was on a vacant lot ad-

joining the Paxton Hotel property; and the evidence discloses that he, with other firemen, went on the vacant lot first referred to, and reared a ladder against the hotel building, or, more properly speaking, the "annex," and were in the act of ascending it to go upon or into the building when the brick wall fell on them, and they were not in or on the premises of plaintiff in error. It was alleged in the petition that a part of the wall of the building, the third story of the annex, "for no sufficient cause except its own defects and inherent weakness, fell westward and outward," and injured the firemen. The theory of this portion of the cause of action was based upon the proposition that if, in erecting the building, the third story was so defectively constructed, to the knowledge of the proprietor, as to be dangerous, and, because of weakness, it fell, and injured any one lawfully in its vicinity, or, as in this case, on the adjoining lot, the owner of the building was liable for any damage so suffered. Carter, the fireman, was lawfully on the adjoining lot. He had a right to go and be there, for the purpose of fighting fire in this or any other of the buildings in that portion of the city.

With regard to insecure buildings and liability attaching to the owners thereof, it is said in Wood on Nuisances (page 140, § 109): "While a man has a right to follow his own tastes and inclinations as to the style and character of the building that he will erect upon his own land, yet he has no right to erect and maintain there a building that is dangerous, by reason of the materials used in or the manner of its construction, or that is inherently weak or in a ruinous condition, and liable to fall and do injury to an adjoining owner or the public. Such a building on a public street is a public nuisance, and is a private nuisance to those owning property adjoining it; and if the building falls, and inflicts injury upon the adjoining owners or their property, or to any one who is lawfully in its vicinity, the owner is liable for all the consequences that ensue therefrom." And see authorities cited in support of the text. "The owner of a building is not an insurer against accident from its condition, but, so far as the exercise of ordinary care will enable him to do so, he is bound to keep it in such condition that it will not, by any insecurity or insufficiency for the purpose to which it is put, injure any person rightfully in, around, or passing it." Ryder v. Kinsey (Minn.) 64 N. W. 94.

But it is urged by counsel for plaintiff in error that the evidence is insufficient to support a finding of defective construction of the third story of this building, and the falling as a consequence thereof; and, further, that if it be conceded that the structure was not of the safest character, or was not safe, that the proximate cause of the falling of the wall was the effect of the fire; that this was an intervening cause, and the immediate and principal one, and not within the reasonable contemplation of the proprietor of the premises, when building or having built the third story to the annex, including the wall in question, or set in motion by him, or arising from the construction of the wall or the manner of its erection; that he was not bound to foresee and so guard against any but natural and probable consequences,—things likely to follow his acts; or, in other words, the fire and the resultant falling of the wall, not being in any manner or degree connected with or referable to him or the construction of the wall, he was relieved from any liability for injuries caused thereby.

It appears from the evidence that the portion of the wall which fell was of a side wall of a third story, which had been built during the year 1886, on the top of one of the walls of a two-story brick building theretofore built and existing; that the first story had what some witnesses called a 16-inch wall, and some a 17-inch. The second story had what was denominated a 12-inch wall, and the third story, or new one, was an 8, or, as one witness called it, a 9 inch wall. The new wall was a 12-inch one up to the top of the floor joists put in for the new or third story; then to its top, 11 feet, was an 8-inch wall. There were ceiling joists, 2 by 8, and 22 feet long, put on 16 inches apart, some of them anchored in a 12-inch wall of the "Paxton Building," and all attached to or resting on it; and at the other end, attached to or resting on the new wall, and fastened to some of them, were iron anchors, which extended through the new wall, and were bolted or appropriately fastened at the outer end, at the outer side of the wall. The roof timbers were 2 by 10 or 2 by 12, and at one end were 2 feet or more above the ceiling timbers, and at the other rested on them or on a level with their upper edges; and both roof and ceiling timbers were connected or tied by a system of braces or trusses. There were some partitions in the new or third story, one of which served, in part, to separate from the general space and form a room called in the record the "fire room"; being the one from which the portion of the wall fell. This room, in size, was 22 by 24 feet 6 inches. This new wall reached to and overlapped a piece of new 8-inch wall on another building, known as the "Goodrich Building," some witnesses state, and some say made an abutting joint with it. It appears that they were not in line, and at this place a number of witnesses say the two walls were connected by spikes and pieces of iron. There is also evidence tending to show that they were not so joined. Mr. Whitlock, city building inspector, testified, and, in so doing, stated that "the west wall of the old building had sagged in towards the east. In running up the additional wall, and making the third story, they kept carrying it over until they got a straight wall from the window. The result was, it left an overhang of nearly half the thickness

of the wall, which showed at the time the extent that was between the two windows. There was a bow in the wall." All the other witnesses who testified on this point stated that the old wall had bulged out, and the new wall was drawn in, instead of built out, or so as to overhang. All agreed in the statement that the brick used in building the wall were good, and this may be said to be established by the great weight of the evidence as to the mortar. Some of the witnesses gave it as their opinion that the eight-inch wall was not a proper one to build; that it was not such a one as, in their judgment, should have been built there. The city inspector of buildings said, in his judgment, it was not a safe wall; but the preponderance of the evidence was to the effect that it was a properly built and safe eight-inch wall, and proper in the position, under the circumstances, and for the use for which it was intended.

In regard to the fire, and the part it played, if any, in causing the wall to fall, the chief of the fire department and some of the firemen who were present at this fire testified to the effect that the most of the burning in this third-story room occurred after the falling of the wall, but the chief was asked the following question: "Q. Now, then, it had got up into the ceiling, between the ceiling and the roof, before the wall fell?' To which he answered: "A. Why, she must have." The city building inspector was interrogated upon cross-examination and answered as follows: "Q. At the coroner's inquest, were you asked this question, and did you make this answer,—I am not now asking you with respect to the facts in the answer, or the matters inquired of, but simply ask you whether you so testified at the coroner's inquest: 'Q. So far as you can observe, there was nothing to indicate that the wall was hot, or that it fell out by reason of the heat?' to which you answered: 'No; I think the ceiling joist, and that is what threw the wall over.' A. That is what I thought at the time. Q. And that is the way you testified? A. I presume that is the way I did, if it is down that way. Q. And that was your theory, that the fire burned off the ceiling joist? 'The fire followed the steam pipes, and came up in between the roof and the ceiling, and, of course, shows there, now, to have burned the ceiling joist off, and, as soon as they burned off, it threw the wall out.' A. That is what I said about that. Q. Was this question asked you by Mr. Connell: 'If that ceiling joist that burned, and the wall fell in, can you account for the falling of the wall on any other theory except that the wall was of insufficient thickness, and was not properly joined and connected together? Can you account for it in any other way?' Answer: 'I will say this: That the morning after the fire, that the ceiling joists, they were broken off; but whether they were burned off before the wall fell, I should judge from the ceiling joist that were burned, and remained there, that they must have burned before the wall fell.' Did you so testify? A. I think so; about that way; it is a good while ago." And during redirect examination: "Q. In reference to the burning of the ceiling joist, did you, at the coroner's inquest, or do you now, claim to have any personal knowledge as to when the burning of those joists occurred? A. Well, it must have occurred before the fire, because the joists could not have been burned in the position they were in. The part down in the ground, they must have burned before the wall fell. Q. Have you any personal knowledge except merely that is your conclusion? A. That is what I found the morning after the fire. Q. Were you at the fire? A. No, sir; I was not at the fire. Q. You have not any personal knowledge as to how the burning actually took place? A. I was not there to see it, of course."

It was shown that, just where the wall fell, a number of the ceiling joists had been entirely severed by the fire, and pieces of them were among the brick and mortar which fell to the ground. One piece was there with an anchor attached, and ends of these ceiling joists were also in the "fire room" on the floor, with anchors attached. The roof timbers were none of them entirely burned off, but were blackened, or rather charred. We are not unmindful here of the argument of counsel for defendant in error, in part founded upon the supposition that the anchor attached to the piece of lumber which was found in the débris was one which had fallen with a piece of floor joist, and the further argument on this part of the case, in which they refer to the different theories advanced by the witnesses in reference to what caused the wall to fall. We must include, in any view we attempt to take of this subject, a few facts which were not controverted. The wall was placed there during the year 1886, and stood almost, if not quite, five years, and was, to all appearances, safe and fit for the uses to which it was put, and to withstand the effects of use, time, and any ordinary tests to which it might be subjected, and, as stated by counsel for defendant in error in their brief, "there was the fact that the wall fell at the time of the fire, which was not disputed"; and in this connection we may add that there was the evidence, not contradicted, of the destruction by the fire of some of the means which had been adjusted, some primarily and some secondarily, with the purpose to assist in retaining the brick wall in an upright position, and make it safe. A careful review and analysis of the testimony leads us to the conclusion that it establishes that the fire and its accompanying facts and circumstances caused the falling of the wall. Whether or not, or to what extent, any inherent weakness or defect in the wall was a factor in bringing about such a result, is not very readily perceivable or answerable. However this may

have been, Mr. Kitchen, in constructing or having constructed this third story or the wall thereof, had exercised such care that it had been and was safe, sufficient, and secure for any and all purposes or uses for which it was intended, and would not, from any inherent defects, fall and injure any person or persons passing it or near it. It stood in the condition in which it was made for several years, and, if the fire had not occurred, would, no doubt, have stood for years more. The fire did not have its origin in any act of the plaintiff in error, nor did it flow from or have its source in that wherein it is claimed he had been negligent,—the erection of the wall. The fire was the immediate and dominant cause of the falling of the wall, and hence was the proximate cause of the injury.

But it is urged that what was the proximate cause was a question of fact for the jury, and their determination of it should not and will not be disturbed. Ordinarily, what is the proximate cause of an injury is, in any case where the question is involved, one of fact for the jury to determine; but where, as in this case, their decision of the question is manifestly wrong, it will be set aside. This is a case in which the sympathies are strongly appealed to and enlisted, but justice and right must prevail, and govern the course of the decision. On the facts and circumstances as they appear in the record, the judgment of the trial court must be reversed, and the cause remanded. Reversed and remanded.

CUMMINS v. CUMMINS.

(Supreme Court of Nebraska. April 7, 1896.)

DIVORCE—DUTY TO GRANT—DISCRETION OF TRIAL COURT.

1. In an action for divorce, even where there is no appearance by the defendant, the trial judge must be satisfied that the case is prosecuted in good faith, and without collusion, and that a cause of action exists. He is not bound to accept as conclusive, in all cases, the testimony of the plaintiff, although corroborated in some minor details.

2. Where the testimony in such a case, when taken in connection with all the circumstances, is weak, and open to suspicion, through a failure to corroborate it on points admitting of corroboration, the action of the district judge in denying a divorce will not be set aside, although the evidence may have been such that it would have sustained a decree for plaintiff, and in cases of a different character might have required it.

(Syllabus by the Court.)

Error to district court, Douglas county; Ferguson, Judge.

Action by Francis M. Cummins against Alice V. Cummins for divorce. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Simeon Bloom, for plaintiff in error.

IRVINE, C. The plaintiff in error brought this action to procure a divorce from the defendant in error. Service was had by publication. There was no appearance by the defendant in error, but on the evidence the court found for the defendant, and dismissed the case. The errors assigned are that the judgment is not sustained by sufficient evidence, that it is contrary to law, and that the court erred in overruling the motion for a new trial. The grounds assigned in this motion are that the judgment is not sustained by sufficient evidence, and that it is contrary to law. We have, therefore, presented, in effect, simply the sufficiency of the evidence. The ground on which the divorce was claimed was cruelty practiced by the wife against the husband. The husband's testimony is to the effect that the defendant had always been harsh and unkind to him; that she had refused to cook for him, wash for him, and mend his clothes; that she had denied him sexual intercourse; and that certain events had persuaded him that she had attempted to poison him. The last charge, if true, undoubtedly constitutes cruelty. Nelson, Mar. & Div. §§ 296, 308. But the sufficiency of the evidence to establish an attempt to poison was, in the first instance, for the trial court, as was the sufficiency of the evidence on other branches of the case. The evidence on this subject was that, after two successive meals, the plaintiff was taken violently sick. Thereafter he detected some foreign substance in his coffee cup, and observed his wife pouring something from a paper into the coffee. He found some article in her possession which he supposed to be the same substance, but he had made no effort to ascertain its character. The parties had three children, aged 17, 19, and 22 years. The plaintiff, it appeared, knew where these children were. They were living in the household at the time of these events. They remained with their mother after the separation, and their testimony was not produced. The plaintiff was corroborated in some parts of his testimony by a woman who had lived next door to the parties in Kansas, and who testified that she had done washing for the plaintiff, and had heard the defendant use harsh and abusive language towards him. His testimony was not corroborated in other particulars. It has been said that the state is a third party to all divorce cases. It is not true that a petition stands confessed because not answered. Nor is the judge who tries a divorce case obliged to find for the plaintiff, simply because he testifies to a state of facts which, if believed, would warrant a decree in his favor. The judge should be satisfied that there is no collusion, that the case is prosecuted in good faith, and that a cause of action exists. This case was begun scarcely seven months from the time the plaintiff came to the state, which was the time of separation. He had then left his wife and his three children behind him, the children choosing to remain with the mother. The parties had lived together for more

than 22 years. The charges of harshness and unkindness were proved only in the most general and vaguest way. The charge that the wife had refused to do the cooking, laundry work, and mending for the family was probably not the charge of a very great offense, in view of plaintiff's testimony that his earnings were $140 per month. The charge of denying the plaintiff sexual intercourse was as vaguely substantiated as the charge of unkind language. It did not appear for what period or under what circumstances there had been such denial. The charge of poisoning was in no degree corroborated, while the evidence showed that through the children and the services of a chemist corroboration might have been obtained had the charge been true. If the trial judge had seen fit to grant a divorce upon the testimony, we would not disturb his action. But in such cases so much depends upon the manner and demeanor of the witnesses that, in view of the weakness of the evidence in this case, while it would be sufficient to support a different finding, we cannot disturb the finding which was made. Nelson, Mar. & Div. § 809. Judgment affirmed.

DAVIS v. CITY OF OMAHA.

(Supreme Court of Nebraska. April 7, 1896.)

MUNICIPAL CORPORATIONS—NEGLIGENCE IN CONSTRUCTING SIDEWALKS—OBSTRUCTIONS IN STREET—LIABILITY—NOTICE.

1. The fee of the streets of the municipalities of this state is vested in the municipalities themselves, and the sidewalks of the various municipal corporations are parts of the streets thereof.

2. The law of this state devolves upon the various municipal corporations thereof the duty of at all times keeping their streets and sidewalks in a reasonably safe condition for travel by the public; and no municipal corporation, by any act of its own, can devolve this duty on another, so as to relieve itself from a liability resulting from its failure to perform such duty. City of Omaha v. Jensen, 52 N. W. 833, 35 Neb. 68, and City of Beatrice v. Reid, 59 N. W. 770, 41 Neb. 214, followed.

3. The law does not make it the duty of a lot owner to build, maintain, or repair the sidewalks, being part of the streets, in front of his premises.

4. A municipal corporation may employ such agency as it sees fit in the construction or repair of its streets and sidewalks, and may license or permit a lot owner to build or repair a sidewalk in front of his premises under its direction.

5. A general permission or license, given by a city to a lot owner, to build or repair a sidewalk on his premises, will continue until revoked by the city, either expressly or by such conduct on its part as authorizes an inference of revocation.

6. If a lot owner be licensed by a municipal corporation to build a sidewalk in front of his lot, which walk it is the duty of the corporation to build and maintain, and in the performance of such work the lot owner negligently leaves an obstruction in the street, which causes an injury, the city is liable therefor.

7. A municipal corporation may be liable for an injury caused by an obstruction placed in its streets by a mere trespasser; but, to make it liable in such case, it must be shown to have been guilty of negligence in the premises.

8. A municipal corporation notified a lot owner to construct a permanent sidewalk in front of his lot within a time specified, and that, in default of his so doing, the corporation would build the walk, and assess the cost thereof to the lot. The lot owner did nothing towards building the sidewalk within the time specified. Afterwards, without the knowledge or permission of the municipal corporation, the lot owner proceeded to build the walk, and for that purpose, on an afternoon, deposited a number of flagstones in the street opposite his lot, and left them there without barriers or signals. The night following the afternoon of the deposit of said flagstones a traveler was injured by coming in contact with them, and sued the municipal corporation for damages. *Held*: (1) That it was the duty of the municipal corporation, and not the duty of the lot owner, to build and maintain the sidewalk; (2) That the municipal corporation had the right to permit or license the lot owner to build the walk; (3) that the notice given by the municipal corporation to the lot owner to build the walk was merely a license or permission to him to do so in the time specified; (4) that the license given was not a general or continuing one, but conditioned and limited to the time therein fixed; (5) that the lot owner, in the construction of the walk after the license from the municipal corporation had expired, was not acting either as the agent, employé, or licensee of the municipal corporation, but was a mere trespasser in the streets; (6) that, as the municipal corporation had no knowledge that the lot owner had done anything towards constructing the walk before the happening of the injury sued for, and as the evidence disclosed no negligence on its part in the premises, it was not liable for the injury.

(Syllabus by the Court.)

Error to district court, Douglas county; Scott, Judge.

Action by Harry B. Davis against the city of Omaha to recover damages for personal injuries. There was a judgment for defendant, and plaintiff brings error. Affirmed.

John D. Howe and E. R. Duffie, for plaintiff in error. W. J. Connell and E. J. Cornish, for defendant in error.

RAGAN, C. Harry B. Davis brought this suit to the district court of Douglas county against the city of Omaha, the city being a municipal corporation existing under the laws of the state as a city of the metropolitan class, to recover damages which he alleged he had sustained by reason of injuries which he had received through the negligence of the city. At the close of the evidence, the jury, in obedience to an instruction of the court, returned a verdict for the city. Judgment of dismissal of Davis' case was rendered upon this verdict, and he prosecutes here a petition in error.

The undisputed facts, so far as the same are material to this opinion, are: That Judge Doane owned a lot fronting on Seventeenth street in said city. Said street was one of the public thoroughfares of the city, and used and traveled by the public as such. On the 3d of May, 1892, the authorities of the city, by resolution, ordered a plank sidewalk in front of Judge Doane's premises to be replaced by a permanent one, and gave notice to Judge Doane that, unless he constructed such

sidewalk within five days from the date of the service on him of said notice, it would construct the sidewalk and assess the costs thereof to his property. On the 31st of May, 1892, the five days within which Judge Doane was to construct the sidewalk expired, and he had not at that time done anything towards constructing it. The city thereupon notified Judge Doane to designate the kind of material of which he desired the sidewalk to be constructed. On the 9th of July, 1892, the city ordered the city contractor to lay an artificial stone sidewalk in front of Judge Doane's premises, but this was not done. On the 15th of October, 1892, Judge Doane began the construction of the sidewalk of Bandera stone in front of his lot, and in the prosecution of this work, and in the afternoon of said day, his employé hauled and deposited in the street, outside the curb, in front of said lot, a number of large flagstones. During the night of said 15th of October, Davis was driving on this street in a buggy, and it ran against these stones, was partially overturned, and he was thrown out and injured. No barriers had been erected to prevent the traveler from coming in contact with these stones, nor had any signals been displayed to warn him of their presence. On the 15th of October, 1892, the city did not know that Judge Doane was proceeding to build the walk in front of his premises. On the 4th of November, 1892, the city being still in ignorance that Judge Doane had built the sidewalk in front of his premises, ordered the city contractor to build a walk there of Indiana stone. Judge Doane testified, on the trial, as follows: "Q. State if, in the fall of 1892, you received an order from the city officials that a permanent sidewalk had been ordered laid in front of that property. A. Yes, sir; I received a notice in the fall, but I had several previous notices to lay the walk, and what time the notice was served I can't now recollect; but, having a good plank sidewalk there, I concluded I wouldn't pay any attention to the notice. But afterwards, in the fall, just what time I can't tell, I received a blank containing prices of stone, kinds of stone the city had a contract for, and notifying me to select from that such stone as I desired laid. Q. Well, then, what did you do? A. Then I went on and made the contract with a stone man to lay the walk myself. Q. So you laid it yourself, after having received this order? A. Yes. Q. Laid it under the order of the city? A. Yes, sir." Cross-examination: "Q. You may state whether or not, in laying that walk, or making your contract, you acted under the directions or control, in any manner, of the city of Omaha. A. Nothing further than under the directions they had given me to lay the walk." Redirect examination: "Q. Never molested you in carrying out that order? A. No; rather insisted upon its being carried out; rather more than I thought they would do."

Under this evidence the learned district court was of opinion that Davis could not recover against the city, and we agree with him. The fee of the streets of the municipalities of this state is vested in the municipalities themselves, and the sidewalks of the various municipalities are parts of the streets thereof. We know of no statute of this state, nor of any ordinance of the city of Omaha, which makes or attempts to make it the duty of a lot owner to build, repair, or maintain the sidewalks adjoining his property. Without quoting the statutes under which the city of Omaha exists, it may be safely said that that corporation, as the other municipal corporations of the state, is by law charged with the duty of at all times keeping its streets and sidewalks in a reasonably safe condition for travel by the public, and that no municipal corporation, by any act of its own, can devolve this duty on another, so as to relieve itself from a liability resulting from its failure to perform such duty. City of Omaha v. Jensen, 35 Neb. 68, 52 N. W. 833; City of Beatrice v. Reid, 41 Neb. 214, 59 N. W. 770. And in the case at bar, if Doane was acting for the city, either as its agent, employé, or contractor, or with its knowledge and permission, then his acts in and about the construction of the sidewalk in front of his premises became and were the acts of the city; and if his placing and leaving the flagstones in the street, in the manner in which they were placed and left, was negligence, which caused an injury to Davis, he being free from negligence, we have not the slightest doubt but the city would be liable to Davis for such injury. See the cases cited above and Stephens v. City of Macon, 83 Mo. 345.

But what were the relations existing between Doane and the city of Omaha at the time the injury sued for occurred, and at the time the flagstones were placed in the street which caused such injury? Section 69 of chapter 12a, Comp. St., part of the charter of the city of Omaha, so far as the same is material here, is as follows: "The mayor and city council shall have power * * * to construct and repair or cause and compel the construction and repair of sidewalks in such city of such material and in such manner as they may deem proper and necessary; and to defray the costs and expenses of improvements or any of them; the mayor and council of said city shall have power and authority to levy and collect special taxes and assessments upon the lots and pieces of ground adjacent or abutting upon the streets, avenues, alleys or sidewalks thus in whole or in part * * * constructed or otherwise improved or repaired, or which may be specially benefited by any of said improvements: Provided, further, that in case the grade of any street or part of street used by the public shall not have been established, or in case any street or part thereof shall not have been worked to grade, then and in such case the owner or owners of any lot or lots or lands abutting on such streets or portions of

streets as aforesaid shall only be required to construct or repair the sidewalk along such street or part thereof with plank as the council may direct," etc. As we read this statute, it does not make, or attempt to make, it the duty of a lot owner to build, maintain, or repair the sidewalks on his premises; but this statute, and others not quoted, devolve upon the municipal corporation the control of all of its streets and alleys and the duty of paving, grading, and maintaining its streets, and building, maintaining, and repairing its sidewalks. What means the city may employ, what agencies it may engage in the performance of these duties, is left by the legislature to the city authorities. To reimburse itself for the expense of building and maintaining sidewalks in front of lots, the municipal corporation is vested with the power and authority to levy and collect special taxes and assessments upon the lots in front of which the sidewalks are built and maintained. True, the statute quoted says that on certain streets lot owners shall only be required to construct or repair the sidewalks with plank as the council may direct. But this statute falls far short of imposing or attempting to impose on a lot owner the duty of building, maintaining, or repairing the sidewalks adjoining his property.

As already stated, on the 3d of May, 1892, the city authorities notified Doane that the plank sidewalk in front of his premises must be replaced by a permanent one, and also notified him that, unless he should build such permanent walk within five days after the service of that notice upon him, it (the city) would at once proceed to construct such permanent sidewalk. This action of the city was in conformity with its ordinances, and we think the statute under which the city exists authorizes the passage of such ordinances. The city, in giving notice to Doane to construct a permanent sidewalk upon his lot, simply licensed him to furnish the material and construct that walk in accordance with the ordinances of the city, instead of paying the taxes and assessments which the city might levy on the lot to pay the cost of constructing the walk. In other words, Doane became and was a mere licensee of the city, and, had he proceeded with the construction of this walk within five days after the service upon him of the notice to construct the walk, then we have no doubt that he would have been acting in that manner for and in behalf of the city; and for his negligence in constructing the walk, if he was guilty of negligence, the city would have been liable. Stephens v. City of Macon, 83 Mo. 345.

It is doubtless true that an agency once established is presumed to continue until it is shown to have ceased; and we have no doubt that a general permission or license, given by a city to a lot owner to build or repair a sidewalk on his premises, will continue until revoked by the city, either expressly or by such conduct on its part as would authorize an inference of revocation. In the case at bar the city in effect said to Doane: "We have determined that the plank sidewalk in front of your premises shall be replaced by a permanent one. We have the authority to build this walk, and charge the expense of it to your property; but we give you permission to construct the walk yourself, in accordance with the ordinances of the city, provided you do it within a certain time." The permission then given Doane was coupled with a condition that the work which he was permitted to do should be undertaken by a certain time, and the failure of Doane to avail himself of the permission given, in the time fixed, worked a revocation of such license. But again, after the license given Doane to construct the sidewalk had expired by its own limitation, he was requested by the city to designate the kind of material out of which he desired the walk constructed. Here, then, was an additional notice, given Doane by the city, that it had revoked the permission given him. Doane, in whatever he did towards constructing this sidewalk after the time fixed by the city council in which he might construct it, so far as this record shows, was a mere trespasser. A lot owner, because such, has no authority to tear up the sidewalk in front of his premises, or to replace it with another. We reach the conclusion, therefore, that the evidence in the record shows that, at the time the accident in question happened, and at the time the flagstones which caused the accident were placed in the street by Doane, he was neither the agent nor the licensee of the city.

The city of Omaha is, however, none the less liable in this case for the injury sustained by Davis, if it knew, prior to the accident, of the existence in the street of these flagstones, or if they had remained in the street such a length of time prior to the accident as to sustain a finding that the city, by the exercise of ordinary care, could have known of their existence, and was guilty of negligence in not so knowing. The flagstones which caused Davis' injury were left in the street in the afternoon of the night he was injured. The record does not show that any officer of the city knew of the existence of these flagstones in the street, or that Doane was building the sidewalk prior to the time the accident occurred. The burden of showing that the city was guilty of negligence in not knowing of the presence of the flagstones in the street was upon Davis. It does not appear, from the record, that these flagstones were deposited in a part of the street used for business purposes, nor in a part of the street which was so constantly used and traveled as to make it negligence per se for the city officials not to know of their existence during the short time that intervened between their being left in the street and Davis being hurt. The judgment of the district court is affirmed. Affirmed.

DALEY et al. v. PETERS.

(Supreme Court of Nebraska. April 7, 1896.)

EXEMPTION—CLAIM—DUTY OF LEVYING OFFICER—CONVERSION—DEFENSE.

1. When an officer seizes property under execution or attachment, and the debtor makes and files an inventory under oath in accordance with section 522 of the Code of Civil Procedure, the officer then has but one duty to perform, and that is to call appraisers, and have the property levied upon appraised, and, if the appraised value of the property is $500 or less, release and return the property to the debtor.

2. Where an officer makes a levy upon personal property, and the debtor files under oath the inventory required by section 522 of the Code of Civil Procedure, and the officer neglects or refuses to cause the property to be appraised, but proceeds to sell it to satisfy his writ, he is thereby guilty of the conversion of the property.

3. Where, in such case, the officer is sued for the conversion of such property, the fact that the averments, or any of them, in the affidavit attached to the inventory, were false, affords him no defense to the action.

4. The only issue available in such an action is the value of the property wrongfully converted. Smith v. Johnson, 62 N. W. 217, 43 Neb. 754; Bender v. Bame, 59 N. W. 105, 40 Neb. 521, reaffirmed.

(Syllabus by the Court.)

Error to district court, Douglas county; Ferguson, Judge.

Action by William T. Peters against Daniel C. Daley and others. There was a judgment for plaintiff, and certain defendants bring error. Affirmed.

B. N. Robertson, for plaintiffs in error.

RAGAN, C. Before a justice of the peace in Douglas county one McCarger obtained a judgment against William T. Peters for $19.25. An execution was issued on this judgment and delivered to one Daley, a constable, and he levied the same upon a horse and wagon and buggy and some harness belonging to Peters. Thereupon Peters filed with the justice of the peace an inventory under oath of the whole of the personal property owned by him, as required by section 522 of the Code of Civil Procedure. The constable, however, disregarded the inventory, and neglected and refused to call appraisers, and have the personal property of Peters appraised, as provided by said section of the Code, and sold all the property levied upon under his execution. The constable then made return on his execution that he had received $97 in money for the property sold; that he had disbursed of that money $50 in discharging a chattel mortgage lien upon the property; paid $12 for feeding the horse, $3.25 for storing the buggy, $1.50 for expressage, $2.91 commission, $2 for advertising, $2 for a clerk, $2.40 for his fees, and turned in to the justice $20.94 to apply on the judgment. Peters then brought this suit to the district court of Douglas county against Daley and the sureties on his bond for the conversion of the property levied upon and sold by the constable. Peters had a verdict and judgment, and Daley prosecutes to this court a petition in error.

1. The inventory filed by Daley with the justice recited that it was an inventory of the whole of the personal property owned by him, and that he was a resident of the state of Nebraska, the head of a family, and that he had neither lands, town lots, nor houses subject to exemption as a homestead. This inventory was duly signed and sworn to by Peters. It is now insisted that the judgment of the district court must be reversed, because the answer alleges that Peters, at the time he made and filed the inventory, was possessed of and in possession of a homestead in Douglas county, and that the reply does not deny this. Section 521 of the Code of Civil Procedure provides that: "All heads of families who have neither lands, town lots, or houses subject to exemption as a homestead under the laws of this state, shall have exempt from forced sale on execution the sum of $500 in personal property." Section 522 of the Code provides that: "Any person desiring to avail himself of the exemption as provided for in the preceding section must file an inventory under oath in the court where the judgment is obtained, or with the officer holding the execution of the whole of the personal property owned by him. * * * And it shall be the duty of the officer to whom the execution is directed to call to his assistance three disinterested freeholders of the county where the property may be, who, after being duly sworn by said officer, shall appraise said property at its cash value." If it be true that Peters owned a homestead exempt from execution under the laws of the state at the time he made and filed the inventory herein, is that a defense for Daley in this action? What was the duty of Daley, the constable, holding the execution, when this inventory was filed? In People v. McClay, 2 Neb. 7, a debtor filed an inventory of all his personal property, as required by said section 522 of the Code of Civil Procedure. The officer refused to call appraisers as required by the statute, and have the property appraised. The execution debtor then applied to this court for a writ of mandamus to compel the officer to call appraisers, and have the property mentioned in the inventory filed by the judgment debtor appraised. The officers made answer to the alternative writ that the execution debtor, though the head of a family, was an alien, not a resident of the state. The court held that the answer was entirely insufficient, and awarded the writ prayed for. Lake, J., speaking for the court, said: "The relator filed an inventory of all his personal property as required by section 522 of the Code of Civil Procedure. * * * This done, the respondent had but one course to pursue. This was to call three disinterested freeholders of the county, and have them appraise the property." State v. Cunningham, 6 Neb. 90, was a mandamus proceeding to this court to compel a sheriff to

call freeholders, and cause certain personal property levied upon by him to be appraised, the execution debtor having filed the inventory required by section 522 of the Code of Civil Procedure. The opinion does not disclose what reason the sheriff alleged as an excuse for failing to comply with the mandates of the statute. The court awarded the writ as prayed, Maxwell, J., saying: "In the case of People v. McClay, 2 Neb. 8, it was there held that when an inventory under oath was filed with the officer, he had but one course to pursue, and that was to call three disinterested freeholders of the county, and have them appraise the property. * * * We approve of that decision. The officer cannot question the correctness of the inventory. If the debtor has real estate which is exempt under the homestead law, or other personal property than that contained in his list, such personal property is liable to be seized for his debts, and he may be prosecuted for perjury. But when an inventory under oath is made by the debtor, and filed with the officer holding the execution, * * * he must call appraisers to ascertain the value of the property seized. He has no discretion in the matter." In Kriesel v. Eddy, 37 Neb. 63, 55 N. W. 224, a constable of Douglas county levied an execution upon certain goods of Kriesel's, who thereupon filed an inventory under oath with the justice of the peace before whom the judgment was rendered, reciting that he was the head of a family, etc., and that he had no other property except the goods which had been seized by the constable. The constable refused and neglected to cause the property levied upon to be appraised, but proceeded and sold it under the execution. Kriesel then sued the constable and his bondsmen for the conversion of the property. On the trial of the case the district court permitted evidence to go to the jury to contradict the averments of the affidavit attached to Kriesel's inventory, that he was the head of a family and a resident of the state, and at the close of the testimony directed a verdict for the defendant. This judgment on proceedings in error here was reversed, the court, through Ryan, C., saying: "Upon the filing of such an affidavit containing an inventory of all the property owned by Kriesel, the law devolved upon the constable holding the execution but one course of action, and that consisted in his calling three disinterested freeholders of Douglas county to appraise said property levied upon at its cash value. * * * In this case the constable ignored the affidavit containing the inventory, and sold all the property which he held under his execution. This rendered him liable for the fair value of said property, at least to the amount of five hundred dollars, and there was no issue in the district court properly triable, except in such value. Officers holding executions should act under the statutes as well to protect the judgment debtor in the enjoyment of the exemption provided by statute as to collect the judgment upon which the execution issued. Such officers may, by arbitrarily overriding the statute, prevent the beneficent operation of the exemption law in favor of the debtor. This is but one species of oppression in office, for which such officers as are guilty will be held to strict accountability if their victims are able to apply to the courts for redress." Bender v. Bame, 40 Neb. 521, 59 N. W. 105, was a suit against an officer for conversion of certain personal property. The execution debtor, at the time the property was levied upon, filed an inventory under oath, as required by the provisions of section 522 of the Code of Civil Procedure. The officer refused and neglected to make any appraisement, and sold the property. Norval, C. J., speaking for the court, said: "That the officer did not cause an appraisement to be made is no fault of the defendant in error [judgment debtor]. All the law required of him was to make and file with the justice an inventory under oath of his personal property, and, after the appraisement had been made, to select therefrom property to the amount of the statutory exemption. It is the well-settled law of the state that exemption laws are to be construed liberally, to the end that the purpose for which they were adopted may be accomplished. After the debtor has complied with the law on his part, he ought not to be deprived of his exemption by the failure of the officer to perform his duty. To hold, when exempt property has been seized under execution, and the proper inventory has been filed, that an action for conversion will not lie where the officer fails or refuses to make an appraisement, would, in many cases, destroy the value of the exemption by preventing the debtor from deriving any benefit from it." And in Smith v. Johnson, 43 Neb. 754, 62 N. W. 217, where all the cases cited above were reviewed, this court held: "It is without the province of an officer holding property under levy of writ, pending sale by order of the court in attachment proceedings, to question the validity or sufficiency of a schedule and affidavit made according to the provisions of the statute governing such proceedings, and filed by the attachment debtor for the purpose of setting aside the property levied upon as exempt."

These cases, then, establish the following propositions: (1) That when an officer seizes property under execution or attachment, and the debtor makes and files an inventory under oath, in accordance with the provisions of section 522 of the Code of Civil Procedure, the officer then has but one duty to perform, and that is to call appraisers, and have the property levied upon appraised; and, if the appraised value of the property is $500 or less, to release and return it to the debtor. (2) Where an officer makes a levy upon personal property, and the debtor files under oath the inventory required by said section of the Code, and the officer neglects or re-

fuses to cause the property to be appraised, and proceeds to sell it to satisfy his writ, that he is thereby guilty of a conversion of the property. (3) And when sued for a conversion of certain property, the fact that the averments, or any of them, in the affidavit attached to the inventory were false, affords him no defense to the action. (4) The only issue available in such action is the value of the property wrongfully converted. If an officer holding an execution may arbitrarily disregard his duties as prescribed by the statute, and, notwithstanding an inventory under oath be filed by the debtor as required by the statute, refuse and neglect to cause the property to be appraised, and sell it, then the very object and purpose of these wise and beneficent exemption laws will always be thwarted. It has been well said that: "The common law had no favors to offer the debtor or his family in the way of exempting any portion of his property from execution for the benefit of his family; and if he owned two gowns one might be seized and sold. Modern legislation has removed this reproach to the law, and there is probably no state or civilized country in the world in which some kind of an exemption is not now allowed. These statutes are designed as a protection for poor and destitute families, and the law thus seeks to mitigate the consequence of the husband's thoughtlessness and improvidence. They are based upon considerations of public policy and humanity, and should be liberally construed." 7 Am. & Eng. Enc. Law, p. 130. It is no concern of a constable or sheriff whether an affidavit attached to an inventory filed by a debtor be true or false. If it is false, the debtor may be prosecuted for perjury. That is a matter between him and the state of Nebraska. The law has not committed to the sheriffs and constables of the state the authority or the duty to inquire into the truth of the averments of the affidavit attached to an inventory filed by an execution or attachment debtor.

Another argument insisted upon for the reversal of this judgment is, in effect, that in any event the constable should not be charged with the full value of the property levied upon and sold by him, but that the judgment at least should be credited with the amount of the mortgage on the property which the constable paid off and discharged out of the proceeds of the sale. We have been cited to no authority to sustain this remarkable contention, nor do we think any can be found. The constable was a wrongdoer in everything that he did with this property, after the filing of the inventory by Peters. If the property had been subject to execution, the constable, by selling it, would have sold only the interest which Peters had therein; and the purchaser at the sale would have taken the property subject to the mortgage lien, if any, thereon. The constable was not the administrator, agent, or guardian of Peters. He was not charged by the latter with the duty of calling in the creditors of Peters, and paying his debts out of his property. Looking at the express provisions of the exemption laws of the state, their purpose and object, and liberally construing these statutes, and influenced also by considerations of public policy, we hold that, where an officer levies an execution or writ of attachment upon personal property, and the debtor files an inventory under oath, as required by section 522 of the Code of Civil Procedure, and such officer neglects or refuses to cause the property levied upon to be appraised, but proceeds and sells the same, and the debtor then sues him for the conversion of the property, the courts will not permit him to urge as a defense to that action that any of the averments in the affidavit attached to the debtor's inventory were false. The judgment of the district court is right, and it is in all things affirmed. Affirmed.

NEHER v. DOBBS.

(Supreme Court of Nebraska. April 7, 1896.)

MALICIOUS PROSECUTION—PROBABLE CAUSE—WHAT CONSTITUTES—EVIDENCE.

1. In an action for malicious prosecution, a presumption of the existence of probable cause is established by proof that the plaintiff was convicted in a criminal action. But this presumption may be rebutted.

2. It is not true that the evidence of probable cause, afforded by proof of a conviction, can be rebutted only by showing that the conviction was procured by fraud or perjury. These are only instances. Such evidence may be rebutted by proof of any facts which show that the conviction was under circumstances depriving it of any naturally probative effect.

3. A petition in an action for malicious prosecution pleaded that the plaintiff had been convicted in the county court, and on appeal in the district court; that the conviction had been reversed by the supreme court, and the cause thereafter dismissed. It was also pleaded that the defendant, when he instituted the prosecution, was aware of certain facts which, in law, established the innocence of the plaintiff; that he had himself, in the county court, testified to those facts; whence it appeared that the conviction in the lower courts was not upon any consideration of evidence which would justify a conviction, but was due solely to a misapprehension of law. *Held*, that the petition sufficiently pleaded want of probable cause.

4. The existence of probable cause, the facts being established, is a question of law, and if the defendant is aware of facts establishing the innocence of the plaintiff, a misapprehension of the law does not create probable cause, although it may affect the issue of malice.

(Syllabus by the Court.)

Error to district court, Gage county; Babcock, Judge.

Action by David Neher against John A. Dobbs for malicious prosecution. There was a judgment for defendant, and plaintiff brings error. Reversed.

Hardy & Wasson, for plaintiff in error. Hugh J. Dobbs, for defendant in error.

IRVINE, C. This was an action for malicious prosecution by the plaintiff in error against the defendant in error. A general demurrer to the petition was sustained, and from a judgment entered thereon the plaintiff prosecutes error

The point relied on in support of the demurrer is that the petition discloses that the plaintiff suffered a conviction in the court in which the prosecution complained of was instituted, and that, while it is alleged that this conviction was reversed on appeal, the conviction in the original court was conclusive of the existence of probable cause for the prosecution, or if not conclusive, it could be rebutted only by evidence of fraud, perjury, or subornation of perjury, leading to the conviction, none of which was pleaded. The petition alleges that the defendant falsely and maliciously, and without probable cause, charged the plaintiff, before the county judge of Gage county, with having maliciously and unlawfully shot and killed a certain dog, the property of Dobbs; that he caused plaintiff's apprehension in such cause; that, on the trial before the county court, Dobbs testified and admitted that the dog killed had no collar upon his neck, with a metallic plate thereon, inscribed with the name of his owner, and that the dog was running at large, and attacked the plaintiff; that all such facts were well known to the defendant when the charge was made; that the plaintiff was convicted in the county court; that he appealed to the district court; that he was there again convicted; that he prosecuted error to this court, where the judgment was reversed; and that, after the cause was remanded to the district court, it was dismissed. That it is not unlawful to kill a dog running at large, not bearing the collar required by law, was decided in Nehr v. State, 35 Neb. 638, 53 N. W. 589, which, by the way, is the case which constitutes the foundation of this action. It is, therefore, in effect, pleaded that defendant caused plaintiff to be prosecuted, knowing the facts which showed that he was guilty of no offense; that, in the county court, he testified frankly to those facts; that the plaintiff was, notwithstanding, convicted by the county court, and, on appeal, by the district court, on account of a misapprehension of law; and that the error was corrected by this court on proceedings in error, the conviction reversed, and the cause finally dismissed. The question, therefore, presented is whether the conviction in the county court, or in the district court, or in both, was conclusive evidence of the existence of probable cause for the prosecution, notwithstanding the fact that the plaintiff was aware of the facts which, on a correct interpretation of the law, would defeat the prosecution.

The older cases are, we think, all to the effect that a conviction is conclusive evidence of the existence of probable cause for the prosecution; and there are many cases holding that this is true, although there may be an acquittal on an appeal or after a reversal of the judgment. Herman v. Brookerhoff, 8 Watts, 240; Clements v. Apparatus Co., 67 Md. 461, 10 Atl. 442, and 13 Atl. 632; Cloon v. Gerry, 13 Gray, 201; Whitney v. Peckham, 15 Mass. 243. In the Maryland case cited, there is a strong dissenting opinion published in an appendix. 67 Md. 605, 13 Atl. 632. There are many other Massachusetts cases in line with those cited, although that of Morrell v. Insurance Co., 10 Cush. 282, recognizes the fact that there may be some exceptions to the rule. The same may be said of Phillips v. Village of Kalamazoo, 58 Mich. 33, 18 N. W. 547. On the contrary, the injustice of a universal application of such a rule has long been recognized. An early case of this character is Burt v. Place, 4 Wend. 591. In that case it was held that, although there had been a conviction, the evidence afforded by that fact of the existence of probable cause was rebutted by proof that a full defense had existed to the knowledge of the defendant, and that he had caused the plaintiff to be detained as a prisoner for the purpose of preventing his procuring such evidence to establish his defense. Following this case, there is a long and well-reasoned line of authorities to the effect that, although the plaintiff may have been convicted, still, if his conviction was procured by fraud, by perjury, or by subornation of perjury on the part of defendant, these facts may be shown to rebut the presumption of probable cause arising from the conviction. Olson v. Neal, 63 Iowa, 214, 18 N. W. 863; Witham v. Gowen, 14 Me. 362; Payson v. Caswell, 22 Me. 212; Richter v. Koster, 45 Ind. 440; Adams v. Bicknell, 126 Ind. 210, 25 N. E. 804; Goodrich v. Warner, 21 Conn. 432. The last two cases cited do not undertake to define the exceptions to the general rule, but are to the effect, generally, that the conviction, although it be afterwards reversed, is prima facie evidence, and that only, of the existence of probable cause. To the same effect is Knight v. Railway Co., 9 C. C. A. 376, 61 Fed. 87. The best review of the cases to which our attention has been called is contained in the case of Crescent City Live-Stock Co. v. Butcher's Union Slaughter-House Co., 120 U. S. 141, 7 Sup. Ct. 472. The conclusion was there reached that all the cases can be reconciled by adopting the doctrine that the presumption of probable cause arising from a conviction can be rebutted only by showing that the conviction had been obtained by fraud. This court has recognized the principle that, where the conviction has been procured by fraud or perjury, even an unreversed conviction does not necessarily defeat a recovery. Murphy v. Ernst, 46 Neb. 1, 64 N. W. 353. A bald application of the foregoing cases would lead to an affirmance of this judgment, because

the petition does plead a conviction both in the county and in the district courts; and it is not pleaded that the defendant resorted to any fraud, perjury, or false testimony to procure the same. We think, however, that the cases cited hardly warrant so narrow a conclusion as that adopted by the supreme court of the United States in Crescent City Live-Stock Co. v. Butcher's Union Slaughter-House Co., supra. Indeed, the court in that case did not undertake to precisely define the rule, and expressly stated that no such precise definition was necessary to a decision of the case before it. All the cases, with one exception, in which the courts undertook to define the exceptions, were cases where fraud or perjury was alleged, or cases resolved in favor of the defendant, because no exception was alleged, and where fraud and perjury were merely mentioned incidentally as sufficient to take the case out of the rule. The principle which we induce from the cases is this: that a conviction is always sufficient prima facie evidence of the existence of probable cause. But that this is a rule of evidence, founded upon the fact that, ordinarily, if a court has proceeded to conviction, it must have had before it such evidence as, in the mind of a prudent and reasonable man, would convince him of the guilt of the accused; and that, therefore, a subsequent reversal, while it may show that the accused was in fact innocent, does not show that there was no probable cause for believing him guilty. Where, however, the conviction is under such circumstances as to deprive it of such naturally evidentiary effect, this presumption ceases. Where it is shown that the conviction is procured by fraud, or by perjury, or by subornation of perjury, we have cases where the conviction has no convincing effect upon the mind; and when the courts have stated that establishing that the conviction was had under these circumstances rebuts the natural presumption from an ordinary conviction, they have simply declared that such exceptions do exist, and have not declared that there may not be other exceptions.

In the case before us it is pleaded that the defendant knew and testified that the dog was running at large without a collar. This court has declared that, under such circumstances, it is lawful to kill the dog. Therefore, the conviction in the county court and in the district court could not have been due to an error in weighing the evidence, but it must have been due solely to a mistake of law arising from such admitted facts. The presence or absence of probable cause for a prosecution, the facts being established, is for the court, and not for the jury. Turner v. O'Brien, 5 Neb. 542. That is, it is a question of law, and not of fact; and, while a mistake of fact on the part of defendant in an action of malicious prosecution may affect the question of probable cause, a mistake of law does not. Hazzard v. Flury, 120 N. Y. 223, 24 N. E. 194. A misapprehension of the law may affect the issue of malice, but not that of probable cause. If the county court had properly interpreted the law, the plaintiff would have been discharged; and the fact that defendant was aware of those things which justified plaintiff's conduct could have been shown in evidence to establish want of probable cause. Is there any reason why the misapprehension of law by the county judge should affect the case, and destroy a cause of action which would have existed had the law been correctly determined in the first instance? We think not. The reason that a conviction procured by perjury is not proof of the existence of probable cause for the prosecution, is that the false testimony deceived the trial court so that the inference naturally drawn from a judgment of that court is no longer a reasonable inference. So, where it is pleaded that the proof disclosed an entire want of probable cause, but that the court mistook the law, and that, on appeal, the judgment was for that reason reversed, the probative character of the judgment of conviction is in like manner destroyed. The case is very different from nearly all the cases in which the old rule was laid down, which were cases where the law was clear, and the only question was whether the facts had been correctly determined on conflicting evidence. In such cases, the judgment of conviction is most clearly and forcibly probative.

We have found no case supporting the application of the rule just announced in direct terms. But we think it is in principle supported by all the cases which recognize a conviction only as prima facie evidence, and hold that it may be rebutted. The case of Herman Brookerhoff, supra, was a case like this, and is contrary to the view which we have taken. But it was decided in 1839, citing only very early cases, and only a few years after the case of Burt v. Place, supra, marked the first departure from the old doctrine. It proceeds upon purely technical grounds, and we do not think it should be followed. We hold, therefore, that the petition, by pleading a knowledge by the defendant, at the time he instituted the prosecution, of facts which in law discharged the plaintiff from culpability, and in pleading sufficient to show that the conviction in the lower court was due to a misapprehension of law, and not to a consideration of evidence justifying a conviction, sufficiently rebutted the presumption of probable cause arising from the first conviction. The effect of these facts on the issue of malice we do not determine. Malice was pleaded, and is a question for the jury. Reversed and remanded.

HORNICK et al. v. MAGUIRE.

(Supreme Court of Nebraska. April 7, 1896.)

REVIEW ON APPEAL—ENTRY OF JUDGMENT.

1. This court will not review a judgment rendered by the district court prior to the formal entry of such judgment upon the journal of the trial court. Ward v. Urmson, 59 N. W. 97, 40 Neb. 695.

2. A memorandum of a judgment made by a judge of the district court upon his trial docket will not authorize a review thereof in this court before the extension of such judgment upon the journal of the district court, in apt language and in due form. Ward v. Urmson, supra.

(Syllabus by the Court.)

Appeal from district court, Cedar county; Norris, Judge.

Action by Hornick, Hess & Moore against Martin Maguire. Judgment for defendant. Plaintiffs appeal. Dismissed.

Miller & Ready and J. S. Lathrop, for appellants. J. C. Robinson and Benj. M. Weed, for appellee.

RYAN, C. Appellants, in their brief, state that they brought suit in the district court of Cedar county to recover $468.37, and that, by virtue of a writ of attachment, the sheriff levied upon and attached a small stock of drugs, the property of the defendant, of the estimated value of about $1,000. It may be that these statements are true. It is unfortunate, if such is the case, that they were not evidenced by the record, which begins with a copy of "An Inventory of and Claim for Exemption," in support of which is found attached the affidavit of Martin Maguire. Following this affidavit is found an "Answer to Affidavit of Defendant for Exemption," verified upon belief. There is next found a transcript of what is denominated "Trial Docket Judges' Entries," from which it appears that the application for exemption was sustained, to which plaintiffs excepted, as they likewise did to an order overruling a motion for a new trial. The above facts shown by the "Judges' Entries" appear in the journal entry, in which, however, there is no final judgment. The entry of the presiding judge in his trial docket of the words: "Judgt. for plaintiff for $468. On $103.55 int. 10 per cent.; on $364.52 int. 7 per cent.,"—does not amount to, and cannot take the place of, a final judgment. Ward v. Urmson, 40 Neb. 695, 59 N. W. 97; Brown v. Ritner, 41 Neb. 52, 59 N. W. 360; Garneau v. Printing Co., 42 Neb. 847, 61 N. W. 100. This proceeding is therefore dismissed. Dismissed.

ALLSMAN v. DALEY.

(Supreme Court of Nebraska. April 7, 1896.)

REVIEW ON APPEAL.

This case presents questions of fact only, and the judgment, being supported by sufficient evidence, should not be disturbed.

(Syllabus by the Court.)

Error to district court, Saline county; Hastings, Judge.

Action by William Daley against John W. Allsman. Judgment for plaintiff, and defendant brings error. Affirmed.

Abbott & Abbott, for plaintiff in error. Hastings & McGintie, for defendant in error.

POST, C. J. The defendant in error (plaintiff below) recovered a judgment against the plaintiff in error in the sum of $63.35 upon a finding of the district court for Saline county, and which it is sought to reverse by means of this proceeding. The findings referred to are, in substance, that one Judy, with the knowledge and approval of the defendant below, and without the plaintiff's consent, took possession of a sulky, the property of the latter, to be used during certain races then impending; that said sulky, while so in the possession of the said Judy, was, through his negligence and improper driving, damaged to the amount of $58.15, and for which with interest judgment was ordered. The sole question presented by the record is that of the sufficiency of the evidence to sustain the finding of the district court. The utmost that can be claimed by the plaintiff in error is that the finding is against the weight of the evidence. But that proposition cannot be conceded. On the contrary, the finding and judgment appear to be supported by the decided weight of the evidence, and must be affirmed. Affirmed.

SCARBOROUGH v. MYRICK.

(Supreme Court of Nebraska. April 7, 1896.)

VACATION OF JUDGMENT—GROUNDS—PRACTICE—ACTION TO QUIET TITLE—PLEADING—SERVICE OF SUMMONS—WAIVER—APPELLATE PRACTICE.

1. Proceedings in error may be commenced in the supreme court at any time within one year from the rendition of the judgment or decree or final order sought to be reviewed.

2. A motion for a new trial is unnecessary to present to this court the question whether the petition states a cause of action.

3. The petition in an action to quiet title examined, and *held* to state a cause of action.

4. To entitle a party to have a decree rendered against him upon service by publication opened under section 82 of the Code, it must appear that he had no actual notice of the pendency of the action in time to interpose a defense.

5. Notice of an application, under said section, to open a judgment or decree, must be given to the adverse party; but where such party appears, and resists the application, it is a waiver of formal notice.

6. In an action to quiet title to real estate, service by publication may be made upon a nonresident defendant who cannot be summoned in the state.

7. Plaintiff's cause of action is not required to be set forth in an affidavit for service by publication. It is sufficient if such affidavit states that the defendant is a nonresident of this state, and that service of summons cannot be had upon him therein, and facts showing the action to be one of those mentioned in section 77 of the

Code, in which constructive service is authorized.

8. Where a decree is rendered upon service had by publication, and the defendant subsequently files an answer to the merits, and asks to have the decree opened under section 82 of the Code of Civil Procedure, such appearance is a waiver of all defects and irregularities in the service.

9. Except in actions specified in section 23 of the Code of Civil Procedure, it is bad pleading to describe the plaintiff or defendant by the initials, only, of his Christian name. But, if so designated, it is merely a misnomer, and, if the defendant appears, or is personally served, and no objection on that ground is made in the trial court, the defect is waived.

10. In the absence of a showing to the contrary, it will not be presumed, for the purpose of invalidating a judgment rendered against a defendant, that he has any other Christian name than the initials by which he was sued.

11. A decree rendered against a defendant upon service by publication alone, he having made no appearance in the cause, and the published notice requiring him to answer on or before a date anterior to the filing of the petition, instead of the third Monday after the completed service, as required by statute, may be set aside on motion of the defendant, as having been irregularly entered under the provisions of section 602 et seq. of the Code of Civil Procedure. Wilkins v. Wilkins, 41 N. W. 1101, 26 Neb. 235.

(Syllabus by the Court.)

Error to and appeal from district court, York county; Wheeler, Judge.

Action by Myron L. Myrick against W. B. Scarborough, in which there was a default judgment for plaintiff. Defendant moved to set the same aside, and from a judgment denying the motion he appeals and brings error. Reversed.

Sedgwick & Power, for plaintiff in error. George B. France, for defendant in error.

NORVAL, J. This action was instituted in the district court of York county on the 5th day of April, 1892, by Myron L. Myrick against W. B. Scarborough, to quiet the title to the real estate herein described, and to annul a certain contract entered into by and between them, by the terms of which the plaintiff agreed to convey, upon certain considerations, the S. W. ¼ of section 3, the S. E. ¼ of section 4, the N. E. ¼ and the N. E. ¼ of the N. W. ¼ of section 9, and the W. ½ of the N. W. ¼ of section 10, all in township 12 N., range 3 W., York county, Neb. Affidavit for substituted service of summons was made and filed, notice of the pendency of the suit was duly published, and, without any appearance on the part of the defendant, a decree as prayed was rendered against him on the 16th day of June, 1892. At a subsequent term of the court, to wit, on December 30, 1892, the defendant, through his attorney, filed a motion to set aside said decree, accompanied with the affidavits of his attorneys in support thereof, and filed his answer in said cause. The application was heard upon affidavits, and also evidence taken by the oral examination of witnesses, which testimony is embodied in the bill of exceptions found in the record. The court refused to set aside the decree, and the defendant has brought the case into this court for review.

One of the grounds urged for a reversal is that the petition fails to state a cause of action. Plaintiff insists that the sufficiency of the petition cannot be now raised, since the cause was not docketed in this court within six months from the entry of the decree; and, further, because no motion for a new trial was filed in the court below. The cause is not here upon appeal, but by proceedings in error. Therefore the defendant was not required to have the cause docketed within six months from the date of the decree. Proceedings in error may be commenced in this court at any time within one year from the rendition of the judgment or decree or final order sought to be reviewed. Bemis v. Rogers, 8 Neb. 149; Rogers v. Redick, 10 Neb. 332, 6 N. W. 413; Hendrickson v. Sullivan, 28 Neb. 790, 44 N. W. 1135. The record discloses that the transcript and petition in error were filed in this court on June 14, 1893, which was less than a year after the decree was pronounced in the district court. No motion for a new trial was necessary to test in this court the sufficiency of the petition. Hays v. Mercier, 22 Neb. 656, 35 N. W. 894; O'Donohue v. Hendrix, 13 Neb. 255, 13 N. W. 215; Schmid v. Schmid, 37 Neb. 629, 56 N. W. 207; Hansen v. Kinney, 46 Neb. 207, 64 N. W. 710; Farris v. State, 46 Neb. 857, 65 N. W. 890. It is insisted that the petition does not state a cause of action, and is therefore insufficient to support the decree, because it fails to allege that plaintiff was the owner of the lands in controversy at the time the action was brought. Undoubtedly, a plaintiff must have title to or claim an interest in the real estate in order to maintain an action quia timet. But he is not required to allege and prove a fee-simple title. Especially is this so where he is in possession of the property. Brewer v. Merrick Co., 15 Neb. 180, 18 N. W. 43; McDonald v. Early, 15 Neb. 63, 17 N. W. 257; Foree v. Stubbs, 41 Neb. 271, 59 N. W. 798. In the case at bar the petition alleges "that the plaintiff was, at the time of the making and execution of the contract hereinafter mentioned [the one sought to have canceled], the owner, and is now, and has been for more than five years last past, in the possession" of the premises in controversy. There is no averment in the pleading attacked that plaintiff has ever parted with the title in the property which he had at one time held, and, at least after decree, we must presume that plaintiff continued to be the owner of the property when this suit was brought. Manifestly this is so, since the plaintiff alleges the making of the contract to convey the property to the defendant, and that the latter has wholly failed and refused to perform the conditions and stipulations therein contained on his part to be kept and observed, thereby showing affirmatively that the defendant has forfeited all rights or in-

terest which he may have had in the contract and lands therein described. While the petition is not as full in its averments as might be desired by some pleaders, yet we think, under the liberal rules of code pleading, it states a cause of action.

One of the grounds stated in the motion to set aside the decree and permit a defense to be made is that there was no other service of summons upon the defendant than by publication. Under section 82 of the Code of Civil Procedure a party against whom a judgment or decree is entered upon constructive service alone, has a right to have such judgment or decree opened any time within five years by complying with the several requirements of said section, two of which being that the party shall give notice of his application to his adversary, and also establish that the defendant had no actual notice of the pendency of the suit in sufficient time to appear in court and contest the cause. This record fails to disclose that notice of the motion to open the decree was served upon the plaintiff. It does, however, show that he appeared and resisted the application, which was a waiver of formal notice. The evidence adduced on the hearing fails to establish that the defendant did not have actual notice that the suit was pending. It follows that the defendant was not entitled to have the decree opened under said section 82. Merriam v. Gordon, 20 Neb. 405, 30 N. W. 410; Hough v. Stover, 47 Neb. —, 65 N. W. 189.

It is urged that the trial court did not acquire jurisdiction, on account of alleged defects in the affidavit of publication and in the published notice. It is true that the affidavit upon which constructive service of summons was based is jurisdictional, and, if there is an entire omission of an averment upon a vital or material matter, the court will not acquire jurisdiction by the published notice, but the proceedings will be absolutely void. The affidavit must disclose, in addition to the fact that the defendant is a nonresident of this state, and service cannot be had upon him therein, that the action is one of those mentioned in section 77 of the Code, in which constructive service can be made. Tested by this rule, the affidavit for publication in the case at bar is sufficient. It states the date of the filing of the petition against the defendant, that the object and prayer of the petition is to declare an agreement entered into between plaintiff and defendant on February 26, 1890, to be null and void, to cancel the same of record, and to quiet in plaintiff the title to certain real estate specifically described in said contract, as in the petition set forth, and that the defendant is a nonresident of the state, and service of summons cannot be made upon him therein. It was not necessary that the affidavit should disclose plaintiff's title to the property in controversy. He was not required to state his cause of action in the affidavit, but in his petition. Grebe v. Jones, 15 Neb. 312, 18 N. W. 81. The affidavit shows that the nature or the character of the suit is one in which the statute authorizes service by publication to be had, and that is sufficient, so far as that point is concerned. Fouts v. Mann, 15 Neb. 172, 18 N. W. 64; Taylor v. Coots, 32 Neb. 30, 48 N. W. 964. Our statute authorizes service by publication in actions to quiet title to real estate when the defendant is a nonresident. Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557.

Another complaint is that in the petition, affidavit, and notice of publication the defendant is designated by his family or surname, and the initial letters only of his Christian name. The statute contemplates that the parties to a suit, whether plaintiff or defendant, shall be described in the pleadings by their full Christian names, except in actions specified in section 23 of the Code. In all other cases it is bad pleading to describe the plaintiff by the initials only of his Christian name. But the absence of his first or Christian name amounts merely to a misnomer, and, if objection on that ground is not made in the trial court, it will be waived. Walgamood v. Randolph, 22 Neb. 493, 35 N. W. 217; Real v. Honey, 39 Neb. 516, 58 N. W. 136; Laws v. McCarty, 1 Handy, 191; Wilson v. Shannon, 6 Ark. 196; Cattle Co. v. Becker, 147 U. S. 47, 13 Sup. Ct. 217; Kenyon v. Semon (Minn.) 45 N. W. 10. In the case at bar the defendant is sued by the name of W. B. Scarborough, no other description being inserted in the petition or proceedings; nor in the verification of the petition is it stated that the real name of the defendant is unknown. Neither in the answer filed by the defendant nor in the motion and affidavits filed by him has he disclosed his full Christian name. The defendant signed the contract sought to be canceled by his initials alone. We have carefully examined the entire record, and find that it nowhere discloses that the defendant has any other Christian name than the initials by which he was sued. This being true, we cannot presume that he has any other Christian name; therefore the objection that the defendant was described in the petition by his initials is not available in this court. Oakley v. Pegler, 30 Neb. 628, 46 N. W. 920; Fewlass v. Abbott, 28 Mich. 270; Kenyon v. Semon (Minn.) 45 N. W. 10. It is, however, argued that service by publication conferred no jurisdiction; in other words, that the summons should have been personally served upon the defendant. Section 148, Code Civ. Proc., provides: "When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name and description, and when his true name is discovered, the pleading or proceeding may be amended accordingly. The plaintiff in such case must state, in the verification of his petition, that he could not discover the true name, and the summons must contain the words, 'real name unknown,' and a copy thereof must be served personally up-

on the defendant." This section was before the court in Enewold v. Olsen, 39 Neb. 59, 57 N. W. 765. It was there held, in an action to recover a personal judgment not brought under section 23 of the Code, where the defendant was sued as F. Olsen, "full name unknown," and the return on the summons showed that he was served by leaving a copy at his usual place of residence, that the court acquired no jurisdiction over the defendant, and that the judgment was void. The scope of this decision is that a personal judgment cannot be rendered when the defendant is sued by his initials, unless the summons is personally served upon him, or he appears, except in cases brought under said section 23. Whether in an action in rem, and in which no personal judgment is sought, service by publication can be had where the defendant is sued by the initials of his Christian name, it is unnecessary to decide, since, if there was any defect in the service in this case, it was waived by the defendant filing his answer to the merits, and asking to have the decree opened under section 82 of the Code. Warren v. Dick, 17 Neb. 241, 22 N. W. 462; Seely v. Boon, 1 N. J. Law, 138.

Objection is made to the published notice. The proof of publication shows that the notice was published four consecutive weeks in the York Republican, the first publication thereof being on April 5, 1892, and the last insertion on the 29th day of the same month. The notice to the defendant required him to answer the petition on or before the 16th day of March, 1892, which was not only prior to the first publication, but before the petition was filed in the district court. By statute the time for filing answer is fixed "on or before the third Monday * * * after the return day of the summons, or service by publication." The notice in question is manifestly defective. It should have required the defendant to answer on or before the third Monday after the completed service. The defect indicated did not invalidate the notice to such an extent as to prevent the court from acquiring jurisdiction, or to render the proceedings absolutely void. It was a mere error or irregularity, not available in a collateral attack of the decree, but constituting sufficient ground for a reversal in a direct proceeding like this, or to set aside the decree under the third subdivision of section 602 of the Code, which authorizes a district court to vacate its own judgments or decrees after the term at which the same was entered "for mistakes, neglect, or omissions of the clerk, or irregularity in obtaining a judgment or order." Wilkins v. Wilkins, 26 Neb. 236, 41 N. W. 1101. The case cited was an action for divorce, in which a decree was rendered against the defendants. Service was by publication only, the notice requiring the defendant to answer on the second Monday, instead of the third, after the last publication. Nearly three years after the rendition of the decree the defendant filed a motion in the same court to vacate the decree for said defect in the notice in fixing the time for answer, which motion was sustained, and the ruling was subsequently affirmed by this court. The decree in the case at bar was irregularly entered, and it should have been set aside. The decree, and the order refusing to vacate the same, are reversed, and the cause remanded for further proceedings. Reversed and remanded.

FIFTH NAT. BANK v. DUNHAM et al.

(Supreme Court of Michigan. March 31, 1896.)

PREFERRED CREDITOR—PRO RATA SHARE OF TRUST FUNDS—ASSERTION OF CLAIM—ESTOPPEL.

1. A corporation and its president, both being insolvent, transferred their property, by several instruments, in trust for preferred creditors, to the president of complainant bank, a beneficiary in each and sole beneficiary in one; the latter being an assignment of its own stock. The trustee took possession of all the trust property, opened a single account as trustee with complainant, which was fully acquainted with the terms of the separate trusts, and continued the business of the corporation. The bank paid checks drawn on it by the trustee, and in some cases applied the proceeds on claims of other creditors, and, though it knew the assigned bank stock was reissued, and that the trustee had sold it, and was using the proceeds of it and of part of the realty in the business, raised no objection, and was equally negligent in asserting its rights when mortgages of part of the property were foreclosed. *Held* that, the trust fund proving insufficient to pay the preferred claims in full, the bank was estopped from asserting a claim to moneys paid to other creditors in administration of the trust, on the ground it had not received its pro rata share.

2. A bank president, trustee of property, to prefer claims of his own bank and a note due another bank on which he was liable as indorser, on maturity of the note notified said other bank to send it through the clearing house, and that his own bank would pay it. The note was so sent and paid, and the trustee subsequently paid his own bank the amount thereof out of the trust funds. *Held* that, the trust funds proving insufficient to pay the preferred claims in full, the trustee's own bank was estopped from claiming that its co-claimant had received more than its share of the fund.

Appeal from circuit court, Kent county, in chancery; Allen C. Adsit, Judge.

Bill by the Fifth National Bank of Grand Rapids against William Dunham, trustee, and others, for an accounting. From a judgment for plaintiff, defendants appeal. Reversed.

Fletcher & Wanty, for appellants Fourth Nat. Bank of Grand Rapids and Northern Nat. Bank and First Nat. Bank of Traverse City. Champlin & Stone, for appellant City Nat. Bank of Lansing. Kingsley & Kleinhaus, for appellant Detroit Nat. Bank. Fitz Gerald & Barry and Francis A. Stace, for appellant T. Stewart White. Wesley W. Hyde and Myron H. Walker, for appellee.

HOOKER, J. The Steele Packing & Provision Company, of Grand Rapids, was indebted as follows: To Fifth National Bank (compt.), $10,000; to Fourth National Bank,

$7,500; to Northern National Bank, $5,000; to First National Bank of Traverse City, $3,000. It owed $21,000 to others not interested in this proceeding. Mr. Steele, its manager, was indebted as follows: To Fifth National Bank (compt.), $10,000; to Northern National Bank, $5,000; to Detroit National Bank, $5,000. All of this indebtedness, except that due the complainant, consisted of negotiable paper indorsed by Dunham, who was president and manager of the complainant bank. On August 28, 1889, both Steele and the packing company were insolvent, and the following instruments were executed to Dunham as trustee: The packing company gave: (1) A chattel mortgage on substantially all of its personal property, "including all personal chattels and effects, goods, provisions, books and book accounts, and choses in action, * * * located at its packing house in Wyoming township." This may be designated the "Chattel Mortgage." (2) A real-estate mortgage upon the packing house property in Wyoming township, which mortgage, after describing the real estate, included the following, viz.: "Also all the buildings, machinery, improvements, and chattels situate upon said premises." This mortgage will be designated the "Packing-House Mortgage." At the same time, Steele executed the following upon his individual property: (1) A real-estate mortgage upon property in Ionia, called the "Ionia Mortgage." (2) An assignment of 70 shares of stock in the Fifth National Bank. The packing company mortgages secured packing company paper, as follows: Complainant, $10,000; Fourth National Bank, $2,500. This mortgage, on its face, purported to secure other claims; but complainant admits them to have been collateral to the $10,000 claim. The packing-house mortgage secured: Fourth National Bank of Grand Rapids, $5,000; Northern National Bank of Big Rapids, $5,000; First National Bank of Traverse City, $3,000. A second clause in this mortgage becomes immaterial, as the property did not produce a sufficient sum to pay the items having priority. The Steele mortgage and assignment secured his individual paper as follows: The Ionia mortgage secured: Complainant, $10,000; Northern National Bank of Big Rapids, $5,000; Detroit National Bank of Detroit, $5,000. The assignment of stock secured the Steele paper, held by the Fifth National Bank, and it is contended that it covered the $5,000 note of Steele, held by the Northern National Bank, which Steele testified that he supposed was held by complainant, at that time; but we think that the weight of evidence is to the effect that it secured complainant only. Had Dunham reduced all of the property to possession before disbursing it, no great difficulty should have been experienced in dividing it in conformity to the terms of the trust among those entitled to it; but he did not do this. On the contrary, he attempted to continue the business of the Steele Packing & Provision Company, opening an account in his own bank (i. e. the complainant), in his name as trustee, and drawing upon the fund for the expenses of the business, and to pay paper falling due, and discounts upon renewals. Such renewals were made or indorsed by him personally. The bank stock was converted into money, and, instead of being used to pay the complainant's notes against Steele, was, in part, at least, applied to other paper as it became due, or to discounts upon renewals. No serious difficulty is found in tracing the funds. Ordinarily, in such cases, those receiving more than their legitimate proportions will be required to surrender the excess, upon a bill filed for an accounting; and the bill in this cause is filed for such purpose. Manifestly, the misconduct and mistakes of the trustee will not relieve a cestui que trust from his duty to account to his fellow beneficiaries; and in this case, if the defendants are to avoid contribution, it is because of facts which make it inequitable for the complainant to ask such relief. Different reasons are assigned by the various defendants, why they should be entitled to retain the sum that they have severally received from the trustee.

First, it is contended that the course of the trustee had the full approval and assent of the Fifth National Bank, and that, as the payments were made over its own counter, upon checks signed by Dunham as trustee, it cannot now be permitted to recall such assent, and recover from the defendants, especially as the defendants relied upon such payments, and Dunham was released in consequence, when he would otherwise have been held as indorser. Dunham took possession of the property at once, upon receiving the papers creating the trust. It will be remembered that each instrument was unlike the others, and no two secured identical obligations. A proper administration of the trust would have required the several funds received from the property covered by the respective instruments to be kept separate, and applied according to the terms of the various instruments. Dunham did not do this. He opened one account as trustee, and deposited moneys from the various sources therein. He paid notes and discounts upon renewals, as they became due, by drawing checks upon this fund. He carried on the business of the Steele Packing & Provision Company, including a retail meat market, paying the expenses, and, there is reason to believe, large losses, from this account, and, apparently, he used the Wyoming township real estate for the purposes of this business. About the first thing done by him was in relation to the note of $2,500, held by the Fourth National Bank, upon which he was indorser. It fell due the day following the creation of the trust. He

telephoned the holder to send it through the clearing house to the Fifth National Bank, and it would be paid. It was so sent, and it was paid, by its application in the adjustment of that day's business between these banks. It appeared upon the hearing that the Fifth National Bank carried this as a cash item for a time at Dunham's direction, and that he subsequently paid it from the trust fund. Complainant now claims that, in the accounting, the Fourth National Bank should be charged with the amount of such note, as though it had received payment from the trust fund, and that, as the fund proved inadequate to full payment of the debts, it should account for the excess with interest.

We may, perhaps, profitably dispose of this question at this point. We think that the Fifth National Bank was under an obligation to treat that note as sent to it for payment. It saw fit to receive it and settle for it upon an understanding with Dunham, which it was not authorized to do on behalf of the holder. If not paid, it should have protested it, and returned it without delay. There is nothing to indicate that the Fourth National Bank expected it to be paid from the trust fund. It had been informed by Dunham that it would be paid if sent to the bank. Was it Dunham as trustee, or indorser, or president of the bank, who made this promise? Inasmuch as there was nothing to indicate that, as trustee, he had money to pay it, but, on the contrary, it quite clearly appears that he had not, it will not be unfair to assume that the direction was given as indorser, and that he arranged with his bank to pay the note and carry it for him. It cannot now shelter itself behind the claim that it relied on his promise as trustee, and carried the note as a cash item against the trustee. So far as this note is concerned, we think complainant estopped; and, for the purpose of any accounting with the trustee, it is to be treated as though it purchased that note, and became entitled to its proportion of the fund obtained from the chattel mortgaged property.

The Fourth National Bank had another claim. This was a packing company note of $5,000, with Dunham's indorsement. It was apparently a renewal of the note secured by the packing-house real-estate mortgage, and was sold for full consideration to the City National Bank of Lansing. Previous to its sale, the Fourth National Bank had received, as discounts, upon successive renewals of this paper, the sum of $149.99. It is contended that this sum should be considered in the accounting. We pass the question, to be considered later, with others of like character, and follow the history of the note itself. On October 8, 1890, it was sent by the City National Bank to the Fourth National Bank for collection, but was not paid. A renewal was returned, with the sum of $103.33 interest, which was paid by a trustee check, signed by Dunham, payable to the Fourth National Bank. We do not discover that further interest was paid on this note, and on March 10, 1891, Dunham filed his bill in Kent circuit court, in chancery, to foreclose the packing-house real-estate mortgage. Earl, who was a stockholder and an officer of the Fifth National Bank, was his solicitor, and the case was commenced upon the request of the City National Bank. It will be remembered that there was a second clause in this mortgage, which secured other creditors, among them the complainant. The debts to be first paid were this $5,000 note, owned by the City National Bank, a $5,000 note given to the Northern National Bank, which found its way to White (as will appear hereafter), and a $3,000 note owned by the First National Bank of Traverse City. A number of these beneficiaries asked leave to answer and file cross bills, and this was permitted, nearly all doing so. The Fifth National Bank filed an answer and cross bill, praying for an accounting, as follows: "That the complainant should render a full and accurate account of all moneys by him received as said trustee, and from all securities, and all acts by him done as such trustee, and asks the aid of this court in requiring from him a full and accurate accounting thereof, and of his disposition of the property that has come into his hands under the said trust, and of the proceeds thereof. The defendant asks the benefit of a cross bill herein upon the facts alleged in this answer, under the rules and practice of this court permitting the same, and that it may have the same relief as though it had filed its cross bill herein, and that the said complainant may come to a full and fair accounting of the said trust aforesaid." The City National Bank also asked accounting. Testimony was taken and proof was made concerning expenses incurred for taxes and insurance, and services of watchmen in protecting the property, by the Grand Rapids Savings Bank, a defendant. The decree adjudged that the Traverse City National Bank's note of $3,000, the City National Bank's note of $5,000, and the note of $5,000 owned by White, had priority of payment. It then determined the notes entitled to consideration under the second clause of the mortgage; but these need not be considered, as the property did not bring a sufficient sum to pay those having priority. It found due upon the City Bank note, $6,588.89; White note, $6,601.11; Traverse City Bank note, $3,924.62. It found that payments had been made to the Traverse City Bank amounting to $1,207.31, together with interest, and ordered this sum to be paid to the register; and, if the Fifth National Bank, which claimed that these amounts had been paid from the chattel mortgage fund, should begin proceedings for an accounting with Dunham and the two banks and White within 30 days, it should be held by the register to await the final decree in such proceeding; otherwise,

it should be divided between the two banks and White. An allowance of $856.51 was made to the Grand Rapids Savings Bank for expenses. On appeal, this court affirmed the decree, the only change being an increased allowance for expenses. 58 N. W. 627. The decree was dated September 22, 1896, and was affirmed by decree of this court filed after this suit was begun. The bill in this cause was sworn to October 30, 1893. It is now contended that the decree in said cause was conclusive between the parties, as to their respective shares in the proceeds of said mortgage, except as to the amount paid to the Traverse City Bank, which was specially mentioned and left open, and that the complainant should not be permitted to claim from the City National Bank the $103.33 and interest which it received. For the same reason it denies complainant's right to recover from it a share of a further sum of $2,500 claimed by Dunham for expenses, services, etc., in managing and caring for this property, and of which the court allowed $2,285.85, the two items amounting, it is said, to over $900 against the City Bank.

T. Stewart White became owner of a note, by purchase from Dunham, it being a renewal of the packing company note, held by the Northern National Bank, indorsed by Dunham, who paid it, and, as stated, secured by the packing-house mortgage, and sold by Dunham to White. White, as already shown, was a party to the foreclosure case, and a decree was rendered against him for a portion of the sum of $2,285.85 allowed Dunham for expenses, etc. But, previous to the procurement of this note from the Northern National Bank by Dunham, and its transfer to White, the original note had been renewed several times, and interest to the amount of $309.99 had been paid, through the complainant, to whom the notes had been successively sent for collection, and the complainant seeks to recover this from the Northern National Bank. The other note of $5,000, owned by the Northern National Bank, was also sent to complainant for collection, and $1,500 and interest was paid from the chattel mortgage fund, and $3,500 and interest was paid from the proceeds of the bank stock. It will be remembered that this note was secured by the Ionia mortgage. Complainant asks to recover these amounts. The Detroit note of $5,000 was sent to the complainant for collection. Payments were made, through complainant, as follows: February 7, 1890, $72.33; February 7, 1890, $1,000; April 22, 1890, $1,000; July 22, 1890, $1,000. On each occasion, time was given upon the balance, upon new paper, signed by Dunham; the original note being held until the new note should mature. It will be remembered that this note was, with others, secured upon Ionia real estate by a mortgage. This was foreclosed, and a decree was filed September 5, 1893. The property was sold to Welch, as trustee for the Fifth National Bank, the suit having been commenced at the request of Mr. Earl, a director of that bank. The decree found that the Northern National Bank had been fully paid, and the $3,000 paid to the Detroit bank was deducted from its claim, and a decree for $2,000 made on its behalf. The Fifth National Bank disavows all responsibility for this, saying that Dunham, and not the bank, was the party complainant, and that it was in no way responsible if the claim of the Detroit bank was reduced, that of the Northern National Bank wiped out, and itself permitted to absorb the bulk of the Ionia property, which it caused, or at least permitted, to be bid in to itself.

To recapitulate the amounts sought to be recovered by complainant: (1) Against the Fourth National Bank, a portion of the amount paid on the $2,500 note, and also the sum of $449, paid to the Fourth National Bank as interest on the $5,000 note subsequently sold to the City National Bank; (2) against the City National Bank, $103 paid as interest on the $5,000 note, and about $700 which it is now claimed that Dunham expended in protecting the Wyoming township real estate, being a part of $2,285.85 allowed by the circuit court; (3) against the Traverse City National Bank, the amount of $1,207.31, payments made to it before foreclosure, being amount deposited with the register, and also its proportionate share of the $2,285.85 mentioned; (4) against T. Stewart White, for a proportionate share of said $2,285.85; (5) against the Northern National Bank, $300 interest on note before its sale to T. Stewart White, and $5,000 and interest which complainant claims to have been paid from trust funds upon note secured by Ionia mortgage; (6) against the Detroit National Bank, payments of $3,072 upon note secured by the Ionia mortgage.

An examination of the testimony has satisfied us that the complainant was conversant with and assented to the attempt by Dunham to continue the business of the packing and provision company, and the payment and renewal of paper as it became due. It knew the terms of the trust, and the deposit of the fund, the drawing and payment of checks to the various creditors and others, which checks it paid, and in some instances received and applied such checks and the avails thereof upon the obligations. It knew that the bank stock was reissued to Dunham, and, although it alone was interested in it, seems to have not concerned itself with the disposition made of it or its proceeds. Its directors grumbled at the result of Dunham's conduct of the business, but permitted it, and we are convinced that it understood that the real estate in Wyoming township was being used in the business instead of being closed out. Again, the course of the complainant in relation to the funds corroborates this. Allusion has already been made to its disregard of its legal rights in the bank stock. It was equally careless in respect to the chattel

property, which, if the defendants are right in their contention, was in part covered by the packing-house mortgage. Upon the foreclosure of this mortgage, it seems not to have occurred to the complainant to make claim in its answer that the various defendants had been paid by its securities, though it prays general accounting by Dunham; and at the hearing it seems to have made no claim of that kind against any of the defendants except the Traverse City Bank. Again, upon the foreclosure of the Ionia mortgage, while not technically a party to the proceedings, its members and solicitors were connected with the case, and through Dunham it secured a decree that determined that the Detroit National Bank claim was reduced, by payment, to $2,000, and that of the Northern National Bank extinguished. Every defendant had reason to suppose that it was paid by the assent of complainant, and in furtherance of a programme which Dunham, then its president, was carrying out. They permitted the real estate to be used for the business. They allowed the personal property to be sold without setting up a claim to it under the real-estate mortgage, which, in terms, covers some of it, and which, to say the least, might in the minds of some clearly include it. They granted extensions of time on partial payment, accompanied by new promises to pay, until Dunham, the indorser, failed. They deferred foreclosure, and finally accepted their allotments under the decrees mentioned, upon the understanding that they had received payment. To now require them to reimburse the complainant would be to misapply the rule that, "of two, the least in fault should not suffer." We are of the opinion that the facts shown amply support the contention that the complainant should be estopped from asserting a claim to the moneys paid. The decree of the circuit court against the appellants should be reversed, and the bill dismissed, with costs of both courts. Ordered accordingly. The other justices concurred.

J. THOMPSON & SONS MANUF'G CO. v. PERKINS et al.

(Supreme Court of Iowa. April 10, 1896.)

SALE — ACCEPTANCE — PLEADING — CONSTRUCTION.

1. An order for goods made through an agent of the seller, subject to the latter's approval, may be countermanded before an acceptance is communicated to the buyer.

2. Where the construction of a pleading, after giving to the language a reasonable intendment, is doubtful, it should be resolved against the pleader.

3. An averment in the complaint that at the time plaintiffs received defendants' written order for goods they "accepted and approved said order and contract and wrote [defendants] a postal card," etc., implies that the order was accepted by sending such communication, and pleads no other legal acceptance.

Appeal from district court, Story county; B. P. Birdsall, Judge.

The plaintiff is a manufacturing firm at Beloit, Wis. In November, 1892, the defendant firm, doing business at Ames, Iowa, gave to one Baldwin, a traveling salesman for plaintiff, a written order for agricultural implements to be shipped to Ames about February 14, 1893. The amount of the order, after the deduction of the value of one plow, was $236.25. The written order contained numerous conditions, and was signed "Perkins & Son." After the signature is the following: "Accepted subject to approval of J. Thompsons & Sons Mfg. Co. F. R. Baldwin, Salesman." About the 1st of February, 1893, the defendants countermanded the order by letter, which the plaintiff disregarded, and shipped the goods, which defendants refused to receive, and this action is to recover the purchase price. Defendants claim the right to countermand the order, because the contract had never been completed by an acceptance of the order. The petition recites the facts as to the giving of the order, the shipment of the implements, and other facts, and the following are the facts pleaded to show an acceptance: "The plaintiffs, by way of amendment to their petition herein, state that at the time plaintiffs received the written order from the defendants set out in the petition, to wit, November 17, 1892, they accepted and approved said order and contract, and wrote Perkins & Son a postal card, addressed to them at Ames, Iowa, as follows: 'Beloit, Wis., Nov. 17th, 1892. Perkins & Son, Ames, Iowa—Dear Sir: Your favor of the 12th received, with order given to our Mr. Baldwin. The above will have our earliest possible attention. We are, yours, truly, J. Thompson & Sons Mfg. Co.'" To the petition the defendants demurred on several grounds, and among them the failure of acceptance, which demurrer the courts sustained, and, plaintiff electing to stand on the petition, judgment was entered against it for costs, and it appealed. Affirmed.

Jordan & Brocket, for appellant. Dyer & Stevens, for appellees.

GRANGER, J. 1. From appellant's argument it appears that the court below, in ruling on the demurrer, took the view that the only acts of approval of the order pleaded are the letter of November 17, 1892, and the shipment of the implements. Until the order was accepted, there was no contract. The acceptance must have been in such a way that both parties could know the contract was complete. No mere mental acceptance would be sufficient, and we do not understand appellant to claim that it would. The order was conditioned, and, before acceptance, defendants had the right to countermand it. Benj. Sales (6th Ed.) § 41. It seems to us that the petition pleads no other acceptance before the countermanding order than the card or letter under date of November 17, 1892. No pleader, intending more,

would have used the language as it is there used in connection with the card. If the construction is doubtful, after giving to the language a reasonable intendment, it should be resolved against the pleader. The acceptance pleaded is in a single sentence, and the language employed, with the punctuation, indicates that the pleader intended to state the fact and manner of acceptance. The law requires that the acceptance must be communicated. 21 Am. & Eng. Enc. Law, 455, and cases there cited. We assume that the pleader undertook to plead a legal acceptance, and to this end made the averment as to the card being sent to show the acceptance. The proposition is not, to us, a doubtful one, that the averment means that the order was accepted by sending the communication. In this court appellant does not contend that the communication is sufficient as an acceptance, and we need not consider the question. The shipment was made after defendants had exercised their right to countermand the order, and, of course, could have no effect to bind the defendants. The judgment is affirmed.

COULTER MANUF'G CO. v. FT. DODGE GROCERY CO.

(Supreme Court of Iowa. April 10, 1896.)

SALE—GUARANTY—PAROL EVIDENCE—CUSTOM.

Parol evidence is admissible to show that a guaranty in a contract for sale of goods, reciting, "Prices guarantied against market price to date of shipment," meant, according to business custom and usage, that the purchaser should have the benefit of any decline in prices.

Appeal from district court, Webster county; D. R. Hindman, Judge.

Action to recover a balance alleged to be due from the defendant to the plaintiff upon the sale of a quantity of jelly. There was a trial before the court, without a jury, and a judgment was entered for the defendant for costs. Plaintiff appeals. Affirmed.

Yeoman & Kenyon, for appellant. Botsford, Healey & Healey, for appellee.

ROTHROCK, C. J. The plaintiff is a corporation engaged in manufacturing and selling merchandise at St. Joseph, Mo. The defendant is engaged as a wholesale dealer at Ft. Dodge, in this state. On the 22d day of March, 1893, W. W Brown, one of the plaintiff's traveling salesmen, went to the defendant's place of business to solicit an order for goods, and a contract was made as shown by the following orders:

"3-22-1893.

"Messrs.: Ship to Fort Dodge Grocery Co., Ft. Dodge, Io.

"How to ship: Freight allowed.

"When: June first.

"Terms: Regular, unless sooner ordered.

"This order is not subject to cancellation.

"Prices guarantied against market price to date of shipment.

1,000 17-lb. kits jelly, assorted, @ 63c.
200 20-lb. kits jelly, " @ 68c

"8c per kit reduction from present price on the 17-lb. kits, and 7c per kit on the 20-lb. kits, to be made good in jelly. Bill to call for above prices, 63c and 68c.

"Fort Dodge Grocery Co."

"3-22-1893.

"Coulter Manufacturing Co., St. Joseph, Mo.

1,000 17-lb. kits jelly, @ 63c.
200 20-lb. kits jelly, @ 68c.

"Frt. allowed to Ft. Dodge. Time, 60. 2 per ct. ten days.

"Ship June 1st, unless sooner ordered, and price guarantied to date of shipment.

"W. W. Brown."

It will be observed that the goods were to be shipped June 1, 1893. On the 8th day of May, the plaintiff telegraphed the defendant that the goods must be shipped that day, and it would date bill June 1st, or cancel the order. No answer was made to this dispatch, and another was sent on the same day advising defendant that the goods were being shipped. The defendant wired the plaintiff to ship the goods as per conditions of telegram and order. The goods were received, and the defendant paid the plaintiff the market price as it was on the 1st day of June, the time when the jelly was to be delivered, and the time to which the bill was to be dated, as shown by the first telegram sent, on the 8th day of May. The market price of the jelly was the same on the 8th day of May that it was at the time the order was given. But on the 1st day of June the price was much less. The defendant paid the full value of the goods as of June 1st, and this action is to recover the balance claimed to be due. It will be seen that the contract names the price of the goods, with the following further provision: "Prices guarantied against market price to date of shipment." The dispute arises upon the proper construction of this guaranty. The plaintiff contends that it is to be understood therefrom that the prices to be paid were not to be more than those named in the contract. On the other hand, it is insisted that, if the prices were less on the 1st of June, the defendant was to have the benefit of the reduction; or, in other words, if there was a decline in the market, the purchaser was to have the benefit of the reduced market value.

The defendant introduced witnesses who were familiar with orders in this form, and they testified that the true meaning of the contract according to mercantile usage is that the purchaser shall have the benefit of the decline. Plaintiff objected to the evidence. The court did not rule on the objections made, but held the same in abeyance, as it is expressed in the abstract. It does not appear that any ruling was at any time made on the question. If we should treat the objections as overruled, we think the ruling was right. This

clause in the contract was not self-explanatory. Parol evidence that the terms used have a well-known meaning in commercial transactions is admissible, not as contradicting the language or terms of a contract, but to apply to them the incidents which obtain by usage and custom. It is not necessary that words and terms in a contract should be technical, scientific, or ambiguous in themselves in order to entitle a party to show by parol evidence the meaning attached to them by the parties to the contract. 27 Am. & Eng. Enc. Law, 827; Manufacturing Co. v. Randall, 62 Iowa, 244, 17 N. W. 507. The judgment of the district court is sustained by the evidence, and it is affirmed.

KNOX v. NICOLI.

(Supreme Court of Iowa. April 11, 1896.)

JUSTICE COURT—APPEAL—REMITTITUR—JUDGMENT—ENTRY FORTHWITH.

1. In an action in a justice's court, the jury, at 9 o'clock p. m., returned a verdict for plaintiff for $40, whereupon defendant tendered an appeal bond, which was filed and approved by the justice. Before judgment was entered, plaintiff filed a remittitur of all demands sued on in excess of $24.50. *Held* that, as no appeal would lie until judgment after the filing of the remittitur, the amount in controversy was less than $25, and consequently no appeal would lie.

2. An appeal bond filed before a judgment is rendered must be regarded as filed after judgment.

3. Under Code, § 3552, requiring judgment before a justice to be entered "forthwith," a judgment upon a verdict returned at 9 o'clock at night may properly be entered the next morning.

Appeal from district court, Keokuk county; Ben McCoy, Judge.

C. M. Brown, for appellant.

KINNE, J. 1. This cause, involving less than $100, comes to this court upon the certificate of the district court, the material facts of which are as follows: Plaintiff commenced an action, claiming $85. Defendant filed a general denial and a counterclaim in the sum of $50. The counterclaim was stricken out on motion of the plaintiff. The jury, at 9 o'clock p. m., returned a verdict for the plaintiff of $40; whereupon the defendant tendered an appeal bond, which was filed and approved by the justice. The judgment on the verdict was not rendered until the next morning, when it was entered for $40. Prior, however, to the actual entry of the judgment by the justice, a remittitur was filed by the plaintiff of all demands sued on in excess of $24.50, and judgment was asked for said amount. The justice allowed an appeal. In the district court plaintiff moved to dismiss the appeal, because the amount in controversy was less than $25, which motion was sustained, and the court rendered a judgment against the defendant for costs. The only question upon which the opinion of this court is sought is as to whether, under such facts, the motion to dismiss the appeal was properly sustained.

2. No appeal lies from the verdict of a jury. There must be a judgment entered by the justice before an appeal can be taken. Code, § 3575; Kimble v. Riggin, 2 G. Greene, 245; Brown v. Scott, Id. 454; Guthrie v. Humphrey, 7 Iowa, 23. And see Evans v. Phelps, 77 Iowa, 526, 42 N. W. 432. At the time the appeal bond was tendered, accepted, and filed by the justice, there was nothing from which to appeal, as no judgment had then been entered. The remittitur was in fact filed before the judgment was entered, and from that moment the amount in controversy was less than $25. Consequently, no appeal would lie, and none should have been allowed by the justice. Vorwald v. Marshall, 71 Iowa, 576, 32 N. W. 510; Bateman v. Sisson, 70 Iowa, 518, 30 N. W. 870; Milner v. Gross, 66 Iowa, 252, 23 N. W. 654; Schultz v. Railway Co., 75 Iowa, 240, 39 N. W. 289. In the latter case it was held that the order of time of filing the appeal bond and remittitur was not material, and that an appeal bond filed before a judgment was rendered should be regarded as filed after judgment. We then have a case in which the remittitur was filed before judgment, and the bond to be treated as filed after judgment. Under the foregoing cases, it is clear that at the time when the bond should be treated as filed, and at the time the judgment was in fact entered, the amount in controversy was less than $25; hence no appeal should have been allowed, and the motion to dismiss was properly sustained.

It is contended that the judgment should have been entered at the time the verdict was returned. It is to be remembered that the verdict was returned at 9 o'clock at night. The provision of the statute that the judgment shall be entered "forthwith" must be reasonably construed. A judgment upon a verdict returned at 9 o'clock at night may properly be entered the next morning. Code, § 3552; Burchett v. Casady, 18 Iowa, 342; Davis v. Simma, 14 Iowa, 154.

The district court properly dismissed the appeal. Affirmed.

CRAWFORD v. BERRYHILL.

(Supreme Court of Iowa. April 10, 1896.)

RECORD ON APPEAL—ABSTRACTS.

Appellee's amended abstract stating that appellant's abstract does not contain an abstract of all the evidence, and that no certificate of the evidence was made out, will be taken as true where it is not denied, and appellant's abstract is silent as to the certification of the evidence.

Appeal from district court, Boone county; B. P. Birdsall, Judge.

Action to quiet title. Decree for the defendant, from which the plaintiff appealed. Affirmed.

M. K. Ramsey and John A. Hull, for appellant. Crooks & Snell, for appellee.

GRANGER, J. Appellee files an amended abstract in which he states that appellant's abstract does not contain an abstract of all the evidence introduced and offered on the trial, and denies that the evidence has in any manner been certified by the trial judge, and states that no such certificate has been made; and appellee states in argument that the abstract does not show that the evidence contained therein is an abstract of all the evidence offered on the trial. Appellee's abstract is not denied, and hence is to be taken as true. Appellant's abstract is silent as to the certification of the evidence, and, although we might otherwise treat the statement in his abstract as a prima facie showing that it was so certified when appellee's amendment was filed, it was, unless denied, to be taken as true. Knight v. Railway Co., 81 Iowa, 310, 46 N. W. 1112, and many other cases. If appellee's abstract was denied, the issue of fact could be settled by a reference to the transcript. Appellee also presents the matter in argument, and the correctness of the position is not questioned. As no evidence has been preserved, there is nothing for us to consider, and the judgment will stand affirmed.

JURGENSEN v. CARLSEN et ux.

(Supreme Court of Iowa. April 10, 1896.)

NEGOTIABLE INSTRUMENTS — INTEREST — REFORMATION — MATURITY.

1. On a note dated June 19, 1893, wherein the maker promised to pay "the principal sum of $4,000, with interest thereon from date until paid, at the rate of 7 per cent. per annum, payable annually, in each year, until said principal sum is fully paid; said payments to be made as follows: $1,000 on or before Sept. 15th, 1894, and $1,000 on or before Sept. 15th in each year, until fully paid,"—the interest matured on June 19th in each year after the date of the note.

2. A party who seeks to reform an instrument on the ground of mistake must establish the issue by clear and satisfactory evidence, which shall be free from reasonable doubt.

3. Where the whole amount of the principal and interest becomes due by the express terms of the note and mortgage on default in payment of interest, neither demand nor notice of election is necessary as a condition precedent to a right of action.

Appeal from district court, Clinton county; W. F. Brannan, Judge.

Suit in equity to foreclose a mortgage given by defendants to plaintiff. The defendants pleaded a mistake in the note and mortgage, asked that the same be corrected to conform to the understanding of the parties, and that the suit be abated. Decree for plaintiff, and defendants appeal. Affirmed.

McCoy Bros. and Wm. Kreim, for appellants. Walliker Bros., for appellee.

DEEMER, J. The suit is predicated upon a note for the sum of $4,000, made and executed by the defendant Julius Carlsen on the 19th day of June, 1893, and a mortgage upon certain real estate, made and executed on the same day, by Julius Carlsen and Gude Carlsen, his wife, to secure the payment of said note. It is provided in the note that a failure to pay any of the interest thereon within three days after due shall, at the option of the holder, cause the whole of the note to become due and collectible at once. The mortgage contains a similar, although somewhat stronger, provision, in that it provides that a failure to pay either principal or interest within three days after it becomes due shall cause the whole sum secured by the mortgage to become due and collectible at once, and further provides that the mortgage may thereupon be foreclosed for the whole of said money, interest, and costs. The note, as we have said, is dated June 19, 1893, and draws interest, payable annually, at the rate of 7 per cent. from date until paid; the principal sum made payable in installments of $1,000 each, on the 15th day of September of each year following and including the year 1894. The mortgage also provides that the mortgagors shall pay interest annually at the rate of 7 per cent. from and after its date, upon the principal sum secured. This suit was commenced on the 26th day of June, 1894, and it is alleged in the petition that defendants neglected to pay the interest maturing June 19, 1894, for more than three days after the same became due. The defendants, in answer, claim that a mistake was made by the scrivener in drawing up the notes and mortgage; that it was the understanding and agreement between the parties that the interest should be paid at the same time that the installments of principal matured, to wit, on the 15th of September in each year; and they ask that the note and mortgage be reformed to express the true agreement of the parties, and that the suit be abated. They further pleaded an arrangement between the parties, by the terms of which the plaintiff agreed that he would receive, and defendants agreed to pay, the whole of the amount of principal and interest within a few days after the maturity of the interest; and they say that, relying thereon, they proceeded to arrange for and procure the sum needed to meet their obligation, but that plaintiff, in violation of his agreement, commenced this suit; and they claim that plaintiff is now estopped from prosecuting the action. The plaintiff denies the alleged mistake in the instruments, and denies the agreement to accept the whole of the principal and interest as pleaded by defendants in their answer. The lower court found for plaintiff, and rendered a decree foreclosing the mortgage. Defendants appeal.

It is argued on behalf of the appellants that the interest did not mature by the terms of the note until the 15th of September, 1894. To determine this question, resort must be had to the note itself, which, in so far as material, is as follows: "$4,000.00. Clinton.

Iowa, June 19th, 1893. On or before four years after September 15th, 1893, for value received, I, as principal, promise to pay to Benedix Jurgensen or order the principal sum of four thousand dollars, with interest thereon from date until paid, at the rate of 7 per cent. per annum, payable annually, in each year, until said principal sum is fully paid; said payments to be made as follows: $1,000 on or before Sept. 15th, 1894, and $1,000 on or before Sept. 15th, in each year, until fully paid." It is manifest, we think, that the interest was payable annually, and that it matured on the 19th day of June in each year after the date of the note. The payments which were to be made on September 15th of each year from and after 1894 are specified and limited, and are manifestly payments of a part of the principal sum.

2. The evidence is in conflict on the issue of mistake. It is well understood that in such cases the burden is upon him who claims mistake to establish the same by clear and satisfactory evidence, which shall be free from reasonable doubt. Now, while the scrivener who drew the instruments states that it was the agreement and understanding of the parties that the interest should mature and be paid with the installments of principal, and that he intended to make the note so read, and the defendant Julius Carlsen also testified that this was the understanding, yet the defendant says that he heard the instrument read before he signed it, and was satisfied with it as read. He also says on cross-examination that there was no such understanding as he now claims before he signed the papers. Plaintiff denies that there was any mistake, and says that, when the papers were read to Carlsen, he expressed himself satisfied therewith. It also appears that defendant made no claim of mistake until about the time the answer was filed, but told a disinterested party that his defense to the suit would be that plaintiff had failed to notify him that the interest was due. There is not such clear and satisfactory evidence in the case as to justify a reformation of the instruments.

3. Nothing is shown in evidence which would constitute an estoppel. It is true that plaintiff agreed to accept from the defendant $1,000 of the principal and the matured interest if paid in a certain time. But defendant did not have the money ready at the time agreed upon. Defendant did not in any manner alter his position or do anything on the strength of the agreement which would furnish the basis for an estoppel. The whole amount of the principal and interest was due by the express terms of the note and mortgage at the time this suit was commenced, and neither demand nor notice of election was necessary as a condition precedent to a right of action. Swearingen v. Lahner (Iowa) 61 N. W. 431.

We reach the conclusion that the decree of the district court is right, and it is affirmed.

FARMERS' CO-OPERATIVE SOC. OF GENEVA v. GERMAN INS. CO.

(Supreme Court of Iowa. April 10, 1896.)

INSURANCE—VERBAL CONTRACT—EVIDENCE—SUFFICIENCY.

1. In an action at law on a verbal contract of insurance the issue whether the contract was in fact made is to be determined by a preponderance of the evidence.

2. Where the evidence is conflicting, the verdict will not be disturbed.

Appeal from district court, Franklin county; B. P. Birdsall, Judge.

This is an action at law upon an alleged verbal contract of insurance against the loss by fire of a grain elevator and grain stored therein, and machinery connected therewith. There was a trial by jury, which resulted in a verdict for the plaintiff. The defendant appeals from a judgment on the verdict.

Berryhill & Henry, for appellant. Taylor & Evans, for appellee.

ROTHROCK, C. J. 1. The main question in the case is whether the evidence was sufficient to authorize the jury in finding that a verbal contract of insurance was made and concluded between the parties. The defendant requested the court to charge the jury as follows: "In an action upon a parol contract to issue a policy of insurance, no policy being in fact issued, there must be conclusive proof that all the essential elements of such a contract have been agreed upon. If the matter is left in doubt, upon the whole evidence, whether a binding contract was entered into, your verdict must be for the defendant. There is a dispute under the evidence as to whether there was any agreement to issue a policy, and as to the three following elements, which must be agreed upon to make a binding contract, viz. the time of payment of the premium, the amount of the insurance, and the distribution or apportionment of the total amount in each policy; and, unless you find from the evidence that there is conclusive proof that the agent of plaintiff and the agent of the defendant agreed upon the matters above mentioned, then the plaintiff cannot recover, and your verdict must be for the defendant." The court refused to give the instruction as requested, and the jury were charged, in substance, that the contract, like any other oral undertaking, might be established by a preponderance of the evidence. It is urged that this is not the rule as applied to an oral contract of insurance. The question is not an open one in this state. The rule is so well established that all questions of fact in a law action are to be determined by a preponderance of the evidence, that it ought not to be a subject of debate. In McAnnulty v. Seick, 59 Iowa, 586, 13 N. W. 743, it is said: "It is, however, the established law of this state that questions of fact submitted to a jury in civil cases are to be determined by a preponderance of the evidence."

2. It is said that no completed contract was made, or, in other words, that there was no meeting of the minds of the contracting parties upon the stipulations essential to constitute a valid contract. It appears that one Osborne was the agent of the defendant. He was not only a soliciting agent, but he was what is known as a recording agent. He had authority to solicit insurance and to fill up and issue policies. He went to the place where the elevator was situated, and proposed to insure the property. He had an interview with the general manager and the secretary of the plaintiff. His first conversation with these officers was on the 20th day of October, 1893. It was thought then that the premium exacted for the insurance would probably be 3½ per cent. Osborne examined the building and machinery, and made a diagram on paper with a pencil, and some figures, which indicated that the policy was to be for $1,850 on all the property. The figures on the paper fixed the amounts on the building, the grain, the boilers and engine, and the other machinery separately, so that the aggregate was to be in that amount. Osborne returned to the elevator on the 24th day of October, and in a very brief interview said that 4 per cent. was wanted for the insurance, and the bargain was concluded at that amount. It is not claimed by plaintiff that a valid contract was made at the first interview. The property was destroyed by fire on the 27th day of October, three days after the plaintiff claims that the contract was made. The policy had not been issued, nor the premium paid when the loss occurred. It is earnestly contended that the verdict is not supported by the evidence, because the evidence shows that the defendant did not at any time undertake to insure the property for the sum of $1,900 as claimed by the plaintiff. The thought of counsel is that, as the figures made on the paper with the diagram and the policy register show that the risk was taken for $1,850, there was no meeting of the minds upon the proposition to insure the property for $1,900. This contention of appellant would undoubtedly be correct if there was no other evidence than the testimony of Osborne, and the diagram and figures thereon, and the policy register. But the general manager and the secretary of the company testified positively that the aggregate amount agreed upon was $1,900. It was a question for the jury to determine this conflict in the evidence, and this court is not authorized to hold that the verdict has not sufficient support, or that it is so manifestly without support as to show passion or prejudice. The judgment of the district court is affirmed.

KUNZ v. YOUNG.

(Supreme Court of Iowa. April 10, 1896.)

APPEAL—RECORD—ABSTRACTS.

1. Where appellee files an additional abstract, in which he denies that appellant's abstract is an abstract of all the evidence, and states that both abstracts do not contain all the evidence, which statement is not denied by appellant, the supreme court cannot review any question arising on the facts.

2. A denial of an abstract in an argument will not be considered on appeal.

Appeal from district court, Webster county; N. B. Hyatt, Judge.

Action to quiet title. Decree for plaintiff. Defendant appeals. Affirmed.

C. C. Cole, for appellant. R. M. Wright, for appellee.

KINNE, J. 1. Plaintiff claims title to the land in controversy in Webster county, Iowa, under the swamp land grant passed by congress on September 28, 1850, and by act of the general assembly passed in 1853, and the subsequent selection of the land as swamp land by the agents of Webster county, the sale of the same to John F. Duncombe, and deed to him by the county; also, under a tax deed of said land, by the treasurer of said county to one A. Jacobs, of date May 28, 1870; also, under a tax deed, by the treasurer of said county, dated April 24, 1888, to F. T. Walker; also, a deed from said Walker and wife to W. G. Watters, and a deed from Duncombe and wife to said Watters; also, a deed from Watters and wife to the plaintiff. Defendant claims title under the railroad land grant of May 15, 1856, and a grant from the state of Iowa to the Dubuque & Pacific Railroad Company, and by subsequent transfer to the Dubuque & Sioux City Railroad Company, and by certification of the land by the department of the interior to the last-named company, and by quit-claim deeds from the railroad company to William Ragan, and from said Ragan to the defendant.

2. In this case the appellant filed an abstract which recites that it contains "all the evidence introduced or offered on the trial of the cause." Appellee files an additional abstract, containing many corrections of and additions to appellant's abstract, and at the close thereof states: "And appellee denies that appellant's abstract, and this additional abstract, when taken together, are or constitute all the evidence offered or received in the trial of said cause." To the denial appellant files no further abstract, either in denial of the additional abstract, or by way of reaffirmance of the correctness of his own abstract. Appellant, however, files a transcript. This is an equity cause, triable de novo in this court; and it is essential that it appear that we have all of the evidence before us. It has often been held that when the appellee, in an additional abstract, denies that appellant's abstract is an abstract of all of the evidence in the case, such statement by appellee will be deemed true, in the absence of a denial by the appellant. Kearney v. Ferguson, 50 Iowa, 72; Love v. Donaldson, 63 Iowa, 631, 19 N. W. 804; Acton v. Coffman, 74 Iowa, 17, 36 N. W. 774; Shat-

tuck v. Insurance Co., 78 Iowa, 377, 43 N. W. 228; Carson & Rand Lumber Co. v. Knapp, Stout & Co. Company, 80 Iowa, 619, 45 N. W. 544; Burkhart v. Ball, 59 Iowa, 629, 10 N. W. 260, and 13 N. W. 666; Marsh v. Smith, 73 Iowa, 295, 34 N. W. 866; Foley v. Hefferon, 70 Iowa, 572, 31 N. W. 877; Chapin v. Garretson, 85 Iowa, 377, 52 N. W. 104; Fairbairn v. Haislet, 90 Iowa, 145, 57 N. W. 702; Hopkins v. Railway Co. (Iowa) 64 N. W. 603; Dungan v. Railway Co., Id. 762; Farwell v. Zenor (Iowa) 65 N. W. 317; Cleveland v. Atkinson (Iowa) 63 N. W. 465; Turner v. Steam Co. (Iowa) 61 N. W. 415. In this condition of the record, we cannot consider the case on its merits. Goode v. Stearns, 82 Iowa, 710, 47 N. W. 893. In such a case we do not go to the transcript, but accept the statement of appellee's abstract as correct. Brooke v. Railway Co., 81 Iowa, 504, 47 N. W. 74, and cases cited.

Some language is used by appellant, in argument, which might, perhaps, be claimed as a denial of appellee's abstract. But a denial of an abstract in an argument is not sufficient. Agency Co. v. Bush, 84 Iowa, 272, 50 N. W. 1063, and cases cited. This disposition of the case renders it unnecessary to pass upon the motions presented. The decree below is affirmed.

PARSONS et al. v. BROWN et al.

(Supreme Court of Iowa. April 11, 1896.)

MECHANIC'S LIEN—ARCHITECT—LIEN FOR PLANS.

An architect who prepared plans and specifications for improvements on a building, which are made in accordance with such plans, is entitled to a mechanic's lien on the property.

Appeal from district court, Marshall county; B. P. Birdsall, Judge.

Action in equity to recover an amount alleged to be due the plaintiffs for services rendered as architects, and to establish a mechanic's lien therefor. There was a hearing on the merits, which resulted in the dismissing of the petition. The plaintiffs appeal. Reversed.

Read & Read, for appellants. H. E. J. Boardman and T. Brown, for appellees.

ROBINSON, J. The plaintiffs are architects, and at the time of the transactions in question were engaged in business in Des Moines. The defendants were the owners of the Tremont House in Marshalltown, and employed the plaintiffs to prepare plans and specifications for changes therein, and improvements, which were projected by the defendants. The agreement between the parties for services to be rendered was verbal. The plaintiffs contend that it provided that they were to receive 5 per cent. of the cost of the changes and improvements for full services, which included the furnishing of plans, specifications, and detail drawings, and the superintending of the work, 2½ per cent. for plans and specifications only, and 1 per cent. for sketching in pencil,—the 5 per cent. to be computed upon the cost of the new work, and the cost or value of the portion of the old building connected therewith, required to be delineated in making the plans and specifications. The plaintiffs allege: That the cost of the new work was $15,000. That the cost or value of the old work delineated was $8,500. That they prepared plans and specifications for steel beams not used, the cost of which would have been $1,200; for certain water closets, not built, which would have cost $800; and for a steam plant the estimated cost of which was $2,000. They also allege that they made a sketch in pencil for an addition to the building which was estimated to cost $8,000. They ask as compensation 5 per cent. of the cost of the new work and of the old work delineated, 2½ per cent. of the estimated cost of the beams, water closets, and steam plant, and 1 per cent. of the estimated cost of the addition, or a total of $1,355, and acknowledge payment on that account of $250. They ask, also, that a mechanic's lien be established on the property for the balance due. The defendants admit the employment of the plaintiffs, but aver that the agreement required them to draw plans, specifications, and details for all work required, which should be of such quality and style that the entire changes and improvements, including labor and material, boilers, plumbing, and steam fittings, should not cost more than $7,500; and for the plans, specifications, and details to be so furnished they were to receive 2½ per cent. of the cost of the changes and improvements. The defendants allege that the work done by the plaintiffs was, in particulars which are enumerated, defective and unskillful; that provision was made by them for certain parts of the work to be in an extravagant and unnecessarily expensive style; that a front arch, for which provision was made, was unnecessary, unsightly, and entailed an unnecessary expense of $1,000; and that the defendants were compelled to abandon some of the plans because they were not properly made. The defendants deny that the plaintiffs were employed to superintend the work, and deny that they are entitled to any compensation for superintending it.

1. The contract of employment was made in Des Moines, by C. H. Parsons for the plaintiffs, and George Glick for the defendants, and was somewhat indefinite. Glick asked what the charges of the plaintiffs were for services as architects, and was told they were 2½ per cent. for preparing plans and specifications, and 5 per cent. for full services in case they superintended. Glick then told Parsons to go to Marshalltown, and make the necessary measurements, and prepare plans and specifications, and that was done. The plaintiffs were not

engaged to superintend the work, although they were at the building several times while the work was being done, and gave some directions in regard to it. But it seems to have been necessary for them to visit the building to make measurements and obtain information from time to time, in order to furnish the necessary specifications and detail drawings. The defendants knew of some of the visits, but we find nothing in the record which charged them with knowledge that the visits were made for the purpose of superintending the building. Therefore we do not think that any allowance for superintendence can be made. The claim of the defendants that the cost of the changes and improvements was not to exceed $7,500, and that the commission of the plaintiffs cannot be computed on a greater sum, is not sustained. That the defendants did not understand that a limitation of that kind was imposed by the contract is shown by the fact that they paid to the plaintiffs voluntarily, while the work was in progress, $250, or $62.50 more than they say they were required to pay for all the services to be rendered under the agreement. The plaintiffs did not represent that the improvements could be made for $7,500, and the defendants knew, from conferences they had with other architects before engaging the plaintiffs, that the cost would probably much exceed that amount. The improvements made, for which the plaintiffs prepared the plans and specifications, cost about $13,000. They are entitled to a compensation of 2½ per cent. of that amount, and in addition the same per cent. of the estimated cost of the steel beams and the ladies' water closets. The former were properly included in the plan, but were finally omitted. The expensive style and finish of the latter, which caused their rejection, were fully authorized by Mr. Brown during a visit he made to Des Moines after the employment of the plaintiffs. The estimated cost of the beams and closets was $2,000. We do not find that the plaintiffs are entitled to recover on account of the steam plant, the plan for which seems to have been defective, nor on account of the proposed addition, nor for the cost of the old portions of the building, which were delineated in connection with the improvements. Nothing was said, when the agreement was made, in regard to such a charge, and it was not mentioned by the plaintiffs when they first demanded of the defendants a settlement. We do not think the defendants are entitled to any allowance for alleged defects in the plans which were used. It is our conclusion that the total compensation earned by the plaintiffs was the sum of $375, of which they have received $250, and that they are entitled to recover in this action $125, with interest thereon at 6 per cent. per annum from November 17, 1893.

2. The appellees say, in argument, that the plaintiffs are not entitled to a mechanic's lien for the services they rendered. The case of Foster v. Tierney (Iowa) 59 N. W. 56, does not sustain the claim thus made. The labor under consideration in that case was performed for an improvement which was not made, and we held that a lien therefor on the building, the improvement of which had been contemplated, could not be allowed. But we need not discuss the merits of the question thus raised, for the reason that it was not brought to the attention of the district court, and cannot be presented for the first time here. The decree will provide for a mechanic's lien for the amount due.

3. Some objections to the sufficiency of the record to authorize a trial de novo is made, but we have examined the record, and do not find the objections to be well founded. Reversed.

SWIGART et al. v. JACKSON COUNTY.

(Supreme Court of Iowa. April 11, 1896.)

APPEAL—FAILURE OF RECORD TO SHOW—PRACTICE IN THE SUPREME COURT.

A proceeding will be dismissed in the supreme court where the record fails to show the taking of an appeal.

Appeal from district court, Jackson county.

Murray & Farr and William Graham, for plaintiffs. G. L. Johnson, for defendant.

PER CURIAM. This appears to be a controversy in reference to awarding the county printing by the board of supervisors. The matter was appealed from the board to the district court by the plaintiffs, and the appeal was dismissed. It is claimed that plaintiffs appealed to this court, but the record does not show that an appeal was taken, and the proceeding is dismissed.

MILLS v. BILLS.

(Supreme Court of Iowa. April 11, 1896.)

PRACTICE IN CIVIL CASES—STIPULATION IN JUSTICE COURT—RESTRICTION OF ISSUES.

A stipulation between parties in an action before a justice of the peace in terms: "To save costs in calling witnesses, it is agreed by the parties to this case that this case shall be submitted to the court for decision upon the one question of fact whether or not the defendant B., on or about the 29th day of November, 1894, represented and stated to the plaintiff that one J. E. (having a debt against the defendant's farm) had consented to throw off the interest on his said debt in consideration of payment and settlement; that evidence shall be introduced on this issue alone," etc.,—obtains only for the purpose of the trial before the justice of the peace. Granger and Given, JJ., dissenting.

Appeal from district court, Dallas county; A. W. Wilkinson, Judge.

The amount involved is less than $100, and the case comes to us on the certificate of the trial judge. The action was commenced be-

fore a justice of the peace, where the plaintiff filed a petition asking to recover $65.83 on a statement of facts showing fraudulent representations, because of which plaintiff had accepted from defendant a less amount than was due him. A fact alleged in the petition was that defendant represented to plaintiff that one J. Ellett, who was also a a creditor of defendant, had agreed to accept less than was due him, because of which plaintiff also agreed to and did accept less than his due, and that such representation was false. No answer was filed by the defendant before the justice, but from a certificate to the judge it appears that "plaintiff and defendant made and entered into the following stipulation and agreement, which was at the time entered of record in the docket and records of the said justice of the peace as a part of the proceeding in said cause, which stipulation and agreement was as follows, to wit: "On the 9th day of February, 1895, the hour for trial having arrived, the plaintiff appeared by his attorneys, Shortley & Harpel, and the defendant appeared in person, and entered into the following agreement in open court, to wit: To save costs in calling witnesses, it is agreed by the parties to this case that this case shall be submitted to the court for decision upon the one question of fact whether or not the defendant, Bills, on or about the 29th day of November, 1894, represented and stated to the plaintiff that one J. Ellett (having debt against the defendant which was a lien on defendant's farm) had consented to throw off the interest on his said debt in consideration of payment and settlement; that evidence shall be introduced on this issue alone; and, if such issue is decided upon the evidence in favor of plaintiff, plaintiff shall have judgment against defendant for the sum of $65.83, otherwise judgment shall be entered against the plaintiff for costs. Such trial shall be held at 2 o'clock p. m. on the 9th day of February, 1895." It appears that a trial was had in pursuance of the stipulation, and a judgment was entered for plaintiff, and the defendant appealed. In the district court defendant filed an answer denying the allegations of the petition except as to the execution of a promissory note and the acceptance of a less sum than was due in payment of it. Plaintiff moved to strike the answer from the files, because defendant was estopped, by his stipulation, to present other issues than agreed upon. The motion was overruled, and exceptions were taken, and upon the trial of the issues in the district court there was a judgment for the defendant, from which the plaintiff appealed. Affirmed.

Shortley & Harpel, for appellant. H. A. Hoyt and White & Clarke, for appellee.

GRANGER, J. The question submitted is whether or not the district court should have overruled the motion to strike from the files the answer by which the issues were changed from those stipulated. It will be observed that there was no attempt to in any way dispose of the stipulation, nor does it appear that the action of the court in permitting the answer to remain was based on any claim of fraud, mistake, or unfairness in making the stipulation. The record presents the question, as we understand it, whether, as a matter of right, a party may, on appeal, disregard such a stipulation, and present new issues. We are agreed that, if the intent of the parties was that the stipulation should obtain for the purposes of the case, and not alone for the purpose of the trial before the justice of the peace, the district court could not properly permit the issues to be changed while the stipulation was in force. A majority of the members of this court construe the stipulation as applicable only to the trial before the justice. Mr. Justice GIVEN and the writer take the other view, and regard it as a stipulation for the purposes of the case, and as controlling the issues until set aside. The views of the majority require that the judgment should stand affirmed.

HINKEN v. IOWA CENT. RY. CO.

(Supreme Court of Iowa. April 10, 1896.)

RAILROAD COMPANIES — ACCIDENTS AT CROSSINGS — CONTRIBUTORY NEGLIGENCE.

It appeared that plaintiff, while crossing defendant's tracks near a station, had been struck by the north-bound train; that the south-bound train was then standing on the track, waiting for the other to pass; that plaintiff saw the south-bound train, and knew that the other train was due; that, before reaching the tracks, plaintiff had looked, but had seen no train coming because of obstructions; that, after reaching the tracks, there was a clear view in the direction of the approaching train, but plaintiff did not again look. *Held*, that plaintiff was guilty of contributory negligence precluding recovery.

Appeal from district court, Franklin county; S. M. Weaver, Judge.

Action at law to recover damages for personal injuries sustained by plaintiff in an accident at a street crossing in the town of Hampton. Trial to a jury. The court directed a verdict for defendant, and plaintiff appeals. Affirmed.

Taylor & Evans and E. P. Andrews, for appellant. Anthony C. Daly, J. H. Scales, D. W. Dow, and Theo. Bradford, for appellee.

DEEMER, J. The accident in question happened at a street crossing in the town of Hampton about a quarter past 12 o'clock on the 28th day of October, 1892. Appellant is a bricklayer by profession, and on the date of the accident was at work in the southwestern part of the town, west of, and several blocks distant from, the tracks of the defendant railway. His residence was northwest of the place where he was at work, and east of the tracks. About noon he quit work, and started on foot for his home. The wind

was from the northwest, and quite a gale was blowing. At the place where he attempted to cross the right of way of the railroad company, there are four tracks. The first on the west was called the "stock-yard track," the next the "main line," the third the "passing track," and the fourth another side track known as the "city track." A regular passenger train was due at Hampton from the south at 12:05, and on the day in question arrived 10 minutes late. A south-bound train was due to leave immediately after the arrival of the passenger from the south, and at the time of the accident was standing on the passing track awaiting the arrival of the north-bound train. Plaintiff had lived in the town a great many years, and was thoroughly familiar with the tracks and with the time-table of defendant's trains. He knew, when he attempted to cross the tracks, from the fact that the south-bound train was standing on the passing track, that the passenger train had not arrived. Plaintiff, in attempting to cross the main-line track, was struck by the north-bound passenger train, and for the injuries received in the collision brings this suit.

The alleged grounds of negligence are that defendant failed to give any warning of the approach of the train, in that it failed to ring the bell or sound the whistle of the engine as it approached the crossing; that it caused the train to run at a high and unlawful rate of speed within the town limits; and that it caused obstructions to be placed upon its grounds and side tracks, so as to prevent the plaintiff from seeing the approaching train, and caused another train to approach the crossing in an opposite direction from that of the passenger train. There was evidence to support some, if not all, of these charges of negligence, and the court did not direct the verdict because of any failure of proof of negligence on the part of the appellee, but because the evidence established negligence on the part of appellant contributing to his injury, and it is with this question we have to deal. Appellant claims that he was free from negligence because the yards and tracks were so obstructed that he could not see the approaching train, that the wind was blowing so hard as to distract his attention, and that the moving of the freight train on the passing track diverted his mind and senses towards it. The evidence shows that there were some obstructions which prevented plaintiff from looking any great distance to the south, except at certain intervals. It also shows, however, that at one place, three or four rods west of the tracks, he had an unobstructed view of the track to the south, and that, after crossing the first or stock-yard track, there was a space of eight feet from any point of which plaintiff might have seen an approaching train for at least twenty-five rods. The plaintiff testified that he looked south for an approaching train before he reached the side track, but said he did not know whether he looked at the interval where he could have seen the train or not. Other witnesses who were not far from plaintiff saw the approach of the train, and avoided it. Plaintiff also testified that he did not look south after crossing the side track, and that, if he had looked south after passing this track, he could have seen the approaching train. It is to be remembered that the plaintiff was on foot, and could in the smallest fraction of time have put himself out of danger had he been on the alert. For at least six feet after crossing the westernmost side track he was in a place of safety, and could from any place in this intervening space have seen the approach of the train had he looked. He may not have been able to hear it on account of the wind which was blowing, but he could see in that direction better than he could to the north, for the wind was blowing towards the south.

It may be there would be some excuse for plaintiff had he looked for the approach of the train at the interval three or four rods west of the tracks, where his view was unobstructed, but he does not say that he did so. He says he looked south, and did not see any train, but does not know where he was when he cast his eyes in that direction. There is no room, then, for the argument, made by his counsel, that he had the right to rely upon the defendant's not running its trains faster than the ordinance of the town permitted. It must also be noted that plaintiff knew a train was due from the south about this time, and he had every reason to believe that it had not arrived, for the train from the north was still on the passing track. He was not justified in giving his undivided attention to the south-bound train, as he claims he did. Pence v. Railway Co., 63 Iowa, 751, 19 N. W. 785; Kennedy v. Railway Co., 68 Iowa, 559, 27 N. W. 743; Nixon v. Railway Co., 84 Iowa, 331, 51 N. W. 157. We have iterated and reiterated the doctrine that a railway track is always a place of danger, and that it is the duty of one about to cross it, even in the absence of any special warnings or signals on the part of those in charge of the train, to use his senses in order to avoid injury. If plaintiff had stopped and looked for the train, even after he had crossed the side track, this sad accident would not have happened. Whether he would have collided with the train had he looked three or four rods west of the right of way will never be known, for plaintiff did not attempt the experiment. He knew, however, that his view of the track was obstructed for some distance just before reaching the side track. This fact, alone, should have made him the more cautious after he arrived at a place where he had an unobstructed view of the track. The principles we have announced are so well established as to need no support of adjudicated cases, but see Banning v. Railroad Co. (Iowa) 56 N. W. 278; Reeves v. Railroad Co. (Iowa) 60 N. W. 244; Haines

v. Railroad Co., 41 Iowa, 227; Benton v. Railroad Co., 42 Iowa, 192; Tierney v. Railroad Co., 84 Iowa, 641, 51 N. W. 175, and authorities therein cited.

The district court correctly sustained the defendant's motion, and its judgment is affirmed.

INCORPORATED TOWN OF CAMBRIDGE v. COOK.

(Supreme Court of Iowa. April 10, 1896.)

DEDICATION OF STREETS—ACCEPTANCE—ADVERSE POSSESSION.

In an action by a town to enjoin defendant from maintaining obstructions in an alley, it appeared that, when the town was platted in 1856, an alley was run through the block; that the town was not incorporated until 1881; that the alley was never open to public use, but in 1866 an orchard was planted, covering the alley, and the whole block was fenced in; that in 1870 a barn was built covering the whole width of the alley at one end; that defendant, who purchased in 1870, maintained a fence across one end of the alley, and another through the block. *Held*, that there was nothing to show acceptance of the dedication, and the town, having acquiesced in the possession of defendant and his grantors for 30 years, is estopped from now opening the alley.

Appeal from district court, Story county; B. P. Birdsall, Judge.

Suit in equity to enjoin defendant from maintaining obstructions in a certain alley in the town of Cambridge. Defense, adverse possession. The cause was tried to the court, and a decree was entered as prayed. Defendant appeals. Reversed.

J. F. Martin, M. M. Keller, and A. L. Bartlett, for appellant. Funson & Gifford, and M. P. Webb, for appellee.

DEEMER, J. The evidence shows that, when the land upon which the town of Cambridge is now situated was platted, there was an alley running north and south through what was called on the recorded plat, "Block No. 28." This plat was made November 21, 1856, and was filed for record in the recorder's office on the next day. The town was not incorporated until the year 1881. The alley so attempted to be dedicated was never opened for public use, but, on the contrary, a fence was erected around the entire block about the year 1867. An orchard was set out in the year 1866, largely upon that part dedicated for the alley, and in 1870 a barn was built, which covered nearly the entire width of the alley at its south end. Defendant purchased a part of the block in the year 1870, and afterwards acquired title to other lots in the block; and at the time of the trial in the court below he was the owner of the entire east half of the block, and of one lot in the west half. He has also at all times maintained a fence across the south end of the alley shown on the plat, and has built and maintained a fence running north and south through the block. This north and south fence is built along or near the center line of the alley. No attempt was made to open the alley until the year 1894, when the city council of the town of Cambridge notified the property owners in block 28 to remove the obstructions and open it up for use by the public. The defendant failed to comply with the notice, and this suit followed. The evidence further shows that the alley has never been used by the public, and there is nothing to show an acceptance on its part of the proposed dedication. On the contrary, it appears that it has always been fenced, has had an orchard growing upon it, and is occupied for near, if not quite, its entire width, by a barn, which cost in the neighborhood of $500. This was first built in the year 1870, and it has been added to and enlarged from time to time since that date. The defendant testified that he did not know there was an alley through the block when he purchased; that the public has never used it, nor made demand for its use until the month of April, in the year 1894; that he at all times supposed he owned the alley, and made his improvements with this thought in mind; that he has paid taxes on the property ever since he owned it, and has cultivated a part of the ground which is said to be in the alley. He is corroborated in his testimony by other credible evidence. Indeed, there is little, if any, dispute in the testimony.

The questions in the case are largely of law, and may be resolved to these three: (1) Was there an acceptance by the public of the proposed dedication? (2) Is the town barred of its right of action by the statute of limitations? (3) Is the plaintiff estopped by its conduct from now insisting upon the removal of the obstructions?

That there must be an acceptance of a dedication of lands for public purposes must be conceded; and, while slight evidence is sufficient to establish it, yet some showing of acceptance is quite as essential as evidence of the dedication itself. Manderschid v. City of Dubuque, 29 Iowa, 73; Johnson v. City of Burlington (Iowa) 63 N. W. 694; Bell v. City of Burlington, 68 Iowa, 296, 27 N. W. 245; Taraldson v. Town of Lime Springs (Iowa) 60 N. W. 658. We have already seen that there is no evidence of acceptance by the public. On the contrary, the alley was fenced as early as the year 1867. Prior to that time an orchard had been set out on the ground dedicated as an alley. In 1870 a barn was built, which covered at least a part of the land which, according to the plat, was set apart for public uses. The public has never used that part of it which is in controversy, unless it be the north end, and this was infrequent. We do not think there was such an acceptance of the dedication as that the plaintiff may now insist upon it.

As to the second question, it may be that defendant has not made such claim of right to the property as will sustain his claim of adverse possession, for he purchased with

reference to the plat, and his deeds, as we understand it, do not call for any part of the proposed alley. But we think that the town, by reason of its conduct, is estopped from now proceeding to open up the alley, for the reason that it has acquiesced in defendant's exclusive possession of the land for more than 15 years, and the public has stood by and seen the defendant erect valuable improvements upon the land, has seen him fence and cultivate it, has seen him or his grantors plant an orchard upon the ground now claimed to be dedicated to public use, and has seen him and his grantors in the possession of the land for nearly 30 years, without making any objection whatever. These facts bring the case within the rule announced in Davies v. Huebner, 45 Iowa, 574; Orr v. O'Brien, 77 Iowa, 253, 42 N. W. 183; Smith v. Gorrell, 81 Iowa, 218, 46 N. W. 902,—and other like cases. For the reasons pointed out, we think the decree should have been for defendant. Reversed.

WHEELER & WILSON MANUF'G CO. v. BJELLAND et al.

(Supreme Court of Iowa. April 10, 1896.)

FRAUDULENT CONVEYANCE—WHAT CONSTITUTES—CONVEYANCE OF HOMESTEAD—CORRECTION OF DEED.

1. In an action by a judgment creditor to set aside a conveyance as fraudulent as made to hinder and delay creditors, where it appears that the land conveyed by the debtor was his homestead, and that a portion of the purchase money received was devoted to the payment of debts, there was nothing indicating fraud, and, plaintiff's judgment not being a lien on the land, he has no ground for complaint.

2. Where, in an action to set aside a conveyance as fraudulent, it appeared that there was a mistake in the description of the land, it was proper, on cross petition, to correct the description in the decree declaring the conveyance valid.

Appeal from district court, Webster county; B. P. Birdsall, Judge.

The plaintiff is a judgment creditor of the defendant K. O. Bjelland. The judgment was rendered on the 14th day of February, 1893. This is a suit in equity, by which it is sought to set aside the sale and conveyance of a farm by Bjelland, on the ground that said sale was fraudulent as to his creditors. There was a decree in the court below dismissing the petition, and the plaintiff appeals. Affirmed.

R. M. Wright and Blake & Mitchell, for appellant. Botsford, Healey & Healey, for appellees.

ROTHROCK, C. J. 1. It appears from the evidence in the case that the defendant K. O. Bjelland was the owner of a farm of 120 acres, upon which he resided with his family for a number of years. He had a son-in-law named Rayne, who at one time was engaged in business by which he became indebted to the plaintiff in the sum of about $900. Bjelland was security for the debt. The farm was incumbered by two mortgages, one for $1,600 and another for $302, and Bjelland owed other debts, including a claim due to his brother, Errick Bjelland, for about $900. On the 18th day of January, 1893, Bjelland and his wife conveyed the farm to the defendant Andrew Arent, and on the 14th day of February, 1894, Arent conveyed the same to the defendant Ole Danielson. The plaintiff attacks these conveyances on the ground that they were fraudulent, and made to hinder and delay the creditors of Bjelland. Errick Bjelland took one of the promissory notes which Arent gave for the purchase of the land in payment of the debt to him from his brother, K. O. Bjelland. This transaction is claimed to be fraudulent, and the plaintiff seeks to subject the note or its proceeds to the payment of its debt. There is no question of law in the case which demands any elaborate consideration. It is proper to say, however, that as K. O. Bjelland had a homestead in the land, and it is not, or ought not to be, disputed that he had a right to sell and dispose of it, no matter how much he was indebted, nor what his motive was in making the sale, the debt due the plaintiff was not a lien upon the homestead; and if the conveyance was voluntary, and without consideration, the plaintiff had no right to complain. Delashmut v. Trau, 44 Iowa, 613; Officer v. Evans, 48 Iowa, 557.

2. When the conveyance was made from Bjelland to Arent, a mistake was made in the description of part of the land. A cross petition was filed, in which it was prayed that the mistake might be corrected, and the deed reformed so as to properly describe all the land. The decree was entered in accord with the prayer of the cross bill. This was fully authorized by law, providing the conveyance was valid, and not fraudulent as to creditors.

3. The controlling question in the case is, was the conveyance to Arent fraudulent as to the plaintiff? The evidence on this question, as is usual in such cases, is quite voluminous. The defendant K. O. Bjelland, the principal party to the alleged fraud, was examined as a witness in plaintiff's behalf at great length, and much of his testimony is set out in the abstract by question and answer. This appears to have been done to show that he was an untruthful witness. And in the argument of counsel for appellant both this witness and Arent are denounced as untruthful, and the claim is made that their testimony discloses unmistakable badges of fraud. We will not review the evidence. It is sufficient to say that there is no question in our minds that Arent paid full consideration for the land, and that, after deducting the value of the homestead, every dollar of the purchase money was honestly applied in the payment of Bjelland's debts and other disbursements, which were perfectly legal and proper. The negotiations leading up to the sale were con-

ducted openly and in the usual manner, without haste or secrecy, and for a full consideration, and the evidence does not show that Arent had any reason to believe that there was any fraudulent purpose on the part of Bjelland in selling his land; and there is no question that Danielson purchased the land in the utmost good faith. There is no other question in the case which demands special mention. A careful examination of the whole record satisfies us that the decree of the district court is right, and it is affirmed.

DENISON v. WATTS et al.

(Supreme Court of Iowa. April 10, 1896.)

COUNTIES—COUNTY BOARD OF SUPERVISORS—DELEGATION OF POWERS—REPAIR OF BRIDGES.

1. A resolution of a board of county supervisors that the county furnish and pay for plank for culverts and small bridges in the respective townships, each member of the board to determine by inspection of his district what plank is needed, and to issue an order therefor when called upon by the road supervisors, is not void because of the power thus delegated to the individual members of the board.

2. Under Code, § 303, cl. 18, making it the duty of the board of county supervisors to provide for the erection and repair of necessary bridges required for public convenience, it is within the discretion of the board to provide for supplying the necessary plank for the repair of small bridges and culverts throughout the county.

Appeal from district court, Cerro Gordo county; John C. Sherwin, Judge.

This is a suit in equity, by which the plaintiff demands that the board of supervisors of Cerro Gordo county be restrained and enjoined from enforcing a certain order or resolution of said board. There was a demurrer to the petition, which was sustained, and plaintiff appeals. Affirmed.

Cliggit & Rule, for appellant. Stanbery & Clark and D. W. Hurn, for appellees.

ROTHROCK, C. J. 1. The plaintiff and the defendants constitute the board of supervisors of Cerro Gordo county. It appears from the petition that at the January session of the board in the year 1895 the following resolution was adopted: "Resolved, that the county furnish and pay for plank for culverts and small bridges made and used in the respective townships of the county for the year 1895, each member of the board to determine by a general inspection of their districts, as near as possible, what plank is needed, and to issue an order for the same when called for by the road supervisors." The defendants, Watts and Kerr, voted for the resolution, and the plaintiff voted against it. The plaintiff does not complain that the proceedings in the matter of adopting the resolution were in any manner irregular or wanting in proper form. Within a few days after the resolution was adopted, the plaintiff commenced this action to annul the same, and enjoin any acts which the majority of the board might think proper, looking to a compliance with the resolution. His petition, as shown by the abstract, is of great length, being 13 printed pages. The demurrer was on the general ground that the facts stated in the petition do not entitle the plaintiff to the relief demanded. It is usual to set out at least the substance of the petition in an opinion where the question presented by the appeal involves the correctness of the ruling of the district court upon a demurrer to the pleading. We cannot do that in this case without extending the opinion to an improper length. We think it is sufficient to briefly refer to the objections to this resolution made by counsel for appellant. The most forcible objection urged is to that part of the resolution which authorizes each member of the board to determine by inspection of a certain district the plank proper to be furnished, and to "issue an order for the same when called for by the road supervisors." We do not believe that the resolution is void or illegal because of the power thus given to a member of the board. In the very nature of the business to be transacted by a board of supervisors, it is necessary that some of it should be distributed, so committees may act thereon. If the board can legally apply county funds to these small expenditures, it is impracticable for all the members to travel over the county in a body, and determine where a few plank may be required here and there to construct or repair culverts, and such small bridges as are built by the road supervisors, and not by the county. By this resolution the member of the board gives an order for the lumber to be furnished, and, if it is wrongfully given, that matter can be corrected by the board when the time comes to audit the bill. If he gives an order when he knows it is wrongful, he may make himself personally liable for it. But an injunction will not issue because in carrying out the order there may be an abuse of discretion or wrongful acts done under it.

2. The plaintiff combats this resolution mainly on the ground that the supervisors have no jurisdiction over small bridges and culverts, but that the duty to build and repair such structures devolves on the road supervisors, and they are to be paid for from the township road tax. Nearly all the cases ever determined by this court founded on claims for damages for injuries resulting from defective bridges are cited and reviewed in argument. The proposition contended for is that under the statutes and decisions boards of supervisors have no right to furnish plank for culverts or small bridges. We will not review these decisions. They relate to the liability of counties, and do not limit the power of the supervisors as to the right to furnish material for the repair or building of culverts or small bridges. And there is no question in this case proper to be discussed as to whether, if a county fur-

nishes plank to a road supervisor, the county would be liable for the manner in which the road supervisor performs his work. All the question there is in the case may be disposed of under clause 18 of section 303 of the Code, which provides that it is the duty of the board "to provide for the erection of all bridges which may be necessary, and which the public convenience may require, within their respective counties, and to keep the same in repair." It is not a question for the courts to determine what the public convenience may require. That is left to the discretion of the board, and the furnishing of plank for small bridges or culverts (which is only another name for small bridges) to the road supervisors is no abuse of such discretion, unless in exercising it there is fraud or bad faith, and there are no facts in this petition showing that the defendants in voting for the resolution were controlled by any improper motive.

Other questions are discussed by counsel, which we do not think require special consideration. The judgment of the district court is affirmed.

PURCELL v. LANG et al.

(Supreme Court of Iowa. April 10, 1896.)

DOWER—ALIENATION BY HUSBAND ALONE—RIGHT OF SURVIVING WIDOW—HOW DETERMINED.

1. Where a husband conveyed land in 1857 without joining his wife, the latter's dower right being then, as at common law, a life interest in one-third the husband's real estate, the fact that Code 1873, § 2440, in force at the time the husband died, provided that "estates of dower and curtesy are hereby abolished," did not prevent the widow from recovering her interest in the land conveyed by the husband, as fixed by the statute in force when the same was alienated.

2. Code 1873, § 2440, giving the surviving spouse a fee-simple interest in one-third the real estate of deceased, and providing that "estates of dower and curtesy are hereby abolished," merely abolished the use of the words "dower" and "curtesy" as descriptive of the enlarged estate.

Appeal from district court, Howard county; A. N. Hobson, Judge.

Action to set apart dower. Demurrer to plaintiff's petition sustained, and she appeals. Reversed.

H. T. Reed, for appellant. Barker & Upton, for appellees.

KINNE, J. 1. Plaintiff and Joseph Purcell were married in the year 1855, and lived together as husband and wife until the husband's death. April 20, 1857, said Joseph Purcell entered and purchased from the government of the United States 160 acres of land lying in Howard county, Iowa. In May of the same year said Joseph Purcell, husband of plaintiff, conveyed said land by deed to one Langworthy, which deed was duly filed for record and recorded. Plaintiff never signed said deed, nor in any manner relinquished her interest, as the wife of said Joseph Purcell, in and to said land. The land was not sold upon execution or other judicial sale against the husband. Joseph Purcell, the husband of plaintiff, died intestate in Howard county, Iowa, in 1889, leaving plaintiff, his widow, surviving him. She now claims to be the owner of an undivided one-third interest in said land, and asks that it be set apart to her. Defendants claim to own said land under title derived by sundry conveyances from and under said Langworthy. To a petition which set forth the foregoing facts defendants demurred on the ground that the facts stated did not entitle the plaintiff to the relief demanded. The district court sustained the demurrer, and, plaintiff electing to stand upon her petition, judgment was entered dismissing it, and against her for costs.

2. The only question presented by this record is this: Is the widow entitled to recover an interest or share in the lands of her deceased husband, owned during coverture, but conveyed by him in 1857, and in which she has made no relinquishment of her right, and which has not been sold on execution or other judicial sale, the husband having died since the enactment of section 2440 of the Code? It is conceded that, if appellant is entitled to dower, it is to be governed by the law in force at the time of the execution of the deed by the husband to Langworthy. Young v. Wolcott, 1 Iowa, 175; Davis v. O'Ferrall, 4 G. Greene, 168; Moore v. Kent, 37 Iowa, 22; Kendall v. Kendall, 42 Iowa, 466. As has been said, the conveyance by plaintiff's husband was made in 1857, and at that time chapter 61 of the Acts of the 4th General Assembly was in force. That chapter repealed section 1394 of the Code of 1851, and provided that "said estate in dower be and remain the same as at common law." Section 3 of the same chapter expressly abolished the estate by curtesy. If, then, plaintiff has a right to dower, she is entitled to recover an estate for life in one-third value of the land thus conveyed. Prior to the enactment of the Code of 1873 the law relating to dower had frequently been changed in this state. In 1839 it was given according to the course of the common law. In 1851 it was enlarged to an estate in fee simple. In 1852 the provision of the Code of 1851 was repealed, and common-law dower restored. In the revision of 1860 the same provisions were retained. In 1862 it was again enlarged to a fee-simple estate, and in the Code of 1873 it is fixed at a fee-simple estate. In the Code of 1851, in the act of 1852, in the revision of 1860, and in the act of 1862 are provisions abolishing the estate by curtesy, and making all provisions of the law relating to the widow of a deceased husband applicable to the husband of a deceased wife. Under the changes thus made the question has arisen in several cases as to the rights of a widow in the lands of her deceased husband which were conveyed by him alone prior to 1851, and when he died after the enactment of sec

tion 1394 of the Code of 1851; and in these cases it was held that she was entitled to recover in accordance with the rights given her by the law in force at the time of the alienation of the property by the husband, notwithstanding the law giving such right had been repealed after the taking of the conveyance, and prior to the husband's death. Davis v. O'Ferrall, 4 G. Greene, 168; Young v. Wolcott, 1 Iowa, 174; Burke v. Barron, 8 Iowa, 132; Lucas v. Sawyer, 17 Iowa, 517. In Davis v. O'Ferrall, supra, it was said: "The Code completely abrogates the general doctrine of dower. It substitutes a new system, and makes the wife a joint owner of one-third of all the real estate in which the husband at any time during marriage had a legal or equitable interest. * * * A change so complete can have no connecting link with, or retroactive effect upon, prior statutes regulating dower." In Lucas v. Sawyer, supra, the court, in speaking of the statutory dower right, says: "It is not dower by name, or as understood at common law, to which she is entitled. It is the purpose for which it is reserved, to wit, the support of the wife, which the law favors, and it is within the legislative discretion to direct the character and amount of this support." In Moore v. Kent, supra, it was held that the act of 1862, which repealed the act of 1852, was not intended to take away the rights of the wife in the real estate of the husband conveyed prior thereto, but the intent was to enlarge those rights that, as to lands conveyed by the husband prior to the enactment of the act of 1862, such rights could not be thus enlarged as against a purchaser of the property, and in such case the widow would take only the interest given her by law in force when the land was alienated. Section 2440 of the Code of 1873 is substantially like the provisions found in the acts of 1862, except that it contains at its close this provision: "The estates of dower and curtesy are hereby abolished." There is no serious contention between the counsel that, had this provision not been embraced within the Code of 1873, there would be no question under the decisions of this court, already referred to, that plaintiff would be entitled to dower under the law as it existed when her husband executed the deed to the land in controversy. It is contended, however, by appellees that this clause does not, in effect, result in a mere enlargement of the dower right, as has been held with respect to former changes in the law, but it operates to do away entirely with the dower right theretofore existing, and that there is substituted in lieu thereof a new right or interest of the wife in her husband's real estate, which the legislature has dominated "the distributive share of the widow." Code, § 2441. We are unable to discover why the use of the words, "the estates of dower and curtesy are hereby abolished," should be held to have the effect contended for. The character and extent of the interest of the wife in her husband's real estate under the provision of section 2440 of the Code of 1873 was not other or different from what it had been under the acts of 1862. True, the act of 1862 provided that "each is entitled to the same right of dower in the estate of the other, and the like interest shall in the same manner descend to their respective heirs." The corresponding provision in the Code of 1873 reads: "The same share of the real estate of a deceased wife shall be set apart to the surviving husband." Code, § 2440. Now, by the Code of 1873 the extent of the dower interest, or the distributive share, as it was called, remained the same as it had been since 1862. The interest was not changed in any respect; it was simply called by another name. What effect, then, should be given to the language which in terms abolishes the estate of dower? It seems to us it should be held as a declaration of the legislature that hereafter the interest of the wife in her husband's realty should be known, not as "dower," but as a "distributive share." This construction seems reasonable, because no change was in fact made as to the character or extent of the wife's interest; and for the further reason that the interest as it existed under the legislation of 1862, and, indeed, under all prior legislation, had not in fact been such an interest as was, strictly speaking, "dower," as known and defined at common law. This larger estate spoken of in Moore v. Kent, supra, had been in existence continually for 11 years prior to the enactment of the Code of 1873. It is true that in many cases where the question now involved was not in issue this court has spoken of the dower estate as being abolished by section 2440 of the Code of 1873. Mock v. Watson, 40 Iowa, 241; Kendall v. Kendall, 42 Iowa, 464; Daugherty v. Daugherty, 69 Iowa, 677, 29 N. W. 778; Ditson v. Ditson, 85 Iowa, 276, 52 N. W. 204, and cases cited. In Mock v. Watson, supra, it is said: "Section 2440 abolishes the estate of dower, and creates another to take its place. For the newly-created estate the legislature has applied no name * * * Before this section, dower, as to quantity and duration as well as in other matters, was wholly regulated by statute. In these matters little, if any, change has been made affecting the estate of the widow, further than the attempted abolition of the use of the term 'dower,' and the suspension of the application of certain principles peculiar to the estate of dower to the newly-created estate of the widow." It will serve no useful purpose to extend this discussion. We conclude and hold that the clause under consideration was intended only to abolish the use of the words "dower" and "curtesy" as descriptive of the newly-created estate, and that it was not intended by its use to do away with the rights of the husband or wife in the real estate of the other as they then existed. This result seems to us in harmony with the holdings of this

court, already referred to, and the force of which is not affected by the phraseology used in section 2440 of the Code of 1873. It follows, therefore, that the demurrer should have been overruled, and the plaintiff, if she establishes the facts pleaded, is entitled to dower as provided in the statute in force when the land was alienated. Reversed.

BALDWIN et ux. v. HILL et al.

(Supreme Court of Iowa. April 10, 1896.)

RIGHT TO DOWER—TAKING UNDER WILL—AGREEMENT BY WIDOW—EFFECT—PAROL EVIDENCE.

1. Under Code, § 2452, providing that the widow's share cannot be affected by any will of her husband, unless she consent thereto, and the consent is entered in the proper probate record, where the provisions of testator's will in favor of his widow do not purport to be in lieu of dower, and there is nothing in the will which is inconsistent with her right to take under the will and also take dower, her right to dower is not affected by her consent to take under the will.

2. Testator gave his wife certain personal property, and gave the residue of his estate, consisting largely of land, to other beneficiaries. She executed to the executors an instrument which recited that she thereby accepted the provisions in the will on condition that the executors pay her $10,000, in addition to all the provisions made for her by such will. The residuary legatees relinquished their interest in $10,000, and authorized its payment on condition that the widow should not waive the provisions of the will. The money was paid to her on such condition. *Held* to vest in the estate, for the benefit of the legatees and devisees other than the widow, all right to the real estate and other property which she might otherwise have claimed.

3. In an action to quiet title, it appeared that plaintiff claimed as successor to the title of the widow of B.; that B., by his will, gave her certain personal property; that she in writing accepted the provisions of the will on condition that the executors pay her $10,000 in addition to all the provisions made for her by the will; and that the money was paid to her on that condition. *Held*, that parol evidence was admissible to show who were the parties to such agreement, they not being named therein, and the consideration which induced them to join in it.

Appeal from district court, Clinton county; P. B. Wolfe, Judge.

Action in equity to quiet in the plaintiff Isaac Baldwin the title to certain real estate, and for general equitable relief. The defendant Hill and interveners D. L. Ryder and Almira M. Ryder ask that the title be quieted in Hill. There was a hearing on the merits, and a decree in favor of Hill. The plaintiffs appeal. Affirmed.

A. P. Parker and Isaac Baldwin, for appellants. L. A. Ellis, A. R. McCoy, and C. H. George, for appellees.

ROBINSON, J. The plaintiffs are Isaac Baldwin and his wife. Baldwin claims to be the owner in fee simple of an undivided one-third of lot No. 15 of block No. 5 in Baldwin's addition to Clinton. His claim is based upon the following facts: In April, in the year 1880, James Boyd, a resident of the state of New Hampshire, died testate, seised in fee simple of the lot described. He was married, and his wife survived him. His will was duly admitted to probate in Hillsborough county, N. H., and afterwards in Clinton county in this state. The first paragraph of the will contained the following: "(1) I give and bequeath unto my wife, Eveline P. Boyd, all my household furniture, beds, bedding, etc., of every description, except my iron safe, all the provisions of the house and cellar, all the books in the house, and all my clothing; the use during life of my pew in the First Presbyterian Church in said Antrim, and horse shed near said church; the use and free occupation of the house on my home place so long as my trustees hereinafter named shall think it best for her to live there, but, if said trustees shall think it best for her to move, I order and direct said trustees to provide her a suitable home at the expense of my estate, and I order and direct said trustees to pay her one thousand dollars a year, to be paid to her semiannually. * * *" Other paragraphs of the will provided for the payment of various sums of money, including annuities, and the eighteenth paragraph gave the residue of the estate to beneficiaries named. The estate thus disposed of included real estate of the value of $9,700 and personal property to the value of a little more than $90,000. The statutes of New Hampshire contain the following provisions: (1) "Every devise or bequest by the husband or wife to the other, shall be holden to be in lieu of the right which either have by law in the estate of the other, unless it shall appear by the will that such was not the intention." Gen. Laws 1878, p. 476, § 18. (2) "The widow of the testator may waive any of the provisions made in his will and intended to be instead of her dower or distributive share, by a writing filed with the judge, and thereupon such provision shall be void, and her dower and distributive share shall be assigned to her." Id. p. 455, § 13. Mrs. Boyd was not satisfied with the provisions of the will made in her behalf, but proposed to the executors to accept what the will gave her and $10,000 in addition, and not waive the provisions of the will. The proposition was accepted, and she gave to the executors an instrument, in writing, of which the following is a copy: "I, Eveline P. Boyd, of Antrim, in the county of Hillsborough and state of New Hampshire, widow of the late James P. Boyd, hereby accept the provisions made for me by the said James Boyd in his last will and testament, upon condition that the executors named in said will pay me ten thousand dollars within two months, in addition to all the provisions made for me by the terms of the said will. June 22nd, 1880. Eveline P. Boyd." The residuary legatees relinquished their interest in the sum of $10,000 in the estate, and authorized its payment on condition that she should not waive the provisions of the will. The money was paid to her on that condition,

and the payment was reported to and approved by the probate court. In June, 1882, Mrs. Boyd died testate, and her will was duly probated in New Hampshire, and in Clinton county in this state. It disposed of articles of personal property, and various sums of money, and gave all the remainder of the estate to four beneficiaries named. No reference was made in the will to real estate. In the year 1888, the plaintiff Isaac Baldwin obtained from the residuary legatees of Mrs. Boyd quitclaim deeds for their interests in the lot in controversy, and in numerous other lots in Clinton and in its additions. The consideration recited in each deed was the sum of one dollar. The alleged title of the defendant Hill was derived from James Boyd as follows: His will provided for two executors and three trustees, and empowered and directed the trustees to sell and convey any or all of his estate when they should deem it best to do so, and to change the investment from time to time as they should think advisable. In October, 1881, the trustees conveyed the lot in question, with other realty in Clinton, to the intervener Ryder. He afterwards conveyed it to one Wilson, and he conveyed it to the defendant Hill. Thus both Baldwin and Hill claim title from James Boyd; Baldwin insisting that Mrs. Boyd acquired from her husband title to an undivided one-third of his real property in this state, in addition to the property given her by the will and the $10,000 given her by the executors, while Ryder and Hill claim that the interest of Mrs. Boyd in the real property in this state was relinquished and terminated by the agreement she entered into with the executors and the payment made by them.

The will of Boyd did not show that the provisions therein made for his wife were not in lieu of the rights which she had in his estate. Therefore, under the statutes of New Hampshire, which we have set out, the provisions made for her benefit were in lieu of all her rights in the estate, so far as the law of New Hampshire was effective. But it is contended by the appellants, and for the purposes of this case it may be conceded, that the law of this state governed the will of Boyd so far as it related to realty within this state. It is the rule in this state that a widow may take under the will of her deceased husband, and also retain her right of dower, unless to do so would be inconsistent with and defeat some provision of the will. Howard v. Watson, 76 Iowa, 230, 41 N. W. 45. The provisions of the will of Boyd in favor of his widow did not purport to be in lieu of dower, and there was nothing in the will which, under the laws of this state, was inconsistent with her right to take under the will and also to take dower in the estate. Section 2452 of the Code provides that the widow's share cannot be affected by any will of her husband, unless she consent thereto, and the consent is entered in the proper probate record. If the instrument which Mrs. Boyd executed be given the effect of a consent to take under the will, it would not affect her right to dower in realty situated in this state, under the concession we have made for the purposes of this case, because there was nothing in the will inconsistent with her right to do so.

We are next led to inquire what effect the agreement she entered into and the payment made to her had upon her right to dower in realty within this state. The evidence shows clearly that the intent of the widow in the transaction was to accept the $10,000 paid, and the benefits expressly conferred by the will, in lieu of her distributive share in the estate of her deceased husband. She stated, repeatedly, that such was the case, and, although she had knowledge of the real estate in Clinton, she never made any claim to it after the money was paid to her according to the agreement, although she knew that it was to be sold. Her will does not contain any intimation that she had or claimed an interest in realty. The settlement she made was in the nature of a sale of her interest in the estate exclusive of the benefits conferred by the will, in consideration of the money paid to her. It is true that it was nominally made with the executors of the estate, and that it was approved by the court; but that did not affect the real nature of the transaction. The same result could have been reached by an arrangement with the residuary legatees alone. The will did not authorize the payment made, and it is not shown that the court had any authority to approve it, unless by giving it the effect of a payment to the residuary legatees. That was permissible, because they authorized the payment, and it was for their benefit. Therefore the written authority to make the payment which they gave was properly treated by the court as a voucher for money paid on their order, to apply on their shares. The effect of the agreement and payment was to vest in the estate, for the benefit of the devisees and legatees other than the widow, all right to the realty in this state, as well as to other property which she might otherwise have claimed. That such was her intent, and the intent of the executors and residuary legatees, cannot, under the evidence, be doubted. It was not necessary that she execute formal conveyances of her interest in the real estate. Dunlap v. Thomas, 69 Iowa, 358, 28 N. W. 637; Richart v. Richart, 30 Iowa, 465. The making of the agreement and the payment of the money was effectual to divest her title, and the trustees had authority to convey the property.

But it is said that parol evidence to show the intent of the parties to the agreement cannot be received, because the agreement is in writing, and free from ambiguity, and that it does not show that any right or interest is thereby transferred by the widow, but shows that the will is to continue in force. The writing is sufficiently explicit in describing the benefits which are to inure to the

widow by virtue of the settlement, but it does not purport to contain the whole agreement. It does not show who are the parties to it, and does not express the consideration which induced the unnamed parties to join in it. We are of the opinion that it was competent to supply these omissions by oral evidence. The writing signed by the widow was not a mere election to take under the will, but part of an agreement, a portion of which was not in writing, and which may be fully shown. The plaintiff had knowledge of the writing before he obtained the deeds under which he claims, and the deeds merely purported to convey the interest which the grantors had in the property described. As they had no interest to convey, none was acquired by their grantee. The conclusions we have stated make it unnecessary to consider numerous questions discussed in argument. The decree of the district court appears to be fully sustained by the record, and is affirmed.

ELDRIDGE v. STEWART.

(Supreme Court of Iowa. April 11, 1896.)

APPEAL—REMARKS OF COUNSEL—REVIEW—INSTRUCTIONS.

1. Where appellee, in his abstract, denies the improper remarks imputed to his counsel in appellant's abstracts, unless appellant files a transcript as to such matter, the remarks cannot be reviewed.

2. Where instructions in regard to the measure of damages are unobjected to, they become the law of the case, and therefore the exclusion of evidence material in view of the rule of damages so laid down requires a reversal, irrespective of whether such rule was correct or not.

Appeal from district court, Cerro Gordo county; P. W. Burr, Judge.

Action for wages. Trial to a jury. Verdict and judgment for plaintiff, and defendant appeals. Reversed.

Richard Wilbur and Cliggitt & Rule, for appellant. Glass & McConlogue, for appellee.

KINNE, J. 1. Plaintiff alleged that he entered into defendant's employment on July 30, 1892, at the agreed price of $50 per month to take care of and track horses and such work as is required in caring for stallions, brood mares, and trotting horses, and continued in said employment until July 17, 1893; that he had been paid $373; that the argeement for the $50 per month was until January 1, 1893, and nothing further was said as to wages; that plaintiff's services were reasonably worth $50 per month for the time after January 1, 1893, and there is $204.40 due him. Defendant answered, admitting that plaintiff's wages should be $50 per month to January 1, 1893, and averring that at said time it was agreed that plaintiff's wages should thereafter be $45 per month. In a counterclaim he alleged: That plaintiff was employed in his (defendant's) stables while the defendant was engaged in the business of standing blooded stallions. That he had appointed plaintiff his general superintendent to, in his (defendant's) absence in Europe, have care of breeding said stallions according to the wishes of defendant's patrons. "That at said time defendant had in his stable, and under plaintiff's control, a stallion called 'Manchester C,' to which one I. L. Potter, a patron of defendant, was desirous of breeding mares, and placed said mares in defendant's stable in the care and control of plaintiff, with the express understanding, as plaintiff well knew, that said mares were to be bred to said stallion; but that plaintiff betrayed the trust confided in him, and willfully, wantonly, and maliciously bred one of said mares to another stallion of defendant's, against the will, and without the knowledge or consent, of defendant or of said patron. That the said Potter had other mares which he contracted to breed to said stallion for the same and the following year, but afterwards learned of plaintiff's breach of trust, and thereby lost his confidence in defendant's stables, and refused to patronize defendant and his stables, and demanded, and defendant was forced to pay, said Potter the sum of $100 damages for plaintiff's said act; and said act became known to many other patrons of defendant, whereby the reputation and standing of defendant's stables became impaired, to his damage, compensatory and exemplary, in the sum of $500, for which he asks judgment." Plaintiff, in a reply, denied all of the allegations of the answer. Defendant filed his affidavit for a continuance of the cause on account of the absence of certain witnesses, which motion the court sustained, whereupon plaintiff, to avoid a continuance, admitted that the witnesses, if present, would testify as in said affidavit stated, and thereupon said cause proceeded to trial. Evidence was introduced by the parties tending to sustain their several allegations. The defendant offered in evidence his affidavit for a continuance, which was read to the jury, except portions thereof, which the court excluded, to which ruling an exception was taken. Appellant charges that plaintiff's counsel was guilty of gross and prejudicial misconduct in making certain statements to the jury in his closing argument, to which exception was taken. These two matters constitute the only errors assigned.

2. Touching the misconduct complained of, we cannot, in the condition in which we find the record, determine it. The language imputed to plaintiff's counsel in appellant's abstract is denied in appellee's abstract, which must, we think, to that extent, be treated as a denial of appellant's abstract. Appellant does not reaffirm the correctness of his original abstract, as we think. If, however, the language used can be so treated, it devolved upon appellant to file a transcript as to the matter in dispute. He has not done so, and

we cannot pass upon the question sought to be presented.

3. It is contended that the court erred in ruling out certain parts of the statements in defendant's affidavit for a continuance, and in this view we concur. We shall not set out the affidavit. In brief, we think that all of that part of the affidavit printed in the abstract in "bold-faced type," as it is called in appellant's argument, and which defendant was prohibited from reading to the jury, should have been admitted in evidence. This we decide without in any manner considering or determining the rule as to the measure of damages in the case, as that question is not before us. The court instructed the jury following the line of defendant's counterclaim, and embracing damages for breeding Potter's mare to the wrong stallion, and for loss of Potter's patronage in the ensuing year on account thereof. These instructions, whether right or wrong, were the law of the case, and it occurs to us that the statements in the affidavit, which we hold to have been wrongfully stricken out or prevented from being read to the jury, were material and relevant in view of the rule of damages stated in the instructions. As we have said, the instructions were not excepted to, and hence we cannot consider the further question argued by counsel as to the rule of damages in such cases. Reversed.

MORSE v. HAMILL, Sheriff, et al.

(Supreme Court of Iowa. April 10, 1896.)

REPLEVIN—PLAINTIFF MUST SHOW TITLE.

In an action against a sheriff and an attaching creditor, to recover goods held by them under an attachment against a third person, where there was evidence that plaintiff had sold the goods to such third person, but none that the sale had been rescinded, a verdict should have been directed for defendant.

Appeal from district court, Carroll county; C. D. Goldsmith, Judge.

Plaintiff, the duly appointed receiver of the firm of Weil, Dreyfus & Co., brings this action to recover the possession of three certain boxes of general merchandise, of the value of $710.59, of which he alleges he is the absolute and unqualified owner, from the possession of the defendant sheriff. The defendants answered, denying generally, and by way of amendment alleged as follows: "The said goods were not replevined by plaintiff, nor the coroner for them, but the return of the replevin in this action is erroneous, and does not state the facts; that said coroner never did, in fact, levy said writ of replevin on said goods, and never in fact delivered said goods to plaintiff, and never in fact took them from the sheriff." At the conclusion of the evidence for plaintiff, the defendants moved for a verdict upon the ground that it was not shown that plaintiff was the owner of the goods, or entitled to the possession of the same, which motion was overruled. After all the evidence was introduced the plaintiff moved the court for verdict, which motion was sustained, and judgment entered for the plaintiff for the possession of the goods and for costs. Defendants appeal. Reversed.

A. U. Quint and F. M. Powers, for appellants. W. R. Lee and George W. Bowen, for appellee.

GIVEN, J. Plaintiff claims possession of the goods in question by virtue of being the absolute and unqualified owner thereof, while the defendant Hamill, as sheriff, claims them by virtue of the levy of a writ of attachment in his hands in favor of defendant Minchen against Nichols. Appellants contend that the plaintiff failed to proved ownership, and that the court therefore erred in directing a verdict for the plaintiff, and in rendering judgment thereon. The only evidence of ownership offered by the plaintiff was that of Mr. Lee, traveling salesman for the plaintiff. He was asked: "Do you know whose goods these were that you examined there in the jewelry store, in the presence of the sheriff and myself?" Defendants objected as incompetent, the objection was overruled, and the witness answered: "I do." He was then asked: "Whose were they?" Defendants objected as incompetent, which objection was overruled, and defendants excepted. The witness answered: "Belong to Weil, Dreyfus & Co." This witness further stated that the goods had been billed to Jones Nichols, Carroll, Iowa, in pursuance of a sale he had made to Nichols. No evidence whatever was introduced tending to show that the sale to Nichols had been canceled. If it may be said that the objections stated above were properly overruled, because the answers called for were merely preliminary to showing ownership in the plaintiff, we are left without any evidence whatever of ownership, but, upon the contrary, have evidence that the goods had been sold to Nichols. The plaintiff having failed to introduce any evidence of ownership or right to possession, we think that the defendants' motion for a verdict should have been sustained, and that the plaintiff's motion for a verdict should have been overruled. Our conclusion is that the judgment of the district court must be reversed.

HATHAWAY v. BURLINGTON, C. R. & N. R. CO.

(Supreme Court of Iowa. April 10, 1896.)

MISCONDUCT OF JUROR—APPEAL—REVIEW.

1. It is error for a juror to state, in the jury room, his own knowledge of facts bearing on a material issue in the case.

2. Where an examination of the evidence in the record shows that a plaintiff would have been entitled to recover nominal damages only, a judgment for defendant will not be reversed for error not affecting the merits of the case.

Appeal from district court, Buchanan county; J. J. Tollerton, Judge.

Action to recover damages for burning grass. Trial to a jury, verdict for defendant, and plaintiff appeals. Affirmed.

E. B. Abbott and M. W. Harmon, for appellant. S. K. Tracy and Ransier & Everett, for appellee.

KINNE, J. 1. This is an action to recover damages for negligently permitting fire to escape from defendant's locomotive, which fire, it is claimed, destroyed the grass upon plaintiff's land. There is no question as to the escape of the fire, and it is equally clear that it burned over the ground of plaintiff. The only controversy is over the question of damages. As the jury returned a verdict for the defendant, it is apparent that they found that the fire caused no damage to the plaintiff. The evidence as to the value of the grass burned was conflicting. Some of it tended to show that it was worth little, if anything. From the whole evidence the jury were justified in their finding, and we cannot disturb it.

2. It is claimed that there was such misconduct of the jury as to necessitate the setting aside of this verdict. Upon this point it is urged that Juror Joslin had a brother in the employ of the defendant, and that he failed to disclose that fact in his voir dire examination. It is not shown that Joslin was asked if he did have a brother in defendant's employ, but it is averred that such questions were asked as "should have caused Joslin to reveal the fact of his brother's employment by defendant." No question is set out from which it can be said that Juror Joslin did not fairly and fully answer all questions put to him on such examination. The statement touching this matter in the affidavit is a conclusion only. No reason is shown in this respect for disturbing the verdict.

3. It is urged that Juror Joslin was guilty of such misconduct in the jury room as warrants us in reversing this case. It is said that he was prejudiced in defendant's favor; that he claimed to his fellow jurors to have personal knowledge of the facts in issue; that he drew a map of plaintiff's land from his own personal knowledge, and stated that he had been over the land and gathered cat-tails on said land, and that the land was not worth anything. So far as the map or outline drawn by the juror is concerned, it does not appear that it was not a correct representation of plaintiff's land as shown by the evidence. The action of this juror was unwarranted. He had no right to state to the jury what he had personal knowledge of, as to matters in controversy. The jury had no right to consider any facts not put in evidence in the regular course of the trial. No juror has a right to give evidence in the jury room, as was done in this case, of matters material to the issue. A material fact in issue was the damage done by the fire to the grass of plaintiff, and the value of said grass; and the statements of the juror Joslin as to the value of the land, and that cat-tails grew upon it, tended to support the defendant's case. Nor were these matters inhering in the verdict. But this case should not be reversed on account of these acts of Juror Joslin, if the verdict actually rendered was substantially just. In other words, if, in view of all of the evidence, the verdict effectuates justice between the parties, it should not be set aside, and the parties put to the trouble and expense of a new trial because of the misconduct of a juror in the jury room. It seems to us, on a full examination of all of the evidence, that substantial justice has been done by the verdict rendered (Woodward v. Horst, 10 Iowa, 120); that, under the view of the evidence most favorable to plaintiff, he would only have been entitled to nominal damages, if any; and we have uniformly held that we would not reverse a case because of a failure to give nominal damages where they would have been justified. We are therefore of the opinion that we are not warranted in reversing this case for the misconduct complained of. Code, § 2690; Croddy v. Railway Co. (Iowa) 60 N. W. 214, and cases cited.

4. Several errors are assigned upon the rulings of the court touching the admission of evidence. We have carefully investigated each of them, and discover no error. Affirmed.

SMITH v. SKOW et al.

(Supreme Court of Iowa. April 10, 1896.)

INTOXICATING LIQUOR—LIEN FOR LICENSE TAX—PRIORITY.

Under the "Mulct Law" (Acts 25th Gen. Assem. c. 62, § 1), providing that the "tax" for the privilege of selling liquors shall be a lien upon all property, both real and personal used in carrying on the liquor business, such lien is not superior to a mortgage existing at the time the lien attaches.

Appeal from district court, Clinton county; A. J. House, Judge.

Action on a note and for the foreclosure of a mortgage securing it. Decree for plaintiff, and the defendant Clinton county appeals. Affirmed.

A. T. Wheeler and F. F. Halleran, for appellant. Calvin H. George, for appellee. Crooks & Snell and A. P. Barker, having a case involving a like question, appear by consent, and file an argument for appellee.

KINNE, J. 1. In October, 1892, the defendant Skow and wife, for the purpose of securing the payment of $2,000 in accordance with the terms of a certain promissory note, executed and delivered to plaintiff a mortgage upon certain real estate situated in the city of Clinton, Iowa. The mortgage was recorded on October 3, 1892, is due and unpaid. In the fall of 1893 and the winter of 1893 and 1894, and ever since that time, the building

situated upon said real estate has been used and occupied by the defendant Jones, the grantee of Skow, for saloon purposes, and he has maintained and kept a saloon therein during all of said time. The defendant Clinton county claims a lien upon said premises in the sum of $443.43 in the nature of a tax under chapter 62, Acts 25th Gen. Assem., known as the "Mulct Law." The only question involved in this appeal is as to whether the lien of the county is superior to that of plaintiff by virtue of his mortgage. The district court adjudged that the lien of the county was inferior to that of plaintiff's mortgage, and the county appeals.

2. The sole question is as to the priority of liens. In Bibbins v. Clark, 90 Iowa, 234, 57 N. W. 884, 59 N. W. 290, this court held that, where taxes on personal property became a lien upon real estate after the lien of a mortgage had attached thereto, such tax lien was junior and inferior to the mortgage lien. Two members of the court dissented from that holding, and adhered to the contrary rule, as stated in the opinion in Trust Co. v. Young, 81 Iowa, 739, 39 N. W. 116, and 46 N. W. 1103. The act providing for the assessment of the tax in controversy and creating a lien therefor reads, "All such taxes shall be a perpetual lien upon all property, both personal and real, used or connected with the business." Chapter 62, § 1, Acts 25th Gen. Assem. As the several members of this court adhere to their former opinions touching the lien of personal taxes on real estate with reference to mortgages which exist upon real estate when such personal tax becomes a lien thereon, it is desirable to rest the determination of the question presented in this case upon another ground, upon which we all agree, and that is that this sum which it is provided shall be a lien upon property, both personal and real, is not in fact a tax, as we usually use that word. It matters not that the legislature, in the statute, speaks of this license or charge as a tax. That does not make it a tax. It is in reality a charge or license exacted for the privilege of carrying on the business of vending liquors, which charge is made by statute a lien upon all property, both personal and real, used or connected with the business. The doctrine adhered to by a minority of the court in Bibbin's Case extends the priority of the lien of personal taxes on real estate over existing mortgages as to taxes proper,—that is, general taxes. As we have said, this is not a tax, and certainly not a general tax. Not being in the nature of a general tax, and the statute not undertaking to make this charge or license a lien upon real property superior to existing liens, we discover no reason for holding it to be prior to the lien of plaintiff's mortgage. It is such a charge as attaches to and becomes a lien on the real estate when it is assessed, and does not take priority over the lien of a mortgage then existing upon real estate. Affirmed.

WHITESELL v. HILL.

(Supreme Court of Iowa. April 11, 1896.)

APPEAL — INCONSISTENT VERDICT — PHYSICIANS — MALPRACTICE — EVIDENCE.

1. In an action against a physician for malpractice in reducing a fracture of an arm, alleged to have resulted in rendering the limb useless, defendant denied negligence, claiming the injury was caused by a second injury to the arm after he had discharged the case, and counterclaimed for services in reducing the fracture. *Held* that, a verdict for plaintiff for $1 would not, on appeal by him, be disturbed as inconsistent, as the jury may have found that the condition of the arm at the trial was in a large measure due to the second injury.

2. A physician is required to exercise only the average degree of skill possessed by physicians practicing in his locality.

3. An instruction that a finding for plaintiff would not be warranted from the condition of plaintiff's arm alone was proper.

4. In an action for malpractice, the burden is upon plaintiff to show his freedom from negligence contributing to the result complained of.

5. Where, in an action for malpractice alleged to have caused the disablement of plaintiff's arm, the answer charged that plaintiff was guilty of contributory negligence, it was proper to instruct as to the care required of plaintiff, and his necessity to follow defendant's instructions.

6. Where plaintiff, in an action for malpractice, claimed that a certain bandage was negligently placed on his arm by defendant, causing him excessive pain, and defendant introduced evidence of directions given plaintiff, which, if followed, would have saved the trouble complained of, it was proper to instruct as to plaintiff's duty to follow defendant's directions, and as to the care which he should have used.

7. That a physician was guilty of negligence in the treatment of his patient, resulting in damages to the latter, does not necessarily preclude him from recovering any compensation whatever for his services; the amount of his recovery, if anything, depending on the amount of damages suffered because of his negligence.

Appeal from district court, Hardin county; B. P. Birdsall, Judge.

This suit was brought against the defendant, who is a physician, to recover damages for malpractice in reducing a fracture of plaintiff's arm. There was a trial to a jury, resulting in a verdict and judgment for defendant. Plaintiff appeals. Affirmed.

J. H. Scales, for appellant. F. M. Williams and C. E. Albrook, for appellee.

DEEMER, J. The plaintiff, while engaged in pulling stumps, with a machine known as a "stump puller," received an injury which resulted in a simple oblique fracture of the humerus bone of the left arm. He employed the defendant to reduce the fracture, and claims that, by reason of the negligent and unskillful treatment he received, his arm is useless, and he is permanently disabled. The defendant admitted that he was called upon to set the plaintiff's arm, but denied any negligence or unskillfulness in so doing; and he claimed that, after he had discharged the case, and ceased to treat plaintiff, he (plaintiff) while carrying some heavy article, slipped and fell, and injured his arm, and that he neglected to notify defendant thereof,

or to call any other physician to treat the same, and that, by reason thereof, his arm is bent and injured, and that the present condition of plaintiff's arm is due to his own negligence and the accident aforesaid. Defendant further pleaded a counterclaim for services rendered the plaintiff in reducing the fracture. The jury returned a verdict for plaintiff in the sum of one dollar, upon which judgment was rendered, and this appeal followed.

1. There are 32 assignments of error; but we find, on turning to the argument, that but few of them are discussed by counsel in their brief and argument, and these may be classed under two heads. First, it is insisted that the verdict is intrinsically discrepant and inconsistent. It will be noticed that the jury canceled the defendant's claim for services, and allowed the plaintiff one dollar in addition thereto. While it may be that the verdict is the result of a compromise, yet it is not so discordant with the evidence as to justify us in interfering. The jury may well have found that the condition of plaintiff's arm, as it appeared at the time of the trial, was in a large measure contributed to by an injury he received after defendant had ceased his treatment.

2. It is urged that instructions 4 and 5, given by the court, are conflicting and misleading. The fourth instruction gives a general statement of the law as to the degree of learning and skill which must be possessed and exercised by one holding himself out as competent to treat diseases or injuries, and the fifth makes an application of the rule to the facts as plaintiff claimed them to be. In each instruction it was said that defendant must possess and exercise the average skill, learning, and proficiency of the medical profession generally in the locality where the defendant practiced. It is true that, in the fifth instruction, the court said that defendant must have and exercise the average proficiency, skill, and care of the medical profession in the vicinity of the defendant's residence; but, as applied to the facts of the case, the instructions meant practically the same thing, for it was shown that the defendant practiced in the vicinity of the defendant's residence. It is also insisted that that part of the fifth instruction which we have referred to is erroneous. The instruction seems to call for the exercise of the average degree of skill, learning, and ability possessed by members of the medical profession in the locality where the defendant practiced. This is all that is required. Smothers v. Hanks, 34 Iowa, 289; Peck v. Hutchinson, 88 Iowa, 320, 55 N. W. 511. The word "average," as used in the instruction, means the same as "reasonable" and "ordinary." Carpenter v. Blake, 60 Barb. 488. And it seems to be well settled that regard must be had to the locality in which the physician practices. See Smothers v. Hanks, supra; Gates v. Fleischer, 67 Wis. 504, 30 N. W. 674; Tefft v. Wilcox, 6 Kan. 46; Nelson v. Harrington, 72 Wis. 591, 40 N. W. 228; Small v. Howard, 128 Mass. 131.

3. In instruction 6½ the court told the jury, in substance, that they might consider the condition of the plaintiff's arm as it appeared upon the trial, but that they were not justified, from this alone, in finding for him; that they must also find such result was due to defendant's negligence in the treatment of the injury. This instruction is complained of. It was clearly correct, and the evidence in the case manifestly called for such an instruction.

4. The sixth instruction is complained of. It required of the plaintiff the duty of following the defendant's directions with reference to the treatment, and related to the care he should use, and directed the jury to disallow any claims of the plaintiff which resulted from his failure to obey such directions or instructions. The rule of law announced is not attacked, but it is said that the pleadings presented no such issue. There are two all-sufficient answers to this claim: (1) The plaintiff claimed that a certain bandage, which was negligently placed on his arm after the reduction of the fracture, caused him excessive pain. Defendant attempted to meet this by evidence showing that he gave the plaintiff directions which, if followed, would have ameliorated the pain, and saved the trouble complained of. This evidence made this instruction proper. (2) While the plaintiff did not allege that he was free from contributory negligence, yet the defendant averred that the plaintiff was guilty of contributory negligence. This condition of the record called for instructions upon the subject, and the court properly told the jury that the burden was upon plaintiff to show his freedom from negligence contributing to the injury. It is to be noted, also, in this connection, that the case was tried after the enactment of chapter 96, Acts 25, Gen. Assem.

5. Instruction No. 6¼ is complained of. We need not set it out, for it states in a terse and plain manner certain elementary rules of law, and contains no error.

6. The eleventh instruction is as follows: "You will determine the amount, if anything, due the plaintiff on his claim, and the amount, if anything, due the defendant on his counterclaim, and, after deducting the lesser from the greater amount, you will return your verdict for the difference, if any, in favor of the plaintiff or defendant, as you find the fact to be. If you find nothing due either party, you will simply return a verdict in favor of the defendant." This is complained of because it is said "the two claims—for service and for malpractice—cannot co-exist," and "that a recovery by either is a bar to an action by the other." That there are some authorities in support of plaintiff's contention will be conceded. See Bellinger v. Craigue, 31 Barb. 534; Patten v. Wiggin, 51

Me. 594. But we do not think these cases announce the correct doctrine. The rule in this state, long ago established, is that a party who has failed to perform his contract in full may recover compensation for the part performed, less the damages caused by his failure to perform the whole contract. Pixler v. Nichols, 8 Iowa, 106; Aetna Steel & Iron Works v. Kossuth Co., 79 Iowa, 44, 44 N. W. 215. It does not necessarily follow that, because a physician or surgeon may be guilty of negligence, which causes some inconsequential or inconsiderable injury, he is to be deprived of all compensation for his services on account thereof. Whether he shall lose the value of his services depends upon the amount of damages suffered by reason of his neglect to perform his duty. No penalty beyond the amount of the actual damages sustained is to be visited upon him because of his negligence or want of skill. Our conclusions on this branch of the case find support in the case of Ressequie v. Byers (Wis.) 9 N. W. 779, and the authorities there cited.

7. Complaint is also made of an instruction with reference to expert testimony. The paragraph attacked announces the rule as we understand it, and it was applicable to the facts in the case. We have examined all the assignments argued, and discover no error. The judgment is therefore affirmed.

WICKENS v. GOLDSTONE.

(Supreme Court of Iowa. April 11, 1896.)

VENUE IN CIVIL CASES.

That a principal, resident of P. county, employed a real-estate agent, residing in W. county, to trade for him a stock of goods situated in P. county for farm land, without regard to the situation of the land, does not show that the principal had an "agency" (Code, § 2585) for the transaction of business in W. county, so as to authorize suit by the agent for his commission in W. county.

Appeal from district court, Webster county; D. R. Hindman, Judge.

Action to recover compensation for services in procuring a purchaser of a stock of goods. Judgment for plaintiff, and the defendant appealed. Reversed.

J. M. St. John, for appellant. Frank Farrell, for appellee.

GRANGER, J. The plaintiff resides in Webster county, and the defendant in Polk county, Iowa; and, the action being brought in Webster county, the defendant filed a motion, supported by affidavit, to change the place of trial to Polk county, as that of his residence. The application was resisted, and the facts can be no more concisely presented than by presenting the respective affidavits, as follows:

"N. L. Goldstone on oath states: That he now resides in Polk county, Iowa, and has so resided for more than twenty-five years. That he has not now, and never has had, an office or agency in Webster county, Iowa. That he states the facts pertaining to the transactions mentioned in plaintiff's petition to be as follows, to wit: That he met the plaintiff, and the plaintiff stated to him that he was authorized by the owner of a certain piece of land in Pocahontas county, Iowa, to find a purchaser therefor, or to find some one who would trade for said farm; and this defendant said to him that he had a stock of dry goods which he would exchange for the farm, if the terms and conditions could be agreed upon; and thereafter this defendant did in fact trade said stock of dry goods for said farm; and it is for services alleged to have been performed in connection with said trade that he now seeks to recover in this suit. That he agreed to pay plaintiff a certain sum for his services in procuring the owner of said farm to exchange the farm for said stock of goods, which was the only transaction between the plaintiff and defendant, and the only one contemplated by them or either of them. That said transaction was without reference to the probable residence of said plaintiff in Webster county, Iowa, and the said farm was situated in Pocahontas county, Iowa. And he further says that the foregoing is true as he verily believes. N. L. Goldstone."

"I, George E. Wickens, being duly sworn, say that I am the plaintiff named in the above-entitled cause; that, during the month of January, 1894, the defendant was at my office in Ft. Dodge, Iowa, and employed me to negotiate for him a sale or trade of his stock of merchandise; that he stated to me that he had a stock in Des Moines, Iowa, which he wished to sell or trade for land, and that he also had a number of town lots in Tara, Iowa, which he wished to sell or trade. He gave me a list of his town lots with prices, and also gave me a general inventory of his stock of merchandise, with prices of same, and said he would like to have me work up a trade for him. I said to him that I would undertake to do so for a stated commission, which he then said he would pay if I found him a purchaser for the stock in trade for land. He knew, at the time, that I was engaged in the business of buying and selling property on commission, and that my place of business and office was at Ft. Dodge, in Webster county, Iowa. In pursuance of the arrangement then and there made I set about finding a purchaser for his stock of merchandise in trade for land, and found a purchaser who took the goods for land in Pocahontas county, Iowa."

The district court denied the application for a change, and the ruling is the only action of the court brought in question in this case. The authority relied on by plaintiff for bringing the suit in Webster county is the following provision of the Code: Section 2585: "When a corporation, company, or individual has an office or agency in any county for the

transaction of business, any suit growing out of or connected with the business of that office or agency, may be brought in the county where such office or agency is located." The query is, did the defendant have an office or agency in Webster county for the transaction of his business, within the meaning of the section? That he had no office there is not questioned. Had he an agency? Agency may be defined as the relation between a principal and his agent; also, the place of business of an agent. The former exists independent of locality, and refers to place. The latter is expressive of locality, and refers to place. The statute under consideration has no reference to an agency not located, because it seeks to locate the venue of the suit by the location of the agency. In Milligan v. Davis, 49 Iowa, 126, the dispute was as to the fact of there being an agent in the "strict legal sense of the term." If there was an agency, in the sense of the relation of principal and agent, then the nature of the business done, and the manner of doing it, gave to it locality. The same is true in Ockerson v. Burnham, 63 Iowa, 570, 19 N. W. 676. In the latter case the more doubtful question was whether the action grew out of the business or agency. In this case there is nothing to show that the business was to be done in Webster county more than anywhere else. Defendant simply employed a man living, and who had an office, in Webster county. The office of residence of plaintiff in no way concerned defendant's business. His stock of goods was in Polk county, and the employment in no way created an office or local agency in Webster county. If plaintiff left Webster county for a day or a month, the agency left that county. There is not a word to show that any business was to be done in one county more than another. The act does not refer to the agent's place of business, but the principal's. We think the application to change the place of trial should have been granted. Reversed.

ROWEN v. SOMMERS.

(Supreme Court of Iowa. April 11, 1896.)

APPEAL—REVIEW—INSTRUCTIONS—EXCEPTIONS.

1. A general exception to the instructions en masse at the time they were given, and assignments of error on the specific instructions, raise no question, on appeal for review, if any of the instructions are good.

2. Where exceptions taken on motion for a new trial are relied on (Code, § 2789) for the review of instructions, the record must show that the motion was filed within three days after the verdict, as required by the statute.

Appeal from district court, Scott county; C. M. Waterman, Judge.

Action for damages arising from the death of Elizabeth Roby. Trial to a jury. Verdict for the defendant. Plaintiff appeals. Affirmed.

J. M. Doran and P. M. Detwiler, for appellant. Bills & Hass, for appellee.

KINNE, J. 1. Plaintiff, as administrator of the estate of Elizabeth Roby, deceased, brings this action against the defendant to recover damages arising from a personal injury resulting in the death of his decedent. The charge is that the defendant was the keeper of an hotel in the city of Davenport, Iowa; that said decedent was a guest at said hotel, and, while such, she, without any negligence on her part, and because of the negligence of the defendant in not locking the door leading to an elevator shaft, was negligently permitted to open said door, step into said shaft, and fall to the floor below, by reason of which fall she received injuries from which she died. The answer was a general denial. It was also averred that the cause of the injury which resulted in the decedent's death was her own negligence; that the door to said elevator shaft was fastened, and the decedent negligently seized said door, and so violently jerked it as to unlock the same, whereupon she stepped into said opening, fell, and was so injured that death resulted.

2. The only errors assigned relate to certain of the instructions given by the court on his own motion. It is said by appellee that, under this record, we cannot consider them. The only exception taken to the instructions is to all of them en masse at the time they were given. No complaint is made to the giving of several of the instructions. We have many times held that a general exception to all of the instructions given, when some of them were good, is not sufficient to bring up for review any particular instruction. The exception goes to the instructions as a whole, and, if any one of them is good, such an exception raises no question for our consideration. Davenport Gaslight & Coke Co. v. City of Davenport, 13 Iowa, 236; Loomis v. Simpson, 13 Iowa, 532; Lyons v. Thompson, 16 Iowa, 66; Browne v. Jefferson Co., Id. 343; Jack v. Naber, 15 Iowa, 452; Armstrong v. Pierson, Id. 476; Pitman v. Moisberry, 49 Iowa, 339; McCaleb v. Smith, 24 Iowa, 591; Reeves v. Harrington, 85 Iowa, 741, 52 N. W. 517; Hallenbeck v. Garst (Iowa) 65 N. W. 417; Leach v. Hill (Iowa) 66 N. W. 71. So, we have held that a general exception to instructions given by the court, and an assignment of error upon specific instructions embraced therein, raise no question for review by this court. Cousins v. Westcott, 15 Iowa, 254. True, it is said in the motion for a new trial that the court erred in each and every one of its instructions given by it on its own motion to the jury. It may be doubted if this could be treated as an exception. It is more in the nature of an assignment of errors. Besides, it does not appear that such motion was filed within the time provided by statute. When exceptions are thus taken, it must be done within three days after verdict. Code, § 2789. This record fails to show when the motion was filed.

Bush v. Nichols, 77 Iowa, 171; 41 N. W. 608. Under this condition of the record, the instructions as to which errors are assigned cannot be considered. Affirmed.

BRUMFIELD v. WESTERN UNION TEL. CO.

(Supreme Court of Iowa. April 11, 1896.)

TELEGRAPH COMPANY—FAILURE TO DELIVER MESSAGE—INSUFFICIENT PROOF.

In an action to recover damages for the failure to promptly deliver a telegraphic message, where the answer contained a general denial, and plaintiff introduced no evidence showing when the message was delivered to defendant to be transmitted, or at what time it was received at the delivery office, a verdict for defendant was properly directed.

Appeal from district court, Boone county; S. M. Weaver, Judge.

Action to recover damages caused by a failure to deliver a telegram. Verdict and judgment for defendant. Plaintiff appeals. Affirmed.

J. M. Goodson and J. F. Martin, for appellant. Cummins & Wright, for appellee.

KINNE, J. 1. December 23, 1893, the defendant company received a message at Lancaster, Ohio, directed to plaintiff at Boone, Iowa, as follows: "Dear Brother: Mother died last night. [Signed] Ella Brumfield." The petition charges that defendant carelessly and negligently failed and neglected to deliver the message to the plaintiff until 9 o'clock at night; that it was received at the Boone office at half past 10 o'clock in the forenoon of the same day; "that, on account of said defendant's carelessness and negligence in the failure to deliver to plaintiff the said message within a reasonable time, the plaintiff was deeply mortified, grieved, and shocked, and suffered intense agony of body and mind; that, by reason thereof, he has been damaged in the sum of five hundred dollars." The answer admitted the defendant's corporate capacity, and denied all other allegations of the petition. There was a trial to a jury, and, at the close of the plaintiff's evidence, the court, on motion of defendant, directed a verdict for it, from which this appeal is taken.

2. Errors are assigned upon the ruling of the court in sustaining the defendant's motion for a verdict; also, in rulings excluding certain evidence offered by the plaintiff. The motion to direct a verdict was based upon the ground that no legal damages had been shown, and that there was no evidence upon which a verdict for plaintiff could be returned; also, other grounds, which need not be stated. Now, while the petition charges that this message was received by the company at its Boone office at half past 10 o'clock a. m., and not delivered until 9 o'clock p. m., such allegations are denied in the answer. The message in fact delivered was, as it appears from the record, introduced in evidence; but it is not in the record. There is no evidence whatever as to the time in the day at which the message was delivered to the defendant at Lancaster, Ohio, for transmission to the plaintiff. There is no evidence as to the time in the day or night, that it was received at Boone, Iowa, by the defendant. There are, it is true, statements in the evidence, by one or two witnesses, which seem to indicate that there had been a delay in the delivery of the message; but what that delay in fact was, and at what time the message was in fact sent from Lancaster, Ohio, and received at Boone, nowhere appears. From this it will be seen that there was no evidence from which a jury could say that the defendant was negligent in delivering the message.

3. In view of the facts heretofore stated, it is not necessary for us to discuss the evidence relating to the claimed damages. The case, in that respect, is not within the rule established in Mentzer v. Telegraph Co. (Iowa) 62 N. W. 1. No negligence in the delivery of the message having been shown, the court properly directed a verdict for the defendant. Affirmed.

EARHART v. HOLMES.

(Supreme Court of Iowa. April 11, 1896.)

EQUITY — SETTING ASIDE CONVEYANCES — FRAUD.

The purchase of land by an uncle from his niece, living in his family, who had barely attained her majority, and whose guardian he had been, for an inadequate price, will be set aside as fraudulent, although the uncle advised his niece against selling, the relations between the parties being such as to require him, if he purchased, to pay the fair value of the land.

Appeal from district court, Johnson county; S. H. Fairall, Judge.

Action in equity to cancel and set aside a deed of conveyance on the grounds of fraud and undue influence and inadequacy of consideration, and for an accounting for rents and profits. Decree was entered in favor of the plaintiff. Defendant appeals. Affirmed.

Ranck & Wade, for appellant. Ewing & Bailey, for appellee.

GIVEN, J. 1. The following facts are undisputed: Elizabeth Loan inherited a tract of land on the Iowa river, estimated to contain 120 acres. She being a minor, appellant, her uncle, was appointed guardian of her person and property on April 1, 1889, and continued to act as such until April 22, 1890, when she arrived at the age of majority. On May 24, 1890, she executed and delivered the deed in question to the defendant for the agreed consideration of $725, upon which payments were made as hereafter stated. Defendant went into the possession and use of the land, and cut and took timber therefrom. Said Elizabeth Loan, having intermarried with Samuel Earhart, brought this

action on February 26, 1892, entitled as above. Pending the action, Mrs. Earhart died, as did also her only surviving child, and Samuel Earhart, the sole heir, was substituted as plaintiff. It appears that Mrs. Earhart's purpose in selling the land was to secure funds with which to erect a dwelling on another tract that she owned. At the time the deed was executed, defendant delivered to Mrs. Earhart, as part of the consideration, a mare that was with foal, at the agreed price of $125, defendant to pay for the service, to pasture the mare free of charge during that summer, and to take her back if Mrs. Earhart became dissatisfied. No notes or other written evidence or security was given by defendant for the remainder of the purchase price, but it was verbally agreed that defendant would make payment at any time Mrs. Earhart desired the money, which defendant was amply able to do. It is conceded that defendant paid on the purchase price $447.54.

2. Decree was entered finding that the deed in question "was obtained by fraud and undue influence, and for an inadequate consideration," and setting the same aside; also, finding that plaintiff was entitled to $120 per year, for the years 1890 and 1891, for the use of the land, and $19.20 interest thereon, and $29 for 58 cords of wood, and that there was due to the defendant, upon the purchase money paid by him, after deducting said sums, $108.54, which was ordered to be, and was, paid to the clerk for the use of the defendant. Defendant's first contention is that there is not sufficient evidence to warrant the setting aside of said deed. The relief asked is upon the ground of fraud on the part of the defendant in procuring the deed for that he procured it by undue influence and for an inadequate consideration. The defendant was a man of mature years and experience in business. He was an uncle of Mrs. Earhart, and the guardian of her person and property up to the time she attained majority, which was but a short time before the deed was given, at which time his account as guardian had not been settled. Mrs. Earhart, being then single, lived for some time in the family of her uncle, and evidently had full confidence in him. She had recently attained her majority, and was legally qualified to dispose of the land, and this she determined to do, notwithstanding the defendant and other friends advised against it. She was no doubt of a very determined disposition, and in this matter at least acted in disregard of the advice of her friends,—a fact that was known to the defendant. Mrs. Earhart represented to the defendant that she was offered $700 for the land, and that she was determined to sell it, and wanted him to buy it, whereupon he offered to pay $25 more than any other person would pay. Thereupon, without any effort to find one that would offer more than $700, the bargain was closed at $725. Mrs. Earhart was inexperienced in business affairs, and knew but little if anything of the value of lands in the neighborhood, as the defendant well knew.

The relation of guardian and ward did not exist between the parties to this deed at the time it was executed, and Mrs. Earhart was then legally competent to execute it. Appellant contends that, for this reason, the rule of the cases between guardian and ward and trustee and cestui que trust does not apply, but concedes that, under the facts, the defendant may be held to the strictest good faith in this transaction. While it is testified that appellant advised Mrs. Earhart not to sell the land, it is evident that he was desirous of purchasing it because of its proximity to lands owned by him, and made the offer he did expecting it would be accepted. He knew that this young girl had full confidence in his honesty, and in his judgment of the value of the land, and that, while he might not dissuade her from selling it, any offer he might make was likely to be accepted. Surely, under the circumstances, good faith required that his offer should be at least the full value of the land. Fifteen witnesses, more or less familiar with the subject, were examined as to the value of the land. Four of the eight called by plaintiff gave as their lowest estimate $10 per acre, and the other four $12. Of the seven called by the defendant two gave $6, one $6.50, one $7, and three $8 per acre as their lowest estimate. The price paid was but a small fraction over the lowest estimate. It is true the acreage was reduced somewhat by the wash of the river, but it is clearly manifest that the land was worth largely more than $725. We are not required to determine the value of the land, but simply to find whether or not the consideration paid was so grossly inadequate that the deed should be canceled.

Let it be conceded that, under the evidence, the deed should not be set aside upon either the ground of undue influence or of inadequacy of consideration taken alone, yet we think it entirely clear that, upon both taken together, it is shown that the deed was obtained by fraud. The principles of law applicable to the case are familiar and undisputed. Therefore we have not cited any authorities, and do not here notice those cited by counsel. We conclude that the decree setting aside the deed in question is fully warranted by the evidence.

3. Defendant's motion to correct the decree by eliminating therefrom the $240 allowed as rent and the $19.20 allowed as interest thereon was overruled, and of this defendant complains, upon the ground that there was no evidence showing the rental value. The evidence upon this subject is quite meager, but there is not an entire absence of evidence as to the rental value of the land. Mr. Havard says: "I hardly know what it would rent for for cash.—$1 or $1.50 per acre. I do not know. I never rented any that way

myself for cash." It is insisted that this witness shows himself incompetent to testify to the rental value of the land; that, therefore, his testimony should be disregarded; and that, there being no other evidence of the rental value, the allowance made is unauthorized. The witness, when asked as to the rental value, says, "I hardly know," then names a value, and adds, "I do not know. I never rented any that way myself for cash." It is apparent, from his further statements, that Mr. Havard was familiar with the location and quality of the land, and the uses for which it was available. We think that, although he had never rented for cash himself, he was competent to testify to the rental value, and that his testimony, in the absence of any conflicting evidence, is sufficient to sustain the allowance made for rent in the decree.

Our conclusion is that the decree of the district court should be affirmed.

CARBIENER v. MONTGOMERY et al.

(Supreme Court of Iowa. April 11, 1896.)

FRAUDULENT CONVEYANCE—TORT—RIGHT OF ACTION—CONSIDERATION—APPEAL—RES JUDICATA.

1. In an action to set aside a conveyance as in fraud of creditors, it appeared that the tort which was the basis of plaintiff's recovery was committed, at least in part, prior to the time the conveyance in question was made. *Held*, that plaintiff's cause of action accrued prior to the execution of the deed.

2. A conveyance made with intent to hinder, delay, and defraud creditors is invalid as to subsequent as well as to antecedent creditors.

3. An advance of money by a wife to her husband, furnished at different times, without any agreement for repayment, and partly used for the support of the family, is not a valid consideration for the conveyance of real estate.

4. An appellee cannot complain of a part of a decree from which he has not appealed.

5. Where the validity of a previous settlement was in issue in an action for damages, and was determined by the jury, it became res judicata, and cannot be relitigated in an action to subject lands to the payment of the judgment for damages.

Appeal from district court, Butler county; Porter W. Burr, Judge.

Creditors' bill to set aside an alleged fraudulent conveyance of real estate. The lower court subjected the land to the payment of plaintiff's judgment, but established a lien thereon for the sum of $800 in favor of defendant Annie Montgomery, and declared it to be prior and superior to plaintiff's lien. The defendant Annie Montgomery appeals. Affirmed.

M. Hartness and Gibson & Dawson, for appellant. Baker & Ball and Courtright & Arbuckle, for appellee.

DEEMER, J. On the 27th day of February, 1894, the plaintiff recovered a judgment against the defendant Henry Montgomery in the sum of $2,001 for alienating the affections of and seducing his (plaintiff's) wife. It is alleged that plaintiff's cause of action on which the judgment was rendered accrued prior to December 28, 1892. On the 29th day of December, 1892, the defendant Henry Montgomery conveyed certain real estate, consisting of about 260 acres, to his wife, the defendant Annie Montgomery. It is alleged that this conveyance was without consideration; that it was made with intent to cheat, hinder, delay, and defraud the creditors of Henry Montgomery, and particularly the plaintiff herein; that defendant Henry Montgomery has no other property in his own name subject to execution, and that he is insolvent. It is further alleged that at the time the conveyance was made defendant Henry Montgomery was under guardianship; that one E. W. Soesbe was at that time guardian of his property, both real and personal, and that by reason of said guardianship and of the further fact that he had theretofore been adjudged to be a drunkard and spendthrift, he was incapacitated from making the deed to his wife. The defendants, in answer, admit that plaintiff recovered a judgment against Henry Montgomery as stated; admit that Henry Montgomery conveyed the land referred to in the petition to Annie Montgomery on December 28, 1892; but deny that plaintiff was a creditor of Henry Montgomery at the time the conveyance was made, and deny that the conveyance was without consideration or was fraudulent and void as claimed. They further aver that at the time the conveyance was made Henry Montgomery was solvent, and possessed of sufficient property other than the real estate in question to pay all his then-existing debts. They further aver that the conveyance attacked by plaintiff was made in good faith, and for valuable consideration. They admit that one Soesbe was, on the application of Annie Montgomery, appointed temporary guardian of the property of Henry Montgomery on the 16th day of December, 1892, and that he continued so to act until April 25, 1893, but they allege that he did not take possession of or assume control of the real estate in controversy. They further allege that the application for guardianship was for the protection of Annie Montgomery and her children; that at the time of the conveyance of the real estate the legal title thereto was in Henry Montgomery, but that his wife, Annie Montgomery, the defendant, was the equitable owner thereof; that Annie Montgomery had at the time good cause for divorce against her husband on the ground of adultery and habitual drunkenness, and that the conveyance was made in consideration of an agreement on the part of Annie Montgomery not to prosecute her action for divorce and alimony against her husband, and a further agreement on her part to assume and pay the mortgage then existing upon the land, and certain other unsecured debts for materials used in the construction of improvements,

and of her agreement to dismiss her action for the appointment of a permanent guardian; that on March 3, 1893, pursuant to said agreement, the action for the appointment of a guardian was dismissed, and the temporary guardian was ordered to file a report, which he did in April of 1893, and said report was approved, and the guardian discharged, and it was adjudged that there was no necessity for the continuance of the guardianship; that by reason of such adjudication plaintiff is estopped from asserting any rights adverse to defendant under the guardianship. Upon the issues thus formed the case was submitted to the court with the result above stated.

The first inquiry in the case is, was the plaintiff a creditor of Henry Montgomery at the time of the conveyance to the wife, and, if not, did he occupy such position as that he may attack the conveyance? In his petition which he filed in the case in which he obtained judgment against defendant Henry Montgomery he stated that about the month of April, 1892, the said defendant began attempting to alienate and destroy the affections of plaintiff's wife, and by a systematic course of wrong conduct from said time until December 27, 1892, he succeeded in wholly alienating and destroying her affections; and that during the time from April, 1892, to June, 1893, defendant seduced, debauched, and carnally knew plaintiff's wife frequently and at divers times during said time. It also appears from the petition that plaintiff claimed damages for an assault made upon him by the defendant on the 27th day of December, 1892. A special verdict was returned by the jury in this case, however, which shows that the jury allowed plaintiff $2,000 for the alienation of his wife's affections and $1 for the assault. It also appears that plaintiff herein commenced another action against defendant Henry Montgomery, based upon the alienation of his wife's affections, and that notice of this action was served upon said defendant on December 29, 1892. This action was settled and compromised by the parties, but it was claimed in the trial of the second action that this settlement was procured by fraud, and the jury evidently found for the plaintiff on this issue. On trial of this case Annie Montgomery testified: "I did not pay him anything for the land at the time the deed was made. He made the deed because he was going away. He was going away because he had quarreled with George Carbiener. He said he was going to leave the country, because he had quarreled with George Carbiener, because he thought Carbiener was going to sue him. That is what he told me. I asked him to deed the property, if he was going to leave the country, because it was more mine than his. He made the deed. I did not give him anything; did not pay him anything; did not give him any notes or mortgages; did not give him any consideration of any kind at that time, and have not given him anything since in consideration for the land. He did not have any other property at the time he made the deed. He conveyed everything to me; all that he had. This land, and the house and lot in town, and the note and the mortgage for $1,500, was all that he had. He had given me the note and mortgage before that." On cross-examination she testified: "I was to have support for myself and children. That he would deed me the land. I would raise and support the children, and assume all debts against the property." "I told him, as he was going away, he had a right to deed all the property to me, as more of it was mine than his. He said that he would. That is so. He said he wanted me not to sue for divorce, and he wanted the guardianship to be off him, and, if I would assume and pay all debts and mortgages I was to pay, he would do so. I told him I would. He said that as long as he was quarreling with me and fighting with Carbiener it was better for him to go away a while, and that I was to live with him after he came back. I told him that I would live with him after he came back. I wanted him to deed it to me so I could have it, because I wanted it. I wanted it because it belonged to me. When he was not doing what was right, I wanted my share. I wanted him to deed it to me because the property was more mine than his. I wanted it to raise the children. I wanted my own share." She further testified as follows: "Question. Then that was, you wanted to raise your children with it? Answer. I wanted my part, whatever you make that out. Q. You wanted your own part, so you could save it and raise the children? A. I wanted it so I could have it for myself. I wanted him to help raise the children. He had as good right to help raise them as I did. Q. What did you give him for his share in the property? A. I did not give him anything. Q. And what you wanted him to deed to you was your share of it, so you could have it; that is what you asked him to do? A. I wanted him to deed all the property to me. He deeded it all to me. Q. Why did you want him to deed it all to you? A. Because I wanted it. Q. That was the only reason? A. Yes, sir."

Now, it quite clearly appears from other testimony adduced that the tort, which was the basis of plaintiff's recovery, was committed, at least in part, prior to the time the conveyance in question was made, and that plaintiff had a cause of action against defendant for the wrong he had committed prior to the time the deed was executed. Indeed, it appears to us from the entire record that the wrong was wholly committed prior to December 29, 1892. The rule seems to be well settled that a demand arising from a tort is in force from the time of the commission of the wrong. Appellant insists that the judgment in this case is for a con-

tinuing wrong, part of which was committed prior and part subsequent to the time of the conveyance, and that the judgment is a subsequent debt; citing Usher v. Hazeltine, 5 Me. 471; Moritz v. Hoffman, 35 Ill. 555; and other cases. We need not determine the correctness of this contention, for our consideration of the testimony leads us to the conclusion that the conveyance was not in good faith, but, on the contrary, was made with intent to hinder, delay, and defraud the plaintiff. That such a conveyance is invalid, as to subsequent as well as to antecedent creditors, seems to be well settled. Romans v. Maddux, 77 Iowa, 203, 41 N. W. 763; Harrison v. Kramer, 3 Iowa, 543; Corder v. Williams, 40 Iowa, 582; Weir v. Day, 57 Iowa, 84, 10 N. W. 304; Whitescarver v. Bonney, 9 Iowa, 480. Appellant contends that there is not sufficient evidence of want of consideration or of fraud to justify the action of the court in setting aside the deed. She claims that the deed was made in consideration of an agreement on her part not to sue her husband for divorce, to have the application for guardianship of her husband's property dismissed, to support and maintain the children, and to assume and pay the mortgages upon the land, and the debts due for materials used in improving the premises. She also claims that she let her husband have $800, which went in part payment of the purchase of the land, and that the conveyance was made in consideration of the money so furnished. As to this last claim of appellant it is sufficient to say that, while it is true she gave her husband the money as claimed, yet it was furnished at different times, without any agreement to repay the same, and was used, partly at least, for the support of the family. Under such a state of facts it has been held that the wife cannot enforce the repayment for the same, either against her husband or his estate, and that such an advancement of money will not constitute a valid consideration for the conveyance of real estate. Hanson v. Manley, 72 Iowa, 48, 33 N. W. 357; Romans v. Maddux, supra. It is not necessary to determine whether the alleged agreement between the appellant and her husband, by which she bound herself not to prosecute an action for divorce, and to withdraw her application for permanent guardian, and to support the children. and pay the mortgages upon the land and other debts, was a sufficient consideration for the conveyance; for we are well satisfied that the deed was made by reason of threatened litigation between plaintiff and defendant's husband, and with intent to save the property to the wife, and thus hinder and defeat the plaintiff in the collection of his claim. The time at which the conveyance was made and the circumstances attending it strongly indicate that it was the purpose of the parties to make the wife a creditor of the husband in view of the impending litigation. We need not set out the evidence which leads us to this conclusion. A fair preponderance of it shows that the conveyance was made in view of the legal complications then gathering around the appellant's husband. The case is in its facts quite similar to the case of Jons v. Campbell, 84 Iowa, 557, 51 N. W. 37.

It is not important that we determine whether the deed in question is void because of the incapacity of Henry Montgomery to make it. If it be conceded that he had the legal capacity, or if it be found that after the discharge of the guardian, which occurred more than three months prior to the bringing of this suit, he ratified and adopted the same, yet, as the conveyance was in fact fraudulent, the defendant Annie Montgomery cannot rely upon it, and hold the land as against the plaintiff.

Appellee complains of that part of the decree establishing a lien for the sum of $800 and interest in favor of appellant. As he does not appeal, we cannot give him any relief, even if we should conclude that he was entitled to it.

Much is said in argument by appellant regarding the effect which should be given to a settlement made between plaintiff and Henry Montgomery after the commencement of the first suit. The record of the case in which the judgment was obtained shows that the validity of this settlement was in issue in that case, and that the jury found the same was fraudulent. This is an adjudication binding upon the parties, and cannot be relitigated in this proceeding. It seems that in this settlement plaintiff received the sum of $240, which he has never tendered back to the defendant Henry Montgomery, and it is claimed that he is now estopped from attacking the same. This is also a question which was, or should have been, tried in the action in which plaintiff obtained his judgment. It cannot be considered now. We have examined the entire record with care, and are satisfied with the decree rendered by the district court. Affirmed.

BARNHART v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Iowa. April 11, 1896.)

RAILROAD COMPANIES—ACCIDENT TO LIVE STOCK ON RIGHT OF WAY—NEGLIGENCE.

1. A motion to direct a verdict should be sustained when, considering all of the evidence, it clearly appears to the trial judge that it would be his duty to set aside a verdict if found in favor of the party on whom the burden of proof rests.

2. The mere fact that a horse ran or jumped over a cattle guard is insufficient to establish that the guard was defective.

3. After horses had entered upon a railroad company's inclosed right of way without fault of the company, a brakeman was sent ahead to assist the keeper in removing them. The train was slowly moved forward, with all

possible caution, and came to a stop a quarter of a mile from the horses, which broke past the keeper and brakeman, and ran into a bridge. *Held*, that the moving of the train was not negligence.

Appeal from district court, Marshall county; S. M. Weaver, Judge.

Action for damages to a horse. Trial to a jury. Verdict and judgment for plaintiff. Defendant appeals.

Dyer & Stevens and Binford & Snelling, for appellant. Brown & Hurd, for appellee.

KINNE, J. 1. Plaintiff seeks to recover damages for the value of a horse, which he claims was so badly injured by reason of defendant's negligence as to be rendered useless. The negligence charged is: First, in maintaining an insufficient cattle guard, over which said horse, which had escaped from an inclosure, passed upon the defendant's right of way, and was injured; second, that the employés of the defendant in charge of its engine and train, and knowing that said horse had passed over said guard onto defendant's track and right of way, which was inclosed by a fence, and also knowing that there was a bridge over a stream about 80 rods east of said guard, "wrongfully, willfully, and maliciously started said train across the cattle guards, and ran the train east, frightening said horses so that they ran past the parties in pursuit, and drove them upon said bridge, where plaintiff's horse, being unable to escape, was driven into it, and crippled, so that it became absolutely worthless, by the gross willful and reckless negligence of the defendant." Defendant denied all of the allegations of the petition, and avers that the injury was caused by the plaintiff's own negligence. At the close of the plaintiff's testimony the defendant moved for a verdict, which motion was overruled, and defendant excepted.

2. The first question for our consideration is, did the court err in refusing to direct a verdict for the defendant? Ordinarily, the question of negligence is one for the jury, though there are cases where it is a question of law for the determination of the court. The rule in this state is, if from the undisputed facts, but one conclusion can be reasonably drawn, then the question is one of law; but if, under the facts, different minds might reasonably reach different conclusions, it is a question of fact for the jury: Milne v. Walker, 59 Iowa, 186, 13 N. W. 101; Whitsett v. Railway Co., 67 Iowa, 150, 25 N. W. 104; Mathews v. City of Cedar Rapids, 80 Iowa, 463, 45 N. W. 894; Collins v. Railway Co., 83 Iowa, 353, 49 N. W. 848; King v. Bird, 85 Iowa, 538, 52 N. W. 494. So it is now the rule that a motion to direct a verdict should be sustained when, considering all of the evidence, it clearly appears to the trial judge that it would be his duty to set aside a verdict, if found in favor of the party upon whom the burden of proof rests. Meyer v. Houck, 85 Iowa, 322, 52 N. W. 235; Reeder v. Dupuy (Iowa) 65 N. W. 338. At the close of plaintiff's case the following facts had been established by his witnesses, and there was no conflict in relation thereto. The horse escaped from plaintiff's inclosure, and ran along the highway until it came to the railway crossing. When it reached that point, it turned east, and ran or jumped over the cattle guard into the defendant's inclosed right of way. The cattle guard was described to the jury, and a plat of it shown some of the witnesses, but it does not appear from the evidence introduced by plaintiff that this plat was introduced in evidence, or seen by the jury. The guard was constructed like all other guards on defendant's road. No evidence had yet been introduced showing it in any respect insufficient. Indeed, the evidence tended to show it to have been sufficient, as all the evidence touching the matter was to the effect that animals had never before been seen to go over these guards. So far as we can see, when plaintiff rested there was no evidence whatever which tended to show that this guard was insufficient, either in construction or repair, unless the fact that the horse passed over it is to be deemed evidence of insufficiency. It is clear that the fact that the horse passed over or jumped over the guard is not of itself evidence of its improper construction or insufficiency. Timins v. Railway Co., 72 Iowa, 96, 33 N. W. 379. We do not think this case comes within the rule of the case just cited. In the case at bar there was no evidence as to depth of pit under the timbers, no evidence that any other sort of a cattle guard was ever used, no evidence that the guard used was not in fact as perfect in design and construction for the purpose of turning stock as any that had been or could be devised, no showing that for the purpose it was designed it was in any way defective or insufficient. Under such circumstances, it seems to us, a jury would not have been warranted in saying that the guard was insufficient, and that, if a verdict was found, based upon such a claim, it would be the clear duty of the court to set it aside.

3. It is claimed that the motion to direct a verdict could not be sustained because of negligence of defendant in running its train towards the horse when it was between the train and the bridge, thereby, as it claimed, frightening the horse, and causing it to run upon the bridge and be injured. Much is said in argument by appellee about the defendant having run its train upon the horse, or driven the horse to death by its train. This is not a case, under the facts, like those cited. The horse was not run upon or driven to death, as claimed by appellee. Plaintiff's witness who was in charge of the animal testified, in substance, that after the horses (there were several of them) had jumped the cattle guard, and ran towards the bridge, he told the trainmen to stop, and

give him 15 minutes, and he would scare the horses back; that he got around the horses, and drove them part way back, when they got scared at the train, which was a quarter of a mile or more away, and they ran onto the bridge, when plaintiff's horse broke his leg. After the witness went to drive the horses back, the train slowly pulled east from the crossing towards the bridge; that when it had reached a point about half way from the crossing to the bridge it stopped, and stood still, until after the horse was injured. A brakeman got off, and assisted all he could in driving the horses back. The train was over a quarter of a mile from the horses when it stopped. When the train moved, it made no noise, did not whistle, but one witness says that "steam will escape from an engine, you know." Do these facts show negligence in the operation of the train, or in moving it at all, while the attempt was being made to get the horse out of the right of way? As the train was moved slowly, without making noise, and as a brakeman had gone ahead to help the man who was after the horses, it would seem that every precaution possible was used by defendant's employés, if the train was to be moved at all. Was it negligence for defendant's employés to attempt to or in fact move the train. To so hold is to say that trains which, in the successful operation of a railroad, must meet and pass other trains at fixed times, should wait an indefinite time for owners of animals to get them out of the right of way before such trains can proceed, and that in cases where said animals are upon the right of way without fault of the railroad company, where they are trespassers upon the right of way. Must the operation of the defendant's road cease at that place pending the attempt to remove these horses from its right of way? Such seems to be appellee's claim, but it seems to us unreasonable. When the train was moved, as is shown, with all possible caution, and stopped as the horses approached, a brakeman sent to aid in driving the horses, but they wheeled, and ran past their keeper and the brakeman into the bridge, it seems to us it must be said that it was a casualty for which no one was in fault; that, under the circumstances, it was unavoidable. This view is based upon the thought that under the circumstances no duty devolved upon the trainmen to keep the train standing, waiting, during the entire time this attempt was made to get the horses out. It then becomes a question whether, under all of the circumstances, the train was moved in a negligent manner, so as to frighten the horse. As we have indicated, the evidence undisputed shows that the utmost care was used by the defendant's employés in moving the train. Such being the facts, it seems to us a verdict, if rendered for plaintiff, should have been set aside by the trial court; therefore it follows that the motion to direct a verdict for the defendant should have been sustained.

4. The conclusion we have reached renders it unnecessary that we consider other errors discussed. Reversed.

McDONALD v. MAGIRL.

(Supreme Court of Iowa. April 11, 1896.)

MORTGAGES—MERGER.

Where the holder of both a first and second mortgage on land forecloses the second mortgage and buys in the land, the senior mortgage is merged in the fee, and the debt secured thereby is extinguished.

Appeal from district court, Delaware county; A. S. Blair, Judge.

This is an action to recover the amount of money secured by a mortgage upon certain real estate. The defendant did not execute the mortgage, but it is claimed he is liable because he assumed the payment of it. There was a trial by jury. At the close of the introduction of the evidence, the court, on motion, directed the jury to return a verdict for the defendant. The plaintiff appeals. Affirmed.

Dunham & Norris and Marsh & Henderson, for appellant. Bronson & Carr, for appellee.

ROTHROCK, C. J. 1. Daniel McDonald was the owner of three lots in Sioux City. On the 17th day of July, 1888, he sold the lots to John Magirl, the defendant herein. The purchase price was $2,500. Of this sum $800 was paid in cash. There was a mortgage on the property for $800 and interest, which McDonald had before that time executed to one Charles C. Orr. A deed was made from McDonald to the defendant, for the lots, by which McDonald warranted the title of the property, excepting the mortgage of $800 to Orr, which the defendant assumed to pay. The covenants of warranty, and the assumption of the payment of the mortgage, were in these words: "And we hereby covenant with the said John Magirl, Sr., that we hold said premises by good and perfect title; that we have good right and lawful authority to sell and convey the same; that they are free and clear of all liens and incumbrances whatsoever, except mortgage of $800 and interest, to C. C. Orr, which grantee assumes and agrees to pay." For the balance of the purchase price, being the sum of $900, the defendant executed promissory notes to said McDonald, and secured the payment of the same by a mortgage on the property. Soon after the sale of the lots, McDonald transferred the notes and mortgage for $900 to said C. C. Orr. After this last transaction, Orr held two mortgages on the property,—one for $800, which was the first lien, and one for $900, which was given by the defendant, which was the second lien. The defendant did not pay the mortgage

which he executed to McDonald, and Orr foreclosed the same, making Magirl and wife and McDonald parties defendant. No resistance was made to the foreclosure, and Orr bought the property at the foreclosure sale for the amount of the judgment and costs, and afterwards a sheriff's deed was made to Orr in pursuance of the sale. After the sale and the deed, Orr died, and McDonald paid to the representatives of his estate the amount of the first mortgage, and assigned his alleged right to be reimbursed by reason of Magirl's assumption of the payment of the mortgage to the plaintiff herein. This action is founded upon the assumption of the payment of this mortgage by Magirl in his purchase of Daniel McDonald. These are the material facts in this case. Other facts, presented in the court below, and discussed by counsel, need not be considered. For example, it is wholly immaterial whether Daniel McDonald paid the first mortgage to representatives of Orr voluntarily or by compulsion. If the foreclosure of the second mortgage operated as an extinguishment of the first mortgage and the debt which it was given to secure, neither McDonald nor his assignee were bound to pay it; and, if they did so, the plaintiff herein is not an innocent holder, as against the defendant. If Orr extinguished the mortgage by his first foreclosure, McDonald, by paying it off, acquired no right to enforce it against the defendant, because the debt was, in effect, paid by the foreclosure, and Daniel McDonald and the plaintiff herein occupy the same position as Orr would have been in, if he had undertaken to foreclose the first mortgage, and collect the debt, after having foreclosed and taken his deed under the first mortgage. These propositions are so plain that they ought not to be the subject of debate.

The contention of appellee is that, when Orr foreclosed the second mortgage, and bought the land, he bought it subject to the senior mortgage, and the senior mortgage thereby merged in the fee, and the debt was extinguished. In our opinion, this proposition is correct, and in accord with the law applicable to merger in such cases. The principle is recognized in the cases of Crowley v. Harader, 69 Iowa, 83, 28 N. W. 446, and Byington v. Fountain, 61 Iowa, 512, 14 N. W. 220, and 16 N. W. 534. In the case of Bank v. Reis (Ill. Sup.) 26 N. E. 646, the following language is employed: "When one who is absolutely entitled in his own right to a charge or incumbrance on land becomes the owner in fee of the same land, with no intervening interest or lien, the charge will at law merge in the ownership, and cease to exist. Under like circumstances, a merger will take place in equity, where no intention to prevent it has been expressed, and none is implied from the circumstances and the interests of the party. 2 Pom. Eq. Jur. § 790. The premises, in such case, become the primary fund for the payment of the mortgage, and whoever acquires that fund and the mortgage also must be regarded as having applied the fund to the payment of the mortgage. Lilly v. Palmer, 51 Ill. 331; Jones, Mortg. § 865. The indebtedness will be presumed to have been discharged as soon as the holder of it becomes vested with the title to the land upon which it is charged, 'on the principle that a party may not sue himself at law or in equity.' The purchaser is presumed to have bought the land at its value, less the amount of indebtedness secured thereon, and equity will not permit him to hold the land and still collect the debt from the mortgagor. Biggins v. Brockman, 63 Ill. 316; Weiner v. Heintz, 17 Ill. 259; Shinn v. Fredericks, 56 Ill. 439."

Our conclusion is that the acquisition of the title under the foreclosure of the second mortgage extinguished the debt secured by the first mortgage. Affirmed.

HATCHER v. DUNN et al.

(Supreme Court of Iowa. April 10, 1896.)

OIL INSPECTOR—MINISTERIAL DUTIES—LIABILITY FOR FALSE TEST—TRIAL—INSTRUCTIONS—EVIDENCE.

1. The action of the oil inspector in testing oil to determine at what temperature it will emit a combustible vapor, the manner of doing so being specifically provided for by statute, compliance with which is bound to lead to a correct test, is ministerial.

2. Under McClain's Ann. Code, § 2493, providing that an inspector "falsely" branding oil tested, shall be liable for the injuries caused thereby, an inspector is liable, irrespective of whether he actually knew that the brand was false.

3. In an action for damages caused by the explosion of oil, falsely branded as up to the required test, the defendant inspector is not liable if the explosion was caused by the defective condition of the lamp in which the oil was burned, though the oil was below the required test.

4. An instruction that plaintiff claimed that "the sole cause of the explosion was because the oil was not up to the test required by law," and that the burden was upon him to establish his claim, did not sufficiently submit the issue whether the cause of the explosion was the defective condition of the lamp in which the oil was burned.

5. Where the thermometer by which an inspection of oil was made is introduced in evidence, it is not error to admit also the certificate of the experts testing the thermometer before its use, which accompanied the thermometer and directed the variations to be made from the face reading to secure accuracy.

Appeal from district court, Linn county; J. H. Preston, Judge.

This action is upon the official bond of defendant James J. Dunn as state inspector of oils, and upon the official bond of Martin P. Healy, as deputy inspector of oils under said Dunn, and is against the said principals and their respective sureties. Plaintiff's statement of his cause of action is, in substance, this: That on December 31, 1891, he was the owner of a building in Tipton, Iowa, used by him as a veterinary hospital, and of a large

amount of personal property therein. That, prior thereto, defendant Healy, as such deputy inspector, affixed upon the head of a barrel of kerosene oil, which he was required to inspect, the following brand: "Approved, flash test, 106 degrees. Iowa, Dec. 24, 1891. M. P. Healy, Deputy Inspector." That thereafter plaintiff purchased of said oil for illuminating purposes, and on the evening of said 31st of December was so using it in said building, when the lamp containing the same exploded, by reason of which plaintiff was seriously burned about his face, neck, and hands, and said building and contents, except four horses, were totally consumed by fire, to the damage of the plaintiff $5,695. Plaintiff alleges that the sole cause of said explosion and fire was that said oil was not up to the standard provided for by law, namely, 105 degrees; "that said device and brand were in fact false and fraudulent, and did not represent the true test of the oil as by law provided, and that said oil, in fact, would not, and did not, test up to or over 105 degrees, standard Fahrenheit thermometer, closed test, as by law provided." Wherefore plaintiff says there has been a breach of the conditions of said bonds, and asks to recover his damages. Defendants answered, admitting that defendant Dunn was inspector, and defendant Healy deputy inspector, as alleged, and the execution of the bonds set out. They denied every other allegation of the petition, and upon these issues the case was tried to a jury, and a verdict and judgment for $2,843.59 rendered in favor of the plaintiff. Defendants appeal. Reversed.

Chas. A. Clark and John M. Redmond, for appellants. Smith & Clemans and Wheeler & Moffit, for appellee.

GIVEN, J. 1. There is no question but that the defendant Dunn was inspector of oils for the state of Iowa, that defendant Healy was one of his deputies, and that they, respectively, with the other defendants as their sureties, executed the official bonds set out. There is but little, if any, question but that the defendant Healy did inspect and brand a lot of barrels containing kerosene oil, on December 24, 1891, "Approved, flash test, 106 degrees"; and that the plaintiff thereafter purchased of said oil for illuminating purposes; and that, while so using it, either from explosion or other cause, the oil was thrown from the lighted lamp, in consequence of which plaintiff's person and property were burned. The dispute as to the facts is whether the oil was below the required test, 105 degrees, and, if so, whether the burning was caused thereby. The plaintiff rests his right to recover upon the provisions of section 2493 of McClain's Annotated Code, and also upon the condition in Healy's bond, without regard to said section. Said section is as follows: "If any inspector or deputy shall falsely brand or mark any barrel, cask or package, or be guilty of any fraud, deceit, misconduct or culpable negligence in the discharge of his official duties, or shall deal in, or have any pecuniary interest, directly or indirectly, in any oils or fluids used or sold for illuminating purposes, while holding such office he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not exceeding one hundred dollars, or imprisoned not exceeding thirty days, and be liable to the party injured for all damages resulting therefrom." The bond of defendant Dunn, after providing for an accounting, contains the further condition that "he shall faithfully and impartially, without fear, favor, fraud, or oppression, discharge all the duties now or hereafter required of his office by law." Section 2485, McClain's Ann. Code, provides that such bonds "shall be for the use of all persons aggrieved by the acts of said inspector, or his deputies." The bond of defendant Healy is conditioned that he "will faithfully perform the duties imposed upon him by chapter 185 of the laws of the 20th general assembly of the state of Iowa, and amendments thereto." The statute requires that oil testing less than 105 degrees must be rejected for illuminating purposes, and so marked, and that oil testing 105 degrees or over be branded "Approved," and provides that the manner of testing and branding shall be as prescribed in rules to be issued by the state board of health. Chapter 185, Acts 20th Gen. Assem., as amended by chapter 149, Acts 21st Gen. Assem. It was unquestionably the duty of defendant Healy to carefully and correctly inspect and brand this oil, with the appliances and in the manner prescribed by the board of health. He did use the kind of instruments prescribed, but the contention is that he falsely branded the barrel containing said oil, in that he branded it "Approved, flash test, 106 degrees," when, in fact, the flash test of said oil was less than 105 degrees. Considerable evidence was introduced upon this subject, and the issue was fairly submitted to the jury.

2. The defendants asked the court to instruct that, to recover, plaintiff must show that the inspection and branding of said oil "was knowingly false to Healy, the inspector, or that Healy was guilty of some known or intentional fraud in the inspection and branding of said oil." The court refused to give this instruction, and, after instructing as to other facts necessary to be proven, instructed as follows: "And if you find, from evidence, that, in addition to the foregoing facts, said oil, upon being tested by a closed test, emitted a combustible vapor at a temperature of 105 degrees or less, standard Fahrenheit thermometer, and that, upon being so used by plaintiff, said oil exploded, producing a fire which destroyed property of plaintiff, and caused injury to his person, then plaintiff will be entitled to recover." The effect of the instruction given is to hold the defendants liable for any damages resulting from the alleged error in branding

the oil, whether the same was knowingly or intentionally committed by Healy. As a different rule of liability applies to the acts of public officers, when acting in a judicial capacity, from that which applies when acting in a ministerial capacity, it is necessary that we first determine in which capacity Mr Healy acted in inspecting and branding this oil. It is not questioned but that a public officer acts judicially when in the performance of the duty he is required to exercise his judgment. "The duty is ministerial when the law exacting its discharge prescribes and defines the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion. Official action, the result of performing a certain specific duty arising from designated facts, is a ministerial act." Mechem, Pub. Off. § 658. Measured by this definition, which is fully sustained by the cases, we think it clear that, in inspecting and branding this oil, defendant Healy acted exclusively in a ministerial capacity. The law specifically prescribes and defines the mode in which the inspection and branding was to be performed In the inspection, specified appliances were to be used, and in a specified manner; and, so using them, the inspector was to ascertain, not as a matter of judgment, but as a fact, at what degree, as shown by the prescribed thermometer, the oil would emit a combustible vapor. If it emitted this vapor at a temperature less than 105 degrees, it was his duty to brand the oil as rejected; otherwise, to brand it as approved, with the degree of temperature at which the vapor was emitted. Though greater care may be required, there is no exercise of judgment in making such an inspection, any more than in taking the weight of an article upon a pair of scales. It was only necessary to use the instruments as directed, and to read the thermometer correctly, and then brand the result upon the cask. Defendant's counsel cite cases wherein it was held that officers acted judicially,—as, for instance, assessors in valuing property, highway officers as to repairs of the highways, aldermen upon letting contracts, officers approving bonds, inspectors of provisions, licensing pilots and teachers, and like cases. In every such instance the officer called upon to act was required to exercise his judgment.

3. Defendants contend that, if Mr. Healy did act ministerially in inspecting and branding the oil, no liability attaches for an honest and unintentional error or mistake therein; also, that said section 2493 must be construed as meaning if any inspector or deputy shall knowingly or intentionally falsely brand or mark, etc. Defendants cite Scotten v. Fegan, 62 Iowa, 236, 17 N. W. 491, and Browne v. Dolan, 68 Iowa, 645, 27 N. W. 795, wherein this court held that, to recover on a notary's bond, for a false certificate of acknowledgment, it must be alleged and shown that the notary knowingly misstated a material fact, and contend that the same rule applies to this case. That holding was under a statute that expressly required that the act be knowingly done to create a liability, while it will be observed that the word "knowingly" is not used in section 2493. A like case is cited, namely, Com. v. Haines, 97 Pa. St. 232, wherein it was held that the notary acted judicially, and that the rule as to an officer performing a ministerial duty did not apply. Jenkins v. Waldron, 11 Johns. 121, also cited, states the rule applicable to "officers called upon to exercise their deliberative judgment." The quotation from Throop, Pub. Off. § 243, is alike inapplicable to this case. The rule there stated is that a condition that the officer shall faithfully discharge the duties of his office "is not broken by an honest error of judgment, or an honest mistake or want of skill in the discharge of a duty, where the precise mode of discharging it is not pointed out by statute." We have seen that, in this case, the precise mode was pointed out, and that no exercise of judgment was required. In Mechem, Pub. Off. § 661, also cited, it is said: "It is well settled that the ministerial officer who performs in the prescribed manner, and with due care and diligence, an act imposed upon him by law, incurs no liability to any individual, however much the latter may be injured." The charge in this case is that Mr. Healy falsely branded this barrel of oil; and if that be true, then he did not perform the duty imposed upon him by law "in the prescribed manner, and with due care and diligence." A merely ministerial act cannot be said to be performed with due care and diligence that is erroneously performed; for, when the exercise of judgment is not required, due care and diligence will avoid error and mistake, and result in correct action. "It is no defense to such an officer, upon whom the law has imposed the positive duty of performance, that he was mistaken as to the nature or extent of his obligation, or that he acted in entire good faith, and with an honest intention to do his duty." Mechem, Pub. Off. § 670. In Bank v. Clements, 87 Iowa, 542, 54 N. W. 197, this court held a county recorder liable for not entering a chattel mortgage for record as required by law. The act required, like that required of defendant Healy, was merely ministerial. The extent to which these illuminating oils are used, and the danger that attends their use, especially when below the required standard, renders their inspection a matter of grave importance. Based upon experiments and experience, the law has fixed 105 degrees as the danger line, and condemned all oils below that standard. An inspector who will use the prescribed instruments in the prescribed manner cannot fail to reach a correct result, and this result it is his duty to correctly brand upon the barrel. When an error occurs, it must, of necessity, result

from some fault on the part of the inspector; but, if his liability is absolute, it is not required that the injured party allege and prove wherein the fault was. As there can be no error without a fault, the allegation and proof of the error is all that is required. Our conclusion is that, as the act required of Mr. Healy was exclusively ministerial, the liability for any error on its performance is absolute, under section 2493. That knowledge is essential to a criminal liability under that section is no reason why it should be required in a civil action. We think there was no error in instructing that defendant's liability was absolute.

4. Defendants asked this instruction, which was refused: "If the fire was caused by use of a defective and unsafe lamp, the defendants are not liable, even though the oil was not up to the statutory test." It is beyond question that defendants are not liable if the burning resulted from any other cause than that alleged. It will be seen that, in the fourth instruction, quoted above, the court did not require the jury to find any causal connection between the oil being below the legal standard and the occurrence of the fire. There was evidence bearing upon this issue, and plaintiff does not question that it was one proper to be submitted to the jury. His contention is that, taking the instructions together, they show that this issue was submitted; that, by saying to the jury, in the first, that plaintiff claimed "that the sole cause of said explosion was that the oil was not up to the standard required by law," and, in the third, that the burden of proof was upon the plaintiff to establish his claim, the court did submit this question to the jury. The question was one of importance, and, in view of the evidence, should have been plainly submitted, and not left to inference. If the jury might have understood, from the first and third paragraphs of the charge, that they were to pass upon that question, such an understanding would have been removed by the fourth, which rests the right to recover solely upon whether the oil was below the standard, and exploded, causing fire, without reference to the cause of the explosion. Explosions do not necessarily follow from the use of oil that is below 105 degrees; and when such oil is used, and an explosion occurs, it is not conclusive that the explosion was caused by the low grade of the oil, especially when there is evidence tending to show that it was from another cause. Formerly the standard in this state was 100 degrees. We think the court should have more specifically submitted to the jury the issue whether or not the fire was caused by the oil being below the standard required.

5. Plaintiffs were permitted to introduce in evidence, over defendant's objection, a certain unverified certificate, signed by Robert Brown, secretary, and of this the defendants complain. The facts concerning this certificate, as shown by the evidence, are these: In the manufacture of thermometers it is impossible to get the inner surface of the glass tube containing the mercury perfectly uniform. Slight irregularities unavoidably occur, that affect the rising and falling of the mercury. It also appears that thermometers lose their accuracy by lapse of time. The thermometers used by the oil inspectors of this state are of one manufacture, each having its separate number, by which it is identified. To insure the highest attainable accuracy, these instruments, before using, are sent to the observatory of Yale College, where each instrument is "calabrated"; that is, its inaccuracies, from whatever cause, are ascertained by a certain process, and the variations certified,—the certificate showing the number of the instrument to which it belongs. An inspector adds to or subtracts from the reading of his thermometer, according to the corrections shown in the certificate accompanying it. Plaintiff introduced evidence tending to show the result of a test of oil taken from the same barrel as that from which he had purchased, and with the same kind of instruments as those used by the state. The thermometer used in that test was in evidence, and the certificate in question is the one that accompanied it. Defendant's contention is that this certificate is "merely hearsay statement as to the true reading of this thermometer"; but not so, we think. Defendants did not object to the introduction of the thermometer, nor to the marks upon its face by which it was to be read; yet these marks were but the unsworn statements of the manufacturer. Under the evidence, this certificate is shown to have become a necessary part of the instrument, as much so as the scale upon its face, and indispensable to a proper use of the instrument. If the instrument was properly admitted, we think the certificate was; but, if not, there was no prejudice, for it was the means, the manner, and result of the test that were important, and these would not appear by looking at the instruments with which it was made.

6. Other assignments of error are discussed, but, as they will not arise on a retrial, we will not extend this opinion by considering them. For the error pointed out in the fourth paragraph of this opinion, the judgment of the district court is reversed.

In re PARKER'S ESTATE.

SMITH et al. v. PARKER et al.

(Supreme Court of Iowa. April 10, 1896.)

DESCENT AND DISTRIBUTION—STEPMOTHER'S INTEREST.

Under Code, § 2455, providing that the surviving parents of an intestate, leaving surviving him neither wife nor child, shall each take one-half his estate; and section 2456, providing that in such a case, if one parent be dead, the surviving parent shall take the entire estate; and

section 2457, providing that, if both parents be dead, their share shall be disposed of as if they had outlived the intestate, and died in possession and ownership of their shares,—a stepmother who survived her stepson was entitled, where he died unmarried after his father, to one-third of the share which would have gone to her husband, or one-sixth of the whole estate, though Code, §§ 2436, 2440, give a widow one-third of the real property "possessed" by her husband during marriage, and one-third of the personal property which he owned at his death.

Appeal from district court, Scott county; C. M. Waterman, Judge.

Application in probate for the allowance, in favor of the estate of the stepmother of the decedent, of a share in his estate. There was a hearing on the merits, which resulted in an order making the allowance asked, and directing its payment. From that order, the administrator of the estate and Josephine T. Brisbin and William F. Parker appeal. Affirmed.

Davison & Lane, for appellants. Bills & Hass, for appellees.

ROBINSON, J. James Monroe Parker, Jr., a resident of Scott county, died, intestate, unmarried, and without issue, in September, 1892, leaving property of considerable value. His mother died in the year 1869, leaving, as her only issue, James Monroe Parker, Jr., William F. Parker, and Josephine T. Brisbin. His father subsequently married, but in February, 1892, died, leaving a widow, Ella W. Parker, and, as his only issue, the children of his former wife we have named. The will of the father made provision for the widow, but she did not consent to take under it, and claimed her distributive share as given by law. In October, 1892, the widow died testate. By her will, her estate was given in trust to S. F. Smith and A. W. Vanderveer. The trustees named filed their petition in this case, claiming that Ella W. Parker was entitled to one-sixth of the property left by James Monroe Parker, Jr., and asking that the administrator of his estate be ordered to pay to them that amount. The administrator and William F. Parker, who was the only brother of James, Jr., and Josephine T. Brisbin, who was his only sister, deny that the stepmother was entitled to any share of his estate. The district court adjudged that the trustees were entitled to one-sixth of it, and ordered the administrator to pay to them that share. We are required to determine whether the stepmother was entitled to any part of the estate of her deceased stepson. It is conceded that, if she was, the amount of recovery was correctly fixed by the district court.

The provisions of law which are especially applicable in this case are found in the following sections of the Code:

"2455. If the intestate leave no issue, the one half of his estate shall go to his parents and the other half shall go to his wife; if he leaves no wife, the portion which would have gone to her shall go to his parents.

"2456. If one of his parents be dead, the portion which would have gone to such deceased parent shall go to the surviving parent, including the portion which would have belonged to the intestate's wife, had she been living.

"2457. If both the parents be dead, the portion which would have fallen to their share by the above rules shall be disposed of in the same manner as if they had outlived the intestate and died in possession and ownership of the portion thus falling to their share, and so on through ascending ancestors and their issue."

Under these provisions, the estate of the deceased son is to be disposed of in the same manner that it would have been had both his parents survived him, and died in possession of their respective shares. In other words, one-half of the estate will go to those who would have taken the mother's share had she died in possession, and one-half will go to those who, under the same circumstances, would have taken the share of the father. It follows that Josephine T. Brisbin and William F. Parker would have taken the mother's share, and at least two-thirds of that of the father. Had the latter died in possession of his share, one-third of it would have become the property of the widow; but it is said that, as he did not die in possession of that share, his widow cannot take any part of it, for the reason that the share given to her by statute was one-third in value of all the legal or equitable estates in real property possessed by her husband at any time during their marriage which had not been sold on execution or other judicial sale, and to which she had not relinquished her right, and one-third of the personal property which he owned at death. It is true, the share of the widow is so fixed by sections 2438 and 2440 of the Code; but the sections we have quoted give to the widow additional rights, and provide for the distribution of estates in the cases to which they apply. In this case they gave to the stepmother one-third of the share of the estate of her stepson which her husband would have been entitled to had he survived his son, or one-sixth of the entire estate of the latter. This conclusion is fully supported by the opinion in Moore v. Weaver, 53 Iowa, 11, 3 N. W. 741, which is identical in principle with this case. That opinion is assailed by the appellants, who insist that it is erroneous and contrary to the reasoning in Lash v. Lash, 37 Iowa, 88, 10 N. W. 302, if not to the law as therein announced. Nothing in the case last cited is in conflict with Moore v. Weaver, and that adopted a rule of property which is of such long standing that we should not be disposed to overrule it, even though we did not fully approve it. See McGahen v. Carr, 6 Iowa, 338; Tuttle v. Griffin, 64 Iowa, 458, 20 N. W. 757. We conclude that the order of the district court was fully authorized, and it is affirmed.

HENKLE v. HOLMES et al.

(Supreme Court of Iowa. April 11, 1896.)

APPEAL—CONSTRUCTION OF JUDGMENT—EQUITY—VACATING VOID JUDGMENT.

1. In an action to recover from H. the balance of the price of land, the rest of the price having been applied to discharge liens as provided by the parties, H. declined to pay, on the ground that defendant C. had a judgment lien against it, which was not included in the liens agreed to be paid. The petition which stated the facts under which C.'s judgment was obtained, and alleged that the same was void, was demurred to by C.; and, his demurrer being sustained, plaintiff excepted, and refused to plead further. Thereupon H. filed a supplemental answer, pleading the adjudication on C.'s demurrer; and, the cause being submitted on an agreed statement of facts, the court held C.'s judgment a lien on the land, and adjudged that the same be discharged with the balance of the purchase money; such decree, which was the only judgment entered, reciting that "the whole cause was submitted on a written agreement of facts signed by the attorneys of the parties." Plaintiff appealed "from the judgment and decree entered in the above-entitled cause." *Held*, that the judgment appealed from included the adjudication on the demurrer.

2. A party who sues in equity to set aside a judgment by default rendered by a justice of the peace without jurisdiction need not show that he is not indebted to the party who obtained such judgment.

Appeal from district court, Van Buren county; F. M. Fee, Judge.

The defendants, other than Holmes, are the Farmers' & Traders' Bank of Bonaparte and F. T. Cramer. The facts, for the purposes of this appeal, may be somewhat abbreviated. The plaintiff sold to the defendant Holmes 80 acres of land, for the agreed price of $3,000. Of the agreed price, all except $238.54 was to be applied to discharge liens on the land; and it has been so applied. This action is to recover the $238.54, which Holmes declines to pay to plaintiff, for reasons as follows: Plaintiff purchased the land of one Secord, and, while Secord owned the land, a judgment was entered in justice court in Van Buren county against Secord, in favor of defendant Cramer, for $78, amounting at this time to $102.89, a transcript of which judgment was filed in the district court of Van Buren county; so that, on its face, it was a lien on the land at the time of the sale to Holmes. This judgment was not included in the liens agreed to be paid from the purchase money. Holmes deposited the $238.54 in the defendant bank, to protect himself against said judgment, and to be applied to its cancellation, or to be paid to plaintiff whenever it should be canceled. Plaintiff makes the bank and Cramer parties, and states in his petition the facts as to obtaining the Cramer judgment against Secord in justice court, showing that the original notice was served in the state of Missouri, and by a publication in Van Buren county that was unauthorized, the action not being aided by attachment. The petition alleges the judgment to be void, asks that it be so adjudged, and that he have a judgment against Holmes and the bank for the balance of the purchase money. Holmes and the bank answered, reciting the facts, including the Cramer judgment. Cramer appeared, and filed a demurrer to plaintiff's petition, which the court sustained, and plaintiff excepted, and refused to plead further. Thereupon Holmes and the bank filed a supplement to their answer, in which they pleaded the adjudication on the demurrer filed by Cramer, in which the judgment is held to be valid. The parties then filed an agreed statement of facts, on which the cause was submitted; and the court entered a decree holding the Cramer judgment a lien on the land, and gave judgment for the application of the money deposited in the bank to its payment, and the plaintiff appealed. Reversed.

Mitchell & Sloan, for appellant. Wherry & Walker, for appellees.

GRANGER, J. 1. A question argued on the appeal by appellant is as to the correctness of the ruling on the demurrer, and appellees insist that there has been no appeal from that ruling, and reliance is placed on the language of the notice of appeal, in which it is said that "R. F. Henkle had appealed from the judgment and decree entered in the above-entitled cause." The only judgment entry in the case is that following the final submission of the cause after the agreement as to the facts. In that "chancery decree," as it is called, the court recites its action on the demurrer, at a previous date, that plaintiff elected to stand on his petition, and excepted to the ruling, and the court then says: "The whole cause was submitted to the court on a written agreement of facts, signed by the attorneys of the parties;" and it is in this decree that the court adjudged the judgment a lien on the land, and fixed the amount due thereon. There is no other judgment in the case. Looking to the stipulation of facts, it does not purport to be by particular parties, but by "the parties." This, in connection with the unusual expression in the decree, after reciting the proceedings in the demurrer, that the "whole cause" was submitted on the agreed facts, and with no other judgment, leads us to think the judgment appealed from includes the adjudication as to all the parties. The agreed statement of facts presents the same legal proposition as the demurrer.

2. The judgment entered by the justice was void. There was no jurisdiction. This is not to be questioned. This is a proceeding in equity to set it aside. That a proceeding in equity will lie to set aside a judgment, see Insurance Co. v. Waterhouse, 78 Iowa, 674, 43 N. W. 611; Arnold v. Hawley, 67 Iowa, 313, 25 N. W. 259; and Telegraph Co. v. Boylan, 86 Iowa, 90, 52 N. W. 1122. Appellees' thought is that, before there can be a decree canceling the judgment, it must appear that there is no defense to the claim on which the judgment was entered. Second,

the judgment debtor, on the face of the record, is not a party to this suit, and there is no presumption that the plaintiff has any knowledge on that subject. Some cases are relied on by appellees to support their claim. In Parsons v. Nutting, 45 Iowa, 404, it was held that a court of equity will not interfere to restrain the collection of a judgment rendered on a claim "admitted to be due," on the ground that it was rendered without jurisdiction. In Gerrish v. Hunt, 66 Iowa, 682, 24 N. W. 274, also relied on by appellees, it is expressly held that such relief will be granted where it does not appear that there is a defense. We do not find any case where the rule of appellees' contention is sustained. There are some of the early cases in which the facts are enough in doubt to make the conclusion questionable as an authority on this question. Later cases, however, seem to set the proposition at rest. In Arnold v. Hawley, supra, it is said: "But, as we have said, the judgment in this case is absolutely void; and our attention has not been called to any adjudged case which holds that, before a party can obtain relief in a court of equity against such a judgment, he must deny and show that he is not indebted to the party obtaining the judgment. The effect of such a rule would be that a void judgment is prima facie evidence of indebtedness. We are inclined to think that such cannot be the rule." Whatever doubt there may be as to the language being applicable to the question involved in this case, it is quoted with approval in Telegraph Co. v. Boylan, supra, and made of controlling importance. It may be regarded as the settled rule of this state. The judgment being void, it is no lien; and hence there was no breach of the covenants of warranty in the deed. This conclusion renders the consideration of the questions as to costs and attorney's fees unimportant, for there can be no judgment which they are to follow. On the face of the record as presented, there should be a judgment for plaintiff for the unpaid portion of the purchase price of the land as found by the district court. Reversed.

MARONEY et al. v. MARONEY et al.

(Supreme Court of Iowa. April 11, 1896.)

EXPRESS TRUST IN LAND — CREATION BY PAROL — PURCHASE BY ADMINISTRATOR FOR BENEFIT OF HEIRS — RESULTING TRUST.

1. Evidence of a verbal agreement by an administrator to buy at execution sale, on a judgment against his decedent, for the benefit of the heirs, and to convey to them when the rents equaled the price paid at the sale, is inadmissible to establish an express trust, since Code, § 1934, provides that trusts in realty, other than resulting trusts, must be executed in the same manner as deeds.

2. In an action by heirs to recover land, there was evidence that it had been fraudulently conveyed by decedent, and that his administrator had bought it in at execution sale, on a judgment against decedent, while it was in possession of the fraudulent grantee; that the decree subjecting the land to such judgment did not divest the title of such grantee; that the purchase was made under a verbal agreement with such grantee and one of the plaintiffs that the administrator should hold the land in trust for plaintiffs until the rents should equal the price paid, and should then convey it to plaintiffs. It was shown that no part of the price was taken from decedent's estate, that the value of the land was not materially greater than the price paid, and that the administrator had improved the property and treated it as his own. *Held*, that a resulting trust did not arise in favor of plaintiffs.

Appeal from district court, Buchanan county; M. J. Wade, Judge.

Action in equity to recover certain real estate, and for general equitable relief. Certain of the defendants claim to own the land, and ask that the title thereto be quieted in them. There was a hearing on the merits, and a decree for the defendants. The plaintiffs appeal. Affirmed.

Woodward & Cook and Remley & Ney, for appellants. Ransier & Everett, for appellees.

ROBINSON, J. The plaintiffs claim to be the owners of 240 acres of land in section 24, in township 88 N., of range 7 W. They are the children and heirs of James Maroney, who died in June, 1884. The defendants who claim the land are the widow and children of Matthew Maroney. He was the uncle of the plaintiffs, and died in May, 1892. The petition alleges that Matthew Maroney was the administrator of James; that the plaintiffs were the owners of 80 acres of land in section 10 in the township and range described; that Matthew had the charge of that land after the death of his brother, receiving the rents and profits therefrom; that in January, 1888, one Bridget Ryan, a sister of both James and Matthew, owned and held the lawful title to the land in section 24; that it had been adjudged liable to pay certain judgments against James Maroney, in favor of Mary Boyle, which amounted to about $3,000; that execution had been issued and levied upon the land, and it was about to be sold at sheriff's sale, but it was worth more than the claims against it, and Bridget Ryan desired to give it to the plaintiffs; that it was agreed, between her and Matthew Maroney and one Anthony McKinney, an uncle of the plaintiffs, that the land could go to sale, and that Matthew should bid it off in his own name, and hold it as trustee for the plaintiffs, and that he should rent it, and pay the taxes, and apply the income and rents on the indebtedness against it, until the indebtedness should be fully paid; that Matthew should have the rents from the land in section 10, which should also apply on the indebtedness, and he agreed that, when it should be fully paid, he would convey the land to the plaintiffs. The petition also alleges that, at the time of and before the sheriff's sale, Matthew also made an agreement to the same effect with Michael Maroney, who was then the only one of the plaintiffs who had at-

tained his majority; that, pursuant to the said agreements, Matthew, on the 1st day of February, 1888, bid off the land, and applied the rents in his hands on the indebtedness, and took possession of the land, and had the income from it for a year before he was entitled to a sheriff's deed; that, when the sheriff's deed was taken, he applied the rent from the 240-acre tract for the preceding year, and the rents from the 80-acre tract for the preceding five years, and procured the remainder of the amount required, about $2,000, by means of a mortgage on the land for which he received a deed. The petition further alleges that the rents and profits derived from the land have amounted to enough to pay all the indebtedness, but that Matthew Maroney failed to apply them upon it, and asks that the plaintiffs be decreed to be the owners of the land in section 24. The answer denies the averments of the petition which tend to show title to the land in controversy in the plaintiffs, denies that the plaintiffs are the owners of the tract in section 10, and avers that Matthew Maroney purchased the land in section 24 for himself, and that the income from the land has not been sufficient to pay the indebtedness on it and taxes and improvements made. The defendants ask that their title to the land be quieted as against the plaintiffs, and it was so decreed by the district court.

1. The material facts established by the evidence are substantially as follows: In June, 1875, the title to the land in controversy was vested in M. E. Maroney, the wife of James Maroney. In March, 1876, it was conveyed to Bridget Ryan, and at the same time the tract in section 10 was conveyed to William McKinney. Wallace Francis had a judgment, which was rendered against M. E. Maroney in October, 1874, and in November, 1876, Mary Boyle recovered judgment against James Maroney for the sum of $1,000 and costs. In November, 1882, the land in controversy was sold under execution issued on the Francis judgment, and in November of the next year a sheriff's deed therefor was issued to Francis. Mrs. Boyle had commenced an action in 1877 to subject the land to the payment of her judgment, but it was not determined by the trial court until December, 1886, and while it was pending in that court Francis was made a party to it. An appeal from the decree of the trial court was taken, and the cause was decided by this court in October, 1887. It was held that the land was subject to the Boyle judgment, and that the sale under the Francis judgment was ineffectual for the enforcement of any right Francis held against Mrs. Maroney, for the reason that she died before he issued his execution, and he had not taken the proper steps after her death to permit him to enforce his rights; and the action of the trial court which set aside the sale and deed was affirmed. Boyle v. Maroney, 73 Iowa, 70, 35 N. W. 145. The land was sold February 1, 1888, to Matthew Maroney, under an execution issued on the Boyle judgment, and on the 9th day of the next February a sheriff's deed therefor was issued to him. He had been appointed administrator of the estate of his brother James in October, 1885, but never made any report. The probate records show that the personal property of the estate amounted to $150. It is contended by the appellee that it was the duty of Matthew Maroney, as administrator, to take possession of the land which belonged to the estate of his deceased brother, because the heirs were not competent to take possession of it, and that he was authorized by Bridget Ryan to occupy that in controversy; that he did so under the agreement with her, and had the rents and profits therefrom for a year before he received the sheriff's deed; and that effect was thereby given to the agreement. It is further insisted that, as it was the duty of Matthew, as an administrator, to take charge of and protect the property, he could not acquire any personal interest adverse to those who were entitled to the estate; therefore, that the land in controversy should be decreed to belong to the plaintiffs. It was found in the case of Boyle v. Maroney, supra, that the conveyance of the land to Bridget Ryan was fraudulent as against the creditors of the grantors, and the land was subjected to the payment of the judgment of Mrs. Boyle; but that decree did not revest the title of the land in the Maroneys. It merely permitted the sale of so much of it as was required to satisfy the judgments which were held to be valid claims against it, and recognized the fact that conveyances of that character divested the grantors of all interest in the property conveyed. The title to the land remained in Bridget Ryan, as before, subject to the liens to which it was made liable by the decree; and the agreement with her did not impose any duties upon Matthew, as administrator, and his relation to the estate of his brother did not charge him with any obligations with respect to the land. The claim that a portion of the money paid for it by Matthew Maroney belonged to the estate of his deceased brother is not sustained by the evidence. He bid for the land the sum of $2,996.47, and to obtain the money assigned the sheriff's certificate of sale to Richard Campbell, who advanced the full amount required. When the sheriff's deed was given, the certificate was reassigned to Matthew, the deed was issued to him, and he gave a mortgage on the land for the amount he had borrowed. It is true that, before the sale, it was verbally agreed between him and Anthony McKinney that each of them would furnish $1,000 towards the purchase of the land, and that the remainder needed should be borrowed, and the land be bought in the name of Matthew for the benefit of the plaintiffs, and that he should hold the title thereto, and have the rents from that, and

from the 80-acre tract in section 10, until they should be sufficient to pay the purchase price, when the land should become the property of the plaintiffs. But McKinney did not furnish his share of the money, the agreement was not carried out, and the purchase made was not by virtue of it. Several witnesses testify to declarations of Matthew to the effect that he intended to save the land for the plaintiffs by purchasing it, and that he was holding it for them. The declarations so made, if competent, were not sufficiently clear and specific to establish a right in favor of the plaintiffs, but were in the nature of statements of an intention which was never carried into effect.

The alleged agreements upon which the appellants rely were designed to create a trust in relation to the land in controversy. They claim that the evidence shows an express trust and a resulting or constructive trust. Section 1934 of the Code provides that "declarations, or creations of trusts or powers, in relation to real estate, must be executed in the same manner as deeds of conveyance, but this does not apply to trusts resulting from the operation or construction of law." It is not competent, under this provision, to establish an express trust by parol. Dunn v. Zwilling (Iowa) 62 N. W. 746, and cases therein cited. The only evidence which tends to show an express trust was verbal, and hence incompetent; and such a trust is not established. Nor do we think a trust of any character is shown. It is clear, as already stated, that Matthew Maroney did not have any duty, as administrator, to perform in regard to the land, and that he did not use any money that belonged to the estate of his brother in purchasing it. It appears that he had received about $70 on account of that estate, and it is claimed that he received some money as rent for the tract in section 10; but the title to that land was conveyed to William McKinney, as heretofore shown, in the year 1876. He died about the year 1880, and the title to the land passed to his widow and a daughter. Anthony McKinney, the brother of William, testifies that he was authorized to take charge of that land, and that he continued in charge of it until the sale of the other land under the Boyle judgment; that, during that time, he had Matthew Maroney collect the rents for the plaintiffs; and that he was authorized to make that arrangement by the widow of his brother. What right to represent the daughter she had is not shown. Much evidence has been submitted to show the value of the land in controversy when sold, and the annual value of the use of that and the other tract, from which it appears that the value of the land in controversy, when sold, did not greatly exceed the amount, including nearly $300 required to satisfy tax liens, which Matthew Maroney paid for it. He improved both tracts at considerable cost, but did not treat them as the property of the plaintiffs. The rent derived from the tract in section 10 was less than $100 a year, and it is not shown that any of it was applied on the land in controversy. There is an absence of definite proof in regard to the source from which any of the money used on account of that land came, excepting the sum which was borrowed of Campbell. If any which belonged to the estate of James Maroney was appropriated to such use, the amount was small, and it has not been traced; but none of it was used in making the purchase, nor until after it was made.

Proof to establish a resulting trust must be clear and satisfactory, and show that the trust results at the instant the title to the property in relation to which a trust is claimed vests in the grantee. Jones v. Storms, 57 N. W. 892; Richardson v. Haney, 76 Iowa, 102, 40 N. W. 115; Koster v. Miller (Ill.) 37 N. E. 46; Van Buskirk v. Van Buskirk (Ill.) 35 N. E. 384: 1 Perry, Trusts, § 133. Therefore, a resulting trust has not been shown, and there is no ground for holding the purchase and subsequent conveyances to constitute a mortgage. It may be that Matthew Maroney was wrong in not filing reports and making an accounting as administrator, and in failing to perform his agreements; but, if so, he was liable therefor in a proper proceeding. No fraud in the transaction in question is shown, and no right to relief in this action under the averments of the petition is established. The decree of the district court appears to be right, and it is affirmed.

LEACH et al v. KUNDSON et al.

(Supreme Court of Iowa. April 11, 1896.)

RIGHT TO JURY TRIAL—ACTION FOR FORECLOSURE.

An answer in an action in equity to foreclose a mortgage, pleading payment and the statute of limitations as defenses, does not entitle defendant to a jury trial.

Appeal from district court, Winneshiek county; A. N. Hobson, Judge.

Suit in equity to foreclose a mortgage. Defense, statute of limitations and payment of the note secured by the mortgage. Trial to the court, judgment and decree for plaintiffs as prayed, and defendants appeal. Affirmed.

E. P. Johnson, for appellants. Geo. W. Adams, for appellees.

DEEMER, J. The action is predicated upon a note for the sum of $400, made and executed by the defendant Sampson Kundson to one A. P. Leach on the 1st day of May, 1876, due on or before the 1st day of May, 1880, and a mortgage made to secure the note upon certain real estate, signed by Sampson Kundson and Sidsel Kundson, his wife. The payee of the note is dead, and this suit was commenced by his administrators on the 10th day of May, 1892. To avoid the statute of limitations, the admin-

istrators alleged that the note was revived by an instrument in writing signed by the defendant Sampson Kundson, of which the following is a copy: "Decorah, Iowa, Apr. 26, 1890. For value received, and in consideration of an extension of time, this note is hereby extended, and I promise to pay said note as therein expressed and in accordance with this extension. Sampson Kundson. Witness: D. H. French." The defendant admits the execution of this instrument, but says that it referred to another note, for the sum of $204.60, which A. P. Leach then held against him, and that it had no reference to the note in suit. After defendants had filed their answer, pleading payment and the statute of limitations, they filed a motion asking that the cause be tried to a jury, upon the ground that such issues were tendered as entitled them to a jury trial. This motion was overruled, and error is assigned upon the ruling. We think the motion was properly overruled. The plaintiff properly commenced his suit in equity, and the defendants tendered no such issue as entitled them to a change of form.

2. Appellants insist that plaintiffs have failed to show that the note upon which the suit was brought has been revived. They contend that the preponderance of the evidence is with them in their claim that the instrument relied upon to constitute a waiver had reference to another note. This presents a question of fact, which is the only one of serious consequence in the case. A careful examination of the evidence as it appears in the transcript leads us to the conclusion that the district court correctly found that the written instrument relied upon was made with reference to the note in suit. When the note was presented at the trial, it had the instrument of revivor attached to it, and there is evidence that it was so attached at the time the defendant Kundson signed the revivor. Indeed, we have no doubt that it was attached to the note when the defendant signed it. True, the defendant and the members of his family testify that, in all the conversations had between the parties before the instrument was signed, reference was made to the $204.60 note; yet we think the preponderance of the evidence shows that the writing, dated April 26, 1890, was, at the time it was signed, attached to the $400 note, and that it was made with intent to renew it. All the presumptions are with the plaintiffs, and these are aided by the testimony of other disinterested witnesses and by the circumstances surrounding the case. There is no competent evidence of the payment of the note, and nothing is said in argument by appellants' counsel regarding this claim. The court below rendered judgment against the defendant Sampson Kundson for the sum of $1,314.75. A mistake was evidently made in computing the amount due, occasioned, no doubt, by the erroneous idea that the interest should be compounded and that interest should be computed at the rate of 10 per cent. This was clearly erroneous, and is so conceded by the appellee. The judgment should have been for $909.60, instead of the sum found due by the court. In all other respects the decree should be affirmed. As appellee, however, made no offer to remit in the lower court, he should pay the costs of this appeal. Modified and affirmed.

DES MOINES LOAN & TRUST CO. v. DES MOINES NAT. BANK.

(Supreme Court of Iowa. April 11, 1896.)

CORPORATIONS — TRANSFER OF STOCK — NOTICE OF TRANSFER — WAIVER OF LIEN.

1. In an action by a corporation to enforce a lien on shares of its capital stock under a by-law providing that no transfer of stock should be made when the registered holder is indebted to the company, defendant testified that he told officers of the plaintiff company that he was about to make a loan on certain stock, and asked information as to its value, and that no claim of lien was then made. Plaintiff's officers testified that they had no recollection of any such disclosure. The holder of the stock testified that he told an officer of plaintiff that he was about to pledge the stock, and that no lien was asserted at that time. The stock so transferred was presented to plaintiff as notice of the transfer, and an indorsement made on the stubs in the stock book stating that the stock was held by defendant as collateral. *Held*, that plaintiff was estopped from now claiming any lien under the by-law.

2. Where the holder of stock assigned the same to defendant as collateral, the corporation being notified thereof, but no actual transfer being made on the corporation books, and afterwards the stock was assigned to the corporation as security for the registered holders' indebtedness, the corporation having had actual notice of the transfer to defendant cannot maintain a superior claim to the stock, on the ground that no transfer was formally made on the books as required by a by-law providing that no transfer shall be valid unless so made.

Appeal from district court, Polk county; S. F. Balliett, Judge.

Action in equity to determine the right of the parties to 80 shares of the preferred capital stock of the plaintiff corporation, evidenced by certificates Nos. 31, 32, 33, and 34, for 20 shares each, issued to L. W. Goode. The district court found for the defendant, and entered judgment dismissing plaintiff's petition. Plaintiff appeals. Modified and affirmed.

Read & Read, for appellant. Dudley & Coffin, for appellee.

GIVEN, J. 1. Plaintiff claims a first lien upon the stock in dispute as security for certain indebtedness of L. W. Goode to it, by virtue of a provision in its by-laws, as follows: "No transfer of the stock, unless made upon the books of the company, shall be valid and binding upon the association, and no transfer of the stock shall be made, when the registered holder thereof is in-

debted to the company, until such indebtedness is fully paid." Defendant claims a lien upon said shares of stock by virtue of an assignment of said certificates to it by L. W. Goode, as security for a loan of $6,000 made to him. Defendant denies that plaintiff was ever entitled to the lien claimed, and alleges that, if it ever was, it waived the same, and is now estopped from asserting it as against the defendant. It is not questioned but that the plaintiff corporation had the right to provide for such a lien. On this subject see Bank v. Haney, 87 Iowa, 106, 54 N. W. 61, and Des Moines Nat. Bank v. Warren County Bank (Iowa) 66 N. W. 154. Defendant contends that plaintiff had no lien, for the reason that the by-law relied upon was not in force, and that plaintiff had no indebtedness against Mr. Goode to which such a lien would apply.

In the view we take of the case, we do not determine these questions. Let it be conceded that said by-law was in force, that there is an indebtedness, and that plaintiff did have a lien; we think it fairly appears that it waived that lien, and, under the facts, should be held to be now estopped from asserting it as against the defendant. There is no dispute but that, after Mr. Goode had applied to the defendant for a loan, with said stock as security, and before the loan was made, Mr. Wellslager, president of the defendant corporation, inquired of Mr. Wishard, president, and Mr. Cassady, treasurer, of the plaintiff corporation, as to the value of the capital stock of the plaintiff corporation. Defendant contends that, in these interviews, Mr. Wellslager disclosed to both Mr. Wishard and Mr. Cassady that his inquiry was with reference to the value of the preferred stock held by Mr. Goode as collateral security for a loan that Mr. Goode was negotiating, and that neither of said officers made any claim to a lien upon said stock. Plaintiff does not deny that Mr. Wellslager did inquire of said officers as to the value of its capital stock, but denies that he disclosed to them that it was with reference to stock held by L. W. Goode, or with a view to receiving the same as collateral security for a loan to Mr. Goode. Mr. Wellslager testified, concerning his interview with Mr. Wishard, as follows: "I called to see him to consult him in regard to the value of the stock which Goode had offered as collateral. The conversation brought out the fact that my inquiries were with reference to its value as collateral security for a loan that Mr. Goode was negotiating. Wishard made no claim of any lien upon the stock. Prior to this conversation, I had a conversation with Wishard with reference to the value of the common stock of the company, with reference to accepting a proposition from a holder of such stock to exchange for the bank's equity in some property. I made known to Mr. Wishard, at that time, why I sought the information. The holder of this common stock was not Mr. Goode." On cross-examination he stated: "I think I disclosed the fact to both Wishard and Cassady that my bank was going to make a loan. * * * I went to those gentlemen for the distinct purpose of inquiring the value of the stock, and not to ask their advice as to whether to make the loan or not. I did not, in fact, stop my inquiries when I got their statement as to the value. I wanted them to know for what purpose I was making the inquiry." He further stated: "Before making the loan to Goode, I called on Simon Cassady, treasurer of the plaintiff company, and disclosed to him that the bank was negotiating a loan to Goode and taking stock as collateral. Cassady made no claim of lien upon the stock in favor of the company."

It is clear that Mr. Wellslager intended to be understood as testifying positively that he disclosed to both Wishard and Cassady that the purpose of his inquiry was to determine whether to accept the stock from Goode as security for the loan. Mr. Wishard was examined on behalf of the plaintiff, prior to the examination of Mr. Wellslager. On cross-examination, Mr. Wishard testified in relation to the interview with Mr. Wellslager as to the value of the stock of the plaintiff company. An examination of his evidence shows quite satisfactorily that it was the first interview that Mr. Wishard had in mind. He states that Mr. Wellslager said "he was thinking of exchanging some real estate or property which they had." He says: "I don't recollect the conversation, so as to say whether Mr. Wellslager made specific inquiry as to the value of preferred stock and of common stock." He further states: "I never had any conversation with him about Goode's stock to the best of my recollection. He did not say to me, in that conversation, that Goode had applied to the bank for a loan, and had tendered this stock, or was about to tender this stock, as security. My recollection is that the conversation was more with reference to preferred stock than to common stock. * * * My recollection is that he said, 'We have some real estate here, and would like to convert it into something else; and I have an opportunity of putting some of it into your stock, and I want to get some idea of your business.' I don't think Wellslager ever had any conversation with me about Goode's stock. I do not think I mentioned anything about Goode's indebtedness in any conversation I had with Wellslager, or with reference to any lien had by the company upon it. I am now speaking more from what I suppose the conversation most likely was, than from any recollection of the words used." It is apparent that Mr. Wellslager had two interviews with Mr. Wishard,—the first concerning the value of the common stock, and with the view of exchanging real estate for some of it with some person other than Goode. The second was evidently with reference to

the value of the preferred stock, and with the view of determining whether to accept it as collateral security. Mr. Wishard, upon his cross-examination, seems to have either forgotten the second interview, or to have confused the two.

After Mr. Wellslager's examination, Mr. Wishard was recalled, and testified that Mr. Wellslager did not inform him that he was making inquiries with a view to making a loan to Goode on his preferred stock. He says: "He had one or two interviews with me relative to the value of the stock of the plaintiff company, and in one of the interviews he said he had been offered some stock for some real estate. To the best of my recollection, he never informed me that he was thinking of loaning money to Goode for any stock, either preferred or otherwise." Mr. Cassady testifies that Mr. Wellslager inquired of him as to the value of the stock, and says: "So far as I recollect, the extent of his inquiries was as to the value of the stock. I have no recollection of his stating what he proposed doing, or that he proposed making a loan." On cross-examination, he says: "I do not recall. He may have said so." The subject-matter of his second interview with Mr. Wellslager seems to have escaped the recollection of Mr. Wishard, and when it is remembered that he had no future interest in the subject of the inquiry, and that it was one such as were being frequently made, it is not surprising that the details of that interview should have escaped his recollection; and the same is true as to Mr. Cassady, who states that he had several inquiries of different people concerning stock owned by Goode. Mr. Wellslager had a future interest in the subject of that interview, such as would tend to fix it upon his mind. It was evidently upon the confidence that he had in the value of the stock that he made the loan to Goode, and that confidence rested upon the information received from Wishard and Cassady. While it is true that Wellslager need not have revealed the fact that his inquiry was made with a view to the loan to Goode, there was the same reason for his disclosing that purpose as there was for his informing Wishard, in the first interview, that he contemplated an exchange of real estate for stock. While it must be admitted that the evidence is conflicting upon this question, we think its weight is in favor of the conclusion that Mr. Wellslager disclosed to both Wishard and Cassady that his inquiry was being made with a view to the loan to Goode, and that neither asserted any claim in favor of the plaintiff against the stock. We are somewhat confirmed in this conclusion by the testimony of Mr. Goode, wherein he says: "I talked with Jones [secretary of plaintiff] in connection with it. I went to Jones before I pledged it, and asked him, in case Wellslager asked about it, to give it a favorable send-off. I am also of the impression that I saw Wishard, but I would not be so certain of that as I am that I saw Jones." Mr. Goode further states: "I never heard of any lien asserted, except as it came out in connection with the request for the transfer of stock to the company on the 6th day of July, 1893." It is our conclusion that, under the facts, the plaintiff should be held to be now estopped from asserting a lien upon the stock in question under its by-laws.

2. On the 14th day of May, 1892, the defendant loaned $3,000 to Mr. Goode, and on May 21st following loaned to him another $3,000; taking his promissory notes therefor, that are due and unpaid. At the same time Mr. Goode assigned to the defendant said stock certificates as collateral security for the payment of said indebtedness. The defendant did not then have any notice, constructive or otherwise, of said by-law, nor any knowledge that the plaintiff claimed a lien upon said shares of stock. On August 6, 1892, Mr. Newell, cashier of the defendant bank, presented said certificates to the plaintiff's bookkeeper, who was then the only person in charge of plaintiff's office. Mr. Newell says: "They were presented, not to have them transferred to the defendant bank, but to give notice, and have proper notice indorsed on the books of the company, that they were held as security. I did not at any time ask to have them transferred to the company. Upon the best information that I can get, to have notice was all that was deemed necessary. The person to whom I presented them did not say anything about a lien of the company upon the stock. I did not ask for anything of that kind." The bookkeeper at that time made an indorsement upon the stubs of said certificates as follows: "8-6-'92. Notice received that the Des Moines National Bank holds this certificate as collateral." On the 8th day of July, 1893, Mr. Goode executed to the plaintiff a writing as follows: "I hereby assign, transfer, set over, and sell to the Des Moines Loan & Trust Company, Des Moines, Iowa, all of my stock in said company as collateral security for the payment of my indebtedness to said company, this 8th day of July, 1893." The transfer of this stock to the defendant was not entered upon the books of the plaintiff, as required by section 1078 of the Code, nor as provided in said by-law. The plaintiff contends that it "merely vested in defendant such rights, and such rights only, as Goode possessed, to have the transfer made, which, of course, was subordinate to the lien reserved by the plaintiff." Our conclusion is that the plaintiff had not reserved any lien, and that, as it took the assignment of July 8, 1893, with knowledge of the prior assignment to the defendant, it took subject thereto. Jennings v. Bank, 79 Cal. 323, 21 Pac. 852, is cited, wherein, under a statute like our section 1078, it is said: "As against the bank, therefore, the assignee took a mere equity, which must yield to the superior equity of the defendant." Again, we say that, at the time the defendant receiv-

ed its assignment, the plaintiff had no superior equity; it had no lien. In Ft. Madison Lumber Co. v. Batavian Bank, 71 Iowa, 270, 32 N. W. 336, also cited, it is held that the transfer of corporation stock is not valid, as against attaching creditors of the assignor without notice, unless the transfer is entered upon the books of the company. It is there said: "The transfer is valid if the parties before the court were the parties to the transfer, and otherwise not. This, at least, is the rule of the statute, and must be followed, unless some equitable consideration controls. If the attaching creditors of the transferror had knowledge of the transfer, it may be that a court of equity would protect the transferee's rights. It has frequently been so held, but that question is not before us."

We think that, as the plaintiff took the assignment of July 8, 1893, with knowledge of the prior assignment to the defendant, and without asserting any claim or lien upon the stock, or making any objection to the transfer to the defendant, the equities are with the defendant, and the plaintiff should not be held to have a superior claim, under said assignment of July 8th, merely because the transfer to defendant had not been entered upon the plaintiff's books. As the assignment to defendant was conditioned for the payment of Goode's indebtedness to it, the subsequent assignment to the plaintiff carried whatever interest Goode had in the stock. If the stock was more than sufficient to satisfy the debt of Goode to the defendant, the plaintiff is entitled to that surplus under the assignment to it; that assignment being valid, as between the parties, though the transfer was not entered upon the books. The decree of the district court will be so modified as to provide for the sale of the stock and the application of the proceeds to the payment of the indebtedness of Goode to the defendant, and of any surplus that may remain to the payment of his indebtedness to the plaintiff. Modified and affirmed.

LESSELL v. GOODMAN et ux.

(Supreme Court of Iowa. April 11, 1896.)

HOMESTEAD — POSSESSION UNDER CONTRACT OF PURCHASE—CONVEYANCE BY HUSBAND ALONE.

1. The right of homestead may attach to land in possession of a vendee, though the vendor retains the legal title till full payment of the purchase price.

2. A husband entered into possession of land and occupied the same with his family as a homestead, under a contract by which title was to be conveyed on payment of the full price by a specified date. Subsequently the vendor declared the contract forfeited, and the husband undertook in writing to acknowledge such forfeiture as valid. *Held*, that such acknowledgment was void, under Code, § 1990, forbidding the conveyance of a homestead except by the joint act of husband and wife.

Appeal from district court, Dallas county; A. W. Wilkinson, Judge.

Action to quiet title. Decree for defendant Mary E. Goodman, and plaintiff appeals. Affirmed.

This action was brought by the plaintiff to quiet title to and recover possession of a lot in the city of Perry. On July 15, 1892, the defendant Joseph Goodman entered into a written contract with the plaintiff, whereby the latter agreed to sell to the former a lot for the consideration of $175, $10 of which was paid down, and the balance was to be paid as follows: $85 July 15, 1893, and $80 July 15, 1894, with 7 per cent. interest. By the terms of the contract, time was made the essence of it, and it was provided that, if any default was made in any of the payments or agreements therein mentioned, the entire contract should be void, and all rights of said Goodman thereunder should at once cease and determine. Goodman and his family took possession of the lot, erected a house thereon, and used and occupied the same as their homestead. A few weeks prior to the maturity of the second payment, Joseph Goodman abandoned his wife, and continued to live separate and apart from her. She, with her daughter, continuously occupied the place as a home up to the time of trial of this cause below. Appellant brings this action to quiet his title, and to recover possession, on the ground that both of the appellees had forfeited their rights to said lot because of the failure to make the payment due July 15, 1894. The defendant Mary E. Goodman claims that plaintiff waived said forfeiture, and that she tendered him the full amount due on said contract, which he refused to receive. She pleads her readiness still to perform, and prays that, on payment of the balance due, plaintiff be required to execute to her a conveyance of said real estate. The court below entered a decree in conformity to the prayer, from which plaintiff appeals.

Shortley & Harpel, for appellant. H. A. Hoyt and White & Clark, for appellee.

KINNE, J. 1. It is contended that Mrs. Goodman has no right of homestead in this lot. In Pelan v. De Bevard, 13 Iowa, 55, it was held that a homestead might exist in a lease-held estate. The court said that the exemption provided by statute "is not limited to any particular estate, either as to its duration or extent." And in Stinson v. Richardson, 44 Iowa, 373, it was held that the fact that a vendor retained the legal title as security for unpaid purchase money would not operate to defeat the vendee's claim of homestead in the property. The interest acquired by the husband in this case was such that the homestead right attached. Such being the case, no conveyance of it by the husband alone would be of any validity. Code, § 1990. An assignment of a lease, by the husband alone, of premises occupied as a homestead, is not valid. Pelan v. De Bevard, 13 Iowa, 53. In the case at bar, the

husband, after plaintiff had declared the contract forfeited, in writing, undertook to acknowledge said forfeiture as valid and binding. It is clear that, under the statute, prohibiting the incumbrance or conveyance of the homestead except by the joint act, in writing, of both husband and wife, this attempted acknowledgment of the claimed forfeiture was void.

2. There is some conflict in the evidence as to whether or not the plaintiff waived his right to insist upon a forfeiture under his contract. We think, however, he, by his acts and statements, fairly led the wife to believe that he would not insist upon the strict terms of the contract as to payments. Therefore, he ought not now to be permitted to insist that, by reason of the payments not being made at the time agreed upon, all rights of the parties thereunder were forfeited. We conclude that plaintiff waived the right of forfeiture provided for in the contract. The tender was sufficient, and the decree below is affirmed.

FURENES et al. v. SERVERTSON et al.

(Supreme Court of Iowa. April 11, 1896.)

APPEAL—INSUFFICIENCY OF ABSTRACT—PRACTICE IN THE SUPREME COURT.

Where, on appeal in equity, appellant's abstract, though purporting to be an agreed abstract, and signed by the attorneys for all the parties, does not state that it contains all the evidence, and appellee, in an additional abstract, supplies further evidence, but denies that both abstracts together contain all the evidence, to which no objection is made by appellant, the court cannot consider the case on its merits, and the decree below will be affirmed.

Appeal from district court, Story county; S. M. Weaver, Judge.

Action in equity for the partition of certain real estate. Decree for plaintiffs, and defendants appeal. Affirmed.

M. P. Webb, for appellants. E. H. Addison, D. J. Vinge, and W. G. Harvison, for appellees.

KINNE, J. 1. The condition of this record is such that it is unnecessary to consume space by a recital of the matters in controversy in this action. The abstract filed by appellants purports to be an agreed abstract of the record, signed by the attorneys for all of the parties. This is all there is in the paper to indicate that it purports to contain the entire record of the proceedings in the case, and it would, in the absence of a denial by appellees, be sufficient. Appellees, however, file an additional abstract, expressly denying that the abstract filed by appellants was agreed upon by the parties or their attorneys, and denying that the same "contains a full, fair, or complete abstract of the record in this case." They then say that, for the purpose of presenting the true record, they file the additional abstract. At the end of this additional abstract is the following statement: "The foregoing abstract contains material additions and corrected portions of the record in this cause, but, taken together with appellant's abstract, does not contain a full, complete, and correct abstract of the pleadings and record in this cause, including all the rulings of the court therein, and exceptions taken thereto." Appellant files no denial of appellees' abstract or reaffirmance of the correctness of his own. From the above it appears that appellants' abstract is denied, and it is averred that the two abstracts do not present the entire case. Under such circumstances we cannot consider the case upon its merits. Being an equity cause, triable de novo in this court, it must affirmatively appear that we have a correct abstract of the entire cause. Under such circumstances the decree below must be affirmed. See Kunz v. Young (decided at this term) 66 N. W. 879, and cases cited therein. Affirmed.

In re FRANKE'S ESTATE.

FRANKE v. WIEGAND et al.

(Supreme Court of Iowa. April 11, 1896.)

WILL—CONSENT OF WIDOW—EFFECT ON RIGHT OF DOWER—OCCUPANCY OF HOMESTEAD.

1. Where a widow received from the executor of the will of her deceased husband all the personal property and money remaining after settlement of the estate, in accordance with the terms of the will, she will be held to have consented to take under the will, and in the absence of proof it will be presumed that such consent was properly entered on the records of the court, as provided by Code, § 2452.

2. The acceptance by a widow of the provisions in the will of her deceased husband does not bar her right of dower unless it is so expressed in the will, or unless the allowance of dower will defeat some of its provisions.

3. Where the will of a testator, to which his widow has consented, gives her the use of the homestead during her life, her occupancy of it thereafter will be held to be under such provision, and will not constitute an election by her to take the homestead in lieu of her distributive share of the estate.

Appeal from district court, Dubuque county; J. L. Husted, Judge.

Proceeding in probate by the widow of the decedent for the allotment of her share in the estate. An answer to her application was filed, to which she demurred. The demurrer was overruled. She elected to stand upon it. Judgment dismissing her application at her cost was rendered, and she appeals. Reversed.

Longueville & McCarthy, for appellant. Lyon & Lenehan, for appellees.

ROBINSON, J. The facts admitted by the pleadings are substantially as follows: The applicant, Anna M. Franke, is the widow of Frederick H. Franke, who died testate in January, 1888. It appears that his will was admitted to probate, that administration of the estate was granted, and that it is closed.

The estate included a homestead and other real estate in the city of Dubuque, and personal property. The will contained the following provisions: "(2) I give and bequeath to my beloved wife, Anna Maria Franke, all my real estate, personal property, moneys, and credits, to be used by her for her sustenance, comfort, and enjoyment during her natural life, as her exclusive property. (3) After the death of my wife I do give and bequeath to my daughter Rosa Franke, the homestead [describing it]. (4) After the death of my wife I give and bequeath to my daughter Barbara Lataur, née Franke, part of lot 151 [describing it]. (5) After the death of my wife I give and bequeath to my stepson Frank Horch the sum of two hundred dollars. (6) After the death of my wife I give and bequeath to my stepdaughter Marie Ruh, née Horch, two hundred dollars. (7) After the death of my wife I do will and desire that real estate, personal property, moneys, and credits remaining after just debts and funeral expenses of my wife, Anna Maria, also the above legacies and bequests to my daughters Rosa Franke and Barbara Lataur, my stepson Frank Horch, and stepdaughter Marie Ruh, née Horch, have been duly paid and executed, be equally divided among the following named children and stepchildren of mine: Katherine Wiegand, née Franke, Barbara Lataur, née Franke, Margaretha Leike, née Franke, Rosa Franke, Peter Horch. (8) I hereby appoint Ernest A. Freugel sole executor of this, my last will and testament, * * * and give him full power to sell and convey all my real or personal estate at public or private sale, at such time or times, and on such terms, and in such manner, as he believes it is to the interest of the heirs to do so." The widow has occupied the homestead as such since the death of her husband. In June, 1889, after the payment of the debts of the estate, the personal property which remained and its proceeds, amounting to $1,784.05, were delivered to the widow, and she has had and enjoyed the use thereof since that time. The application in this case was filed in January, 1895. It describes the homestead; also two lots and parts of another; and avers that the applicant has a life estate in all the property described, in addition to her interest therein as a widow. The appointment of referees to set off her share is asked. The defendants are beneficiaries named in the will.

The grounds of the demurrer are: "(1) That it does not appear from said answer that petitioner has accepted, as widow, the provisions made for her benefit by the will of her deceased husband. (2) It appears from the statements of the answer and the will that the provisions made for her benefit were not in lieu of her share as widow, and that she is entitled to what the will gives her, and also her share as widow."

1. Section 2452 of the Code provides that "the widow's share cannot be affected by any will of her husband, unless she consents thereto within six months after notice to her of the provisions of the will by the other parties interested in the estate, which consent shall be entered on the proper records of the circuit (now district) court." No formal consent to take under the provisions of the will is shown, but that is not necessary to hold the widow to the provisions of the will. Her election may be shown in other ways. Baldozier v. Haynes, 57 Iowa, 683, 11 N. W. 651; Pellizzarro v. Reppert, 83 Iowa, 499, 50 N. W. 19. In Craig v. Conover, 80 Iowa, 358, 45 N. W. 892, it is said that the rule is that "no particular form of words is necessary to denote an intention to take under the will, but, if the record discloses an act or declaration of the widow plainly indicating a purpose to take under the will, she will be held to have so elected." In that case statements contained in the report of the executors of the will and a receipt signed by the widow for all the personal property bequeathed to her by the will and consenting to the closing of the estate were given the effect of a consent under the statute. See, also, Stoddart v. Cutcompt, 41 Iowa, 329, and Ashlock v. Ashlock, 52 Iowa, 322, 1 N. W. 594, and 3 N. W. 131. The plaintiff was entitled, by virtue of the statute, to but one-third of the personal property of the estate, but she received all of it under the provisions of the will. She could not elect to accept the provisions favorable to her and reject the remainder, but was required to consent to the will as a whole or reject it altogether. What she did must be given the effect of a consent to take under the will. The facts in regard to the delivery of the property and the payment of the money to her should have been shown by the report of the administrator, and, with the receipt she gave, made of record. This, or something equivalent, was necessary to a settlement of the estate, and we must presume that the court, having jurisdiction of the matter, discharged its duty. The delivery to the widow of all the personal property and money belonging to the estate could have been approved only on condition that she had consented to accept the will, and that her consent had been made of record within the time and in the manner required by law. We cannot presume that the court acted erroneously in approving what was done by the executor. It follows that the facts admitted by the demurrer are sufficient to show the statutory consent by the plaintiff in the will.

2. It is insisted that the plaintiff is entitled to accept all the benefits which the will gives her, and, in addition, the interest in real estate which the statute would have given had there been no will. It is the well-settled rule in this state that a devise by a testator to his widow when accepted by her does not defeat her right to dower, unless the intent of

the testator that the devise shall be in lieu of dower is shown by a declaration in the will to that effect, or is clearly deducible from its terms; as, where it appears that a claim for dower would be incompatible with the will, and that to allow it would defeat some provision of the will. Bare v. Bare (Iowa) 59 N. W. 20, and cases cited therein; Herr v. Herr (Iowa) 58 N. W. 898; Hunter v. Hunter (Iowa) 64 N. W. 656; McGuire v. Brown, 41 Iowa, 655; Parker v. Hayden, 84 Iowa, 495, 51 N. W. 248; Baldwin v. Hill (decided at present term) 66 N. W. 889. Therefore the consent of the plaintiff to the will in question did not have the effect to defeat her right to the relief she asks in this case, unless the will shows that to allow it would be contrary to the intent of the testator. The will does not state that the provisions for the benefit of the wife are in lieu of dower, and, if it was intended by the testator that they should be, that intent must be gathered from the will as an entirety. That gave to the plaintiff "during her natural life" all of the real estate of the testator, "as her exclusive property," and provided that the homestead and part of one of the other lots should go to two of his daughters, after the death of his wife. No devise excepting to his wife for life was made of the remainder of his real estate.

It is said that the third and fourth paragraphs of the will are incompatible with the right of the plaintiff to dower, because, if she were entitled to the dower, she might have it so set off as to include the homestead, and to have that done; and to have a portion of the real estate devised by paragraph 4 set apart to her under her dower right, would defeat the manifest intention of the testator to have all of the property specified in the two paragraphs go to persons therein named. The case of Snyder v. Miller, 67 Iowa, 261, 25 N. W. 240, is relied upon as supporting that claim. The will construed in that case devised to the wife in fee simple certain real estate, and gave to her a life estate in a small tract of land. After making certain bequests, it gave without condition all the remainder of the property of the testator, both real and personal, to persons named. This court held that the language used showed that it was the intent of the testator to give to the wife only the property which was specifically set apart for her, and to dispose of all the remainder—not merely two-thirds of it—to other devisees. The language of the will construed in that case was so unlike that of the will under consideration that they are not governed by the same rules, and the case does not support the claim that the share given to the plaintiff must be held to be in lieu of the dower. It is well settled in this state that a devise to the wife for her life of all the real estate of her husband's estate is not incompatible with her right of dower. The will considered in Metteer v. Wiley, 34 Iowa, 215, contained a provision as follows: "I give and bequeath to my wife all my property, real and personal, except what is hereinbefore devised, to be held by her during her natural life, for her sole use and benefit. But at her death I direct that the same shall be divided among all my children or their heirs." It was held that the acceptance of the will by the widow did not bar her dower. The rule of that case was approved and followed in Watrous v. Winn, 37 Iowa, 72; McGuire v. Brown, 41 Iowa, 655; Potter v. Worley, 57 Iowa, 66, 7 N. W. 685, and 10 N. W. 288; Daugherty v. Daugherty, 69 Iowa, 677, 29 N. W. 778; Richards v. Richards (Iowa) 58 N. W. 926; Bare v. Bare (Iowa) 59 N. W. 20. In the cases of Richards v. Richards and Daugherty v. Daugherty there were specific devises which might have been affected by allowing the widow a distributive share in the real estate. The rule which all of these cases support is decisive of this case, and sustains the application of the plaintiff for a share of the real estate in addition to the provisions made for her by the will. In re Will of Foster, 76 Iowa, 364, 33 N. W. 135, and 41 N. W. 43, relates to personal property, and is not in conflict with the conclusions we reach.

3. When this proceeding was commenced the plaintiff had occupied the homestead continuously since the death of her husband, a period of about seven years. It is said that her occupation of the homestead was an election to take it in lieu of her distributive share in the real estate left by her husband. It is at least doubtful if any issue in regard to her occupation of the homestead is presented by the pleadings, but, as the effect of that occupation is discussed by both parties without objection, we may say that, since she consented to the will, and that gave to her the right to possess and occupy all the realty of the estate, including the homestead, during her lifetime, it will be presumed, in the absence of a showing to the contrary, that her occupation was under the will, and that it was not an election to take the homestead in lieu of her distributive share of the real estate. Hunter v. Hunter (Iowa) 64 N. W. 658. For the reasons indicated, the judgment of the district court is reversed.

CAREY v. HOME INS. CO. OF NEW YORK.

(Supreme Court of Iowa. April 10, 1896.)

INSURANCE—OWNERSHIP OF PROPERTY—MISSTATEMENT IN POLICY — KNOWLEDGE OF AGENT — ESTOPPEL—STATEMENTS IN PROOF OF LOSS.

1. Where, on the expiration of a policy of insurance on a homestead, payable to the husband, a new policy in renewal was written by the agent of the company, on the oral application of the wife, in which the ownership of the property was stated to be in the husband, as in the former policy, when in fact it was then in the wife, the fact that the wife stated, when making the application, that the property had been conveyed to her, may be shown, to charge the company with notice of the fact; and, having issued the policy with such knowledge, the husband may maintain an action to recover

thereon, he having an insurable interest in the property.

2. It was not necessary, in such action, that plaintiff should ask a reformation of the policy so as to show the true ownership of the property; the defendant, having written the policy with knowledge of the fact, being estopped to defend against it on the ground of the misstatement therein.

3. The fact that, in answering a question upon a printed blank for making proof of loss, plaintiff stated that "the building was owned in fee simple, and was the homestead" of himself and wife, did not constitute an "attempted fraud by false swearing," avoiding the policy.

Appeal from district court, Muscatine county; W. F. Brannen, Judge.

Plaintiff brought this action at law to recover $800 and interest upon a policy of insurance against loss by fire, issued to him by the defendant. He alleged a loss, and that notice and proofs thereof were duly made; also, that the provision in the policy that "loss, if any, payable to Scottish-American Mortgage Co., Limited, of Scotland, mortgage or assigns," was waived by said mortgagee, both orally and in writing, and set out the writing. Said mortgage company was made a defendant, and answered, setting up the mortgage from plaintiff and wife, the provisions in the policy quoted above, and asking that whatever sum was found due to the plaintiff be brought into court, and applied on said mortgage. The defendant answered, denying a waiver by said mortgage company, and alleging violations of certain provisions of the policy as to ownership and sale of the insured property, and that plaintiff attempted to commit a fraud on the defendant by claiming the full amount of the loss, knowing that he was not the owner of the lost property. Defendant alleged that, by reason of these violations and this attempted fraud, said policy became void. Wherefore it prays to be dismissed, with costs. Plaintiff replied, denying each and every allegation in defendant's answer, and the case went to trial to a jury. After the evidence for the plaintiff had been introduced, defendant filed an amendment to its answer, alleging that the house destroyed was not situated on the land described in the policy. Thereupon plaintiff filed an amendment to his petition, alleging that the intention was to insure his homestead, situated on section 10 mentioned in the policy; that he does not know upon which part of said section it was situated; that, if the part named in the policy is not correct, the error was by the mutual mistake of plaintiff and defendant's agents. He asked that the case be transferred to equity, and, if a mistake is found to exist in the policy, that it be reformed to conform to the true intention of the parties. The case was transferred to equity, and, the defendant failing to answer this last amendment, default was entered against it, which default the court afterwards, on the day the case was called for trial as per previous assignment, refused to set aside. The court also refused to set aside the assignment for trial, on defendant's motion, and thereupon the case was tried to the court. Before the trial commenced, it was agreed in open court that the case should be submitted on the evidence taken before the jury, and such other evidence as to the alleged mistake in the policy, in the description of the land, as the parties might wish to introduce. Decree was entered reforming and correcting the policy "so as to read 'on the south half of section ten,' instead of 'on the north half' of said section, as written in the policy of insurance," and rendering judgment in favor of the plaintiff for $894.50, with interest, and for costs. Defendant, Home Insurance Company, of New York, appeals.

McVey & Cheshire, for appellant. Jayne & Hoffman, for appellee.

GIVEN, J. 1. Appellee contends that appellant's abstract fails to show that the evidence was properly preserved, and that all the evidence is before this court. We will not consume space to discuss this contention, further than to say that while it is true that appellant's abstract is somewhat confused, and difficult to understand, we think it sufficiently appears therefrom that the evidence before us was duly certified, and is all the evidence offered or introduced on the trial. Appellee filed an additional abstract, which appellant denies, and moves to tax the costs of the transcript to appellee. Since it is largely by the aid of the transcript that we are able to understand appellant's abstract, this motion is overruled.

2. There is no question but that the dwelling house intended to be insured, and that was destroyed by fire, was situated on the south half of the section 10 named, instead of the north half, as written in the policy. Plaintiff asks that the policy be reformed, and made to conform to the intention of the parties. "Before a written instrument can be reformed on the ground that there was a mistake in the drafting of it, the evidence that there was a mistake should be clear, satisfactory, and free from reasonable doubt." Wachendorf v. Lancaster, 61 Iowa, 509, 14 N. W. 316, 16 N. W. 533. We will not set out the evidence on this branch of the case. It is sufficient to say that it shows beyond doubt that the error in the description of the land in the policy occurred by mutual mistake of the parties, and that the description intended was the south half of the section named, and not the north half, as written. The plaintiff has established his right to a reformation of the policy, in this respect, beyond a reasonable doubt.

3. The policy contains this provision: "If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, it must be so represented to the company, and so expressed in the written part of this policy; other-

wise the policy shall be void." The facts are that the title to the property was formerly in the plaintiff, and that during that time appellant issued to him a policy of insurance thereon against loss by fire. The property was the homestead of plaintiff and his wife, and they continued to so occupy it until the house was destroyed. Prior to the issuance of the policy sued on, the plaintiff conveyed said property to his wife. Appellant contends that because of this conveyance the policy is void, under the clause quoted above. The policy sued upon was issued on the verbal request of Mrs. Carey, at the instance of the mortgage company, and the renewal of the former policy which had expired. Three witnesses testify positively that, at the time the request was made, appellant's agent was informed that the title was then in Mrs. Carey, while the two agents present say they have no recollection of such a statement. It was certainly reasonable that the fact should be stated, and we think the evidence shows that it was. The draftsman no doubt referred to the former policy, in drawing this, and, overlooking this information, did not state the fact as to the title as it then was. It is not questioned but that "knowledge of the agent writing the insurance is the knowledge of the company, in so far as to conform the application to the truth." It is conceded that the agent is bound to state the truth in the application, and, if he does not, the truth may be shown. Slitz v. Insurance Co., 71 Iowa, 710, 29 N. W. 605; Key v. Insurance Co., 77 Iowa, 174, 41 N. W. 614. The rule is alike applicable to a policy as to an application. The application becomes a part of the contract, and the rule applies to the writing of the contract, whether in the form of an application or of a policy. The policy must be taken to be as if written according to the fact concerning the title. The property insured being the homestead of the plaintiff, he had an insurable interest therein. Reynolds v. Insurance Co., 80 Iowa, 563, 46 N. W. 659; Merrett v. Insurance Co., 42 Iowa, 13. Appellant, with knowledge, through its agent, of the true state of the title of the insured property, and that it was not entirely unconditional and sole, issued this policy to plaintiff, who had an insurable interest in the property. In Lamb v. Insurance Co., 70 Iowa, 238, 30 N. W. 497, it is said: "The defendant knew, when issuing the policy, that the assured did not own the fee-simple title to the real estate; and it knew precisely what title he had, and, so knowing, issued the policy. If there was a false statement, the defendant so knew, and must be held to have waived the conditions of the policy in this respect." That policy contained the same condition as to title as this, and that case seems to us decisive of the question under consideration. In McMurray v. Insurance Co., 87 Iowa, 453, 54 N. W. 354, it is said, "The failure of the policy to state correctly the title of the plaintiff was due wholly to the fault of the defendant, and it will not be permitted to escape liability on account of it." Such are the facts in this case, and lead to the same conclusion. The plaintiff had an insurable interest in the property which the appellant insured to him, and his right to recover will not be defeated by the fault of the defendant to state the title correctly.

4. Appellant contends that as no reformation of the policy is asked, as to ownership of the insured property, parol evidence is not admissible to change the terms of the policy, under the familiar rule that parol evidence is not admissible to vary or contradict a contemporaneous written contract. By introducing the policy in evidence, and proving the loss, and that notice and proofs of loss had been made as required, the plaintiff made out his case. Defendant seeks to defeat recovery by showing that plaintiff had not "the entire, unconditional, and sole ownership of the property," for that the title was in his wife. The plaintiff, in reply, shows that defendant was correctly informed as to the title, but failed to write it in the policy according to the fact, and correctly claims that appellant is therefore estopped from asserting this defense. Surely appellant should not be permitted to profit by its own fault, in not writing the policy according to the fact as it was known to it.

5. In connection with said provision as to title, the policy contains the following: "When property has been sold and delivered, or otherwise disposed of so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate. * * * In case the use or occupation of the above-mentioned premises, at any time during the period for which this policy would otherwise continue in force, shall be so changed as to increase the risk thereon, except as may hereafter be agreed to by this corporation in writing upon this policy, from thenceforth, so long as the same shall be so used, this policy shall be of no force or effect." On the 23d day of February, 1891, plaintiff and his wife signed a title bond to G. E. Baker, conditioned that, upon payments by Baker as specified, they would convey to him the land described, including that upon which the insured house stood. The bond provides, "possession to be given on the 1st day of March, 1891, excepting twenty acres of farm land on the east side of the road right south of the house and the hog pasture." This transaction was without notice to or consent of the appellant, and it is contended that because thereof the insurance then terminated. The dwelling house was situated on the 20 acres, and, with the 20 acres, remained in the possession of the plaintiff and his wife until the fire. If it may be said that the house and 20 acres were sold, they were surely not delivered "so that all interest or liability on the part of the assured herein

named had ceased," nor had there been any such change of occupation as to increase the risk. The evidence shows that, after said bond was signed, Baker, without the consent of Carey or his wife, interlined therein these words: "Possession of the farm land and hog pasture to be given March 1, 1892." Even if this was with the consent of Mr. and Mrs. Carey, it left to them the possession of the insured property. We will not discuss the evidence relating to this bond. It is sufficient to say that we are satisfied that the parties to it never regarded it as binding between them, and that there was no such sale and delivery, or change of occupation, of the insured property, as to have terminated this insurance.

6. This policy provides that "all fraud or attempted fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy." Appellant contends that, in his proofs of loss, plaintiff swore falsely that "he was the owner of the property, when he was not," and that thereby he forfeited all claim on appellant. The forfeiture here provided is not for false swearing, but for fraud by false swearing or otherwise. Even if plaintiff had sworn that he was the owner of the property when he was not, it would not follow, under the facts, that a fraud was intended, or would have resulted. The facts are that the proofs were made upon a printed blank furnished by appellant, which contained this inquiry: "If the loss is on building, state whether real estate is owned in fee simple, or held on lease." To this plaintiff answered, "The building was owned in fee simple, and was the homestead of Aden Carey and wife." We do not think it can be fairly said that, in so stating, plaintiff intended to commit a fraud on appellant. Our conclusion upon the whole record is that the decree of the district court should be affirmed.

CITY OF YANKTON v. DOUGLASS.

(Supreme Court of South Dakota. April 9, 1896.)

INTOXICATING LIQUORS — SUFFICIENCY OF COMPLAINT—APPEAL FROM JUSTICE—REVIEW—ARGUMENTS OF COUNSEL—PROHIBITION OF SALOONS.

1. A complaint made to a police magistrate, under an ordinance of the city of Yankton, which declares "that any person who, within the limits of this city, shall keep and maintain a tippling shop, * * * shall upon conviction be fined," etc., in which it is charged that the defendant, "at the city and county of Yankton, on the 17th day of September, A. D. 1893, with force and arms, did keep and maintain a tippling shop, * * * within the limits of the city of Yankton, state of South Dakota, against the peace and dignity of said city of Yankton, and contrary to the form of the ordinance in such case made and provided," states facts sufficient to constitute a public offense under such ordinance. Haney, J., dissenting.

2. When an appeal is taken from a justice's court upon questions of both law and fact, the case is tried anew in the appellate court, and no statement of the case is provided for; and in such case the appellate court cannot review alleged errors of the justice's court.

3. Improper remarks, made by counsel, on the trial of a cause, in the presence of the jury, which the jury are at once directed by the court to disregard, will not, ordinarily, constitute sufficient ground for a reversal of the judgment, as this court will presume that the jury have followed the direction of the court, and disregarded them.

4. An act may constitute a penal offense under the laws of the state and further penalties, under proper legislative authority, may be imposed for its commission by municipal laws; and the enforcement of the one would not preclude the enforcement of the other.

5. There is no conflict between the power conferred by a city charter to "prohibit and suppress tippling shops," and the prohibitory liquor law of this state; and the provisions of the charter were not repealed by such law.

(Syllabus by the Judge.)

Error to circuit court, Yankton county; E. G. Smith, Judge.

Thomas Douglass was convicted of keeping a saloon in violation of a city ordinance, and brings error. Affirmed.

V. V. Barnes (Estes & Lambert, of counsel), for plaintiff in error. French & Orvis, Hugh J. Campbell, City Atty., John Holman, State's Atty., and Coe I. Crawford, Atty. Gen., for defendant in error.

CORSON, P. J. Defendant was convicted, in justice court, for violating a city ordinance. Upon appeal to the circuit court, the action was tried anew, resulting in conviction and judgment against him. He brings the case here for review upon writ of error.

It is contended that the facts stated in the complaint do not constitute an offense under the ordinance alleged to have been violated. Omitting the title, such complaint is as follows: "August Seibert, being by me duly sworn, on oath complains and charges that the defendant, Thomas Douglass, at the said city and county of Yankton, on the 17th day of September, A. D. 1893, with force and arms then and there did keep and maintain a tippling shop, a place where intoxicating liquors were sold to be used as a beverage, within the limits of the city of Yankton, state of South Dakota, against the peace and dignity of the said city of Yankton, and contrary to the form of the ordinance in such case made and provided; and prays that the said Thomas Douglass may be arrested and dealt with according to law." The ordinance provides "that any person who, within the limits of this city, shall keep or maintain a tippling shop, or place where intoxicating liquors are sold to be used as a beverage, or shall sell any intoxicating liquors in any such tippling shop or place, shall upon conviction be fined in any sum not less than thirty (30) dollars, nor more than one hundred (100) dollars, and in addition thereto may be imprisoned not to exceed thirty days." Under a special charter, the city of Yankton has power "to restrain, prohibit and suppress tippling shops, billiard tables, ten pin alleys,

houses of prostitution and other disorderly houses and practices, games and gambling houses, desecration of the Sabbath, commonly called Sunday, and all kinds of indecencies." Such being its conceded authority, the ordinance must be construed with reference thereto. It cannot include what is not included in the charter. Under it the city may restrain, prohibit, and suppress tippling shops, but it is not authorized to restrain, prohibit, or suppress the mere sale of intoxicating liquors. The term "tippling shop" has a well-defined legal meaning. It is a place in which liquors are sold in drams, or small quantities, and where men are accustomed to tipple. To tipple is to drink spirituous or strong drink habitually. Webst. Dict. A tippling shop is a building or room wherein intoxicating liquors are habitually sold to be drank upon the premises. Bish. St. Crimes, § 1065; Black, Intox. Liq. § 20; And. Law Dict.; City of Emporia v. Volmer, 12 Kan. 622. We have found no well-considered definition of the term which does not include the element of drinking upon the premises. In so far as the ordinance attempts to prohibit the mere sale of intoxicating liquors, or the keeping of a place wherein such liquors are sold to be drank as a beverage elsewhere, we think it exceeds the authority of the charter, and is to that extent invalid. The clause, "a place where intoxicating liquors were sold to be used as a beverage," inserted in the complaint, not being authorized by the charter, and therefore not legally a part of the ordinance, cannot properly constitute a part of the complaint, and it will be treated as surplusage, and disregarded. Without this allegation in the complaint, it is clearly sufficient. The term, "did keep and maintain a tippling shop," sufficiently defines the offense charged, as the term "tippling shop," as we have seen, has a well-understood and a well-defined meaning. Mr. Bishop, in his work on Statutory Crimes (section 1065), speaking of the indictment in this class of cases, says: "The indictment is only required to charge, in the general words of the statute, if so its terms are duly covered, that, at a specified time and place, the defendant did keep a drinking house and tippling shop." The words "drinking house" add nothing to the charge, as a tippling shop includes a drinking house. In City of Emporia v. Volmer, 12 Kan. 622, a similar complaint was held good by the supreme court of Kansas.

It is further contended that the police justice erred in refusing to allow the defendant to challenge certain jurors peremptorily who were impaneled to try the case. But we do not deem it necessary to consider that question, for the reason that it is not properly before us. An appeal was taken from the justice court to the circuit court upon questions of both law and fact. In such cases no statement is made, as the case is tried anew in the circuit court. The error, if any was committed, could not have been reviewed by the circuit court, and cannot be reviewed by this court on writ of error. The proceedings to be taken in the two classes of appeals from a justice court are fully pointed out by sections 6129–6131, 6136, 6177, 6178, Comp. Laws. See Coughran v. Wilson (S. D.) 63 N. W. 774.

It is also urged, as reversible error, that the defendant was prejudiced by the remarks of counsel for the city in presence of the jury. The remarks to which our attention was first called were improper, but evidently made inadvertently, without any improper motive. The court, immediately upon its attention being called to the matter, instructed the jury to disregard the remarks. This, we think, cured the error. The second remarks objected to seem only to have been the conclusion or opinion of counsel as to the result of the evidence. We discover no error in these remarks. The counsel for appellant further contends that, while the city counsel has conferred upon it power to "restrain, prohibit and suppress tippling shops," it did not possess the power or authority to pass an ordinance imposing a penalty of fine and imprisonment upon one who should violate the ordinance, and that so much of the ordinance, therefore, as prescribes such a penalty is unauthorized and void. In other words, he contends that power "to restrain, prohibit and suppress" does not include the power to punish by fine and imprisonment, but only the power to pass an ordinance restraining, prohibiting, or suppressing the "tippling shops" in some manner that will accomplish that purpose. And the counsel cite Incorporated Town of Nevada v. Hutchins (Iowa) 13 N. W. 634; City of Charlton v. Barber (Iowa) 6 N. W. 528; In re Lee Tong, 18 Fed. 253,—which seem to support his contention. But it is insisted, on the part of the city, that the powers conferred upon the Yankton city council by its charter are unusually broad and comprehensive, and that, while the decisions referred to were proper under the charters the courts had under consideration, they are not applicable to the charter now under consideration in the case at bar. There is much force in these suggestions. The city charter of Yankton does seem to confer upon the city council of that city very large powers. The sections of the charter of the city of Yankton to which our attention has been called read as follows: Section 82: "When by this act, the power is conferred upon the mayor and council to do and perform any act or thing, and the manner of exercising the same is not specifically pointed out the mayor and council may provide by ordinance the details necessary for the full exercise of such power." Section 13: "The mayor and council of the city of Yankton shall have the care, management and control of the city, and its property and finances, and shall have power to enact and ordain, any and all ordinances,

not repugnant to the organic act, and the laws of this territory, and such ordinances to alter, modify and repeal." Section 16: "And shall have power to regulate the police of the city, and impose fines, forfeitures, and penalties, for a breach of any ordinance, and provide for the recovery and collection thereof, and in default of payment to provide for confinement in the city prison, or for hard labor in the city." The powers conferred by these sections do seem to be extensive and sweeping, and evidently are broad enough to include the power claimed. The city council not only had authority to adopt the ordinance for suppressing and prohibiting tippling shops, but to enforce such provisions by fine and imprisonment in case of failure to pay the fine. The charters in the cases cited clearly could not have had the broad and comprehensive provisions found in the charter under consideration.

This brings us to a very important and interesting question, as to whether or not the adoption of the state constitution, by which the manufacture and sale of intoxicating liquors as a beverage were entirely prohibited, had the effect of repealing the provisions of the Yankton charter upon the subject of prohibiting and suppressing "tippling shops." So far as the term "restraining" is used, we think the effect of the adoption of the constitution was to supersede that clause, as the term "restrain" may include the power to restrain by a license. But, as to the terms "prohibit and suppress," there seems to be no conflict between the charter and the state law passed to carry into effect the provisions of the constitution. An act may constitute a penal offense under the laws of the state, and further penalties, under proper legislative authority, may be imposed for its commission by municipal laws; and the enforcement of the one would not preclude the enforcement of the other. Judge Cooley, in his work on Constitutional Limitations, says such is the clear weight of authority. Cooley, Const. Lim. (5th Ed.) *199. And the learned author cites, in support of this position, a very large array of authorities. The reason for the rule above laid down is thus clearly stated by Collier, C. J., in Mayor, etc., v. Allaire, 14 Ala. 400: "The object of the power conferred by the charter, and the purpose of the ordinance itself, was not to punish for an offense against the criminal justice of the country, but to provide a mere police regulation for the enforcement of good order and quiet within the limits of the corporation. So far as an offense has been committed against the public peace and morals, the corporate authorities have no power to inflict punishment, and we are not informed that they have attempted to arrogate it. It is altogether immaterial whether the state tribunal has interfered and exercised its powers in bringing the defendant before it to answer for the assault and battery, for whether he has there been punished or acquitted is alike unimportant. The offenses against the corporation and the state, we have seen, are distinguishable, and wholly disconnected, and the prosecution at the suit of each proceeds upon a different hypothesis. The one contemplates the observance of the peace and good order of the city; the other has a more enlarged object in view,—the maintenance of the peace and dignity of the state." In that case, the city of Mobile, by ordinance, had prescribed that the offense of assault and battery within the city limits should be punished by a fine of $50. What the fine should be when the offense was committed in violation of the state law does not appear, but it is quite evident the penalty was different. If an act is permitted by the state law, it cannot be forbidden by municipal ordinance; neither can an act forbidden by the state law ordinarily be permitted or licensed by the municipal authorities. But the penalty imposed for a punishment of the offense under the state law may be increased by a city ordinance. Thus, by the state law of New York, a penalty of one dollar was imposed for servile labor on Sunday, and the city imposed a penalty of five dollars for the same offense. The municipal law was held valid. Rogers v. Jones, 1 Wend. 261. In the recent case of People v. Hanrahan, 75 Mich. 611, 42 N. W. 1124, this question was very fully considered by the supreme court of Michigan, and the conclusion reached that, if the state law and municipal law can be given full force without conflicting with each other, both must stand.

It may be proper to remark that "tippling shops," as such, are not specifically prohibited by the state prohibitory law. Undoubtedly the law includes them in some of its various provisions; but, if it does so, there is no conflict between the state law and the city ordinance. They both seek to accomplish the same object, namely, the prohibition and suppression of the sale and use of intoxicating liquors. The city ordinance does not purport to be exclusive. The state law is left in full force and effect, to be enforced by the officers charged with the duty of enforcing it, as well in the city of Yankton as in other parts of the state. Whether or not a party convicted under the city ordinance may be again tried and convicted under the state law, it is not necessary now to decide. Our conclusions are that there is no such conflict between the provisions of the city charter and the law of the state and state constitution as had the effect to abrogate or repeal, by implication, the provisions of the city charter. We have not overlooked the cases of People v. Jaehne, 103 N. Y. 182, 8 N. E. 374, and People v. O'Neil, 109 N. Y. 251, 16 N. E. 68, cited by counsel for appellant in support of his contention. The court of appeals of New York, in these cases, was not considering the pow-

er conferred upon the lawmaking department of the city of New York, but was considering a section of the charter prescribing the penalty for bribery, which, it was claimed, was superseded or repealed by the amendment and re-enactment of the penal law of the state, in which a different punishment had been provided for the crime of bribery. That court held that, by reason of the changes made in the state law, and other circumstances, the legislative intention to repeal the provision in the charter pertaining to the punishment of bribery was clear, and it had, in effect, repealed it. But in the case at bar we find no evidence of any intent to repeal the power conferred upon the city council of Yankton to prohibit and suppress tippling. The existence of such a power, and an ordinance adopted in pursuance thereof, are perfectly consistent with the constitution, and the prohibitory act passed under it. As before stated, there is no conflict between the two, and it seems very proper that the city should be clothed with the power to prohibit and suppress tippling shops, in the interest of good government. Whenever the state law is fully executed, there may be no necessity for the exercise of the power granted in the charter; but the fact that, under such circumstances, the power would remain dormant, does not affect the right to exercise it when the necessity for its exercise exists. Our conclusions are, therefore, that there is no error in the record, and the judgment of the circuit court is affirmed.

HANEY, J. (dissenting). It seems to me the clause, "a place where intoxicating liquors were sold to be used as a beverage," is a particular description of the place maintained by defendant, and should not be regarded as surplusage. If so, defendant did not keep a tippling house, because there cannot be a tippling house without drinking upon the premises. If such clause be stricken out, I do not think enough remains to make a good complaint. It is true Mr. Bishop, in his valuable work, above cited, seems to except this offense from the general rules of criminal pleading; but I do not believe he is sustained either by reason or authority in so doing. I think the facts stated in the complaint do not constitute an offense under the ordinance, and for this reason the cause should be reversed.

STRUNK v. SMITH et al.

(Supreme Court of South Dakota. April 7, 1896.)

PAROL EVIDENCE — MODIFICATION OF CONTRACT.

Ordinarily, a clear and explicit written instrument supersedes all contemporaneous oral negotiations concerning the subject to which the same relates, and parol evidence is inadmissible to show that the parties intended that time should be of the essence of the contract.

(Syllabus by the Judge.)

Appeal from circuit court, Minnehaha county; Joseph W. Jones, Judge.

Action by Peter Strunk against George M. Smith and James Smith, co-partners as George M. Smith & Co., and John Smith. Judgment for plaintiff. Defendants appeal. Affirmed.

Hosmer H. Keith, for appellants. Aikens, Bailey & Voorhees, for respondent.

FULLER, J. Plaintiff instituted this action against the defendants to recover $700, alleged to be the unpaid balance of the agreed consideration for a certain quarter section of land sold and conveyed to the defendant John Smith on the 3d day of December, 1885. Upon findings of fact and conclusions of law prepared and submitted by Charles L. Brockway, Esq., to whom the case was referred, the court rendered judgment against the defendants George M. Smith and James Smith for the full amount claimed, and therein directed the costs to be taxed against John Smith and his co-defendants jointly. From said judgment, and from an order overruling a motion for a new trial, the defendants appeal to this court.

Under a final receipt issued to him by the receiver of the United States land office, respondent was in the actual and undisturbed possession of the premises described in his warranty deed, executed and delivered to appellant John Smith, on the 3d day of December, 1885, by virtue of which said Smith went into the immediate possession thereof, which has ever since been enjoyed by himself and his grantee, without any interruption whatever. Of the $1,700 mentioned in said deed as the consideration therefor, $1,000 was at the time paid in cash to respondent, and the remaining $700 was deposited by appellant John Smith, to the credit of respondent, Strunk, in a bank owned by appellants George M. and James Smith, doing business in the firm name of George M. Smith & Co., upon the conditions evidenced by the following written instrument, executed by said bank contemporaneously with the execution and delivery of the deed: "Egan, D. T., Dec. 3, 1885. Received of John Smith the sum of seven hundred dollars, deposited by him, payable to the order of Peter Strunk whenever the aforesaid Peter Strunk shall procure from the United States a patent for the following described land, to wit, * * * and the removal of all legal clouds to the title thereof; provided that George M. Smith & Co. can deliver this money to Peter Strunk at any time on the order of John Smith whenever Peter Strunk shall deliver a good and sufficient bond to be executed by Peter Strunk, and good and sufficient sureties, that will be acceptable to John Smith, conditioned that they will guaranty the aforesaid Peter

Strunk to furnish John Smith with the patent to the aforesaid land from the United States, and that he will remove all legal clouds from the land aforesaid. * * * Said patent to be delivered to John Smith, and the legal clouds to be removed from the aforesaid land, on or before two years from the date of this receipt. George M. Smith & Co. In presence of R. Brennan." On the same day, and evidently in connection with the transaction, the bank entered into the following written agreement with respondent: "12/3/85. I agree to pay Peter Strunk, in case he should be legally entitled to the $700 deposited here between himself and John Smith on land sold, four per cent. per annum if left three months, or six per cent. per annum if left six months. George M. Smith & Co." The patent, which issued on the 3d day of August, 1891, was delivered by respondent to his grantee, Smith, as soon thereafter as said Smith could be induced to receive the same; and it is obvious that the title to said premises was by said instrument fully perfected. In support of his separate answer, and upon the theory that time was of the essence of the contract, appellant John Smith sought to introduce evidence tending to show that the agreement and negotiations for the purchase and sale of the land were oral, and in effect as follows: Upon the execution and delivery of the deed, Smith was to pay $1,000 in cash, and deposit $700, to be paid in case the patent was obtained within two years, and not otherwise; that it was the understanding between the parties that the land was being purchased for a son of said John Smith, and that, unless the title thereto could be perfected within two years, no improvements could be made thereon during that time, and the land would consequently be worth but $1,000; that on the same day, and pursuant to said oral agreement, the deed was executed and delivered, the $1,000 was paid to respondent, and the $700 was deposited in accordance with said arrangement between the parties; that, owing to respondent's failure to obtain the patent within the two years, the son for whom the land was purchased refused to take the same, and, as no improvements could be made thereon, said land was worth $700 less than it would have been had the title been perfected within the time specified.

Practically, all the testimony concerning the oral negotiations between the parties prior to the execution and delivery of the deed and other instruments in writing relating to the purchase and sale of the real property in question was excluded by the referee, and counsel for respondent frankly concede that a reversal must follow if such evidence ought to have been admitted. It is not claimed that the written instruments failed to express the real intention of the parties, on account of fraud, mistake, or accident, but appellants' counsel confidently maintains that all of the original oral agreement was not reduced to writing, and that the omitted recital thereof was that time should be the essence of the contract, and that $1,000 should be the entire purchase price in case the patent was not furnished within two years. The delay in obtaining a patent was caused by a contest proceeding instituted against respondent some time after the execution of the foregoing written instruments, and which was not finally determined until August, 1891. While the writing designed to show the purpose for which the deposit was made was not immediately delivered to respondent, it was executed solely for his benefit, to carry out the agreement between the parties, and with the exception of the claim that it was, prior to its execution, orally agreed that time should be the essence of the contract, it confessedly contains all the essential negotiations between the parties concerning the payment of the $700. Although its clear and concise recitals were for years familiar to all the parties bound thereby, no objection thereto was ever raised, until its enforcement was sought in the court below. Under the covenants of the deed, independently of the foregoing certificate and memorandum, this action to recover the balance of the purchase price could not be resisted by showing a defective title, unless it appeared that the possession or quiet enjoyment of Smith or his grantee had been in some manner disturbed. Price v. Hubbard (S. D.) 65 N. W. 436.

The title being clear, and the possession continuously peaceful, it is evident that testimony tending to show that Smith was damaged because the cloud was not removed earlier was properly rejected, and the decisive question in the case is whether, in view of the written instruments, parol evidence is admissible to prove an oral agreement that time should be of the essence of the contract. By section 3573 of the Compiled Laws, it has been declared that "time is never considered as of the essence of a contract unless by its terms expressly so provided"; and, as it cannot be claimed that any of the written instruments before us expressly so provide, such fact must be shown by parol, if at all. The above section, which is in derogation of the common law, was taken from what is known as the Civil or David Dudley Field Code, prepared for the state of New York, and to which the commissioners affix the following note: "This provision is new. As to the present law upon the subject, see Story, Eq. Jur. § 776. It involves so much difficulty that the commissioners deem it wise to adopt this more stringent rule." Civ. Code, p. 253. The terms, condition, and purpose of the deposit are clearly expressed in the written instrument by which the transaction was evidenced; and when considered, as it must be, with the deed and written agreement of the bank to pay respondent interest thereon, it is amply sufficient to show the clear intention of the parties, and to supersede all prior or contemporaneous oral negotiations concerning the subject to which

such instruments relate. Comp. Laws, §§ 3545, 3553–3555, 3557. While it is in effect stated that the patent is to be furnished within two years from the date of the contract, there is nothing written to indicate that it was ever intended that respondent, in case of a failure in that particular, should forfeit $700 of the money for which he had sold his farm; and in our opinion, for reasons too obvious to mention, oral testimony was not admissible, under the rules of evidence or statutory provisions above cited, to show that time was of the essence of the contract. Washabaugh v. Hall, 4 S. D. 168, 56 N. W. 82. Our statute will neither allow time to be made of the essence of a contract by implication, nor permit an oral extrinsic showing that such was the intention of the parties to a written contract, the terms of which are expressed in clear and explicit language.

While the numerous assignments of error relied on by counsel for appellants have received merited attention, it is unnecessary to extend this opinion by a discussion thereof. The judgment is affirmed.

FREEMAN v. CITY OF HURON et al.

(Supreme Court of South Dakota. April 9, 1896.)

CONTEMPT — TITLE OF PROCEEDING — ATTORNEY'S JUDGMENT—INFORMATION AND BELIEF.

1. A contempt proceeding for violating an order in an action may properly be entitled as in that action.

2. Other than the state's attorney may conduct the prosecution of a contempt proceeding.

3. The court, having pronounced its sentence in the presence of accused, in a contempt proceeding, may sign and file a formal judgment in accordance with the sentence, in the absence of them and their attorney.

4. One who, knowing of an order of court and its contents, intentionally does an act which constitutes a violation of the order, is guilty of contempt.

5. An affidavit alleging material facts on information and belief does not give a court jurisdiction of a contempt proceeding.

Error to circuit court, Beadle county; A. W. Campbell, Judge.

Contempt proceeding for violation of an order in an action of John C. Freeman against the city of Huron and others. The accused were found guilty, and bring error. Reversed.

A. W. Wilmarth, for plaintiffs in error. W. A. Lynch, for the State.

HANEY, J. This is a contempt proceeding, brought here for review upon a writ of error. On May 10, 1895, in the above-entitled action, then pending in the circuit court of Beadle county, after due notice and hearing, the following order was made: "And it is ordered that the said defendant, said city of Huron, and E. C. Patterson, as treasurer thereof, and each of them, and their agents and servants, pending the trial of said cause, and until the final determination thereof, be, and they are each of them hereby, restrained and enjoined from paying out any of the funds of the said city of Huron, other than the special sidewalk fund and the sinking fund, on any warrant, or in any other way or manner than on warrants duly issued payable out of the general fund of said city, in the order of the presentation of warrants as the same appear on the warrant register kept in the treasurer's office of the city of Huron." On October 4, 1895, while such order was in force, upon an affidavit of W. A. Lynch, Esq., attorney for plaintiff, a rule was issued requiring H. Ray Myers, mayor of Huron, D. W. Smith, E. M. Thomas, J. M. Jarvis, and George T. Groves, aldermen of said city, and A. W. Wilmarth, Esq., as its attorney, to show cause why each of them should not be punished as for a contempt, in violating the above-mentioned order. All appeared except Myers. Mr. Lynch and Mr. Mouser, members of the Beadle county bar, neither of whom was state's attorney, conducted the prosecution. Mr. Wilmarth acted as attorney for the accused. The affidavit of Mr. Lynch and all papers are entitled in this action, except the judgment, which is in the name of the state against the parties who appeared and were found guilty. Each of the accused who appeared filed an affidavit. Oral and record evidence was received. At the conclusion of a trial wherein accused were given an opportunity to adduce all the evidence they desired, the court made this announcement: "The judgment of the court in this case will be that these defendants who appear here be adjudged guilty of a contempt of this court; that each of them be fined $100 and costs, and, in case of failure to pay the fine, they be imprisoned in the county jail for a period of thirty days." A motion in arrest of judgment was made and overruled. Subsequently a formal judgment, reciting in detail the proceedings, the findings of the court, and imposing the same punishment as that previously announced, was signed and filed in the absence of the accused and of their attorney.

A motion to dismiss the proceeding because entitled in the civil case, and not in the name of the state, and because it was not conducted by the state's attorney, was denied. This is assigned as error. Regarding procedure in contempt cases, the authorities are in inextricable confusion. There is no settled doctrine with reference to the proper method of framing the title to such proceedings. 4 Enc. Pl. & Prac. 772. We have no statute regulating the matter. The proceeding is special and peculiar,—in the nature of, but not strictly, a criminal action. State v. Knight, 3 S. D. 509, 54 N. W. 412. Important constitutional provisions, applicable to criminal actions, are not applicable to this proceeding. State v. Mitchell, 3 S. D. 223, 52 N. W. 1052. It would be better practice to institute an independent action in the

name of the state, and assimilate the proceeding to the criminal procedure as nearly as practicable; but, believing the course adopted in the court below was warranted by abundant authority, and that it did not tend to prejudice the accused in respect to any substantial right, we hold there was no reversible error in the manner of entitling the affidavit and other papers, and that there was no error in allowing counsel, other than the state's attorney, to conduct the prosecution.

An affidavit was filed by each of the accused which was treated as an answer, and upon the issue so raised evidence was adduced on each side. Possibly a more simple and commendable method would have been to treat the Lynch affidavit as a complaint or information, to which accused might have pleaded not guilty, and thus thrown upon the prosecution the burden of proving all of the allegations necessary to sustain the contempt charged. We would certainly approve the adoption of such procedure. However, we find nothing in the record which indicates that these persons were not fairly tried upon the allegations of the affidavit. The order of proof is a matter within the sound discretion of the court, especially in the absence of a jury. We discover no reversible error in the manner of conducting the trial. Having pronounced its sentence in the presence of accused, the court could properly sign and file a formal judgment in accordance with such sentence, in their absence and the absence of their attorney.

The court had jurisdiction of the parties and subject-matter in the civil action. It issued the order of injunction. Such order was in force when the alleged violation occurred. It had not been dissolved. It was properly issued. State v. Campbell (S. D.) 64 N. W. 1125. Each of the accused knew of its pendency and purport. Having actual notice, service upon them was unnecessary. 2 High, Inj. 1102; State v. Knight, 3 S. D. 509, 54 N. W. 412. Its terms are clear and unmistakable. It forbids any agent or servant of the city from paying warrants drawn upon its general fund, except in the order of their registration. Willful disobedience of this lawfully issued order was a crime, and a contempt of court. Comp. Laws, § 6402. The term "willful," as here used, implies simply a purpose or willingness to commit the forbidden act. Comp. Laws, § 6961. Each of the accused testified that he knew of the order and its contents, but that he did not intend to violate it, and did not understand he was doing so. It is contended that the intention of each was absolutely locked within his own breast, and that his sworn declaration concerning such intention is conclusive. We deem this position untenable. The vital questions are these: (1) What act was forbidden? (2) Did accused intentionally commit such act, knowing it was forbidden? If the prohibition was definite and certain, it matters not what motive prompted its violation. If accused were mistaken as to the effect of the order, if they honestly believed they did not come within its terms, such fact or facts should be considered in mitigation of punishment, but not as a defense. In this, as in other criminal cases, the intent of accused is a question of fact, to be determined from a consideration of their conduct. If the act which they knowingly and intentionally committed constitutes a violation of the court's order, they were guilty of contempt, and cannot escape the consequences of their voluntary conduct by merely denying under oath that they intended to violate the order.

No doubt exists as to what was forbidden. It was the payment of warrants out of their order, an act in itself contrary to law. The city of Huron, its agents and servants; Patterson as treasurer, his agents and servants, —are the persons who were expressly forbidden to make such payments. Accused were officers of the city, and consequently its agents, and clearly within the class mentioned in the order. The material facts involved are simple, and can be briefly stated. Were warrants paid out of their order? Did accused make such payments, or aid and abet the making thereof? If they did, they are guilty of contempt. However, the court did not have jurisdiction to inquire into their conduct, unless every material fact constituting the alleged violation is stated in the affidavit upon which the contempt proceeding is based. State v. Sweetland, 3 S. D. 508, 54 N. W. 415. Accused contend it is fatally defective. They moved to dismiss, in the court below, upon this ground. Certain allegations are made upon information and belief. Independently of these, the affidavit contains no fact tending to connect any one with the payment of warrants except Myers, the acting treasurer, who did not appear in the contempt proceeding. We think the portions of the affidavit stated upon information and belief cannot be considered, and without them the affidavit is insufficient to confer jurisdiction as to the plaintiffs in error. Thomas v. People (Colo. Sup.) 23 Pac. 326; Ludden v. State (Neb.) 48 N. W. 61; Gandy v. State, 13 Neb. 445, 14 N. W. 143. In cases of this character the facts should be stated with certainty. Persons should not be required to answer an essentially criminal charge based merely upon the belief of a private prosecutor. Because the affidavit did not confer jurisdiction upon the court below, its judgment is reversed, and the cause remanded for such further proceedings as may be proper and consistent with this opinion.

McHARD v. WILLIAMS.

(Supreme Court of South Dakota. April 7, 1896.)

COUNTERCLAIM—SAME TRANSACTION.

In an action to foreclose a mortgage on land given to secure a note, a counterclaim alleged that, at the time the note was given, defendant executed to plaintiff a chattel mortgage as security for the note; that thereafter, before filing it, plaintiff materially altered it, without the consent of defendant; that thereafter plaintiff, pretending to foreclose the altered mortgage, unlawfully took the chattels and converted them, defendant knowing nothing of the alteration till plaintiff had disposed of the chattels. *Held*, that the cause of action set out in the counterclaim arose out of the transaction set out in the complaint, or was connected with the subject of the action.

Appeal from circuit court, Hand county; Loring E. Gaffy, Judge.

Action by William McHard against Thomas M. Williams. A demurrer to a counterclaim was overruled, and plaintiff appeals. Affirmed.

C. G. Hartley (Pepper & Scott, of counsel), for appellant. Hassell & Myers, John Pusey, and S. V. Ghrist, for respondent.

CORSON, P. J. This is an appeal by the plaintiff from an order overruling his demurrer to a counterclaim interposed by the defendant. The action was brought to foreclose a real-estate mortgage. The defendant Williams filed an answer, in which he sets up two counterclaims. The demurrer to the first was sustained, and it will not be further noticed. The demurrer to the second was overruled. This counterclaim is as follows: "(7) For a further answer and for a second counterclaim to the causes of action set forth in plaintiff's complaint, this defendant alleges that on the 9th day of July, 1887, at the time the note for $300, described in the first paragraph of the complaint, was given, and as a part of that transaction, this defendant duly made, executed, and delivered to the plaintiff a certain written instrument, to wit, a chattel mortgage, dated on that day, and signed by this defendant, which said chattel mortgage was so given, as security for the payment of the said $300, on four mules belonging to this defendant, and the said chattel mortgage, at the time of its execution and delivery as aforesaid, provided for no attorney's fee; that thereafter, and before said chattel mortgage was filed for record in the office of the register of deeds in and for said Hand county, in which county this defendant resides, the plaintiff, by himself or agent, and with the knowledge, consent, and authority of plaintiff, and without any consent thereto by this defendant, materially altered and changed the said chattel mortgage by inserting therein a provision for the payment of an attorney's fee of $100; that, after the said mortgage had been so altered, the plaintiff caused it to be filed in the office of the said register of deeds; that on or about the 10th day of May, 1892, this defendant was lawfully possessed of and was the owner of the mules described in the said chattel mortgage, of the value of $700; that on said last-mentioned day, at said Hand county, the said plaintiff, pretending to foreclose the said fraudulently altered chattel mortgage, unlawfully took and carried away said mules, and converted and disposed of the same to his own use, to the damage of this defendant seven hundred (700) dollars; that this defendant knew nothing of the said fraudulent alteration in said chattel mortgage until after said plaintiff had disposed of said mules."

It will be observed that it is alleged that the giving of the chattel mortgage was a part of the same transaction set out in the complaint, the chattel mortgage being given to secure the same note that was secured by the mortgage on real estate sought to be foreclosed by this action. But appellant contends that the counterclaim is not based upon the chattel mortgage, as the pleader, in effect, shows that the chattel mortgage was void, and hence it is out of the case, and that the claim of the defendant is based upon the wrongful conversion of the mules by the plaintiff, not constituting a breach of any contract, but a tort, which cannot be counterclaimed against a cause of action on contract. Respondent, however, insists that the counterclaim was proper, under subdivision 1, § 4915, Comp. Laws, and that the cause of action set out in the counterclaim arose out of the transaction set forth in the plaintiff's complaint, or was connected with the subject of the action. The cause of action set out in the counterclaim, it seems to us, clearly arose out of the transaction, or was connected with the subject of the action, set forth in plaintiff's complaint. A part of that transaction, as set out in the counterclaim, was the giving of the chattel mortgage under which the plaintiff assumed to sell defendant's mules. The mere fact, therefore, that the acts of the plaintiff regarding the chattel mortgage, subsequent to its execution, are claimed to have invalidated it, and rendered plaintiff's sale of the mules illegal, and subjected the plaintiff to liability to the defendant for their full value, does not render the sale any the less a part of the transaction connected with the subject of the action. Laney v. Ingalls (S. D.) 58 N. W. 572; Ainsworth v. Bowen, 9 Wis. 348; Streeper v. Thompson (Tex. Civ. App.) 23 S. W. 326; Carpenter v. Insurance Co., 93 N. Y. 552; Bliss, Code Pl. §§ 372-377. In Carpenter v. Insurance Co., supra, the court of appeals of New York uses the following language: "The counterclaim must have such a relation to and connection with the subject of the action that it will be just and equitable that the controversy between the parties as to the matters alleged in the complaint and in the counterclaim should be

settled in one action by one litigation, and that the claim of the one should be offset against or applied upon the claim of the other. Here it is sufficiently accurate to say that the subject of the action was the wood wrongfully taken by the defendant, and the counterclaim was for damages sustained by the defendant, in the wrongful impairment of its security, by the severance of the same wood from the land, and thus diminishing the value of the land by the value of the wood. In such case it is certainly just that the defendant should counterclaim its damages for the severance of the wood against the plaintiff's claim for the conversion thereof. In the forum of conscience, the plaintiff was under obligation to restore the wood to the defendant as a portion of its security for its claim against the mortgagor. Thus it can with great propriety be said that defendant's claim had some connection with the subject of the action." If the note set out in plaintiff's complaint, and to satisfy which he seeks to sell defendant's real property, was in effect satisfied by a sale of defendant's personal property, mortgaged to secure the same note, it would be manifestly unjust to compel the defendant to submit to a judgment upon the note, and a sale of his real property to satisfy the same, and leave him with simply a right of action against the plaintiff for the value of his mules.

One of the more important purposes of the adoption of the code system of pleading, was to avoid as far as possible a multiplicity of suits, and to enable parties to determine their differences in one action. And to this end counterclaims were designed, not only to include recoupment and set-offs at common law, but to enlarge their scope, so that but few cases could arise in which all litigation between the parties to the action might not be settled in the same suit. The learned counsel for the appellant has argued the case upon the theory that the provisions relating to counterclaims should be strictly construed, but in this he is clearly in error. These provisions should receive a liberal construction, as, in the language of Mr. Justice Fuller, in Laney v. Ingalls, supra, it "enables litigants to determine their controversies without additional expense, and, in case a plaintiff is insolvent, it is often the only means by which a defendant may obtain justice." The order of the circuit court overruling the demurrer is affirmed, and the case remanded, for further proceedings according to law.

BOWERS v. GRAVES & VINTON CO.

(Supreme Court of South Dakota. April 7, 1896.)

CONTRACTS — TILLAGE OF FARM ON SHARES — MEASURE OF DAMAGES.

1. Where plaintiff contracted to farm defendant's land, and sow certain crops thereon, supply all seeds, labor, machinery, etc., and deliver one-fourth of the crop to a certain elevator, title to the crops to remain in defendant, who, on his part, agreed, on the faithful performance of his part of the contract, to deliver to plaintiff three-fourths of the crops so produced, such contract is not one of hire, but in the nature of an adventure.

2. On breach by defendant, the measure of plaintiff's damages is not the value of his services in sowing and harvesting the crop, but the value of his share thereof.

Appeal from circuit court, Brown county; A. W. Campbell, Judge.

Action on contract brought by Andrew Bowers against the Graves & Vinton Company. A motion to strike out plaintiff's claim for damages having been sustained, plaintiff appeals. Affirmed.

J. H. Hauser, for appellant. J. H. Perry, for respondent.

CORSON, P. J. The plaintiff set out in his complaint a contract, from which it appears that the plaintiff agreed, for the consideration thereinafter named, "to well and faithfully till and farm, during the season of farming in the year 1894, in good and husbandlike manner, and according to the usual course of husbandry," a certain tract of land described, and the plaintiff agreed to sow and plant the said land in such crops as the defendant should direct. The plaintiff also agreed "to furnish, at his own cost and expense, all seed, and all proper and convenient tools, teams, utensils, farm implements, and machinery, and to furnish and provide all proper assistance and hired help in and about the cultivation and management of said farm." Here follow numerous provisions common in such contracts. The contract further provides that, until after the delivery thereinafter specified, "the title and possession of all the hay, grain, crops, and produce on said premises shall be and remain" in the defendant. It was further agreed that said plaintiff should deliver one-fourth of all grain or other farm produce, at an elevator named, free of all cost to defendant. It was further agreed that the plaintiff might plant and cultivate 10 acres in corn, and retain the entire products under certain conditions therein named. The contract contained the further stipulations: "In consideration of the faithful and diligent performance of the foregoing stipulations by the party of the first part, the party of the second part agrees, upon the reasonable requests thereafter made, to give and deliver on said farm, the three-fourths of all grains, vegetables, and other farm produce so raised and secured upon said farm during said season." The complaint further alleges that, in the spring of 1894, the plaintiff prepared 105 acres of the said land, sowed and planted the same, and harvested and stacked 60 acres of the wheat, and alleges: "The plaintiff further shows that it was reasonably worth the sum of $4 per acre to plow and prepare, to furnish seed, machinery, and teams, and properly put in, as was done by this plaintiff, the above-describ-

ed 105 acres of wheat; that it was reasonably worth the sum of $1 per acre to harvest the 60 acres of wheat above described; that it was reasonably worth the sum of $6 per acre to plow and prepare the ground, and plant the corn, and cultivate the same, as was done by this plaintiff, upon the 10 acres of corn above described. The plaintiff further shows that, after the said grain was planted, and the said corn was cultivated, the defendant refused to allow this plaintiff to harvest or thresh said grain, or to gather said corn, and has refused to deliver to the plaintiff three-fourths of the wheat so raised upon said land, or any part thereof, and has refused to deliver to the plaintiff all of the corn grown upon said land, or any part thereof, and has refused to allow said plaintiff to remove any of said corn or grain, or to apply the same to his own use. The plaintiff further shows that the work so performed by this plaintiff for the defendant, and the materials furnished as hereinbefore set forth, were reasonably worth the sum of $540. Wherefore the plaintiff demands judgment against the defendant for the sum of $540, besides his disbursements and costs." The defendant moved to strike out the first paragraph above copied, relating to the value of the services per acre for plowing the same, upon the following grounds: "(1) The said portion of said complaint is irrelevant; (2) that said portion of said complaint is redundant; (3) that said portion of said complaint does not allege the correct measure of damages." This motion was granted, and from the order granting the same the plaintiff appeals.

The respondent's counsel suggests, in his brief, that the order is not an appealable one; but, as no motion was made to dismiss the appeal, we do not deem it necessary to pass upon that question, and shall assume, for the purposes of this decision, that the appeal is properly before us.

The appellant contends that, the defendant having, as alleged in the complaint, prevented him from completing his contract, he is entitled to recover of the defendant what his services were reasonably worth, and hence the allegation stricken out is a proper one in the complaint, and striking it out was error. The respondent contends that the contract does not create the relation of master and servant between the parties, and hence that the only damages plaintiff could in any event recover are the value of his three-fourths interest in the crop raised, less the expense of harvesting and threshing the same. The contract in this case belongs to that class of contracts for the cultivation of lands for a share of the crop that has given rise to much diversity in the decisions of the courts as to their nature and the measure of damages for a breach of the same. Some courts have been inclined to regard them in the nature of leases, and to apply to them the rules applicable to breaches of contracts for leasing. Other courts have treated them as more in the nature of contracts for hire, the services to be paid for by a share of the crop. Porter v. Chandler, 27 Minn. 301, 7 N. W. 142; Am. & Eng. Enc. Law, pp. 897–899. Much of this diversity in the decisions has undoubtedly arisen by reason of the various stipulations in such contracts, in which slight changes in their terms have produced important differences in the views of courts as to the character of the contracts and the rules that should govern the measure of damages for breach of the same. Warner v. Abbey, 112 Mass. 355. In the early case of Walker v. Fitts, 24 Pick. 191, the supreme court of Massachusetts, in discussing a contract quite similar to the one before us, says: "The occupant was not the mere servant of the owner. It was not a contract of hire, in which the laborer was to receive a portion of the crop as a compensation for his services. It was not a mere license to enter upon and cultivate the farm, nor a tenancy at will. He had a right to occupy, and an interest in the land. * * * The owner could not exclude him, nor maintain an action against him for anything done in pursuance of the agreement. But what the precise nature and character of his interest was, is not so easily determined." And the court of appeals of New York, in the well-considered case of Taylor v. Bradley, 39 N. Y. 129, take the same view of contracts of this class, and hold that such contracts are special, and partake somewhat of the nature of an adventure, entitling the party to a chance in the profits or benefits derivable therefrom. This seems to us to be the most satisfactory view of such contracts, and one that more nearly carries out the intention of the parties than any other. That such is the nature of the contract before us seems clear from its terms. It will be noticed that the plaintiff is to furnish all seed, teams, implements, &c., and all hired help required to raise the crop. He is subject to no direction of the defendant, other than to sow and plant said land in such crops as the defendant should direct. He is not subject to the orders, nor under the control, of the defendant, in the performance of his labors. He is, in fact, his own master, and master of such help as he might employ. His services are not to be paid for by any definite or fixed standard, but depend entirely upon the nature and value of the crop. If the season is a favorable one, his remuneration may be large; if unfavorable, his crop may be light, and his remuneration or profits small; and the remuneration of the owner of the land for its use is subject to the same contingencies. In entering into the contract, therefore, the plaintiff must be presumed to have taken into consideration all these circumstances, and elected to make the venture, and take the chances of success or failure.

Upon the breach of the contract, as al-

leged in the complaint, by the defendant, he became liable to the plaintiff for such damages as would compensate him for the detriment proximately caused by such breach (Comp. Laws, § 4581), not exceeding "the amount the plaintiff could have gained by a full performance" of the contract on both sides (Comp. Laws, § 4617). But the plaintiff cannot claim that, by reason of the breach, the relations of the parties to each other have been changed. If the plaintiff was not a servant or employé of the defendant under the terms of the contract, he does not become such by the breach thereof. Assuming the facts to be as alleged in the complaint, the plaintiff was entitled to the performance of the contract on the part of the defendant, and to his right to his share in the profits or benefits derivable from the contract, of which he has been deprived by the defendant. His damages, therefore, are the amount of the detriment caused by the breach. In other words, what has the plaintiff lost by reason of the breach on the part of the defendant? Clearly, only what he could have realized from his three-fourths of the crops, except corn, to the whole of which he was entitled, and such other benefits as he was entitled to under the terms of the contract, less the cost of completing the same on his part; or, as stated in Taylor v. Bradley, supra, the value of his contract at the time the breach occurred. The plaintiff's claim for damages in this case is quite analogous to that of the plaintiff in Cranmer v. Kohn (S. D.) 64 N. W. 125, in which this court held that the contract itself furnished the measure of damages, and that the plaintiff could not be permitted to prove the monthly value of his services. That, like the case at bar, was an action for a breach of the contract, and the amount that the plaintiff could have realized as commissions under the contract, was held to be the measure of his damages. There would seem to be no very great difficulty, in ordinary cases, of approximately arriving at the damages an occupier may sustain in this class of cases. The probable amount and value of the crops can be ascertained with reasonable certainty, and such other damages as the party may be entitled to under the contract can be approximately ascertained and recovered. Cranmer v. Kohn, supra.

The paragraph stricken out alleged the value of certain labor and services, clearly required to be performed under and as a part of the plaintiff's contract. The defendant had neither directly nor indirectly assumed the payment for any such services, as such, and hence the paragraph was clearly irrelevant, and had no proper place in the complaint. These observations lead to the conclusion that the matter in the paragraph stricken out was properly stricken out. The order of the circuit court striking out the same is affirmed, and the case is remanded for further proceedings according to law.

FIRST NAT. BANK OF REDFIELD v. KOECHEL.

(Supreme Court of South Dakota. April 7, 1896.)

CHATTEL MORTGAGE — SUFFICIENCY OF DESCRIPTION.

A chattel mortgage, duly filed, which described a colt correctly, except in calling it a yearling when in reality it was but about six months old, but which further stated that it was the only colt owned by the mortgagors, was sufficient to charge a subsequent purchaser with notice, it being shown that the mortgagors owned no other colt during the year.

Appeal from circuit court, Spink county; A. W. Campbell, Judge.

Action by the First National Bank of Redfield against H. F. Koechel. Judgment for defendant, and plaintiff appeals. Reversed.

Howard & Walsh, for appellant. Sterling & Morris, for respondent.

HANEY, J. This is an action in claim and delivery to recover possession of a colt. Plaintiff claims under a chattel mortgage; defendant as a subsequent purchaser, without notice. The only question involved is the sufficiency of the description in the mortgage. An instrument, duly executed by J. M. Carico and S. E. Beddow, and filed in the proper county, mortgages to plaintiff property described as follows: "One black mare, 3 years old, weight 950 lbs.; one mouse color mare, 3 years old, weight 900 lbs.; one buckskin mare, 7 years old, weight 900 lbs.; one yearling colt, color sorrel, 4 white feet; one sorrel horse with white spots, 4 years old, weight 1,150 lbs. All of said property being now in the possession of said mortgagors, in the village of Crandon, owned by them, and free from all incumbrance, and being the only property of this description in his possession." After the filing of this mortgage, and without an examination of the record, defendant purchased a colt of Carico, the possession of which plaintiff seeks to recover in this action. Defendant is presumed to have known, when such purchase was made, what the record revealed, and what would have resulted from such inquiries as the record itself suggested. If a person of ordinary prudence, acting in good faith, and making the inquiries suggested by the mortgage, would have been enabled to identify the mortgaged property, the description is sufficient. 1 Cobbey, Chat. Mortg. § 161; Schmidt v. Bender (Kan. Sup.) 18 Pac. 491; King v. Aultman, 24 Kan. 246; Adamson v. Fagan (Minn.) 47 N. W. 56; Yant v. Harvey, 55 Iowa, 421, 7 N. W. 675. It was shown, conclusively, that Carico had only one colt of any description in his possession, at Crandon, during the fall of 1892. As it does not appear that Beddow had any, the fair inference is that he had none. Then the only colt in the possession of either was the one purchased by defendant. It was foaled April 21, 1892, had four white feet, a white strip in

the face, and its color was any shade of sorrel or bay, according to the individual notions of color entertained by numerous witnesses. There was a difference between this animal and that described in the mortgage, in respect to age; but any uncertainty in this regard was removed by the important declaration, corresponding with the fact, that it was the only property of that description owned by or in the possession of either mortgagor. Defendant knew, his knowledge being imparted by the record, that Carico and Beddow had given a mortgage upon the only colt owned or possessed by either. Inquiry at the village of Crandon would have informed him that the colt he was about to purchase was in fact the only one either possessed when or since the mortgage was made, and he must have concluded it was the animal intended to be covered by such mortgage. An honest, reasonable person could have reached no other conclusion. Exercise of ordinary care required an examination of the record. Defendant is alone to blame for the consequences of his failure to make such examination. We think the court erred in granting defendant's motion for a direction of the verdict in his favor. Judgment reversed, and cause remanded for such proceedings as may be consistent with this opinion.

BENNETT v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of South Dakota. April 7, 1896.)

APPEAL—RAILROADS—KILLING STOCK—CONFLICTING EVIDENCE—HARMLESS ERROR.

1. Where, in an action to recover for stock killed by a railway train, the testimony as to the circumstances of the killing, on which the question of defendant's negligence depended, was conflicting, the verdict of the jury will not be disturbed.

2. A judgment will not be reversed because of the erroneous admission of evidence, where it is not prejudicial to appellant.

Appeal from circuit court, Marshall county; A. W. Campbell, Judge.

Action by Frank Bennett against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

H. R. Turner, for appellant. James Wells, for respondent.

HANEY, J. In this action plaintiff recovered judgment for a cow killed by one of defendant's engines. Defendant appeals. But two errors are assigned: (1) The introduction of improper evidence; (2) insufficiency of the evidence to sustain the verdict. At the trial plaintiff established the killing and rested. Defendant showed that its train was equipped with proper appliances, that it was in charge of competent employés, and attempted to show that it was properly managed at the time of the accident. In rebuttal plaintiff sought to show that it was not properly managed, and that the accident might have been avoided by the exercise of proper care. The instructions are not before us. A general verdict was returned in favor of plaintiff. The animal was killed about 3 o'clock in the afternoon. The conductor testified that he did not see the cow. The engineer called for brakes. Were running about 25 miles an hour when signal for brakes was given in such manner as that he wanted them real bad. Was in mail department. Rushed out on platform, both brakemen were then at brakes. Then they got signal to release brakes, and passed place where cow was struck, but did not know they had struck her until they reached Britton. The engineer testified that he had been a locomotive engineer for defendant seven or eight years. They were running 25 miles an hour. He was on the watchout. Saw the cow come upon the track ahead of the engine. Knocked her off. He reversed the engine at the time he saw her coming on the track. She was about 15 rods away when he first saw her coming up the bank and coming upon the track. He was at that time at his station, on the lookout. Train did not stop. The cow came up the fill from the ditch on the track suddenly in front of the engine. He whistled for brakes first, then reversed engine, and then gave alarm for stock. Was 13 or 14 rods from cow when he reversed. When running at such rate of speed you come suddenly upon stock. It is duty of engineer, in some cases, to put on steam, instead of reverse engine. When positively there is no chance of stock getting off, you do not reverse. If this cow had been standing on the track at the point where struck, he could have seen her for two miles. That day, at that point, running at 25 miles an hour, with all train men doing their best to stop the train, that train could have been stopped at about a quarter of a mile from the time he called for brakes. The fireman testified that immediately prior to sounding call for brakes the engineer was at his station, and on the lookout. Charles Bennett testified in rebuttal that he saw the cow standing on the track when the train was a mile and a half away, and she stood there until the train came up and knocked her off. Ed Thieman testified, in rebuttal, that he saw the cow on the track before he saw the train. Saw the cow on the track when he saw the train a mile and a half away. Could not tell whether she remained on the track until struck. When he saw her, she was eating grass between the ties.

Assuming, without deciding, that it was not the engineer's duty to keep a lookout for cattle,—the view most favorable to appellant,—it was unquestionably his duty to use all reasonable means to prevent striking the cow after he first saw her upon the track. He says if she was on the track he could have seen her

when the train was two miles distant, and that the train could have been stopped in one-quarter of a mile after calling for brakes. He was at his station, and on the lookout. Two witnesses testify the animal was on the track when the train was a mile and a half distant; one that it remained there until struck by the engine. If the jury believed this testimony, they were entirely justified in concluding the engineer did not signal for brakes when he first saw the cow, as he must have seen her while running more than a mile; and they were warranted in concluding there was ample time in which to stop the train, after the cow was first seen on the track, and before the accident happened. They were at liberty to discredit his positive statement relative to calling for brakes when he first saw the cow on the track, if they believed other evidence in the case established the existence of circumstances inconsistent with, and which made improbable, such statement. Lighthouse v. Railway Co., 3 S. D. 518, 54 N. W. 320. Whether this animal was standing on the track when the train was more than a mile distant, and remained until struck, or came suddenly in front of the passing train, was a material and controlling circumstance, concerning which the evidence was conflicting. There was legal evidence which fairly warrants the verdict. It should not be disturbed. Jeansch v. Lewis, 1 S. D. 609, 48 N. W. 128; Baker v. Baker, 2 S. D. 261, 49 N. W. 1064; Cannon v. Deming, 3 S. D. 421, 53 N. W. 863; Brewing Co. v. Mielenz, 5 Dak. 136, 37 N. W. 728.

Frank Ferris, called by plaintiff in rebuttal, testified: "My age is 62 years. I am a farmer. I ran a locomotive engine a little over 22 years. It has been 10 years since I ran an engine." The witness was then interrogated by plaintiff's counsel as follows: "Supposing a train was running at the rate of 25 miles an hour, and an animal suddenly came upon the track in front of the engine, say 100 or 150 feet, and in the judgment of the engineer he would inevitably strike it, what is the proper thing for the engineer to do, under the circumstances, for the safety of his passengers and the safety of his train?" To which defendant objected, for the reason that it was incompetent, irrelevant, and immaterial, and that witness is not shown competent to answer the same, and that the question is hypothetical, and there is no evidence on which to base such a question. The objection being overruled, the witness answered as follows: "In cases of that kind, if they were too near to stop, he would increase his speed, and throw the stock from the track. In trying to stop the train when the train is running that fast you are more liable to knock the stock ahead on the track, and run over them, than you are to knock them clear of the track." Permitting this answer could not have prejudiced defendant, its engineer having given, without objection, substantially the same testimony. If there was error, it was harmless, and not reversible. The same witness was asked this question: "What is your experience as an engineer in regard to animals being scared from the track? Ordinarily, will not a proper use of the alarm whistle scare animals from the track, especially cattle?" To which the defendant objected as being irrelevant, incompetent, and immaterial. The objection being overruled, the witness answered as follows: "More especially cattle run from the track. Horses or mules are not so apt to leave the track as cattle." Twenty-two years' experience as a locomotive engineer certainly qualified this witness to testify concerning the ordinary effect of a stock alarm. It being disputed that any was given, the usual effect of such an alarm was a proper matter for the jury to consider, in connection with all the evidence, in determining what actually took place at the time of the accident. The effect of the answer, possibly more favorable to defendant than plaintiff, must have been slight, but its weight was for the jury, not the court. It was properly received. The judgment of the circuit court is affirmed.

HOWARD v. DWIGHT.

(Supreme Court of South Dakota. April 7, 1896.)

SALE — DELIVERY AND CHANGE OF POSSESSION — EVIDENCE — ATTACHMENT — RECITALS IN AFFIDAVIT.

1. Evidence that from the date of the alleged sale of a store, with its stock of goods, to plaintiff (who did not personally take possession), up to the time the goods were attached by a creditor of the vendor, the same manager and clerks remained in charge; that the vendor's name during this period remained on the window shades and in the newspaper advertisements; and that bills were made out to him, and paid by the manager, without objection, — sufficiently shows that there was no "immediate delivery, followed by an actual and continued change of possession," within Comp. Laws, § 4657, without which the transfer is conclusively presumed to be fraudulent.

2. Where an officer justifies the seizure of goods under a writ of attachment valid on its face, the recitals of indebtedness in the affidavit, or in the complaint annexed and made a part thereof, are prima facie evidence of such indebtedness.

Appeal from circuit court, Davison county; D. Haney, Judge.

Action by Jarvis C. Howard against Sperry Dwight to recover damages for the conversion of personal property. Judgment was directed for defendant, a new trial denied, and plaintiff appeals. Affirmed.

Frank A. Luse, C. J. Hute, and A. E. Hitchcock, for appellant. French & Orvis, Tilton & Levy, and Winsor & Mohr, for respondent.

CORSON, P. J. The plaintiff sued to recover damages for the seizure and conversion of a stock of goods of which plaintiff claimed to be owner. Judgment for defendant, and

from the judgment and an order denying a motion for a new trial the plaintiff appeals.

Prior to February 6, 1893, the National Union Company carried on the mercantile business, by means of some 40 or 50 stores located in different states, conducted by managers, who received a salary and percentage of the profits. Several of the stores were located in this state, and among them was one at Mitchell and one at Vermillion. At about the last-mentioned date, the National Union Company, as it is claimed, sold out its various stores to the plaintiff. The business of the plaintiff in the West seems to have been placed under the management of one Drakely, who had previously been the business manager of the National Union Company, and through him a new contract was entered into between the plaintiff and one Van Horn, of Mitchell, who had formerly acted as the local manager of the National Union Company. One Gadd Peterson acted as the local manager of the said corporation at Vermillion. In the latter part of February, 1893, said Peterson, claiming that there was due him $2,979.91, from said company, commenced an action against said company, and caused a warrant of attachment to be issued, and the stock of goods in the Vermillion store to be seized, and subsequently sold, leaving a balance unpaid of $1,053.21, for which a second action was commenced, on June 21, 1893, and a warrant of attachment issued, by virtue of which the stock of goods in the Mitchell store, under the management of said Van Horn, was seized and taken into the possession of the defendant as sheriff, and for which alleged seizure this action was instituted. At the close of all the evidence, the plaintiff moved the court to direct a verdict in his favor for the value of the goods seized, upon the ground that there was no evidence upon the part of the defendant that there was an indebtedness in favor of Peterson, and no evidence that there was not an immediate delivery and actual and continuous change of possession. This motion was denied, and the plaintiff excepted. Thereupon the defendant moved the court to direct a verdict in his favor, on the ground that the undisputed evidence showed that there was no such immediate delivery and actual and continued change of possession of the property involved in this action, and attempted to be transferred, as is contemplated by section 4657, Comp. Laws. This motion was granted, and the plaintiff duly excepted. We are of the opinion that plaintiff's motion for the direction of a verdict was properly denied; but, in the view we take of the case, it will not be necessary to discuss at length the plaintiff's motion, as that will necessarily be disposed of by the decision upon the motion made by the defendant, which was granted by the court.

The only questions necessary to be determined are: First. Was there sufficient evidence of an immediate delivery, and actual and continued change of possession as to require the case to be submitted to a jury? Second. Was there sufficient undisputed evidence to warrant the court, as matter of law, in holding that the National Union Company was indebted to Peterson at the time his warrant of attachment was issued?

Section 4657, Comp. Laws, upon the subject of fraudulent conveyances, reads as follows: "Every transfer of personal property, other than a thing in action, * * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors, while he remains in possession. * * *" This section (section 2024 of the Civil Code) has settled for this state the question that has given rise to much discussion and innumerable decisions, namely, the good faith and bona fides of the transaction, by making the presumption conclusive that the transfer is fraudulent and void unless there is an immediate delivery, followed by an actual and continued change of possession. The delivery and change of possession contemplated by the provisions of this section must, to a considerable extent, be governed by the nature of the property transferred, and the circumstances surrounding the parties (Tunell v. Larson [Minn.] 39 N. W. 628); but ordinarily the acts showing a change must be so open and manifest as to make the change of possession apparent and visible. The acts should clearly show the vendor's intention to part with the possession of the property, and to transfer it to the vendee. Such acts are required as will notify the public generally that there has been a change in the ownership of the property. In the language of Mr. Justice Field, in Allen v. Massey, 17 Wall. 351, "the possession which the purchaser was required to take of the property sold, in order to render the sale valid under the statute, must be open, notorious, and unequivocal, such as would inform the public or those who were accustomed to deal with the party that the property had changed hands, and that the title had passed from the vendor to the purchaser." Longley v. Daly, 1 S. D. 257, 46 N. W. 247; Claflin v. Rosenberg, 42 Mo. 439; Grady v. Baker, 3 Dak. 296, 19 N. W. 417; Woods v. Bugbey, 29 Cal. 467; Godchaux v. Mulford, 26 Cal. 316; Engles v. Marshall, 19 Cal. 320; Sweeney v. Coe, 12 Colo. 485, 21 Pac. 705; Bassinger v. Spangler, 9 Colo. 175, 10 Pac. 809; Burchinell v. Weinberger, 4 Colo. App. 6, 34 Pac. 911.

In the case at bar the undisputed evidence shows that subsequent to February 6th, when the sale from the National Union Company to the plaintiff is claimed to have been made, and up to June, when the warrant of attachment was served, the same manager and clerks remained in charge of the same store

with the same stock of goods, and with the sign of the National Union Company on the front window curtain; that the same stationery was used, with the name of the company printed thereon; that the advertisement in the paper, as late as June 29th, called particular attention to the fact of the "National Union Company's" store; and that bills to that company were made out and paid by the manager, without objection. The defendant, who was sheriff of the county, testified that he was a resident of the city of Mitchell, and was familiar with the store, both before and after February 6th; and that he never saw anything to indicate any change of the possession or ownership of the store; and that he did not know at the time he served his warrant of attachment that there had been any change in the ownership. The plaintiff proved that Van Horn went to Chicago late in February, and saw Drakely, who was formerly the general manager of the National Union Company, and who then claimed to be the manager for the plaintiff, and made a new contract with him in the name of the plaintiff; and that, on his return from Chicago, he called on Peterson, the manager of the Vermillion store, and plaintiff in the action in which the attachment was issued, and informed him what he had done, and requested him to go to Chicago, and make a similar contract, which he declined to do. It does not appear that Van Horn informed any other person of this contract or sale from the National Union Company to the plaintiff. There was therefore no evidence of any open or manifest change of possession, and no evidence of any continued change of possession. Possibly, Van Horn could have properly been retained as manager, and the same clerks retained, if there had been sufficient other evidence to show that there had been an immediate delivery, followed by an actual and continued change of possession. But there was no such evidence Van Horn, notwithstanding his new contract with Drakely, assuming to act for the plaintiff, seemed to have continued to act as the agent of the National Union Company up to the time of the service of the warrant of attachment, so far as his ostensible management of the business was concerned; and his notices in the newspapers were apparently made solely in the interest of the old company.

The learned counsel for the appellant has called to our attention several cases in which they claim the facts were similar, and the delivery and change of possession were held sufficient. But an examination of these cases shows they are not analogous to the case at bar. In Ford v. Chambers, 28 Cal. 13, the purchaser of a stock of goods went into the store, took possession, took an invoice in connection with the clerks of the vendor, and "assumed the direction of matters in the store, and sold goods to customers." The inventory was completed before the goods were seized by the sheriff. The purchaser took a new lease of the store, and the vendor had nothing to do with the goods after the purchaser took possession. The court held that the mere fact that the purchaser did not discharge the clerks in the employ of the vendor, and re-employ them, was not sufficient to prove that there was not an immediate delivery and continued change of possession, evidenced by his other acts. As the case of Billingsley v. White, 59 Pa. St. 464, seems to be a leading case upon this subject, we quote at some length from the opinion of the court: "In the case before us the evidence of the sale and actual delivery of the goods was positive and uncontradicted. The vendors, Billingsley & Patterson, were engaged in mercantile business in Cookstown; and on the 17th of March, 1867, they sold their stock of goods to the plaintiff, and on the 9th of March, after the completion of the invoice, they delivered to him the possession. * * * Notice of sale and change of possession was given by advertisements put up on the door of the store, and in at least two other public places in the town or borough; and personal notice thereof was given to all creditors of the firm in Pittsburg. Immediately after the sale, the plaintiff took possession of the store, and began to conduct the business in his own name and on his own account, and continued to carry it on for a period of ten months, when, in January, 1868, the sheriff seized and sold his stock of goods upon the defendant's execution as the property of Billingsley & Patterson. There was positive evidence that the advertisements giving notice of the sale were seen and read, and that it was known that the plaintiff was carrying on the business. The fair and reasonable inference from all the evidence is that the sale was well known in the community, and that the customers of the firm, who dealt with the plaintiff after the sale, knew that he was carrying on the business in his own name, and apparently on his own account. There was not a particle of evidence tending to show that either Billingsley or Patterson, after the sale to the plaintiff, ever bought or sold any goods, or did any other act professedly or apparently in the name of the firm, or that either of them had any connection with the plaintiff's business, except as his agent or employé. Patterson rented a field, and went to farming; but because he sold a few goods in the store after the sale to the plaintiff, and Billingsley acted as plaintiff's clerk or salesman under a contract of hiring, the court declared there was no such evidence of delivery or change of possession as the law requires in order to render the sale valid as against creditors. Do these circumstances, then, in connection with the other facts of the case, constitute such a badge of fraud or evidence of retained possession as to render the sale fraudulent in law? They would, undoubtedly, be sufficient to avoid the sale if they had the effect of rendering the possession of the plaintiff doubtful or ambiguous. But, if they did not, why should the sale be

declared fraudulent? If no one was misled or deceived by the conduct of the parties, if their relations to each other and to the goods in question were well understood by those who dealt with them after the sale, and if their acts and declarations accompanying and following the delivery furnished such evidences of an apparent and actual change of possession as to satisfy the community, why should not these evidences be sufficient to satisfy the requirements of the law?" It will be observed that the purchaser in that case took actual possession of the goods, and gave such notices and so conducted the business thereafter that it was clearly obvious to all that there had been a change in the ownership and possession of the property. These cases sufficiently illustrate the marked difference in the facts in the cases cited by appellant's counsel from those in the case at bar. The court was, in our opinion, fully justified in holding that, from the undisputed evidence, there was no such immediate delivery and actual and continued change of possession as is contemplated by the provisions of the section quoted. Was there sufficient undisputed evidence to warrant the court in holding, as matter of law, that Peterson, the attaching creditor, was such creditor of the National Union Company at the time the warrant of attachment was served? The defendant sought to prove this indebtedness by an account stated in November, 1892, between Peterson and the company; but this statement was stricken out by the court, for reasons not necessary now to be stated. It was also sought to prove this indebtedness by the affidavit for the attachment and judgment; but, in the view we take of the case, the judgment will not be considered, and its effect as proof of such indebtedness is not decided, as we are of the opinion that the affidavit for the attachment was sufficient prima facie evidence of the existence of the indebtedness. When the sheriff or other officer, as in this case, justifies the seizure of goods under a writ of attachment valid upon its face, the recitals of indebtedness in the affidavit must be taken as prima facie evidence of such indebtedness. Treat v. Dunham, 74 Mich. 114, 41 N. W. 876; Rinchey v. Stryker, 28 N. Y. 45; Hall v. Stryker, 27 N. Y. 596.

It is contended by the appellant that the affidavit is insufficient, in that it does not show when the indebtedness of the National Union Company was to be paid the plaintiff Peterson, or that the amount was due when the affidavit was made. In this the appellant is in error. The complaint is annexed to and made a part of the affidavit. In the sixth paragraph of the complaint it is stated that on December 21, 1892, it was agreed and admitted that there was due and payable to the plaintiff $3,151.90; and it is further alleged in the complaint that all of said amount had been paid, except the sum of $1,053.21, for which sum the plaintiff Peterson demanded judgment. If the amount specified was found due and payable to the said Peterson on December 21, 1892, and $1,053.21 of which sum was unpaid in June, 1893, that sum would be due and payable. We conclude, therefore, that the court below committed no error in directing a verdict for the defendant, and the judgment of that court is affirmed.

HANEY, J., took no part in the decision.

LEIGHTON v. SERVESON et al.

(Supreme Court of South Dakota. April 7, 1896.)

LIEN OF ATTORNEY — WHEN DIVESTED — ASSIGNMENT OF CLAIM BY CLIENT.

After judgment for plaintiff in justice court, his attorney perfected a lien for fees, as against the judgment debtor, as provided in Comp. Laws, § 470, subd. 4; and, after affirmance of the judgment on appeal to the circuit court, an action was brought by plaintiff against defendant and the sureties on his appeal bond. *Held* that, by filing his lien, the attorney obtained an interest both in the judgment and in the cause of action on the appeal bond, which was not affected by a subsequent assignment of plaintiff's interest in the judgment to one of the defendant sureties on the bond.

Appeal from circuit court, Sanborn county; D. Haney, Judge.

Action by William Leighton against James Serveson, George W. Corkings, and another on an appeal bond. Plaintiff had judgment, and defendant Corkings appeals. Affirmed.

N. B. Reed and T. H. Null, for appellant. S. A. Ramsey, for respondent.

FULLER, J. In justice court plaintiff obtained a judgment for $68.50 against the defendant Serveson, who appealed therefrom to the circuit court, where said judgment was affirmed. Plaintiff's attorney herein, S. A. Ramsey, Esq., had at all times exclusive charge of the above-mentioned cause, and before the commencement of this action against Serveson, as principal, and Corkings and McAulay, as sureties, upon the undertaking on appeal from the judgment obtained in justice court, an attorney's lien for $33 was by said Ramsey perfected and made effectual against the judgment debtor, by filing the same as provided by subdivision 4 of section 470 of the Compiled Laws. Plaintiff had judgment below, and the defendant Corkings appeals.

During the pendency of this action in the trial court, and long after the filing of the attorney's lien above mentioned, and apparently with actual notice thereof, the defendant Corkings obtained an assignment of plaintiff's interest in the judgment existing against the defendant Serveson, and by leave of court filed a supplemental answer in which such assignment was averred, and in which a dismissal of the cause was demanded, together with a judgment for costs, against plaintiff, accruing in this action subsequently to plaintiff's assignment of his interest as a judgment

creditor of Serveson. A motion to substitute Corkings as a party plaintiff in the action upon the grounds mentioned in his supplemental answer, was properly overruled. By filing his lien for attorney's fees Ramsey became, as against the judgment debtor, and in equity, the assignee and owner of an interest in the judgment and cause of action upon the undertaking, which was not divested nor affected by the assignment of plaintiff's interest therein. Clark v. Sullivan (N. D.) 55 N. W. 733. The assignment of plaintiff's interest in the judgment to the defendant Corkings neither relieved the judgment debtor nor his sureties from their liability to Ramsey. He still remained a party in interest, and it was within the power of the court to permit the action to proceed to judgment in the name of the original plaintiff against the sureties upon their undertaking, they alone having appeared herein. Comp. Laws, § 4881. The judgment against Serveson still stood charged with the attorney's lien, and the fact that the court sustained a motion to direct a verdict in plaintiff's favor against the defendant sureties, simply for the amount of the unassigned interest of Ramsey, being fully established by the evidence, is not a matter of which appellant has any reason to complain The record as presented discloses nothing to justify a reversal, and the judgment of the trial court is affirmed.

HANEY, J., took no part in the decision.

BUSH v. FROELICK et al.

(Supreme Court of South Dakota. April 7, 1896.)

MORTGAGES—FORECLOSURE—JOINDER OF DIFFERENT CAUSES.

Under Comp. Laws, § 4932, subd. 1, authorizing the joinder of causes of action arising out of "the same transaction, or transactions connected with the same subject of action," the holder of a note secured by a trust deed may in one action seek to foreclose the trust deed, to set aside a prior foreclosure made by the trustee without plaintiff's knowledge or consent, to enjoin the county treasurer from issuing to the trustee a tax deed for the mortgaged premises, and to adjust the equities of the various parties.

Appeal from circuit court, Kingsbury county; J. O. Andrews, Judge.

Action by Ella J. Bush against Henry J. Froelick and others in foreclosure. From an order overruling their demurrer to the complaint, certain defendants appeal. Affirmed.

John L. Pyle, for appellants. Whiting & Cooley, for respondent.

CORSON, P. J. This is an appeal from an order overruling a demurrer to the complaint. The complaint, a synopsis of which only will be given, alleges that in October, 1886, the defendant Froelick made to the defendant Miller, as payee, his promissory note for $1,650, payable five years from its date, and attached to which were 10 interest coupons, and secured the same by a trust deed on real property in Kingsbury county, and in which trust deed defendant Hole was named as trustee; that, very soon after its execution, the said note was transferred by said Miller, together with his interest in the trust deed to the plaintiff; that the 10 coupons attached to said note for the payment of interest were paid at their maturity, but that the principal of said note is due and unpaid, with interest from October, 1891; that in 1893 the said Hole, the trustee named in said trust deed, foreclosed the same by advertisement, and that the defendant the Valley Land & Irrigation Company, at said Hole's request, bid in the property described in said trust deed at the sale for the sum of $3,068.96, but that said Valley Land & Irrigation Company has not paid any part of said sum so bid, though it has received a certificate from the sheriff therefor; that said Valley Land & Irrigation Company refuses to transfer to the plaintiff the certificate of sale made to it by the said sheriff, unless she will assume and pay about $800, claimed to have been paid by said Hole, trustee, as interest in taking up the coupons on plaintiff's note, and about $300 taxes, which said Hole, as trustee, claims to have paid upon the property for the years 1886 to 1891, inclusive; that said Hole has taken in his own name a tax certificate to said property included in said trust deed, and now holds the same, and refuses to transfer the same to the plaintiff. She further alleges that she had no knowledge or information that said Hole was paying the interest and taxes upon said property, but supposed that the same were being paid by said Froelick, the maker of said note and grantor in said trust deed; that she has resided since 1886 in the state of Pennsylvania, and that her place of residence, and the fact that she was the owner of said note, were well known to said Hole during all said time, but that neither he nor any other person informed the plaintiff that said interest and taxes were not being promptly paid by the said Froelick, and that, had she been so informed, she would have foreclosed at once her trust deed, in accordance with its terms; that plaintiff was not informed of said foreclosure sale until after the same had been made, and that she did not authorize the said Valley Land & Irrigation Company, nor any other party, to bid the same in for her, or for her benefit; that said property does not exceed the value of $2,200; and that the amount due plaintiff for principal and interest on her said note exceeds $1,800. The complaint concludes with a prayer for judgment against the Valley Land & Irrigation Company and said Hole for the amount due her, and that said property be decreed to be sold to pay the same; that the treasurer of Kingsbury county be perpetually enjoined from issuing a tax dee-

to said Hole, etc., with the usual prayer for such other relief, etc. To this complaint the defendants Hole, Miller, and the Valley Land & Irrigation Company demurred, upon the following grounds: "First, that said complaint does not state facts sufficient to constitute a cause of action; second, several causes of action have been improperly united, to wit, for the foreclosure of a mortgage and a cause of action to set aside the foreclosure of a mortgage; and, third, an action to determine adverse interests in real estate; and, fourth, an action to set aside tax deeds and tax-sale certificates upon the property described in the plaintiff's complaint; and, fifth, an action for the recovery of money only upon contract."

The learned counsel for the appellants and respondent argued the case orally, and filed printed briefs, in which they have discussed the questions presented by the demurrer very fully; but, in the view we take of the case, it will not be necessary to review or discuss many of the authorities cited, as the demurrer must be determined by the provisions of our own Code. If the complaint states more than one cause of action, we think they are properly joined as causes of action arising out of "the same transaction or transactions connected with the same subject of action." Subdivision 1, § 4932, Comp. Laws. Neither text writers nor judges have been able to define with accuracy the meaning of this subdivision, but they all agree that its object is to adopt as a rule, in actions under the code system, the rule formerly prevailing in equity proceedings. Mr. Bliss, in his work on Code Pleading, says: "But not only under this class may all causes of action that arise out of the same transaction be united in one proceeding, but also those that arise from different transactions, provided they are connected with the same subject of action; * * * and this is, ordinarily, the property or the contract and its subject-matter or other thing involved in the dispute." Bliss, Code Pl. § 126. Mr. Baylies, in his work on Code Pleading, says: "The clause in question was introduced by an amendment of the old Code of (New York) 1852, which is substantially re-enacted in the present Code, and was, doubtless, intended to remedy the defect, and to apply to equitable actions, which frequently embrace many complicated acts and transactions relating to the subject-matter of the action, which it would be desirable to settle in a single action." Baylies, Code Pl. p. 117. Mr. Pomeroy, in his treatise on Remedies and Remedial Rights, says: "The class which is described by the language of the Codes quoted in the above heading is broad, comprehensive, vague, and uncertain. The principal design was, undoubtedly, to embrace the vast mass of equitable actions and causes of action which could not be classified and arranged in any more definite manner; and the language was properly left vague, so that it might not in any manner interfere with the settled doctrines of equitable procedure and pleadings, parties, and remedies." Pom. Rem. & Rem. Rights, § 463. and, after a lengthy discussion of the subject, he says that, in his view, "subject of action" means "subject-matter of the action"; and he concludes as follows: "I can conceive of no other interpretation which will apply to the phrase and meet all the requirements of the context. 'Subject-matter of the action' is not the 'cause of action,' nor the 'object of the action.' It rather describes the physical facts, the things, real or personal, the money, lands, chattels, and the like, in relation to which the suit is prosecuted. It is possible, therefore, that several different 'transactions' should have a connection with this 'subject of action.' The whole passage is, at best, a difficult one to construe in such a manner that any explicit and definite rule can be extracted from it. I remark, in bringing this analysis of the language to a close, that the latter clause of the subdivision, 'or transactions connected with the same subject of action,' can probably have no application to legal causes of action, and can only be resorted to in practice as describing some equitable suits which involve extremely complicated matters. In fact, Mr. Justice Comstock's position is doubtless correct, that the entire subdivision finds its primary and by far most important application to equitable, rather than to legal, proceedings." Id. § 475.

It seems clear, in the case at bar, that all the matters set out in the complaint are connected with the same subject of action, and that the transactions of the trustee and Valley Land & Irrigation Company alleged arise out of, or are connected with, the "subject of the action," namely, the note and trust deed. It is apparent from the facts alleged in the complaint, and which are admitted by the demurrer, that the plaintiff was the owner of the note executed by Froelick to Miller, and which was secured by the trust deed executed to Hole as trustee; that Hole, as trustee, allowed the interest to accumulate for a number of years, so far as the defendant Froelick was concerned, by paying it himself, instead of collecting it from Froelick; and that he had allowed the taxes to accumulate so far as Froelick was concerned, by paying them himself, without notifying the plaintiff of the nonpayment of such interest and taxes; and that he foreclosed the mortgage or trust deed without her knowledge or consent, and caused the property to be bid in by the Valley Land & Irrigation Company for a sum largely in excess of the value of the property, for his own benefit; and that the Valley Land & Irrigation Company now refuses, by the direction of said trustee, to surrender to the plaintiff the certificate to which she is entitled, unless she consents to pay about $1,100, which

the trustee claims to be due him for such interest and taxes paid by him. If, as is claimed by counsel for the respondent, it was the duty of the trustee, upon the failure of Froelick to pay the interest and taxes when due, to have notified the plaintiff of such failure, that she might have taken such proceedings as she was authorized to take by the terms of the trust deed, and he failed in the performance of that duty, by paying such interest and taxes himself, and with which he now seeks to charge her, and requires her to pay, before she can avail herself of the attempted foreclosure, she is entitled to relief in some form, and has a good cause of action, to which the trustee and the Valley Land & Irrigation Company are properly parties, as they are, by their acts, preventing the plaintiff from making available her security.

The law does not favor a multiplicity of actions, and when all the matters in controversy can properly be settled in the same action, as they clearly may be in this action, it is proper that they should be so settled in one action. The action is one in equity, and is, in effect, for the foreclosure of the trust deed. All persons, therefore, claiming an interest in, or lien upon, the property subsequent to the execution of the trust deed, are proper parties; and their claims, liens, and equities should be, and are properly, determinable in this action. Whether or not the prayer for relief is strictly the proper one is not necessary now to be determined, as a demurrer does not reach the prayer of the complaint. "An improper demand for relief does not render the complaint demurrable." Maxw. Code Pl. p. 9; Bliss, Code Pl. § 417; Hudson v. Archer, 4 S. D. 128, 55 N. W. 1099. Under the general prayer, where the defendants have appeared in the action, the court may grant any "relief consistent with the case made by the complaint, and embraced within the issue." Comp. Laws, § 5097.

We are of the opinion that the demurrer was properly overruled, and the order overruling the same is affirmed, and the case is remanded to the circuit court for further proceedings.

SUNDBACK v. GILBERT.

(Supreme Court of South Dakota. April 7, 1896.)

PLEADING—PETITION—SPECIFIC PERFORMANCE.

1. An allegation in a complaint that the parties entered into a contract will be taken on demurrer to mean a legal contract, and one in writing, where that is essential to its validity.

2. A petition for the specific enforcement of a contract by which defendant agreed to convey certain land to plaintiff is not demurrable because it fails to describe other land which was to be conveyed by plaintiff to defendant in part payment, where it alleges that plaintiff has fully performed on his part.

Appeal from circuit court, Minnehaha county; Joseph W. Jones, Judge.

Action by John Sundback against J. T. Gilbert. From a judgment on a demurrer to plaintiff's petition he appeals. Reversed.

Joe Kirby, for appellant. Winsor & Kittredge, for respondent.

HANEY, J. This appeal is from an order sustaining a demurrer to the complaint and from a judgment of dismissal upon plaintiff's failure to amend. The material parts of the complaint are as follows: "(1) That April 1, 1892, the Palisade Improvement Company made a contract with one Royce, whereby it leased to Royce certain realty, together with certain improvements and water rights, for five years, for a valuable consideration, under which contract Royce entered into possession of the leased premises, and retained possession until possession thereof was delivered to plaintiff as hereinafter stated. (2) That, in addition to said contract, it was agreed Royce should have the right at any time during the term of said lease to purchase the property for a consideration to be thereafter agreed upon, and that Royce undertook, as a part of said contract, to build up the trade of the mill upon said premises, and enhance the value of the property. (3) That April 1, 1893, the plaintiff entered into a contract with said Palisade Improvement Company and Royce, whereby he assumed and acquired a one-half interest in all the right of Royce under the aforesaid contract. (4) That subsequently said company conveyed all its right, title, and interest in the property, subject to the right of Royce, to defendant. (5) That thereafter plaintiff, Royce, and defendant entered into a contract whereby plaintiff acquired the sole and absolute right of Royce to the property under said contract, and is now the owner thereof. (6) That thereafter plaintiff entered into a further contract, and in compliance with the aforesaid agreement with defendant, whereby defendant agreed to sell and convey by good and sufficient warranty deed to plaintiff said property (describing it by metes and bounds); and in consideration thereof plaintiff was to pay defendant $4,500, by paying $1,000 in cash and conveying to him one-quarter section of land theretofore agreed upon, subject to a mortgage of $1,000, and plaintiff was to assume an incumbrance against the aforesaid property to the extent of $2,000. (7) That said property consists of a flouring mill and appurtenances, principally valuable on account of custom trade. That at the time said contracts were made with Royce and with plaintiff such trade had run down, and the mill had become dilapidated. That in pursuance of said contract plaintiff has used his influence and best endeavors to restore and build up a good name for the mill, with a view of becoming the owner thereof, and has expended $1,000 in placing improved machinery therein. (8) That plaintiff has in all things done and per-

formed his part of said contract to be performed by him, but that the said defendant has totally disregarded and refused to comply with his part of said contract to be performed by him, and now refuses to complete said contract by a conveyance of said property to this plaintiff, to the great and irreparable injury of plaintiff. (9) That plaintiff has no remedy in a court of law, and therefore, unless this court, as a court of chancery, compels the said defendant to convey said premises to him, as by their contract and agreement he was to do, great and irreparable injury will be suffered by plaintiff." Plaintiff demands judgment requiring defendant to convey according to the terms of the contract. Defendant demurred on the following grounds: "(1) That there is a defect of parties plaintiff and defendant, to wit, the Palisade Improvement Company and Ira O. Royce, mentioned in said plaintiff's complaint. (2) That the complaint does not, on the face thereof, state facts sufficient to constitute a cause of action." Do the facts alleged entitle plaintiff to a decree compelling defendant to convey? It is not stated whether the contracts are written or oral. If necessary to their validity, it will be presumed they are in writing. Jenkinson v. City of Vermillion, 3 S. D. 238, 52 N. W. 1066. This excludes any contention regarding the statute of frauds. All facts well pleaded are admitted. When the contract alleged in sixth paragraph, between plaintiff and defendant, was made, defendant was the sole and absolute owner of the property in question. He then agreed to convey it to plaintiff upon condition that plaintiff would pay him $1,000 in cash, convey to him a certain quarter section of land, and assume the payment of a $2,000 mortgage. It must be admitted, because properly pleaded, that each of these conditions has been performed. Comp. Laws, § 4927. Did it not appear from the complaint that these conditions have been performed by plaintiff, a cause of action would not be stated, for the reason that it would be impossible for the court to decree specific performance without a description of the land to be conveyed by plaintiff to defendant. In that case the contract would be too indefinite and uncertain for specific performance. But such is not the situation we have to consider. We must assume that defendant has received $1,000 in cash, a proper conveyance of the quarter he bargained for, that plaintiff has in a proper manner assumed the payment of the mortgage of $2,000 according to the terms of the contract, and that nothing remains to be done except the making of a conveyance by defendant of the premises involved, which are properly and particularly described. Such being the facts as admitted by the demurrer, and there being nothing in the various transactions respecting the property, prior to the making of the new contract by plaintiff and defendant, inconsistent therewith, we think the complaint states a cause of action. Neither Royce nor the improvement company was a party to the contract, which we hold can be enforced upon the theory of its full performance by plaintiff; nor has either any interest in it, or any interest in the property to be conveyed. In the view we take of the complaint, neither of them need be a party to this action. The judgment is reversed, and the cause remanded, with directions to overrule the demurrer, and allow defendant to answer upon such terms as may be deemed proper. All the judges concur.

SMITH v. HAWLEY, Sheriff.

(Supreme Court of South Dakota. April 7, 1896.)

EVIDENCE—DOCUMENTARY EVIDENCE.

1. Plaintiff shipped certain wheat to P., to be sold, and the proceeds placed to his account. The proceeds were afterwards attached as the property of a third party. *Held* that, on evidence of such shipment, entries in the books of P. in relation to the transaction, made in the ordinary course of business, and in the handwriting of a bookkeeper since deceased, were admissible as part of the res gestæ.

2. In an action against a sheriff for conversion by wrongful attachment, a disclosure in the attachment suit by a witness since deceased is not admissible against the sheriff, where he was not a party to the attachment suit.

Appeal from circuit court, Brookings county; J. O. Andrews, Judge.

Action by William H. Smith against W. H. Hawley, sheriff, for conversion by attachment of the proceeds of grain while in the hands of the vendee. From a judgment for plaintiff, defendant appeals. Reversed.

Alexander & Fairlamb and John A. Hooker, for appellant. Cheever & Hall, for respondent.

FULLER, J. Based upon a claim of ownership, plaintiff instituted this action against a sheriff to recover $277.54, which he alleges the defendant wrongfully converted. The issues presented by the answer, in which plaintiff's ownership is denied, and in which the defendant pleads a justification under legal process, were tried to the court and jury. This appeal is by the defendant, from a judgment against him in plaintiff's favor for $259.27, including interest. If there is no reversible error in the admission of evidence, the following material facts are fairly established. In the winter and spring of 1893 respondent stored about 1,600 bushels of wheat in a warehouse operated by H. S. Murphy, through his agent and buyer, W. E. Hendricks, taking a receipt therefor, in which no price or value was stated. About 800 bushels of the grain was placed in a separate bin. On the 18th day of June, 1893, Hendricks quit the employ of Murphy, but remained at the same place of business, and bought grain for the Davenport Mill Company. The grain in question was never sold to Murphy, and on the 22d day of June, re-

spondent called at the warehouse, and requested Hendricks to pay him for the wheat, all of which had been shipped or disposed of excepting about 488 bushels, which still remained separate from other grain, and undisturbed, in the bin where the same was placed when delivered. This grain, which was immediately turned over to respondent, was, upon the following day, and in his presence, loaded from the bin into a car, which was billed to Minneapolis, and shipped, at respondent's request, in the name of Mr. Hendricks, to C. E. Peck & Co., who, in the due course of business, received, at Elkton, $247.77 as the net proceeds thereof, and upon which, as the property of H. S. Murphy, the appellant sheriff levied an attachment, at the suit of the plaintiff, in an action then pending, wherein M. H. Casey was plaintiff and H. S. Murphy was defendant. This attachment was continued in force until judgment was docketed in plaintiff's favor against the defendant Murphy, when execution issued thereon, and the defendant herein, by virtue thereof, levied upon the money thus attached, and applied the same in satisfaction of said judgment. Before the commencement of this action respondent duly demanded said money of appellant.

The testimony of witnesses as adduced at the trial will be discussed only so far as the same is deemed essential to a determination of certain of the objections which counsel for appellant interposed thereto. The bookkeeper of the Mill Company or C. E. Peck & Co. produced the firm books, and, after stating that he had the custody and control of the books and records showing all shipments of grain to C. E. Peck & Co., and that he was not connected with the concern at the time of the statement in question, but that it was the custom of the firm to keep a record of all such transactions, and that the books were kept by the company, and the entries relating to the money in question were made in the handwriting of C. E. Peck, since deceased, counsel for respondent were allowed, over appellant's objection, to introduce in evidence certain entries thus identified, and appearing upon the blotter, journal, and ledger produced by said bookkeeper, which tended to show that the money in dispute, the proceeds of respondent's car load of wheat, had been received by C. E. Peck & Co. on the 26th day of June, 1893. That the entries had not been shown to be original, and that the books had not been "identified as the books of any particular firm or corporation," were the grounds specified in the objection of counsel for appellant to the introduction thereof. Independently of these entries it had been shown by the testimony of Mr. Hendricks, introduced without objection, that the grain turned over to respondent was shipped to C. E. Peck & Co., on the 23d day of June, and we think the preliminary evidence, though to some extent uncertain, was, when considered with other facts and circumstances before the trial court, sufficient to show that the entries were made in the ordinary course of business by Mr. Peck, and in the due performance of his duty as the bookkeeper of the firm. As the blotter, presumably the book of original entry, the journal, and the ledger were clearly proved to be the books of the firm, and the entries to be in the handwriting of Mr. Peck, whose duty it was to keep said books, our conclusion is that the evidence was not subject to the objection interposed and that the same was admissible as a part of the res gestæ. These entries, made before any question arose as to the ownership of the money now in dispute, purport to have been made at the time of, with reference to, and in acknowledgment of a liability upon the part of C. E. Peck & Co., arising from the receipt of the proceeds of respondent's car load of wheat, and the fact that the party making such entries has since died, does not render the evidence inadmissible, had the objection been sufficient to present that question for review. Lassone v. Railway Co. (N. H.) 24 Atl. 902; Reynolds v. Sumner, 126 Ill. 58, 18 N. E. 334; Carpenter v. Camp, 39 La. Ann. 1024, 3 South. 269; State v. Phair, 48 Vt. 366; Walker v. Curtis, 116 Mass. 98.

Appellant, in effect, certified in his return upon the warrant of attachment, issued in the action of Casey v. Murphy, and which was introduced at the trial of this cause in respondent's behalf, over appellant's objection, that C. E. Peck had, by order of court, appeared before John A. Hooker, a referee, on the 6th day of June, 1893, and had disclosed under oath certain recited facts relative to the matters now in controversy, and in consequence of which, and by virtue of the attachment, a levy was made and declared upon certain moneys shown by such disclosure to be the property of the defendant Murphy, and in the hands of said Peck, or the Mill Company, of which he was at the time secretary. Obviously, for all essential purposes, said John A. Hooker, referee and clerk of the court before whom this case was being tried, was called as a witness, and produced for identification the testimony of Mr. Peck, deceased, given at the time specified in appellant's return, in connection with the attachment proceedings and before said referee, in response to questions propounded by the attorney for the plaintiff in the attachment suit; and, after the witness had stated that said Peck was duly sworn, and that the questions and answers were at the time correctly reduced to writing by said referee, and recorded in full, the same was offered and received in evidence, over the objection that said disclosure was "incompetent and immaterial, and the further ground that the defendant had no opportunity to cross-examine the witness who testified at the time, he not being a party to the action." This evidence tended strongly to show that the money in suit belongs to respondent, and

to contradict appellant's return, so far as the same recited, in substance, that it was disclosed before the referee, by the examination of the witness Peck under oath, that the money in the hands of said Peck, seized and now in controversy, belonged to the attachment debtor. It would be useless, however, to state and discuss the force and effect of the testimony of Mr. Peck, taken before the referee, as the only question that can be considered, under the foregoing objection to the introduction thereof, is whether such testimony ought to have been excluded, for the reason that appellant was not a party to the action or proceeding in which the same was taken, and had no opportunity to cross-examine the witness. The statements of Mr. Peck, given without cross-examination before the referee, which went most directly to the question of the ownership of the money, and by which the same was measurably established, were hearsay in character, and the witness, if present in court, would not be permitted, over a valid objection, to detail the same. Moreover, in all cases, before the testimony of a witness, since deceased, can be used upon the trial of a cause, it must be made to appear that said evidence was used in an action or proceeding between the same parties, or their representatives in interest; that the issuable matter in the case upon trial, to which the same relates, was in substance the same in the former proceeding; and that the party against whom such evidence is to be used had the right and opportunity to cross-examine the witness when such evidence was adduced. Marshall v. Hancock, 80 Cal. 82, 22 Pac. 61; 1 Rice, Ev. p. 395; McMorine v. Storey, 34 Am. Dec. 374; 1 Whart. Ev. 177. The ex parte and hearsay statements under consideration, given in a proceeding between entirely different parties, wherein appellant had neither right nor opportunity to cross-examine the witness, were highly prejudicial to his cause, and the objection to the introduction thereof should have been sustained.

We have determined only such questions of evidence as appear likely to arise upon a retrial, and the assignments of error, so far as it has been necessary to extend our examination, are not subject to the objections discussed in the brief of respondent's counsel. The judgment is reversed, and a new trial is ordered.

STATE v. LA CROIX.

(Supreme Court of South Dakota. April 7, 1896.)

BURGLARY — INFORMATION — CRIMINAL LAW — EVIDENCE — VARIANCE — APPEAL — PRESUMPTIONS — REVERSAL — OBJECTIONS TO EVIDENCE.

1. Laws 1895, c. 64, § 3, requires an offense charged in an information to be stated with the same precision as is required in an indictment. Comp. Laws, § 7249, provides that an indictment is sufficient if the act charged is clearly set forth in ordinary language, so that a person of common understanding could know what is intended, and with such certainty as that the court can pronounce judgment according to the right of the case. Section 6741 provides that every person who breaks and enters in the nighttime any building, etc., in which any property is kept, with intent to steal or commit any felony, is guilty of burglary in the third degree. *Held*, that an information was sufficient which charged that defendant, in the nighttime, burglariously broke and entered with intent, etc., burglariously to steal, though it did not state the degree of the offense charged.

2. On appeal it will be presumed in favor of an order of the trial court overruling an unsupported motion to set aside the information that such information was not filed until a preliminary examination had either been held, or waived by defendant, as required by Laws 1895, c. 64, § 8.

3. After impaneling and swearing the jury in a criminal case, the court adjourned until the next morning, when one of such jurors did not appear, and the court discharged him. Another juror was selected by order of the court, which gave defendant the right to exercise three additional peremptory challenges, none of which were used. After the jury was thus completed, the juror discharged came into court. *Held*, that a conviction would not be set aside in the absence of any claim by defendant that he was prejudiced.

4. An objection that evidence is irrelevant and immaterial is insufficient.

5. An information alleged that defendant broke and entered the store building of H. & S., situate in the town of G., with intent to steal the goods of said H. & S. The evidence showed that such firm was composed of H. and S.'s wife; that the store occupied by such firm was owned by B., and contained a stock of merchandise belonging to such firm. *Held*, that the variance between the information and proof was immaterial.

Error to circuit court, Buffalo county; D. Haney, Judge.

Joseph La Croix was convicted of burglary, and brings error. Affirmed.

C. C. Morrow, F. F. Haskell, and James Brown, for plaintiff in error. Coe I. Crawford, Atty. Gen., and H. B. Farren, State's Atty., for the State.

FULLER, J. Upon a duly-verified information plaintiff in error was prosecuted for and found guilty of the crime of burglary in the third degree, and from a judgment of conviction error is brought to this court for review. Section 3, c. 64, Laws 1895, requires that an offense charged in an information "shall be stated with the same precision and fullness in matters of substance, as is now required in indicting in like cases." The allegations of the information are conceded to be entirely sufficient, so far as they relate to the party charged and to the particular circumstances of the offense, but counsel for plaintiff in error maintain that there is a failure to charge any offense whatever, in that the degree of burglary is nowhere stated. As the caption and all formal parts of the accusation are omitted from the abstract, which purports to contain only that part of the information which is rightfully admitted to be sufficiently "direct, and contains as it regards the particular circumstances of the

offense charged," it might well be presumed, in the absence of anything to the contrary, and in support of the ruling of the court upon a demurrer and motion to set the information aside, that the degree of burglary, the facts constituting which are stated in ordinary and concise language, was stated in the introductory part of the information. In State v. Eno, 8 Minn. 220 (Gil. 190), the court says: "When the crime has a name, such as treason, murder, arson, manslaughter, larceny, etc., and is susceptible of division into different classes or degrees, it is sufficient to charge the defendant with the crime by name in the accusing part of the indictment, and describe the particular degree or class of the offense in the specifications." As no question is raised as to the formal averments, none of which appear in the abstract, and it being admitted that the particular circumstances of the offense charged are sufficiently stated, it must, of necessity, follow that the information is direct and certain as to the offense charged. "Every person who breaks and enters, in the daytime or in the nighttime, * * * any building, or any part of any building, booth, tent, railroad car, vessel, or other structure or erection in which any property is kept, with intent to steal therein, or to commit any felony, is guilty of burglary in the third degree." Section 6741, Comp. Laws. The information charged: "That Joseph La Croix, on September 28, 1895, with force and arms, about the hour of twelve o'clock in the nighttime, at the town of Gann Valley, in the county aforesaid, the store building of William J. Hughes and Henry Slechta, partners doing business in the firm name and style of Hughes & Slechta, there situate, unlawfully, feloniously, and burglariously did break and enter, with intent the goods, chattels, and personal property of the said Hughes and the said Slechta, in said store building, then and there being kept, then and there unlawfully, feloniously, and burglariously to steal, take by stealth, and carry away, with intent to deprive the aforesaid owners thereof." Section 7249 of the Compiled Laws is as follows: "The indictment is sufficient if it can be understood therefrom: * * * (6) That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. (7) That the act or omission charged as the offense, is stated with such a degree of certainty, as to enable the court to pronounce judgment upon a conviction, according to the right of the case." Under the statute the facts constituting a public offense are charged in ordinary and concise language, so that a person of common understanding may know that the crime described is burglary in the third degree, and, as the information is therefore sufficient, the demurrer was properly overruled.

Section 8 of chapter 64 of the Laws of 1895 provides that: "No information shall be filed against any person for any offense until such person shall have had a preliminary examination thereof as provided by law before a justice of the peace or other examining magistrate or officer, unless such person shall waive such right: provided however, that information may be filed without such examinations against fugitives from justice." Under the rule by which presumptions are entertained in support of judicial proceedings, in the absence of evidence or anything to the contrary, it will be presumed in favor of an order of the trial court overruling an unsupported motion to set aside the information that the same was not filed until a preliminary examination had either been held, or waived by the defendant.

At the trial, and after nine jurors had been selected and impaneled, the court adjourned until 9 o'clock the next morning, when one of the jurors thus chosen and sworn to try the case failed to appear; whereupon the court, after being informed that said juror, upon the adjournment of court the evening before, had gone to his residence in the country, six miles away, discharged said juror, and ordered the selection of another in his stead, and at the same time gave the defendant the right to exercise three additional peremptory challenges, none of which were used. After the completion of the jury and the commencement of the trial, the juror discharged on account of absence came into court. Without the claim that the accused was prejudiced, his counsel's contention that the action of the court in discharging the absent juror is error for which the cause must be reversed cannot be entertained with favor. While litigants, within the statutory restrictions, have power to reject, it is not their province to select jurors; and, ordinarily, when a prisoner has been tried by one impartial jury, he should not be allowed another trial to another impartial jury, simply because the court excused a qualified juror and selected in his stead another, possessing the same qualifications, and against whom no objection is urged. The fifth headnote in People v. Barker, 60 Mich. 277, 27 N. W. 539, is as follows: "During the impaneling of a jury in a criminal case, and before a full panel had been secured, an adjournment was had until the following morning. Upon the opening of court at the appointed hour, a juror who had been accepted as one of the panel prior to such adjournment failed to appear, and after an hour's search was found in a room of an hotel, playing pool. The court excused him from the panel, his place being filled by another juror, to which order the respondent excepted. Held, that a circuit judge is invested with a certain degree of discretion in the selection of a jury, which should be exercised by seeing that proper and competent men are selected; and so long as the case of the respondent is not prejudiced

by the exercise of such discretion he cannot complain." "The court may, of its own motion, for any good reason excuse a qualified juror from sitting on the panel in a criminal case; and this will not be error if the defendant is tried by a jury of lawful men." People v. Arceo, 32 Cal. 40. See, also, State v. Davis (W. Va.) 7 S. E. 24.

The information charges that plaintiff in error broke and entered "the store building of William J. Hughes and Henry Slechta, partners doing business in the firm name and style of Hughes & Slechta," and it appears from the cross-examination of said William J. Hughes that the above-named firm is composed of himself and Christina Slechta, the wife of Henry Slechta, and that the store building in question, occupied by said firm of Hughes & Slechta for the purposes of trade, is owned by George Backus. In response to a question propounded by the prosecuting attorney on redirect examination, and over the general objection that the same was "irrelevant and immaterial," the witness was allowed to state that at the time in question there was no other general store building in Gann Valley, Buffalo county, S. D., and this ruling of the court is assigned as error. To prevent surprise, and enable the court and counsel to deal with an objection understandingly, their attention must be brought directly to the specific point wherein the question is claimed to be irrelevant and immaterial, and, unless this is done, no question is presented to an appellate court for review. Mining Co. v. Noonan, 3 Dak. 189; Agricultural Works v. Young (S. D.) 62 N. W. 432; 3 Rice, Cr. Ev. p. 259, and numerous cases there cited.

Upon the ground of a variance between the information and the proof as to the ownership of the building and the stock of merchandise therein contained, counsel for the accused moved the court to direct the jury to return a verdict of not guilty, and the denial of said motion is assigned as error. This motion was properly overruled. There is no material variance between the information and the proof as to the occupancy of the building, and it appears from the undisputed evidence that said building contained a stock of merchandise belonging to the firm of Hughes & Slechta at the time the offense was committed. The fact that the title to said building was shown to be in another, and that Slechta's name was Christina, instead of Henry, is not a material variance. No pretense is made that the accused was, by the variance, misled or prejudiced in making his defense, and surely he is not exposed to the danger of being put twice in jeopardy for the offense described in the information. The variance was therefore properly disregarded. Section 7588, Comp. Laws; Abb. Tr. Brief, p. 411; Coates v. State (Tex. Cr. App.) 20 S. W. 585; State v. Emmons (Iowa) 33 N. W. 672; Smith v. State (Tex. Cr. App.) 29 S. W. 775; Leslie v. State (Fla.) 17 South. 555; Winslow v. State (Neb.) 41 N. W. 1116. As the view we have taken of the questions presented by the record leads to the conclusion that the case was correctly tried, and submitted to the jury under proper instructions as to the law of the case, the judgment of the trial court is affirmed.

HANEY, J., took no part in this decision.

BANKS v. CRAMER.

(Supreme Court of Michigan. April 21, 1896.)

PRINCIPAL AND AGENT—UNDISCLOSED PRINCIPAL—APPEAL—FAILURE TO EXCEPT.

1. In an action to recover damages for failure to fulfill an agreement to procure insurance on plaintiff's property, it is no defense that defendant was acting for another person in making the agreement, unless such fact was disclosed to plaintiff.

2. Assignments of error based on rulings to which no exceptions were taken cannot be considered.

Error to circuit court, Washtenaw county; Edward D. Kinne, Judge.

Action by Frank Banks against Densmore Cramer to recover damages for failure to fulfill an agreement to insure plaintiff's property. Judgment for plaintiff, and defendant brings error. Affirmed.

Densmore Cramer, in pro. per. Arthur Brown (E. B. Norris, of counsel), for appellee.

MONTGOMERY, J. The plaintiff sued to recover damages from the defendant for failure to fulfill an agreement to insure plaintiff's property. The testimony offered on behalf of the plaintiff tended to show that the defendant promised the plaintiff to cause a policy of insurance to be written on his dwelling house in the sum of $300; that the insurance premium was paid; and that plaintiff supposed that the insurance policy had been issued and retained by the defendant as security for a mortgage which defendant or his father-in-law retained on plaintiff's property. Plaintiff's dwelling house was consumed by fire, and he testified that he learned that defendant had pocketed the money, and failed to effect the insurance. The case turned almost wholly upon questions of fact. It seems not to have been contended below that the testimony wholly failed to show any contract, or that, if the jury believed plaintiff's testimony, there was not an agreement to effect insurance, but it was claimed that the defendant, in whatever he did, acted as the agent of one Twichell. It appears that, at the time this alleged contract was made, plaintiff effected a loan through Mr. Cramer, and gave a mortgage running to Twichell. Plaintiff's testimony tended to show that he supposed that this mortgage ran to defendant. However that may be, the defendant was engaged in

the insurance business, and it did not appear that Twichell was. It does not necessarily follow that, because defendant represented Twichell in making the loan, he did not act independently in engaging to effect insurance. The circuit judge instructed the jury that if the defendant was acting as agent for Twichell, and disclosed that fact to plaintiff, then plaintiff could not recover. We think this instruction sufficiently favorable to the defendant.

There are numerous assignments of error based upon the rulings which are not excepted to, and defendant has discussed the testimony in his brief, and endeavored to show that that of plaintiff was untrue. It is needless to say that we cannot deal with such questions on error. There are no other questions which require discussion. We are satisfied that no legal error was committed, and the judgment will be affirmed.

LONG, C. J., did not sit. The other justices concurred.

FITZHUGH et al. v. RIVARD.

(Supreme Court of Michigan. April 21, 1896.)

JUSTICE COURT—DOCKET ENTRY—VALIDITY OF JUDGMENT.

A default judgment of a justice of the peace is void where the docket entry shows that the cause was adjourned for six days, without stating the place to which the same was adjourned. Waldron v. Palmer (Mich.) 62 N. W. 731, followed.

Error to circuit court, Bay county; Andrew C. Maxwell, Judge.

Action by Charles Fitzhugh and another, sureties on the replevin bond of Charles C. Fitzhugh, deceased, against Leander Rivard. Judgment for plaintiffs, and defendant brings error. Affirmed.

Lindner, Porter & Haffey, for appellant. Simonson, Gillett & Courtright, for appellees.

MONTGOMERY, J. Defendant in this case relied upon a judgment rendered by a justice of the peace. The docket entry showed that the cause was adjourned for six days, without stating the place to which the same was adjourned. The case is ruled by Waldron v. Palmer (Mich.) 62 N. W. 731. It is sought to distinguish this case from that, on the ground that in the former case the defendant in the case before the justice understood that the case was to be heard at the office of the justice. It is sufficient to say that, although the court assumed this to be the fact, no proof was offered to show it. We do not mean to intimate that the docket entry could be supplemented in a jurisdictional matter by such proof, if offered. The judgment is affirmed.

LONG, C. J., did not sit. The other justices concurred.

REED v. JOURDAN.

(Supreme Court of Michigan. April 21, 1896.)

PLEADING AND PROOF—DEFENSE NOT PLEADED—FRAUDULENT CONVEYANCES.

1. In a suit by an executor under How. St. § 5884, to set aside a voluntary deed by his testator as in fraud of creditors, the defense that in the allowance of the claims to the payment of which the land is to be subjected, and in making the report, only one of the two commissioners acted, unless pleaded, is not available as a defense, though evidence in support thereof is introduced.

2. In such a suit, a decree setting aside the deed absolutely should not be rendered, but it should be conditioned on the nonpayment of the claims within a specified time.

Appeal from circuit court, Ottawa county, in chancery; Philip Padgham, Judge.

Suit by Theophilus M. Reed, administrator of the estate of Joseph Jourdan, against Pearley Jourdan. From a decree for plaintiff, defendant appeals. Modified.

Stephen H. Clink, for appellant. Louis P. Ernst (George A. Farr, of counsel), for appellee.

LONG, C. J. The bill in this case was filed under the provisions of section 5884, How. St., by the complainant as administrator, to set aside a deed made by the deceased in his lifetime to the defendant, as a fraud upon the creditors of the estate. The statute provides that "when there shall be a deficiency of assets in the hands of an executor or administrator, and when the deceased shall in his lifetime have conveyed any real estate or any right or interest therein with intent to defraud his creditors, or to avoid any right, debt or duty of any person, or shall have so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator may, and it shall be his duty to commence and prosecute to final judgment any proper action or suit at law or in chancery for the recovery of the same, and may recover for the benefit of the creditors all such real estate so fraudulently conveyed," etc. The bill alleges substantially that the complainant was appointed administrator of the estate, and that no personal estate came into his hands; that the claims against the estate to the amount of $666.82 were duly allowed by the commissioners on claims appointed by the probate court; that the report of said commissioners and allowance of said claims had been duly filed in the probate court; that more than 60 days had elapsed from such filing and allowance, and that no appeal had been taken from the same; that the probate court had ordered the payment of said claims; that more than 60 days had elapsed since the entry of such order, and said claims had not been paid or any bond given for such payment, and that such claims constituted the lawful, liquidated, and adjudicated debts against

said estate; that the expenses of administration would amount to about $75; and that there was no money or personal property of said estate to pay the same. The bill further alleges that the real estate of the deceased was 60 acres of land in said county, inventoried and appraised at the sum of $1,200; that said lands were incumbered through the dower interest of the widow, and also a mortgage of about $250; that on December 21, 1891, and two days after the death of Joseph Jourdan, a deed of the north 40 acres was recorded from him to the defendant; that said deed was without consideration, and was delivered, if at all, but two days before the death of the deceased, and after the debts so found had been contracted, and was made with intent to defraud the creditors of the deceased; and that the remaining 20 acres of land is wholly insufficient to pay said debts. The bill also alleges that complainant had been licensed to sell said lands, but, in consequence of the record of said fraudulent deed, could not do so. The answer admits the appointment of complainant as administrator, and states that defendant has no knowledge of the amount of the personal property that came into the hands of the complainant. It alleges that many of the claims that were allowed against the estate were illegal and fraudulent, and were permitted to be approved and allowed by the complainant as such administrator; that the claim of $440 allowed to the widow was wholly fraudulent, and without foundation in fact or equity, and was well known so to be by the complainant at the time the same was allowed, but that complainant, instead of defending the estate against said fraudulent and dishonest claim, encouraged and advised the making of such claim, and fraudulently connived at the allowance thereof by the judge of probate; that the claim of D. Cleland of $46.23 was upon a note which was outlawed a long time prior to the allowance thereof, notwithstanding which the complainant made no defense or protest against such allowance, but, on the contrary, permitted such allowance, while knowing it to be illegal; that many of the other claims allowed against the estate were fraudulent and illegal, which fact was well known to the complainant; that the defendant would have appeared and defended against the allowance of said claims had he not relied upon the complainant to do his duty as administrator, and defend the estate against unlawful claims; that the defendant therefore denies that said claims constitute a lawful debt against the estate to the amount of $666.82, or to any other amount exceeding $100; and that, under the circumstances, the complainant is not entitled to receive any compensation because of his maladministration of the affairs of the estate. The answer further sets up that defendant neither admits nor denies the allegation of the bill as to the dower interest of the widow in the real estate in question. The answer then states: "This defendant says that it is true that he caused a warranty deed to be recorded in the office of the register of deeds of the county of Ottawa, wherein and by virtue of which the deceased had in his lifetime conveyed to the defendant the forty acres of land described in the bill, but that said deed was made and delivered without any corrupt or fraudulent purpose whatsoever, and was accepted in absolute good faith by the defendant, and for a good and sufficient and due consideration." A replication was filed, and the proofs taken in open court. The record states that "the complainant's counsel offered all the records and files in the probate court, including all the claims presented to the commissioners and their findings in the estate of the deceased." The record further states: "It is admitted that the probate proceedings offered were legal in form; that the probate court had jurisdiction to appoint commissioners, and did so appoint; and that the files so offered contain, among other things, what purports to be a warrant to the commissioners, their report, and the order of the court thereon." The finding of the commissioners on claims shows the amount as stated in the bill of complaint. It purports to be signed by the two commissioners, and was returned and filed in the probate court August 17, 1892. It appears from the testimony that no appeal was taken from the allowance of these claims, and that more than 60 days had elapsed from the date of the filing of the report of the commissioners on claims in the probate court before the present bill was filed. It was shown that there was no personal property from which these claims could be paid. It was further shown that two days before the death of the deceased, and after all these debts had been contracted, the deceased delivered to the defendant the deed in controversy. The deed purports to have been dated March 18, 1887, but it was retained by the deceased, and not delivered until December 25, 1891. It was further shown that, at the time the deed bears date, the deceased was unmarried, but that four days after that date, he married one Araminda Ferguson, who remained his wife until his death, and who still survives, and that she had no knowledge of the deed until after the death of her husband.

The court found from the testimony that, under the circumstances, the widow was entitled to her dower in the lands; and, further, that the deed was made without consideration, and with intent to hinder and delay the creditors of the estate in the collection of the just claims against him and his estate; and that the same was fraudulent and void against his creditors, and against the claims so proved against his estate; and, in and by the decree, the court set aside and vacated the deed. The defendant, upon the hearing,

gave no satisfactory explanation as to the manner in which he obtained the deed, or that any consideration was paid therefor. He did introduce testimony tending to show that one of the commissioners did not sit while the proofs were being taken in the allowance of the claims, and that such commissioner's name was signed to the report by the other commissioner. He also gave some testimony tending to show that some of the claims were invalid, and now claims that the administrator did not object thereto, and did not protect the estate against their allowance.

The contention in this court is that the decree of the circuit court cannot stand: (1) Because it sets aside the decree absolutely and unconditionally; (2) because only one commissioner acted in the allowance of the claims and making the report; (3) because the complainant does not come into court with clean hands; (4) because there is no showing that the probate court ever legally ordered these claims to be paid out of the property of the estate.

Upon the second proposition, we think the defendant cannot be heard here. There was no such claim set up in the answer. The answer does not deny the jurisdiction of the commissioners to act, nor does it deny the validity of their action. It admits that the claims set up are just to the amount of $100. The complaint is that the claims are unjust in themselves, and that the administrator did not do his duty in not contesting them. The rule in such cases is that, besides answering the complainant's case as made by the bill, the defendant must state to the court in his answer all the circumstances of which he intends to avail himself by way of defense, for it is a rule that the defendant is bound to apprise the complainant by his answer of the nature of the case he intends to set up, and that he cannot avail himself of any matters in defense which are not stated in his answer, even though they should appear in his evidence. 1 Barb. Ch. Prac. 137. This rule is settled in this court in Van Dyke v. Davis, 2 Mich. 144; Smith v. Brown, 2 Mich. 161; Fosdick v. Van Husan, 21 Mich. 573; Smith v. Rumsey, 33 Mich. 189; Higman v. Stewart, 38 Mich. 519. In Smith v. Rumsey, supra, it was said: "The proposition that the court is bound to adjudge according to the case shown and issues raised by the pleadings is so evident, and has so repeatedly been expounded and applied in this state, that anything beyond a reference to it would scarcely be excusable." Complainant contends upon this point that, if for no other reason, this defense cannot be made, as the decision and finding of the commissioners cannot be impeached collaterally. We need not discuss this view of the case, being satisfied to rest our decision upon the ground that no such claim was set up in the answer.

The court below found upon the third and fourth points against the contention of the defendant, and we think properly, under the evidence.

We think defendant's first point has some merit. The decree sets the deed aside absolutely. This, we think, should not be done, and that the defendant should have been permitted, upon the payment of the claims and the costs of the proceedings in the probate court and of the circuit court, to have retained the lands subject to the widow's dower interest therein. The decree will be modified to that extent, and provide for such payments within 60 days of such claims and costs by the defendant; but, upon failure to pay the same within such time, the decree of the court below will stand affirmed. Neither party will recover costs of this court. The other justices concurred.

CITY OF LANSING v. LANSING CITY ELECTRIC RY. CO.

(Supreme Court of Michigan. April 21, 1896.)

STREET-RAILWAY COMPANY—ORDINANCE GRANTING FRANCHISE—CONSTRUCTION—PAVING BETWEEN TRACKS—MANDAMUS.

1. City of Lansing Ordinance No. 61 (granting a street-railway company the franchise to lay its tracks upon the street), by section 15, provides that the railway company, in constructing its tracks, shall pave between the tracks with the same material as that adjoining said tracks; and, if the city provides for paving or repairing any street, the company shall use within the railway tracks the same material, and keep the same in good repair. *Held*, that the company is bound to repave between the tracks, in case a street is repaved with different material, with the material used in the new pavement.

2. Mandamus will lie to compel a street-railway company to pave the street between its tracks as required by the ordinance granting it the franchise to lay the tracks upon the street.

Certiorari to circuit court, Ingham county; Rollin H. Person, Judge.

Mandamus proceedings, on the relation of the city of Lansing, against the Lansing City Electric Railway Company. There was a judgment for relator, and defendant brings certiorari. Affirmed.

Jay P. Lee, for appellant. Russell C. Ostrander, City Atty., for appellee.

LONG, C. J. In June, 1895, a petition was filed in the Ingham circuit asking an order against the respondent to show cause why mandamus should not issue, requiring it to pave with brick that part of Washington avenue, in the city of Lansing, from Kalamazoo street south to the bridge across Grand river, lying between the rails of its track, and on each side of its track, to the end of its ties. In answer to an order to show cause the respondent made return, and on the hearing in the circuit court that court determined that the respondent should pave with brick such portions of its street between its tracks, and denied the mandamus to compel it to pave that portion outside its tracks. The case comes to this court by writ of certiorari upon behalf of the respondent. The

errors claimed are (1) that mandamus is not the proper remedy; (2) in ordering the mandamus to issue to compel the paving between the tracks.

It appears that prior to the organization of the respondent company the Lansing City Railway Company was organized, and obtained certain privileges and franchises from the city of Lansing, in 1886, under Ordinance No. 61 of the Public Ordinances of said city. Under this ordinance the company had the right to construct, maintain, and operate a street railway by electricity. The respondent is the successor or that company, having obtained all its rights, privileges, and franchises, and is operating by electricity its railroad within the city of Lansing. Section 12 of Ordinance No. 61 provides: "The common council hereby reserves the right to make such further rules, orders and regulations as may from time to time be deemed necessary to protect the interests, safety, welfare or accommodation of the public in relation to said railway, not inconsistent with the provisions of this ordinance." Section 15 provides: "Said railway company, in constructing its tracks along any streets or avenues that are paved, shall pave between said tracks with the same material as that adjoining said tracks. If the city shall provide for the paving or grading any street or repairing of any of the bridges occupied by said company, the said company shall contemporaneously with the paving or grading of streets or repairing of bridges, at its own expense, grade or repair within said railway company's track with the same material, or with material and in a manner satisfactory to the common council, and at all times keep or cause to be kept such pavements or bridge planking within said track in good repair." When the Lansing City Railway Company's tracks were first constructed along Washington avenue, said avenue was paved with cedar blocks between Kalamazoo street and the bridge crossing Grand river. The company used the same material between its rails along Washington avenue, between these points. In 1892 the Lansing City Railway Company passed into the hands of a receiver, and, while the road was under his control, permission was granted him to lay T rails upon all its lines in the city, upon condition that the company pave between its rails under the supervision of the city engineer, and subject to approval. That permission from the council reads as follows: "Resolved by the common council of the city of Lansing, February 18, 1892, that the railway company be and are hereby permitted to lay a 'T' rail on their lines within the city limits: provided, they pave to the rail so as not to interfere with the carriage, wagon or sleigh traffic of the city, and to be under the supervision of the city engineer, and subject to approval." The respondent began the relaying of its entire line, using the T rail, and, though remonstrated with by the council, it laid cobblestones between its rails on that portion of the street here in controversy. On July 30, 1894, a resolution was passed by the common council as follows: "Resolved by the common council of the city of Lansing that: whereas, it has been deemed a necessity by this council that Washington south should be paved with brick from the north side of Kalamazoo street south to Grand River; and whereas, the franchise of the Lansing City Railway provides that they shall contemporaneously with the paving of any street, at their expense, pave with the same material all that portion of said street that lies between their tracks and so far on either side as may be disturbed by the laying or relaying of the ties: Therefore, be it resolved that the mayor and city clerk notify the officers of the Lansing City Railway in writing that they are hereby required to pave that portion of said Washington avenue that should be paved by them under their franchise, at the same time and with the same material that the balance of the street is to be paved with." Notice of this resolution was served upon the railway company. The company refused to pave within its tracks with brick. Upon the hearing of the case in the court below, it was contended by counsel for the respondent that the ordinance above quoted contains no provision for repaving the street, and that, under the terms of the ordinance, it is required only, in laying its track in any street which is paved, to pave when the track is laid with the same material as that upon the street, and thereafter to keep such pavement in repair; that if the track is laid in a street which is not paved, and the city afterwards pave that street, then, by the terms of the ordinance, it is required to pave with the same material that the city uses, and at the same time, and after that to keep the street used by the roadbed in repair; that under no circumstances is it bound to repave any portion of the street, except by way of repair merely, and in such repairing it is not required to lay or use other material than that which had before been used by it in paving between the tracks. The circuit judge did not agree with counsel in this contention, but held that the company was bound to repave with the same material that the city used. We think the court below was correct in this interpretation of section 15 of the ordinance. The Lansing City Railway Company obtained all its rights to lay its tracks upon the streets of the city of Lansing under and by virtue of Ordinance No. 61, and, by the terms of section 15 of that ordinance, it is bound, whenever the city shall lay a pavement, either original or in repaving, to lay a pavement of similar material within the lines of its rails, when the common council shall so determine. This section could not be so construed as to permit the company, when it has once paved within its tracks, to continue that character

of pavement for all time, whatever pavement the city might conclude to lay upon the street outside the rails. We think the ordinance was intended to require the railway company to pave or repave between its tracks with a substance of like character as the city might use in paving outside the tracks, whether the city was paving a street for the first time, or was repaving it. The company, for the purpose of operating its road by electricity, asked to have the right to lay a T rail. This permission was given upon condition that the company pave between its tracks under the supervision of the city engineer, and subject to approval. The city council undoubtedly had in mind the terms of section 15 of Ordinance 61, and that by its terms the respondent would be compelled to relay its pavements with like material as the city might use when it paved or repaved a street. This is the plain intent of section 15, and the respondent is bound to comply with its terms.

The point that mandamus is not the proper remedy has no force. It was the plain duty of the railway company, when ordered by the council to repave with brick between its tracks, to have complied with the resolution. City of Detroit v. Ft. Wayne & B. I. Ry. Co., 95 Mich. 456, 54 N. W. 958. The order made by the court below, directing the performance of this duty by respondent, must be affirmed. The other justices concurred.

PEOPLE v. KNOPF et al.

(Supreme Court of Michigan. April 21, 1896.)

INTOXICATING LIQUORS—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

In a prosecution for violation of the local option law, there was evidence that defendants sold intoxicating liquors as a beverage, and kept a saloon and place where lager beer and whisky were kept for sale, as alleged in the information, to such persons as applied for them; that there was a pool, billiard, and card table in the room; and that soft drinks were sold there. *Held*, that the evidence was sufficient to support a conviction, though there was no evidence that defendants were not registered pharmacists. People v. Berry (Mich.) 65 N. W. 98, followed.

Exceptions from circuit court, Hillsdale county; Victor H. Lane, Judge.

George Knopf and Fred Knopf were convicted of keeping a place and saloon where intoxicating liquors were sold, stored for sale, and furnished as a beverage, in violation of the local option law, and appeal. Affirmed.

Defendants claimed that the people had failed to make out a case, because no evidence was offered tending to prove that they were not registered pharmacists.

W. D. Fast, for appellants. Guy M. Chester, Pros. Atty., for the People.

GRANT, J. The conviction in this case should be affirmed. It falls directly within the rule of People v. Berry (Mich.) 65 N. W. 98. The fixtures, surroundings, and furniture were such as all know are found in the ordinary saloon, and are never the accompaniments of a drug store. The statement in the record is that "the people gave evidence tending to prove that the defendants sold intoxicating liquors as a beverage, and kept a saloon and place where intoxicating liquors, namely, lager beer and whisky, were kept for sale as a beverage, as alleged in the information, to such persons as applied for them, and that there was a pool, billiard, and card table in the room, and soft drinks were sold therein." The respondents introduced no evidence. We said in the Berry Case: "The testimony taken discloses the situation and character of an ordinary saloon, and there was enough testimony to make a prima facie case that the respondents were not engaged in the business of keeping a drug store, and was sufficient for the jury to find that the respondents were not druggists." We held this sufficient aside from the evidence that they had filed no druggists' bonds. Conviction affirmed. The other justices concurred.

PETAJA v. AURORA IRON MIN. CO.

(Supreme Court of Michigan. April 21, 1896.)

MASTER AND SERVANT—MINING—SAFE PLACE FOR WORK—FELLOW SERVANTS.

1. Portions of the stope or room from which the ore is being taken, and which, as the work progresses, it becomes necessary to timber, are not, from the time it becomes necessary to timber them, places for work, within the rule requiring a master to furnish his employés a safe place to work.

2. A shift boss of miners is a fellow servant of a trammer.

On rehearing. Affirmed.

For former opinion, see 64 N. W. 335.

Julius J. Patek (Clark & Pearl and Cahill & Ostrander, of counsel), for appellant. Charles E. Miller, for appellee.

HOOKER, J. The substance of the question which we are disposed to consider upon the rehearing of this cause is whether the fact that mining operations have proceeded beyond a given point in the stope, and the stope has been "timbered up" to that point, changes the portion so timbered so that it is to be treated as a place to work, within the decisions requiring a master to furnish the servant a reasonably safe place to work. The alleged inaccuracy of the court, in stating that the testimony showed that the miners had not put the newly-opened space in condition for the timber men, has no bearing upon this question; and we are satisfied with the proposition enunciated,—that the failure of the miners or boss to notify the timber men that the place was in readiness was the negligence of fellow servants of the plaintiff. But it was urged by counsel that in the discussion of the question the court neglected to consider the fact that, at the time of the accident, the last timbers set did not support the roof of the mine, the

lagging being some distance below the roof, by reason of the caving or dropping of ore from the roof, above the lagging, until it left a space between the lagging and the roof of the mine, and that, as this increased the area of roof unsupported, it caused the ore to fall and injure the plaintiff. It is apparent that if we are to adhere to the holding that miners and trammers are fellow servants, and that the shift boss, like the foreman of a section gang, is not an exception, there can be no theory upon which the plaintiff can recover, except that, immediately the room was in readiness for timbers, it was the duty of the master to see that they were properly set and maintained. And it is obvious that this claim must be, as it is, planted upon the rule that, in appropriate cases, requires the master to provide a safe place. The operation of mining, in this and similar mines, is to sink a shaft, and from the shaft start a drift, from which stopes or rooms are excavated across the vein, from the lower to the upper or hanging wall. It is accomplished by caving down and removing the ore. It is manifest that this cannot proceed unless the roof is supported behind the miners, and this is done by putting up timbers to support the roof until the ore shall be excavated beyond. It is said that, when the room has been excavated sufficiently large, it is the practice to cave the room down into the mining sets, and place more timbers on top of the first. Now, if this room can properly be said to be a place furnished to the servants in which to carry on the master's business, and which he must, at his peril, keep in reasonably safe condition, as a factory or warehouse, then the case should have gone to the jury; but, if it is not such a place, then it falls within that other rule, that the duty of the master is performed by using reasonable care, or furnishing suitable material, and employing capable and efficient men to do the work. In view of the cases of Schroeder v. Railway Co. (Mich.) 61 N. W. 663, and Beesley v. F. W. Wheeler & Co., Id. 658, cited in the former opinion, there is no doubt that a master must furnish a reasonably safe place for a servant to work, if a structure is required for the carrying on of his business; and the briefs furnished in this case upon the part of the plaintiff would render us more assistance, had they called our attention to cases establishing the claim that a master is obliged to make safe the place which the servant makes and occupies as a means of doing his work, or which results as an incident of the work, although it necessitates his presence in a place, to a greater or less degree, unsafe. In such cases, must the master stay with, or follow up, the servants, to be certain that they make the place safe, so that they or some of them be not injured? There are many cases which draw the distinction pointed out. Such a case is Beesley v. F. W. Wheeler, supra. Several other cases are cited in the former opinion. In Fraser v. Lumber Co., 45 Minn. 237, 47 N. W. 785, it is said, "An important consideration, often overlooked, is whether the structure, appliance, or instrumentality is one which has been furnished for the work in which the servants are engaged, or whether the furnishing and preparation of it is itself part of the work which they are employed to perform." As we understand from the brief of counsel and the record,—and we do not discover a denial of it,—this stope or room starts from a drift at or near what is called the "foot wall," which is the bottom, as distinguished from the overlying stratum of the vein of ore. Both foot wall and top wall depart from the level, and dip sharply, so that, in running the stope on a level, it can go but a short distance until the top or overhanging wall is reached; and then the operation is repeated above the lagging, removing the lagging and caving down the roof,—supporting the new roof thus formed by new sets placed upon the first. Thus, so far as the lagging is concerned, it has a temporary use merely to enable the miners to push the breast through to the overhanging wall, by supporting the roof. It is a part of the operation of mining, as much as a blast or a staging, and is not a part of the permanent structure. The following cases confirm us in our opinion that, as an incident or means of excavating the ore, the master has only the duty of furnishing competent men, and furnishing suitable materials for the use of those engaged in the common employment: Hall v. Johnson, 3 Hurl. & C. 589, where it was held that "an underlooker in a mine, whose duty it was to examine the roof, and prop it up if dangerous, was a fellow laborer with a workman." Waddell v. Simoson, 112 Pa. St. 567, 4 Atl. 725, where it was decided that "the operator of a coal mine fulfills the measuse of his duty to his employés if he commits his work to careful and skillful bosses and superintendents." And in Coal Co. v. Scheller, 42 Ill. App. 619, the court held that, if a master exercises reasonable or ordinary care in selecting men and materials, a mine owner is not liable if the roof falls. In Mining Co. v. Kitts, 42 Mich. 34, 3 N. W. 240, a workman was injured by a fall occasioned by the breaking of a bridge across a permanent opening, consisting of a winze or perpendicular shaft for ventilation in a mine. The timber man was held to be a fellow servant, which excludes the theory contended for in this case. A case substantially like the one before us is Mining Co. v. Clay's Adm'r (cited in the former opinion), 38 N. E. 610. We see no occasion to change or modify the opinion heretofore filed in this cause, which disposed of all questions necessary to a decision of the case. Judgment affirmed.

LONG, C. J., took no part in the decision. The other justices concurred.

MICHIGAN LAND & IRON CO., Limited, v. CLEVELAND SAWMILL & LUMBER CO.

(Supreme Court of Michigan. April 21, 1896.)

REFUSAL TO SUSPEND TEMPORARY INJUNCTION—WHEN DISTURBED.

In an action to enjoin defendant from damming a creek along which both complainant and defendant owned timber land, on the filing of the answer admitting the material facts alleged by complainant, but denying that any serious injury would be caused to its land, and alleging that the dam was necessary to provide a flow of water to float defendant's logs, that its logs could not be brought down to its mill without the use of the dam, and that to restrain it from maintaining the dam would cause it an injury 20 times greater than the damage to complainant, the court suspended the temporary injunction before issued for 60 days, on defendant's giving bond to pay any damages which might result, and, at the end of such time, suspended it for 60 days more. *Held*, that a refusal to further suspend the same, at the end of the 120 days, to enable defendant to get out the remainder of its logs, would not be disturbed.

Appeal from circuit court, Marquette county, in chancery; John W. Stone, Judge.

Bill by the Michigan Land & Iron Company, Limited, against the Cleveland Sawmill & Lumber Company, to restrain the construction of a dam and the flooding of its lands. From a judgment for complainant, defendant appeals. Affirmed.

Clark & Pearl, for appellant. Ball & Ball, for appellee.

GRANT, J. In 1890 one John C. Brown entered into a logging contract with R. K. Hawley and Thomas H. McGraw, by which he agreed to cut, skid, haul, bank, and deliver to them, all the pine from certain lands situated in the county of Marquette, Mich., and on the upper part of Dead river and its tributaries. One of these tributaries is known as "Clark Creek," which flows into Bruce creek, which flows into Dead river. Neither of the first two streams is navigable. The logs could not be floated down either of them without building dams and creating a flood. In 1890 Brown built a dam across Clark creek, situated partly on the lands of Hawley & McGraw, and partly on the lands of the complainant. By reason of this dam, about 120 acres of the complainant's land were overflowed, and the timber destroyed. Of the construction of this dam the complainant had no knowledge, and first obtained positive knowledge of it about August, 1892, when it presented a claim to Brown for damages, which was never paid. Brown failed, and surrendered his contract to Hawley & McGraw, who, in turn, sold and assigned the entire business to defendant. The dam was used to get out logs during the season of 1891 and 1892. It was not used during the seasons of 1893 and 1894, except in the spring and summer of 1894, when it was used to create floods to help drive the logs below into the main stream. In the winter of 1894–5 defendant cut and banked upon Clark creek, above the dam, mostly on complainant's land, about 2,000,000 feet of logs. The defendant obtained no permission from the complainant to so use its land, and complainant was not aware of it until the logs were banked and ready for the spring drive. Meanwhile a portion of the dam had been carried away, and the defendant in May applied to the complainant's agent at Marquette to purchase some timber to rebuild it. Complainant refused, and forbade the defendant to rebuild the dam or flood its lands. The defendant, however, was proceeding to rebuild the dam, when, on June 17, 1895, complainant filed this bill to restrain the construction of the dam and the flooding of its lands. The answer filed admits the ownership of the lands, and the construction of the dam; the flowage of the complainant's lands in consequence; that, since the failure of Brown, it has owned and maintained the dam for the purpose of carrying on its lumbering operations. Denies any serious injury to the lands of the complainant. Alleges that the dam was absolutely necessary for the purpose of providing a flow of water to flow its logs over the rapids lying a short distance below the dam; that it has about $10,000 worth of pine saw logs hung up in said creek above the rapids, and within the flowage of the dam, which cannot be brought down to the defendant's mill, situated at the mouth of Dead river, without the use of the dam; that it has standing timber situated above said dam of the value of $10,000, which will become entirely worthless if the defendant is restrained from building and using the dam; that it would be unequitable and unjust to restrain it from repairing, maintaining, and operating said dam, thus causing an injury to it 20 times the amount that it is possible for the complainant to suffer. Upon the filing of the bill a temporary injunction was granted. Upon the coming in of the answer the court made an order suspending the temporary injunction for the period of 60 days, upon the filing of a bond to the complainant to pay it such sum as should be assessed to the complainant as damages. On September 3, 1895, the court granted a further extension of 60 days to enable the defendant to get out its logs. Upon November 5th further extension was applied for, which was denied. Proofs were then taken in open court upon the issues involved, and upon the hearing a final decree was entered, fixing the amount of damages, and perpetually enjoining the defendant from using the dam and flooding the lands of the complainant. The learned circuit judge, in deciding the case, said: "The court has exercised a great deal of leniency in this matter, having first given an extension of 60 days, and then another extension of 60 days, during the best of our summer and fall season,—being four months' time,—in which to get out this timber; and, under the testimony and facts known to the court, the season, it seems to me, was pretty

favorable last season, in this Upper Peninsula,—somewhat exceptionally so. I think the court has given the defendants ample opportunity to get these logs out. I find that this timber was put in here without any knowledge or acquiescence on the part of the complainant, and it is simply saying to the complainant it shall have the enjoyment of its own property."

The appeal is taken to this court for the sole purpose of obtaining a further extension of time, a further use of the dam, and a further flowing of the complainant's lands, to enable the defendant to get out the remainder of its logs. Twice the defendant appealed to the conscience of the circuit court in equity, which, by a mere grace, and not by any absolute right, granted the favor. Both parties own timberland along these creeks. Complainant desires to sell its timber, which is of comparatively little value unless it can be floated down these streams. The defendant has the entire control of the streams below, and is undoubtedly seeking to take advantage of the situation to enhance its own interests. It is contended on behalf of the defendant that the damage to it will be so great, by the loss of its logs, while that of the complainant will be so small, that the court should permit the defendant to make use of the complainant's lands, although it has no legal right to do so. Other considerations, however, enter into the question, and we are not prepared to say that they should be ignored. We do not feel justified in overruling the conclusion reached by the learned circuit judge, who was familiar with the situation, saw the witnesses, and concluded that the gracious hand of the court had been extended to the relief of the defendant to a reasonable limit, and that it had not improved the opportunity with the diligence which, under the circumstances, was required. The decree will be affirmed, with costs.

LONG, C. J., did not sit. The other justices concurred.

WILLIAM WRIGHT CO. v. FRAZER, Circuit Judge.

(Supreme Court of Michigan. April 21, 1896.)

EXECUTION—RETURN—CONCLUSIVENESS—MANDAMUS—COMPELLING COURT TO VACATE ORDER.

1. A return of nulla bona is not open to attack on a judgment creditor's bill based on such return.

2. A judgment debtor may, in the suit in which the judgment was rendered, move to set aside the return on execution, and show its falsity.

3. Where, after a return of nulla bona, a judgment creditor's bill was filed, and a receiver appointed, and the judgment debtor moved in the suit at law to set aside the return, and in the equity suit filed a plea setting up that he had property subject to sale on execution, and conflicting affidavits were filed by both parties, mandamus to compel the circuit judge to vacate orders setting aside the return and vacating the order appointing the receiver will be denied.

Mandamus, on the relation of the William Wright Company, against Robert E. Frazer, Wayne circuit judge. Writ denied.

Bowen, Douglas & Whiting, for relator. C. E. Warner, for respondent.

MONTGOMERY, J. Relator is a judgment creditor of William G. Hamlin and Thomas N. Fordyce. This judgment amounts to $3,383. Relators caused an execution to be issued and placed in the hands of an officer, which was returned nulla bona. Thereupon a judgment creditor's bill was filed, and a receiver appointed. The defendant Fordyce moved, in the suit at law, to set aside the return, and, in the equity suit, filed a plea setting up that he had a large amount of property subject to levy and sale on execution. These claims were supported by affidavits, and, on the other hand, numerous affidavits were filed showing that the property referred to in the affidavit of Fordyce was incumbered to its full value. The relator also produced the affidavit of the deputy sheriff who made the return, as follows: "Immediately on receiving the execution, I caused to be mailed a notice, on a blank like the attached, to both William Y. Hamlin and Thomas M. Fordyce. In response to said notice, said Thomas M. Fordyce came to the sheriff's office, and said to me, in substance, as follows: That he had received the notice sent, and that neither Hamlin nor himself had any property out of which the execution could be made by levy. I requested him to point out any property he or Hamlin owned on which the execution could be levied, and he refused to do so, saying that he had none that anything could be realized out of. He also referred to the property he said he was supposed to own in Grosse Point, and told me that this property belonged to his wife, and had belonged to her for some time. Not being able to find any property, and on the strength of Fordyce's statement, I returned the execution unsatisfied." The statement is denied by the affidavit of Mr. Fordyce. The circuit judge set aside the return, and vacated the order appointing a receiver, and relator asks to have the two orders vacated.

The basis for a judgment creditor's bill is a return of nulla bona, and in the equity suit the return is conclusive, and not open to attack. Bank v. Dorr, Walk. Ch. 317. But the defendants may move in the main case to set aside the return, and show its falsity. The only question here is whether the showing is such as to justify setting aside the return. The showing ought to be clear that relator was entitled to have the return sustained, to justify this court in interposing at this stage in the proceedings by the writ of mandamus. There were affidavits filed which, if believed, established the fact that the return was not in accordance with the facts, and that the defendant Fordyce had equity in realty sufficient to satisfy the relators' demands many times. It is true, this showing

was contradicted, but the court below had better means of determining the facts than we have. Writ denied.

LONG, C. J., took no part in the decision. The other justices concurred.

WHEELOCK v. AMERICAN TRACT SOC. et al.

(Supreme Court of Michigan. April 21, 1896.)

WILL—CONSTRUCTION—CHARITABLE BEQUESTS.

Testatrix devised her property to her executors in trust to pay the same to certain charities, "in such sums and portions as, in their discretion, they shall think proper," the amount to be paid or sums to be distributed to each being left to the discretion of the executors, and, if they thought best, to appropriate a portion of the money, and pay the same, in such sums and at such times as they may determine, to such "worthy poor girls" as they may select. *Held*, that the will is inadequate to create a valid trust, under How. Ann. St. 1883, § 5573, providing that a trust for the benefit of any person may be created only when fully expressed and clearly defined upon the face of the instrument creating it.

Appeal from circuit court, Calhoun county, in chancery; Clement Smith, Judge.

Action by Charles H. Wheelock, as administrator with the will annexed of Sarah W. Wheelock, deceased, against the American Tract Society and others, to obtain construction of the will. There was decree declaring the will void, and defendants appealed. Affirmed.

The following is a copy of the will:

"I, Sarah W. Wheelock, of the township of Athens, county of Bradford, and state of Pennsylvania, being of sound mind, do make and publish this my last will and testament. And, first, as to such worldly estate as it hath pleased God in His mercy to intrust me with, I dispose of as follows: I direct that all my funeral expenses be paid as soon after my decease as possible, out of the first moneys that shall come into the hands of my executors. And, as to the residue and remainder which shall remain in the hands of my executors, that the same may be applied to useful and charitable purposes, it is my will, and I hereby direct my executors, hereinafter named, to dispose of the money that may come into their hands from my estate, whether the same be from real or personal property, to such charitable and Christian purposes as hereinafter named, in such sums and portions as, in their discretion, they shall think proper and right; and for such purposes I do hereby give and bequeath to Moses W. Wheelock and Mrs. Charlotte Fairbanks (my executors, hereinafter named) all my property, of whatever kind or nature, in trust and for the uses hereinafter set forth; that is, to pay the same to the 'American Board of Foreign Missions,' to the 'American Tract Society,' to the 'American Home Mission,' and to the 'American Female Guardian Society,' incorporated by the legislature of New York in the year 1849. And should my executors think it best to appropriate a portion of the moneys which may come into their hands, which shall not be expended and paid as hereinbefore set forth, and as to the amount to be paid, or sums to be distributed to each, I leave entire to the judgment and discretion of my executors to act in this respect as they shall think right. It is my wish and desire, and they are hereby directed, to pay to such worthy poor girls, to aid in their education, such sums as shall not be expended or paid as hereinbefore provided; said donees to be chosen by my executors, they having full power as to the amounts to be paid, and the times of payment, appropriating the same as their goodness and judgment shall dictate. I give and bequeath the best of my wardrobe to Mrs. Charlotte Fairbanks. And I hereby nominate, make, and appoint my beloved brother, Moses W. Wheelock, my executor, and my friend, Charlotte Fairbanks, my executrix, to this, my last will and testament. In witness whereof, I have hereunto set my hand, to this, my last will and testament, written on one sheet of paper, A. D. March 25th, 1858.

"Sarah W. Wheelock.

"Signed by Sarah W. Wheelock in our presence, as her last will and testament: H. W. Patrick, N. C. Harris."

Swayne, Swayne & Hayes, for appellants. Hulbert & Mechem, for appellee.

HOOKER, J. The complainant is administrator with the will annexed of Sarah C. Wheelock, and files this bill to obtain a construction of the will, a copy of which is appended. This will was made when the testatrix was a resident of Pennsylvania, and her estate was administered nearly to the point of distribution before the will was discovered. The persons named in the will as executors died before the will was discovered, —one before the death of the testatrix, and one after. The estate consists of real estate, there being little personal property, and this will be required to pay the expenses of the administration. The circuit judge held the provisions of the will void. The complainant contends that the will is inadequate to the creation of a trust, while the four corporations mentioned seek to uphold its validity. This must depend upon two questions: (1) Does the will comply with subdivision 5, § 5573, How. Ann. St.? (2) If so, does it fail by reason of the death of the trustees named in the will?

Whether or not this trust is fully expressed and clearly defined upon the face of the instrument creating it, as required by subdivision 5, § 5573, How. Ann. St., must depend upon the construction of this will. It is agreed by all parties that the provision for "poor and worthy girls" is ineffective, and must fail. So far as that provision is concerned, the trust is not fully expressed or clearly defined. On the other hand, the pro-

vision for the four societies is not open to that objection, and may stand unless it is inseparably connected with the other provision, and must fall with it. A similar will was considered in the case of Tilden v. Green, 130 N. Y. 29, 28 N. E. 880, where this interesting question will be found elaborately discussed. In that case the residuum of the estate was devised in trust, to be devoted to some objects to be worked out through a prospective corporation, which the trustees were authorized to cause to be created, if possible, but subject to the power of the trustees to divert the fund, or any part of it, from that object, and apply the same to general charity, if they deemed it inexpedient or the corporation should not be organized. The court held that the will indicated that the testator had in view one general scheme of charity, and that all the provisions of the will were inseparably connected, and must fall, inasmuch as some of them, like the provision for "poor girls" in this will, were vague and indefinite, and inasmuch as the will designated no beneficiary who might enforce the trust. The attempt to maintain that the Tilden trust was the primary object of the testator's bounty was similar to the claim made here that the four societies were intended to be the first objects to be considered.

We do not fail to note the distinction urged by counsel that this will indicates that some provision, be it never so small, was, by the terms of this will, assured to these societies, or one of them; but if this can be said to be so, in view of the fact that the "poor girls" were mentioned, and of the statute (How. Ann. St. § 5616), we are still impressed by the fact that the testatrix apparently intended that the interests of the "poor girls" should be weighed by the trustees before determining how the estate should be divided. As said in the Tilden Case: "How could the trustees, charged with the imperative duty of devoting the estate to charitable purposes, consider the question whether they should give the four societies anything, or (if, as contended, each was entitled to something) more than a nominal sum, without taking a complete view of the whole field of charities embraced within the provisions of the will?" We think the case is within the rule maintained in the Tilden Case, and that the view taken by the learned circuit judge was correct, and that the decree should be affirmed. The other question need not be discussed. Decree affirmed. The other justices concurred.

REGENTS OF UNIVERSITY OF MICHIGAN v. AUDITOR GENERAL.

(Supreme Court of Michigan. April 21, 1896.)

CONSTRUCTION OF STATUTES—IMPLIED REFERENCE TO OTHER STATUTES—REPEAL.

1. An act passed for a particular purpose is not repealed by a general law sufficiently broad to include it, unless the intent to repeal is clear.

2. How. St. §§ 5360, 5361, providing for the payment of interest on the university fund, but without specifying the rate, impliedly fixed the same at 7 per cent., that being then the legal rate; and the rate so established for such fund was not affected by a subsequent modification of the usury law, changing the legal rate of interest on money to 6 per cent.

Mandamus, on the relation of the regents of the University of Michigan, to compel Stanley W. Turner, as auditor general of the state of Michigan, to compute interest on the university fund at the rate of 7 per cent. per annum. Writ granted.

Hanchett & Hanchett (B. F. Graves, of counsel), for relator. Geer & Williams, for respondent.

HOOKER, J. Certain lands granted by the federal government to the state as an endowment to the State University having been sold by the state, the fund resulting therefrom constitutes the university fund. A similar provision exists for primary schools, while state land grants for the endowment of the State Normal School and the Agricultural College have resulted in funds for the support of these institutions. It is the custom of the state to pay interest upon such funds annually, the same having been paid from specific taxes. See Const. art. 14, § 1. Act No. 114, 1845, provided for the payment of interest upon the primary school fund, at a rate therein specified, viz. 7 per cent. This act was repealed in express terms. See Rev. St. 1846, p. 736. Rev. St. 1846, p. 216, § 8, provides for interest for the university and primary school funds in the following language: "Upon all sums paid into the state treasury on account of the principal of the university or primary school funds, except where other provision is or shall be made by law, the treasurer shall compute interest from the time of such payment or from the time of the last computation of interest thereon, to the first Monday of April, in each and every year, and shall give credit therefor to the university or primary school interest fund, as the case may be, and such interest shall be paid out of the general fund." Laws 1847, p. 173, Act No. 107, makes provision for interest upon these funds from the annual state tax upon railroads. Laws 1851, p. 116, Act No. 99, § 10, provides for the payment of interest upon the various educational funds. See, also, Laws 1853, p. 85, Act. No. 60; Laws 1855, Act No. 73; Laws 1857, Act No. 56; Laws 1859, p. 397. Act No. 143, being How. St. § 5360, provides: "That the auditor general be, and he is hereby, required to credit to the university interest fund, interest from and after the thirty-first day of December, eighteen hundred and sixty, on the entire amount that has heretofore been, or may be hereafter, received by the state for university lands sold or contracted, and to draw his warrants upon the state treasurer for the same, who is hereby required to pay the same to the treasurer of

the university upon his application therefor, from time to time, as the said interest may accrue, and be required for the use of the university." Section 5361 is as follows: "The people of the state of Michigan enact, that upon all sums paid into the state treasury upon account of the principal of any of the educational funds, except where the provision is or shall be made by law, the auditor general shall compute interest from the time of such payment, or from the time of the last computation of interest thereon, to the first Monday of April in each and every year, and shall give credit therefor to each fund, as the case may be; and such interest shall be paid out of the specific taxes." Thus, it will be seen that at no time has the law fixed the rate of interest to be paid upon these funds in express terms, except by Act 114 of the Laws of 1845, which was repealed, as stated, the next year. During all of the time since 1845, up to the present year, 7 per cent. upon the several funds has been paid by the state, and up to the year 1887 7 per cent. has been the rate of interest established by the usury laws. In 1887 the general statute was changed, and the legal rate of interest upon money was then fixed at 6 per cent., where it has since remained. See Laws 1887, Act 138; Laws 1891, Act 156.

The relators ask a writ of mandamus, to compel the payment of 7 per cent. upon the university fund. The question before us is, therefore, a construction of the statutes referred to. It appears to be conceded that the several laws providing for the payment of interest upon the university fund contemplated its computation at 7 per cent., that being the legal rate. It is a general rule of construction that, where an act is passed for a particular purpose, it is not abrogated by general legislation, sufficiently broad to include it, unless the intent to abrogate it is clear, under the maxim, "Generalia specialibus non derogant." Earl of Derby v. Commissioners, L. R. 4 Exch. 226; Kidston v. Insurance Co., L. R. 1 C. P. 546; Conservators of River Thames v. Hall, L. R. 3 C. P. 419; End. Interp. St. § 223, and cases cited; Crane v. Reeder, 22 Mich. 322. This would seem decisive of this case, unless we are to say that the legislature intended that the legal rate should be paid upon the fund, whatever that rate might be. We think it more reasonable to say that, when those acts were passed, the intention was to pay interest at the then-existing legal rate, which was 7 per cent., and that the general statute was made a part of these several acts by reference, which reference must necessarily be implied, as there could be no other means of determining the rate intended. The rule in such cases is that such adoption does not include subsequent additions or modifications of the statute so taken, unless it does so by express intent, and that the repeal of the statute adopted will not affect its operation as a part of the statute adopting it. Schlaudecker v. Marshall, 72 Pa. St. 200; Nunes v. Wellisch, 12 Bush, 363; Knapp v. City of Brooklyn, 97 N. Y. 520; In re Main Street, 98 N. Y. 454; Allen v. Mayor, etc., of Savannah, 9 Ga. 286; U. S. v. Paul, 6 Pet. 141; Kendall v. U. S., 12 Pet. 524; Clarke v. Bradlaugh, 8 Q. B. Div. 69; Darmstaetter v. Moloney, 45 Mich. 621, 8 N. W. 574. The latter case is as closely analogous to this as it could well be without raising the identical question before us. In that case the charter of the city of Detroit provided that "the assessor * * * shall be, and is hereby, vested with the powers and duties of supervisors, as provided by the laws of this state," etc. It will be noticed that this does not specially refer to any particular statute or statutes, but in a general way it adopts such as prescribe the duties of supervisors, and it cannot be doubted that the effect would have been the same had the words "as provided by the laws of this state" been omitted, as they would have been clearly implied. It might as well be said in that case that the legislature intended that the duties of the assessor should change, like those of supervisors, with changes in the law fixing the duties of the latter, as to say in this case that the legislature intended that the rate of interest to be paid upon the educational funds should change from time to time, with changes made in the usury laws, because the act providing for the payment of such interest failed to fix a specific sum as the rate to be paid, or to specifically mention the then-existing law fixing the legal rate of interest, which was unnecessary. This court held in the case cited that changes in the duties of supervisor did not affect the assessor of Detroit, saying: "The case falls under the rule that a piece of legislation for a particular city, which adopts, under general words of reference, a specific regulation in a separate general law, is not to be taken as adopting prospectively the future alterations in the provisions of the general law so appropriated, unless the intent therefor is express or strongly implied." It is reasonable to suppose that the framer of the interest law had not in mind the question of interest upon educational funds, and, if he had, there is nothing to call attention to that subject in the bill or title; and while we do not say that this would be fatal to the bill, or exclude the relator's contention if the intent were manifest, the construction here given to this act is in harmony with the spirit of the constitution, which provides safeguards against concealed or unintended legislation. These principles seem to us conclusive of the question, and the writ will issue as prayed, but without costs.

GRANT, MONTGOMERY, and MOORE, JJ., concur.

CITY OF DETROIT v. LEWIS et al.

(Supreme Court of Michigan. April 21, 1896.)

TAXATION—CREDITS HELD BY RESIDENT TRUSTEES—REIMBURSEMENT FROM TRUST FUND.

1. The legislature may impose a tax on credits in the hands of resident trustees in trust for nonresidents.

2. Pub. Acts 1893, No. 206, § 8, subd. 6, declaring that, for the purpose of taxation, personal property "shall include all credits of every kind belonging to inhabitants of this state," and section 14, subd. 6, providing that personal property under the control of a trustee may be assessed to him in the township where he resides, authorize a tax on credits held by resident trustees for nonresident beneficiaries.

3. A trustee against whom judgment has been rendered for taxes on credits held by him for a nonresident cestui que trust is entitled to pay the judgment from the trust fund, and credit himself with the amount so paid.

Error to circuit court, Wayne county; William L. Carpenter, Judge.

Action by the city of Detroit against Alexander Lewis and another, trustees, to collect a tax on personal property. Judgment for plaintiff, and defendants bring error. Affirmed.

On the 5th of July, 1892, the Detroit Gaslight Company and Camille Weidenfeld, of the city of New York, executed a contract, the material parts of which are as follows: "Whereas, said second party is desirous of purchasing so much of the property of said first party as is used for the purpose of making and distributing gas, and is also desirous of acquiring all of the capital stock of said first party, and has offered the said first party the price and terms therefor hereinafter named, and the directors of said first party deem it wise, and best for the interests of the stockholders of said first party, that such sale be made; and whereas, in order to consummate such transaction, it will be necessary to obtain the assent of all the stockholders of said first party: Now, therefore, said first party agrees that it will, as soon as practicable, present the said proposition to its stockholders, and use reasonable efforts to obtain the authority of all of them to the sale of said property and stock, and, if successful in such efforts, to notify the said second party, within ninety days from the date hereof, of its readiness to carry out the sale aforesaid. And, upon receiving such power and authority from its stockholders, said first party agrees to sell, by good and sufficient conveyance, to said second party and his associates, or to such person or corporation as he may designate: provided, that if such assent, ratification, and authority from such stockholders be not obtained within ninety days from the date hereof, then this agreement becomes void and of no effect, at the option of the party of the second part, to be declared within thirty days after the expiration of said period of ninety days, and he shall have the right to purchase the holding of the stockholders so assenting, for a pro rata proportion of said purchase money; and in any event the party of the second part shall have no cause of action against the party of the first part for its failure to obtain the assent, ratification, and authority of all of said stockholders. And in consideration of the premises the said second party agrees to purchase the said property and stock, and to pay therefor the sum of $1,450,000, in manner following: $450,000 within nine months after receipt of notice of the authority given by said stockholders as aforesaid, $500,000 on or before one year from the date of such first payment, and $500,000 on or before two years from the date of such first payment; such deferred payments to bear interest at the rate of six per cent. per annum, payable semiannually, until paid, and to be secured by a purchase-money mortgage upon the property so transferred, executed by said second party to such persons as said first party shall designate to hold the same as trustees for the stockholders of said first party. Such mortgage shall contain the usual interest clause contained in the long-form real-estate mortgage in common use in this state. Concurrently with the payment by the party of the second part of said first payment of $450,000, and the execution and delivery of said purchase-money mortgage, the said party of the second part shall be entitled to, and shall be put into, the possession of said property and stock; and the board of directors of said party of the first part shall at once hold a meeting of said board of directors, and severally resign as such directors, and, as each resignation shall be accepted, the remaining members of said board shall elect such person to fill the vacancy as shall be named by the party of the second part, and continue to do so until all of said directors shall be persons designated by said party of the second part. All money on hand and accounts due to said first party at the time of the transfer shall be retained by the said first party, and transferred by it to the trustees, for the benefit of its stockholders. It is intended and understood that the property of said first party not expressly transferred hereby, and the purchase money aforesaid, shall be, by said first party, prior to the transfer of its capital stock to said second party, transferred to certain persons, to be designated by said first party (presumably, the persons named in said mortgage as trustees), to hold the same for division and distribution among the stockholders of said first party authorizing the sale of such stock; and, wherever the word 'stockholder' is used herein, the stockholders authorizing such sale of stock to said second party are the ones meant, and not such as may be stockholders after such transfer." This contract, it appears, was carried out, the stock secured, transferred to the new corporation, and on February 1, 1893, Mr. Weidenfeld executed to the defendants and Charles B. Lothrop, all of Detroit, a mortgage for $1,000,000. The description of the property, and the terms of payment, are immaterial. The mortgage was in the usual form, but does not appear to have

been accompanied by any note or bond. It specified that the parties of the second part held as trustees and as joint tenants, and not as tenants in common. It does not contain the provisions of the trust. On February 20, 1893, the Detroit Gaslight Company assigned and transferred to said trustees all their rights under the above contract, "particularly the covenant of said Weidenfeld for the payment of the within purchase price; the same being secured by mortgage executed and delivered at the date hereof, but dated Feb. 1st, 1893, to the trustees aforesaid." The defendants are the surviving trustees. In 1894 the assessors of Detroit assessed this mortgage, and two others to the same trustees amounting to $7,500, to the defendants, as trustees, at their face value; the total amount of the tax being $15,888.52. The defendants appeared before the assessor, and denied their liability, and appealed to the board of review, which decided against them. Upon their refusal to pay, the city instituted this suit, and recovered the full amount of the tax. The case was tried before the court without a jury, upon an agreed state of facts, of which, except as above stated, the material ones are these: There were 11,397 nonresident shares of the stock of the gaslight company, at $50 per share, $569,850; 8,603 resident shares, at $50 per share, $430,150. The statute under which this tax was assessed is subdivision 6, § 8, Act No. 206, Pub. Acts 1893, which provides that "for the purpose of taxation personal property shall include all credits of every kind belonging to inhabitants of this state, over and above the amounts respectively owed by them, whether such indebtedness is due from individuals or from corporations, public or private, and whether such debtors reside within or without the state."

Cutcheon, Stellwagen & Fleming, for appellants. John J. Speed, for appellee.

GRANT, J. It is important first to determine the exact status of the credit which is the subject of this litigation. At the time this mortgage was given the stockholders of the Detroit Gaslight Company, resident and nonresident, had assigned all their shares, under the agreement above referred to. Upon the giving of this mortgage they were not the owners, therefore, of any of the stock of that corporation, but had parted with their title to it. All their interests were then represented by this mortgage, which, when collected by the trustees, was evidently to be divided among the cestui que trusts, the former stockholders, in proportion to the amount of stock formerly held by each. There is no presumption that the interests of either the resident or nonresident parties had been assessed to them at their domiciles in 1894. By their voluntary act the legal title was vested in three citizens of Michigan, as trustees, and remained so vested at the time the assessment was made. Under these facts the principal questions are: (1) was it competent for the legislature to impose a tax on credits in the hands of resident trustees in trust for nonresidents of the state? and (2) does the act of 1893 impose a tax on credits so held?

The learned counsel for the defendants contend that the legislature has no power to impose such tax, and cite and rely upon the following cases: State Tax on Foreign-Held Bonds, 15 Wall. 319; Graham v. St. Joseph Tp., 67 Mich. 655, 35 N. W. 808; Kirtland v. Hotchkiss, 100 U. S. 491; City of Davenport v. Mississippi & M. R. Co., 12 Iowa, 539; People v. Eastman, 25 Cal. 603; Commissioners v. Cutter, 3 Colo. 349. These authorities, and many others, have established the rule that the situs of a credit is the domicile of the owner, and that a credit due from a citizen of this state to a citizen of another state is not subject to taxation at the domicile of the debtor. In none of these cases, however, was the legal title to the credit vested in trustees resident in the domicile of the debtor. So, too, the fact that the credit is secured by a mortgage upon the land of the debtor, or that it is in the hands of an agent for collection merely, does not authorize an assessment against the nonresident creditor. Goldgart v. People, 106 Ill. 25; Grant v. Jones, 39 Ohio St. 506; Territory v. Delinquent Tax List (Ariz.) 24 Pac. 182; Commissioners v. Cutter, supra; Herron v. Keeran, 59 Ind. 472. In Goldgart v. People, however, it is said, "If the owner is absent, but the credits are in fact here, in the hands of the agent, for renewal or collection, with the view of reloaning the money by the agent, as a permanent business, they have a situs here for the purpose of taxation, and there is jurisdiction over the thing." See Burroughs, Tax'n, 44. In Grant v. Jones it is said, "Whenever the person holding such choses in action resides in Ohio, he must list for taxation such credits, whether he holds them as owner, guardian, trustee, or agent. If they are held within the state in any such capacity, they are within the jurisdiction of the state for purposes of taxation. If they are not so held, but are owned and held by a nonresident, they are not subject to taxation." Similar language is also found in Herron v. Keeran. We must not be understood to indorse the doctrine of the three cases last cited, in so far as they appear to hold that credits owned by a nonresident, and placed in the hands of an agent for collection and reinvestment, obtain such a situs in this state as will subject them to taxation. We are not dealing with such a case, but with one where the absolute legal title is in persons residents of this state. It is clear that these authorities, which are cited by the defendants, recognize a distinction between cases where the legal title is in the nonresident, and where it is in trustees, guardians, or agents at the domicile of the debtor. The question is little discussed by the text writers. Perry says, "In the absence of a statute, the

law would look upon the trustee as the owner, and assess the property at his domicile." Perry, Trusts, § 331. Lewin says, "Trustees are liable to be rated for the property vested in them." Lewin, Trusts, p. 214. Cooley says, "In general, personal estate in the hands of a trustee is to be assessed to him at the place of his domicile." Cooley, Tax'n, p. 275. "Property in trust is, in the absence of a special provision of statute, taxed at the same place as though the trustee were the absolute owner." 25 Am. & Eng. Enc. Law, p. 153. Where trustees holding credits secured by mortgages resided in one county of a state, and the cestui que trusts resided in another county, an assessment upon the cestui que trusts at their domicile was held void, and the credits held assessable at the domicile of the trustees. Latrobe v. Mayor, etc., 19 Md. 13; Mayor, etc., v. Stirling, 29 Md. 48. A cestui que trust residing in Massachusetts was held not taxable there for shares in corporations held in trust for her by trustees residing in another state. Dorr v. City of Boston, 6 Gray, 131. Funds in the hands of trustees were held assessable at their domicile, though they belonged to nonresident beneficiaries. Davis v. Macy, 124 Mass. 193. Where a judgment was rendered against trustees for maladministration, and they were directed to pay the amount into the hands of a receiver, to be turned over to a new trustee, it was held that the beneficiaries were not liable for taxes. Smith v. Byers, 43 Ga. 191. In Price v. Hunter, 34 Fed. 355, trustees in Pennsylvania were held liable for taxes upon a mortgage upon property in that state held in trust for a nonresident beneficiary. The same doctrine is held in the following cases: People v. Assessors of Albany, 40 N. Y. 154; Lewis v. Chester Co., 60 Pa. St. 325. See, also, Trustees of Greene Foundation v. City of Boston, 12 Cush. 54; Greene v. Mumford, 4 R. I. 313; Catlin v. Hull, 21 Vt. 152. We are cited to no authorities, nor have I been able to find any, which hold that where the legal title and ownership of personal property, tangible or intangible, is vested in trustees, the beneficiaries or cestuis que trustent are taxable, or that the funds in the hands of the trustees are exempt from taxation at their domicile, in the absence of a statute making the property assessable to the cestui que trusts. It is, however, contended that the terms of the statute, "all credits of every kind belonging to inhabitants of this state," do not include trustees holding credits for the benefit of nonresidents. It follows from the authorities above cited—and we think the holding based upon sound reason—that the term "inhabitants" includes resident trustees, in whom is vested the absolute legal title to choses in action. Our statute, however, appears to control the question. It provides, "Personal property under the control of a trustee or agent, whether a corporation or a natural person, may be assessed to such trustee or agent in the township where he resides, except as otherwise provided." Pub. Acts 1893, Act No. 206, § 14, subd. 6.

It appears by the stipulated facts that the trustees have commenced foreclosure proceedings, and that one of the defendants in that suit has answered, denying all indebtedness upon the mortgage, and has interposed a cross bill charging fraud and deception on the part of the Detroit Gaslight Company in the sale of the property, and praying a cancellation of the mortgage. That suit is pending and undetermined. Counsel, in their brief, say: "If the pending foreclosure suit is decided in favor of the defendants in that case, can it be possible that the law will compel the defendants in this case to pay, not only the large judgment in this case, but also the taxes assessed before the determination of the foreclosure suit, out of their individual property, when they have been remiss in no way?" That question may arise when the defendant trustees shall be called upon to account for the trust funds, provided the mortgage is declared void. It is not now before us. It is not claimed that they have not in their hands moneys sufficient to pay these taxes. In their appeal from the action of the assessors to the board of review, they set up this pending suit, and state that they have in their hands moneys paid to them as interest on this mortgage; and it is also a fair inference from the record that the $450,000 of the purchase price has been paid to them, and for which an accounting is asked in that suit. Several of the cases above cited appear to have been brought and decided upon the theory that the trustees, having legal title to the property, were obligated to pay the tax. In Latrobe v. Mayor, etc., it is said: "That the taxes assessed upon a trust estate constitute a legal cause of action against the holder of the legal title, we do not doubt: for at law the legal estate, in the hands of a trustee, has the legal incidents and obligations of an absolute title, subject only to the claims in equity of the cestui que trust." Such suits must, of necessity, be brought against the trustees; and, when judgment is rendered against them, they are entitled to pay the judgment from the trust fund, and credit themselves with the amount so paid. Where a court has adjudged the tax to be valid, it would seem to logically follow that the trustees will be protected in its payment from the trust fund. The judgment is affirmed.

LONG, C. J., did not sit. The other justices concurred.

WEBBER et al. v. [illegible]

(Supreme Court of Michi[gan])

MORTGAGOR AS SURETY — [illegible] VENCY—RIGHTS OF [illegible] —PAYME[illegible]

1. A mortgage [illegible] the mortgagor to secu[illegible] and another a note [illegible]

fide indebtedness is not fraudulent as to the mortgagor's creditors, though it was executed as a preference to the mortgagees in case of the future insolvency of the mortgagor.

2. Subsequent lienholders, as such, have no right to insist that the mortgagees should resort to their action against the principals on the note before selling the mortgaged property.

3. The evidence fairly establishing that the mortgagor was indebted to his son in almost the amount of the mortgage, and that there was an agreement between them that the mortgagor was to pay said secured note, and that his son was then to repay him the difference between said indebtedness and the amount of the note, equity will not require that the principals to said note should pay the same.

Appeal from circuit court, Kent county, in chancery; Allen C. Adsit, Judge.

Bill by George W. Webber and Andrew J. Webber against Oscar Webber and others to foreclose a mortgage. George F. Beardsley and others were made parties as subsequent incumbrancers. From the decree rendered certain defendants appeal. Modified.

James H. Campbell and T. J. O'Brien, for appellant Beardsley. N. O. Griswold and Clute & Clute, for other appellants. W. O. Webster, for appellees G. W. & A. J. Webber. F. C. Miller, for appellee Oscar Webber. W. W. Mitchell, for other appellees. J. W. Champlin, J. C. Fitzgerald, and G. E. Nichols, of counsel, for appellees.

MONTGOMERY, J. The complainants filed their bill to foreclose a mortgage upon property in the city of Ionia, consisting of four parcels of real estate, the cost price of which was about $20,700, to secure the payment of a note of $14,500, given by the defendants Joseph Webber and Thomas R. Buck, June 30, 1893, and due December 31, 1893, and indorsed and guarantied by Oscar Webber. The mortgage was given July 14, 1893, by Oscar Webber alone, his wife not joining. The defendants George F. Beardsley, Payne Knight, Lorenzo A. Corey, and Jacob Neff were made parties as subsequent incumbrancers, they having, after the execution of the mortgage, caused levies to be made upon the property as the property of Oscar Webber. Thereupon the defendants filed cross bills or answers in the nature of a cross bill, setting up that Oscar Webber was indebted to them in various sums, and that they had each caused a levy to be made on the mortgaged property; that Oscar Webber was insolvent; and that the mortgage in question was given with a fraudulent purpose of defeating the creditors of Oscar Webber in their efforts to collect their claims, and was being foreclosed with that purpose. The case as it is presented in this court presents three questions: First. Was the mortgage given to complainants by Oscar Webber fraudulent in its inception? Second. If not, was it given under such circumstances, or has it been so dealt with by complainants, as to make it inequitable for them to resort to the mortgage security before they have proceeded against the makers of the note; or can the court protect these lienholders to any extent because the liability of Oscar Webber is only secondary, and because Webber & Buck, the makers of the notes, should in equity and good conscience pay the notes? And, third, if the court should be of the opinion that there is power to compel resort to Webber & Buck, have they shown counter equities which limit the result? The circuit judge granted a decree of foreclosure, and provided for no remedy against Webber and Buck, so that his determination must have been based upon a negative finding as to the first two questions. We will consider the questions separately so far as practicable and in their order.

1. It appears that Joseph Webber (of Webber & Buck) is the son of Oscar Webber, and on the occasion of this engaging in business in 1886, Oscar Webber, then apparently, and probably in fact, a man of considerable means, undertook to indorse and guaranty the paper of the firm to be from time to time given to Webber Bros., composed of complainants, who are brothers of Oscar Webber. That the purpose of this arrangement was not to enable Webber & Buck to make a temporary loan, but to furnish capital, the expectation being that the loan was to be renewed from time to time, as it in fact was, and apparently increased or diminished as the necessities of Webber & Buck demanded. The $14,000 note secured by the mortgage here in question was given in the regular course of the business, and is beyond all question bona fide, representing on its face actual indebtedness of Webber & Buck, guarantied by Oscar Webber. So far as complainants knew, Oscar Webber was a surety merely, and such, we think from the evidence, he was in fact. Oscar Webber had, prior to December, 1892, been a member of the banking firm of Webber & Chapin, doing business at Stanton. On the 28th of December, 1892, this co-partnership was dissolved, Mr. Chapin buying the interest of Webber, and agreeing to pay him $6,000 therefor in monthly installments, and agreeing to pay the indebtedness of the firm. At this time there were liabilities on certificates and to the bank of about $150,000, and on the face of the books an apparent surplus of $23,000. Chapin continued the business until July, 1893, paying to Webber $3,000 of the indebtedness, and reducing the deposit accounts upon which Webber was liable to about $28,000. At about this date Oscar Webber went to Stanton, and sought to obtain security, but this was refused him, and he returned to Ionia, and saw the complainant George W. Webber on the same day. George asked him how Chapin was getting along, and how much of the paper Oscar was now liable on, and, on hearing that Chapin was turning out paper to the creditors of the bank, and that Oscar was liable on about $3,000 of the bank debts, asked him to pay the note. Oscar said he could not do that, but would secure it, and

the mortgage was thereupon given. We discover nothing in this transaction up to this time either unnatural or unusual. We find the creditor demanding from his debtor security, and receiving it, and while it must have been in the contemplation of both that in case of the disaster to Chapin & Co., resulting in their failure to care for the obligations to Webber & Chapin, this security would work preference in favor of Webber Bros., yet under the rules of the common law, which protect the vigilant, this security is protected. Olmstead v. Mattison, 45 Mich. 617, 8 N. W. 555; Sheldon v. Mann, 85 Mich. 265, 48 N. W. 573; Hill v. Bowman, 35 Mich. 191. The transaction does suggest anew the pressing necessity of a bankrupt or insolvency law which shall afford some protection to the less greedy and importunate creditors, and which shall render it no longer possible for a debtor in failing circumstances to prefer members of his own immediate family. But the case is not peculiar in this. Such object lessons are so often presented that it seems impossible that the attention of legislative bodies will or can be for much longer diverted from the crying need of reform in this respect. But until there is some legislation which prohibits preference, and provides for a uniform distribution of the assets of an insolvent debtor, the creditor must be accorded the right which he undoubtedly has under the common law of taking security, even though the effect may be to delay or defeat a less diligent creditor.

2. The appealing defendants are, then, subsequent lienholders, and the question is presented as to whether as such they can insist that complainants shall resort to their action against Webber & Buck before selling the mortgaged property. In Brandt on Suretyship and Guaranty (2d Ed.) 238, it is said: "It is settled by a long-continued and unvarying current of authority that the surety may by a suit in chancery, after the debt becomes due, and before he pays it, compel the creditor to proceed to collect the debt from the principal, provided he indemnify the creditor." The cases cited to sustain the text, and the cases generally which sustain the doctrine, are cases in which the creditor holds no security for the debt, either from the principal debtor or his security. But we think it is not the rule that when a surety has given security for the payment of a debt he may compel the creditor to resort to action against the principal, and postpone the enforcement of his claim by resort to the security. This would be going directly against the terms of the contract. The right which the surety has is to be subrogated to the claim against the principal upon payment of the debt. Colebrook, Collat. Sec. § 215; McElroy v. Hatheway, 44 Mich. 399, 6 N. W. 867. The doctrine of marshaling securities does not aid the plaintiff, as it is an essential precedent condition that there be two funds which may be resorted to by the creditor, and the naked promise of the debtor has not, we think, been regarded as a fund in such sense that the creditor may be compelled to resort to suit and levy on property before resorting to property specifically dedicated to the payment of the debt. Wolf v. Smith, 36 Iowa, 454. The right of Oscar Webber before the levy by the defendants was to discharge this debt, and resort to action against Webber & Buck for the whole or such portion of the debt as Webber & Buck were bound to pay. He would also have this right if his property went to pay the debt of Webber & Buck; and we think it clear that the defendants, having acquired liens upon the property of Oscar Webber, would be subrogated to his right to the extent of this lien. 1 Story, Eq. Jur. § 563; Foy v. Sinclair, 93 Tenn. 297, 30 S. W. 28.

3. This brings us to the question which is the principal one in controversy in this case, viz. whether Webber & Buck or Oscar Webber should in equity pay this mortgage. There is no question that when the note was given to complainants it was the note of Webber & Buck with Oscar Webber as guarantor of payment. It is now claimed by Joseph T. Webber that his father, Oscar Webber, was indebted to him in the sum of $12,625, and that after the mortgage in question was given he asked his father how he, Joseph, was to receive his pay, and that his father agreed to pay the $14,500 note to complainants upon the understanding that he (Joseph) was to repay him any difference between what was due from his father to him, and the amount of the indebtedness to complainants. If this claim is sustained by the proofs, and such an arrangement was in fact made, there can be no question that in equity this mortgaged property became the primary fund out of which this debt might and should be realized, not only as between Oscar Webber and complainants, but as between Joseph and the creditors of Oscar. The question of fact involved has given us no little difficulty, and the conclusion we have reached after the most careful consideration does not rest upon the absolute faith in the correctness of our conclusion, which we would like to feel in all cases. We have not had the witnesses before us, and can only judge of their credibility by what appears in the record of the case. The two defendants Oscar and Joseph Webber were called by the appealing defendants, and gave testimony which, if true, fully established a liability of Oscar to Joseph on account of money held in trust for many years, and left in control of Oscar by his wife, the mother of Joseph. There are circumstances which cast suspicion upon the transaction, and create some doubt; the chief one being the long delay in paying over this fund, although there have been times when Oscar could have done so without inconvenience, and when the fund would have been very useful

to Joseph, who was during much of the time borrowing money to do business with, and this on his father's indorsement. On the other hand, this is explained by saying that this fact of the indebtedness of Oscar to Joseph furnished the reason for the indorsement. Without enlarging upon the circumstances, which cannot be of interest in other cases, we have determined upon the whole case that the indebtedness from Oscar to Joseph is fairly made out.

The decree of the circuit court should be modified in two particulars: First, the defendants holding liens are entitled in order of priority to be subrogated to the claim of complainants to the extent that the amount realized on the sale of the mortgaged premises should exceed the amount of Oscar's indebtedness to Joseph, and we think complainant's costs in the court below should be limited to single costs. Under chancery rule 90, if the defendants had prevailed, the costs would have been apportioned, and we see no reason why complainant should be entitled, when he prevails, to more than single costs. No costs will be awarded to either party in this court.

MOORE, J., concurred with MONTGOMERY, J. LONG, C. J., took no part in the decision. HOOKER, J., did not sit.

GRANT, J. I concur in the opinion of my Brother MONTGOMERY, except that portion of it referring to the necessity of a bankrupt law, and as to that I express no opinion.

WEIKLE v. MINNEAPOLIS, ST. P. & S. S. M. RY. CO.

(Supreme Court of Minnesota. April 30, 1896.)

GUARANTY—WHAT CONSTITUTES—RAILROAD COMPANY—LIABILITY FOR CONTRACT OF AGENT.

1. The defendant is a railroad corporation, and its general manager and general freight agent requested plaintiff to ship certain hogs from Glenwood and Elbow Lake, Minn., to one H., at Hankinson, N. D., and that, if he did so, they would guaranty the payment to plaintiff of the price of the hogs. Plaintiff shipped the hogs, but H. was unable or unwilling to pay for them, and so informed the plaintiff; and thereupon the general manager and general freight agent, without plaintiff's knowledge or consent, had the hogs reshipped to Minneapolis, Minn., and demanded of the plaintiff that he receive and accept them at that point. The defendant made no charges for transporting the hogs, and received no benefit or profit from the transaction. *Held*, that this promise of the manager and freight agent was strictly a guaranty of the debt of H., and not an original undertaking on the part of the defendant.

2. *Held*, further, that as there was no express authority from the defendant to the manager or agent to make such a guaranty of payment, and as none could be implied, because giving such guaranty was beyond the scope of their authority, the defendant is not liable.

(Syllabus by the Court.)

Appeal from municipal court of Minneapolis; Andrew Holt, Judge.

Action by T. K. Weikle against the Minneapolis, St. Paul & Sault Ste. Marie Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

F. D. Larrabee, for appellant. A. H. Bright and Henry B. Dike, for respondent.

BUCK, J. The defendant is a railroad corporation, operating a line of railway through Glenwood and Elbow Lake, in this state, and to Hankinson, in the state of North Dakota; and, at the times mentioned in the complaint, F. D. Underwood was the general manager, and W. L. Martin the general freight agent, of this railroad corporation, its business being that of a common carrier. On December 1, 1894, the plaintiff was the owner of 98 hogs, of the value of $493, part of said hogs being at Glenwood, and the others at Elbow Lake, Minn., which were stations on the line of defendant's railway. Prior to the date above named, the defendant's general manager, Underwood, and general freight agent, Martin, ascertained that the plaintiff was willing to dispose of said hogs for the price of 5 cents per pound for part of said hogs, and for 5½ cents per pound for the others; and they requested him to ship said hogs to one R. H. Hankinson, at Hankinson, N. D., and informed him that, if he would do so, the defendant railroad corporation would guaranty the payment to plaintiff of the price of said hogs. Accordingly, plaintiff shipped said hogs to Hankinson, N. D., and delivered them to R. H. Hankinson, who was unwilling or unable to pay the price for them, or any part thereof, and so informed the plaintiff. Thereafter, and in the month of December, 1894, Underwood and Martin, without plaintiff's knowledge or consent, caused said hogs to be shipped from Hankinson to Minneapolis, in this state, and demanded of plaintiff that he should receive and accept said hogs at Minneapolis, which plaintiff refused to do, and he demanded payment of defendant of the price of the hogs, no part of which has ever been paid.

Fairly construed, we think that the complaint and findings of the trial court do not show a purchase of the hogs by the defendant, but that they were sent to Hankinson in the expectation that he would purchase and pay for them, and that, if he did not do so, then the manager and freight agent assured the plaintiff that the defendant would guaranty such payment. Certainly in such case the defendant was not the principal or original purchaser or debtor. The fact that the general manager and freight agent assured plaintiff that defendant would guaranty the payment excludes the proposition that it was an original undertaking, as a purchase, on the part of the defendant. In the case of Dole v. Young, 24 Pick. 250, the following writing was signed and addressed to the plaintiff by the defendant: "Please send W. goods to the amount of $100, and I

will guaranty the same in four months." And the plaintiff, immediately after the presentation thereof, delivered the goods to W. It was held (Chief Justice Shaw delivering the opinion) that it was strictly a guaranty of the debt of W., and not an original undertaking on the part of the defendant. It does not appear that there was a completed sale to any one. Hankinson did not agree to buy or pay for the hogs, and he not only refused to pay for them, but did not keep them. The defendant, not having bought them or paid for them, did not seek to keep them, and, without making any charges for transporting them to North Dakota, shipped them back to Minneapolis, where it offered to deliver them to plaintiff, who refused to receive them. Whether the hogs at Minneapolis were worth more or less than the previously agreed price of $493, or whether they would have been worth less than that amount if delivered at Glenwood and Elbow Lake, does not appear, and perhaps in this particular and in this action it is not essential. We merely refer to it for the purpose of showing that it does not affirmatively appear that the plaintiff was damaged by the act of the defendant in shipping the hogs either way, or leaving them at Minneapolis.

The appellant's counsel suggests that a railroad corporation has implied authority to do all acts necessary for the full and complete utilization of its special powers which are not impliedly excluded by the terms of its grant, and cites the case of State Board of Agriculture v. Citizens' St. Ry. Co., 47 Ind. 407, in support of this position. The facts in that case are materially different from those appearing in this action. In that case the street-railway company had received the benefits, profits, and advantages of the contract made with it, and these profits had gone to swell the dividends of the stockholders of the corporation, and the court held it liable. The street-railway company had subscribed $1,000, and promised to pay the same to the state board of agriculture, as an inducement for it to hold a fair for three successive years north of the city of Indianapolis, whereby the street-railway company would be greatly benefited in carrying passengers. After receiving the benefits resulting from the holding of such fair, it refused to pay its subscription, and the court held it liable. This decision is criticised by Wood, R. R. 552, citing Davis v. Railroad Co., 131 Mass. 258, as holding a diametrically opposite doctrine. We express no opinion as to which of the cases states the correct doctrine, there being no express or implied contract of purchase between plaintiff and defendant, and the latter, not having received any of the profits or benefits of the transaction, is not primarily liable to pay the price of the hogs. Is it liable upon the guaranty of its general manager and general freight agent that if Hankinson, a third party, not shown to have any business connection with the defendant, should not pay the price of the hogs, then the defendant would guaranty the payment of the price thereof to the plaintiff? We are of the opinion that it is not so liable. There was no express authority from the corporation that the manager or agent might make such a guaranty, and there could not be any implied power, because giving such guaranty was beyond the apparent scope of their authority. "A party dealing with a corporation is chargeable with notice of the nature and extent of its powers, as declared by its charter or articles of association." Kraniger v. Building Soc. (Minn.) 61 N. W. 904.

There has not been any recognition or ratification of the acts of the general manager and general freight agent by the corporation, and, whatever may be the liability of the manager and agent on account of the part which they took in the transaction, the defendant is not liable. Judgment affirmed.

WHEELER v. PATERSON.

(Supreme Court of Minnesota. April 23, 1896.)

REPLEVIN BOND—OMISSION OF NAME OF SURETY—EFFECT—JUSTICE OF THE PEACE—LOSS OF JURISDICTION.

1. The fact that the name of a surety who signs and seals a bond is not mentioned therein does not affect its validity, if it is apparent from the face of the bond that he intended to be bound by its conditions. Campbell v. Rotering, 43 N. W. 795, 42 Minn. 115, followed.

2. Rule applied to a replevin bond, in justice court, in which the name of one of the sureties, who signed and sealed the bond, was omitted from the body thereof, and *held*, that the omission did not affect the jurisdiction of the justice to issue the writ and hear the case. *Held*, further, that such jurisdiction was not affected by the fact that the sureties on the bond did not justify, and that the bond was not acknowledged.

3. In an action in justice court, there was no general appearance by the defendants. The plaintiff filed his complaint, and the cause was adjourned for three days, but the justice omitted to state in his docket upon whose motion the adjournment was had. *Held*, that the justice did not lose jurisdiction to hear the case on the adjourned day.

(Syllabus by the Court.)

Appeal from district court, Martin county; M. J. Severance, Judge.

Replevin by Edwin J. Wheeler against F. A. Paterson, receiver of Wheeler & Young, insolvents. From a judgment for plaintiff, defendant appeals. Affirmed.

Ward, Dunn & Ward, for appellant. Voreis & Mathwig, for respondent.

START, C. J. This is an action of replevin, originally commenced in justice court, to recover possession of an office desk and an iron safe. Upon the return day of the writ, January 24th, the plaintiff appeared and filed his complaint; but the defendant appeared specially, for the purpose only of objecting to the jurisdiction of the court, and moved to dismiss the action for the alleged reason that

the court was without jurisdiction in the premises, because no valid replevin bond had been given. The justice denied the motion, and allowed the plaintiff until January 27th, at 10 o'clock a. m., to furnish a proper bond, to which time the case was adjourned; but upon whose motion the adjournment was made, the record is silent. The defendant duly excepted to these rulings. On January 27th the plaintiff filed a further replevin bond, which, in form and substance, complied with the statute, and was approved by the justice. The cause was tried on that day, and judgment entered for the plaintiff, from which the defendant appealed to the district court, and from the judgment of that court, affirming the judgment of the justice court, he appealed to this court.

The defendant's assignments of error are included in two general claims: First, that the original replevin bond was void; second, that the adjournment of the cause for three days worked a discontinuance, and jurisdiction thereafter to hear the case was lost.

1. The original bond complied with the statute, in form and substance, except that the name of one of the two sureties who signed and sealed the bond was omitted, in the body thereof. For this reason the defendant claims that there was but one surety on the bond; therefore it is void as a replevin bond, because the statute requires a bond with two sureties, at least, as a jurisdictional requisite to the issuing of the writ by the justice. If both sureties are liable on this bond, the claim of the defendant falls. They are both so liable, for it is apparent on the face of the bond that the omission of the name of one of the sureties in the body of the bond was a clerical mistake, and that such surety intended to be bound by the obligations of the bond. Its commencement and conclusion are in these words: "Know all men by these presents, that we, Edw. J. Wheeler, as principal, and G. M. Wheeler and ——, are held and firmly bound unto F. A. Paterson. * * * In testimony whereof, we have hereunto set our hands and seals." This bond is signed and sealed by the persons named in the body thereof, and by another surety, Frank A. Day, who is not named therein. Now, Mr. Day signed this bond with some intent, and for some purpose. What were they? He answers the question over his own signature; for he expressly declares that, in witness of his obligation to perform the conditions of the bond, he signs and seals it. He and the other parties signing the bond are the "we" referred to in the body thereof. The fact that the name of a surety who signs and seals a bond is not mentioned therein does not affect its validity, if it is apparent from the face of the bond that he intended to be bound by its conditions. Campbell v. Rotering, 42 Minn. 115, 43 N. W. 795; Cobbey, Repl. § 1290. The cases of Blake v. Sherman, 12 Minn. 420 (Gil. 305), and State v. Austin, 35 Minn. 51, 26 N. W. 906, relied on by the defendant, are not in point. In the former case there was no attempt to give a bond with two sureties, as required by statute, but an undertaking signed by only one surety was made; and it was held that this was not a compliance with the statute, but that the defect could be cured by filing such a bond as the statute required. In the latter case the bond was not signed by the principal, and it was held that the sureties were not bound. The defendant also claims that the bond is void because the sureties did not justify and the bond was not acknowledged. This omission did not affect the validity of the bond. Gale v. Seifert, 39 Minn. 171, 39 N. W. 69. The acknowledgment and justification are no part of the bond, and there is no statute requiring them to be indorsed on the bond. There is, however, a rule of the district court requiring this to be done, but the rule does not apply to a justice court.

2. The justice did not lose jurisdiction of the case by adjourning the case, after the pleadings were closed, for three days. "When the pleadings are closed the justice on the application of either party shall adjourn the case for not exceeding one week." Gen. St. 1894, § 4990. This statute authorizes the justice, on the application of the plaintiff, without the consent of the defendant, and without showing cause, to adjourn the case, not exceeding one week. O'Brien v. Pomroy, 22 Minn. 130. The defendant appeared specially to challenge the jurisdiction of the court. He did not answer, and had no intention of answering. Hence the pleadings were closed before the adjournment. The defendant, however, claims that the application for the adjournment was not made by the plaintiff, but that the justice adjourned the case on his own motion. As already suggested, the justice did not state in his docket at whose request the case was adjourned. Gen. St. 1894, § 4961, subd. 5. There is no presumption that the case was adjourned on the justice's own motion, but the presumption is in favor of the regularity of the proceedings, and that the adjournment was on the application of the only party in court,—the plaintiff. The omission to so state in the docket does not render the judgment erroneous. Meister v. Russell, 53 Minn. 54, 54 N. W. 935; Smith v. Victorin, 54 Minn. 338, 56 N. W. 47. Judgment affirmed.

D. M. OSBORNE & CO. v. GULLIKSON.

(Supreme Court of Minnesota. April 23, 1896.)

NEGOTIABLE INSTRUMENTS—GUARANTY—CONSIDERATION—RELEASE OF GUARANTOR.

1. Where the written contract of a principal sets forth or imports a consideration,—for example, a promissory note,—and a contract of guaranty, by a third party, is a part of, or is indorsed upon, the note, and is delivered simultaneously with it, the consideration for the note supports the guaranty. Highland v. Dresser, 29 N. W. 55, 35 Minn. 345, followed.

2. The mere neglect of the holder of a

promissory note to pursue a remedy against the maker does not discharge a guarantor of the payment of the note. Hungerford v. O'Brien, 34 N. W. 161, 37 Minn. 306, followed.

(Syllabus by the Court.)

Appeal from district court, Norman county; Frank Ives, Judge.

Action by D. M. Osborne & Co. against G. O. Gullikson. From an order overruling a demurrer to an answer, plaintiff appeals. Reversed.

Calkins & Sharpe, for appellant. Wm. Watts, for respondent.

START, C. J. The complaint in this action sets up the making of four separate promissory notes to the plaintiff, by as many different makers, and a guaranty of the payment of each note by the defendant. The allegations of the complaint as to the contract of guaranty on each note are, substantially: That at the time of making the note, and for the purpose of inducing the plaintiff to accept the same, the defendant guarantied the payment of the same, in these words: "For value received, I hereby guaranty the payment of the within note at maturity, and at all times thereafter, and waive demand, protest, and notice of nonpayment thereof." That such guaranty was indorsed on the back of the note, and signed by the defendant, before the delivery of the note, and that, relying on such guaranty, the plaintiff was induced to accept, and did accept, the same. The answer admits the making and delivery of the notes and contracts of guaranty as stated in the complaint, but denies that the guaranties, or any of them, were made for the purpose of inducing the plaintiff to accept the same, and avers that the defendant made the guaranties at the request of the plaintiff. It also alleges that the plaintiff neglected to collect the notes, at their maturity, of the makers, as it might have done, and that since that time, and before the commencement of this action, the several makers disposed of their property, and none of the notes can now be collected from the makers. To this answer the plaintiff demurred on the ground that it did not state a defense, and this appeal is from an order overruling the demurrer. The demurrer should have been sustained, for the answer does not state a defense. The defendant claims that the denials of the answer put in issue the consideration for the making of the contracts of guaranty, and that the neglect of the plaintiff to proceed promptly to collect the notes of the makers constitutes a defense in his favor.

1. While the answer denies that the guaranties were made for the purpose of inducing the plaintiff to accept the notes, yet it admits the other allegations of the complaint, to the effect that each of the contracts of guaranty recited on its face that it was for value received; that it was written on the back of the note, and signed by the defendant, and delivered with it; and that the plaintiff accepted the note, relying on the guaranty. These admitted allegations show a valid consideration for the contract of guaranty. In view of these admissions, the allegation which the answer denies is immaterial; for, where the written contract of a principal sets forth or imports a consideration,—for example, a promissory note,—and a contract of guaranty, signed by a third party, is a part of, or is indorsed upon, the note, and is delivered simultaneously with it, the consideration for the note supports the guaranty. Highland v. Dresser, 35 Minn. 345, 29 N. W. 55. Again, the words "for value received," in the guaranty, are a sufficient expression of the consideration. D. M. Osborne & Co. v. Baker, 34 Minn. 307, 25 N. W. 606. Neither the consideration for the note, nor that of the contract of guaranty, is questioned by the answer.

2. The mere neglect of the plaintiff to collect the note at maturity does not release the defendant, as guarantor of the payment of the note. Hence the new matter alleged in the answer does not constitute a defense. Hungerford v. O'Brien, 37 Minn. 306, 34 N. W. 161. Order reversed.

MEEKS v. CITY OF ST. PAUL.[1]

(Supreme Court of Minnesota. April 23, 1896.)

ACTION FOR NEGLIGENCE — EXCESSIVE VERDICT — NEW TRIAL — NEWLY-DISCOVERED EVIDENCE.

1. In an action of tort, it is not enough that the damages are, in the opinion of the court, excessive, to warrant the granting of a new trial on that ground. It must further appear that they were given under the influence of passion or prejudice. Nelson v. Village of West Duluth, 57 N. W. 149, 55 Minn. 497, followed.

2. A motion for a new trial will not be granted, on the ground of newly-discovered evidence, where such evidence is conflicting or cumulative, or where no facts are shown why it could not have been discovered, before the trial by reasonable diligence.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Hascal R. Brill, Judge.

Action by George W. Meeks against the city of St. Paul. There was a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

E. J. Darragh and Robertson Howard, for appellant. S. C. Olmstead, for respondent.

START, C. J. On March 20, 1895, the plaintiff was injured by a defect in a sidewalk of the defendant, and this action was brought to recover damages for such injury. He recovered $3,000, and the defendant appeals from an order denying its motion for a new trial.

1. The first assignment of error is that the trial court erred in admitting evidence as to the probable cost of medical treatment of the plaintiff subsequent to the trial. Evidence was offered, on behalf of the plaintiff,

[1] Rehearing denied.

tending to show that there was a withering or atrophy of the muscles of his left shoulder joint, particularly the deltoid, as a result of his injuries. A witness, who was called as a medical expert, and gave evidence as to the nature and extent of plaintiff's injuries, was asked this question: "Q. Now, what would be the only treatment that would be likely to be of any benefit in that condition?" This was objected to as incompetent and immaterial by the defendant; objection overruled, and exception. The question was then repeated, and answered as follows: "Q. What treatment would be necessary, and the only treatment, in fact, by which these parts could be restored, in your judgment? A. Electricity and massage materially assist nature and hasten repair." Conceding that the purpose of the question was to show the probable cost of future medical treatment, we are not called on to decide whether such evidence was admissible; for it is manifest that the answer was not responsive to the question, and was so indefinitely neutral as to be absolutely harmless. The first assignment of error is not regardable.

2. "That the court erred in holding that the damages awarded were not excessive," is the second alleged error. The simple fact that the damages in an action in tort are, in the judgment of the court, excessive, is not a ground for a new trial. It must further appear that they were given under the influence of passion or prejudice. Nelson v. Village of West Duluth, 56 Minn. 497, 57 N. W. 149. Hence, if the court was in error in holding that the damages were not excessive, the defendant would not be entitled to a new trial for this reason alone. But, assuming that the assignment, liberally interpreted, is to the effect that the court erred in denying defendant's motion for a new trial because the damages are excessive, and were given under the influence of passion or prejudice, we are of the opinion that the trial court did not so err. While the damages seem to us to be generous, the evidence does not justify the conclusion that they were given as the result of passion or prejudice. The evidence tends to show that the plaintiff, at the time of the injury, was 38 years old, strong, in good health, and earning five dollars a day in his business of a piano mover; that, as a result of his injury, the deltoid muscle of his left shoulder is paralyzed, which prevents him from raising his arm at right angles, and incapacitates him from doing any work which would involve the raising of the arm. As to the permanency of his injury, three experts were examined. The first testified that there was a possibility of the injury being permanent, that there was a probability that he might recover under a long course of treatment, and that there was no certainty either way. The second, that the probability was that the injury was permanent, and that the plaintiff will never regain the power of the muscle; that he examined the plaintiff in March (the time of the trial was in June), and, if there was going to be any revivifying power, there would now be some evidence of it; that there was no increase in the loss of nerve power, for that was gone when he examined the plaintiff in March, but there was an increase in the atrophy of the muscle, in the loss of power in the muscle. The third gave it as his opinion that the chances were even that the plaintiff would recover; that it would certainly be a long time before he is fully recovered. Upon this evidence honest men might reasonably differ as to the permanency of the plaintiff's injuries and the amount of damages he had sustained. There is nothing in this case to justify us in the conclusion that the verdict was the result of passion or prejudice, the verdict having been approved by the trial judge.

3. The last alleged error is that the court erred in not granting a new trial on the ground of newly-discovered evidence. The general nature of the alleged newly-discovered evidence is that two persons make affidavit that they saw the plaintiff move a piano since he was injured, and that he had no difficulty in using his left arm or in lifting the piano. The counter affidavits of the plaintiff and his attorney render it probable that the parties making the affidavits as to the plaintiff's moving the piano were mistaken as to the identity of the plaintiff. The only showing of diligence in the premises is the following conclusion in the affidavit of defendant's attorney: "Before the trial of this action I made diligent search for witnesses, and was unable to discover any evidence, except the evidence that was introduced at the trial." Where did he search for them? What did he do? The alleged newly-discovered evidence is conflicting, cumulative, and no facts are shown why it could not have been discovered before the trial. Such being the case, the trial court properly denied the motion for a new trial on this ground. Order affirmed.

RUNDLETT v. CITY OF ST. PAUL.

(Supreme Court of Minnesota. April 23, 1896.)

STATUTES — REPEAL — MUNICIPAL CORPORATIONS — SALARY OF CITY ENGINEER — REDUCTION.

1. A statute revising the subject-matter of a former one, and intended as a substitute for it, operates as a repeal of the prior act to the extent to which its provisions are revised; and a statute providing that a previous one shall be amended "so as to read as follows" repeals everything contained in the original, which is not reenacted.

2. Rule applied to certain special laws relating to the salary of the city engineer of the city of St. Paul, and *held*, that section 13, c. 2, Sp. Laws 1883, repealed all prior laws giving the common council of such city power to reduce the salary of the city engineer.

3. *Held*, that a certain resolution of such council, purporting to reduce the salary of the city engineer as fixed by law, is void.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; Hascal R. Brill, Judge.

Action by Leonard W. Rundlett against the city of St. Paul. From a judgment sustaining a demurrer to the answer, defendant appeals. Affirmed.

E. J. Darragh and Robertson Howard, for appellant. Michael & Peebles and W. J. Romans, for respondent.

START, C. J. This is an action for the recovery of the salary of the plaintiff, as city engineer of the defendant, for the month of July, 1895, at the rate of $5,000 per annum, as fixed by Sp. Laws 1891, c. 9. The answer alleges that the common council of the city of St. Paul, on June 6, 1895, by resolution, duly fixed the salary of the city engineer from and after July 1, 1895, at $3,500 per annum. The plaintiff demurred to this answer, and from an order sustaining the demurrer the defendant appealed.

The record presents only one question for our decision. Did the common council of the city of St. Paul have power to fix the salary of the city engineer as alleged in its answer? We answer the question, "No." The council has only such powers as are expressly or by necessary implication granted to it by the legislature; and, if the legislature has absolutely fixed by law the salary of the city engineer, the council has no power to increase or reduce it. Another form of the question then is: Does the law now in force absolutely fix such salary at $5,000? An answer to this question involves an examination and consideration of a number of special laws relating to the salary of the city engineer and other city officers. Sp. Laws 1874, c. 1, subc. 6, § 11, authorized the board of public works to appoint the city engineer, and fix his salary, with the concurrence of the council. The latter could not fix the salary of the city engineer without the concurrent action of the board. In this respect the salary of the engineer was made an exception to the general power, given by the same chapter, to the council, to fix the compensation, unless otherwise therein provided, of all officers elected or appointed under the act. As to the salary of the engineer, it was therein otherwise provided. Section 5, c. 86, Sp. Laws 1876, fixed the salary of the engineer at $2,500; but the council was given the express power to reduce it. This act contains no express repeal, but the legal effect of the act was to repeal so much of the act of 1874 as related to the salary of the engineer, for it takes from the board of public works all power to fix the salary of the engineer, and fixes it at a given sum, with sole power in the council to reduce the amount, but not to increase it. The two acts in this respect are inconsistent. The provision of the act of 1876 giving the council power to reduce, but not to increase, the salary of the engineer, was continued and re-enacted in section 1, c. 216, Sp. Laws 1878, and in section 18, c. 93, Sp. Laws 1881. This last act (section 18) fixed his salary at $2,500, and expressly authorized the council to fix the salary at a lower rate. Section 19 of the act provided that "all acts and parts of acts contrary to this act are hereby repealed." After the passage of this act of 1881, it was the only law thereafter in force authorizing the council to reduce the salary of the engineer as fixed by the legislature. The re-enactment in section 18 of the act of 1881 of the provision contained in the prior acts giving the council power to reduce the salary of the engineer was clearly intended as a substitute for the similar provision in the earlier acts, and operated as a repeal thereof; and the case falls within the rule that a statute revising the subject-matter of a former one, and evidently intended as a substitute for it, operates as a repeal of the prior act to the extent to which its provisions are revised and re-enacted. 23 Am. & Eng. Enc. Law, 485; Towle v. Marrett, 14 Am. Dec. 210, note. Section 13, c. 2, Sp. Laws 1883, enacts that section 18, c. 93, Sp. Laws 1881, "be, and the same is hereby, amended so as to read as follows: 'Section 18. * * * The salary of the city engineer shall be twenty-five hundred dollars ($2,500) per annum.'" Then follow other city officers named in section 18 of the act of 1881, with the salary of each; but the section wholly omits the proviso of the original section giving the council power to reduce the salaries as fixed by the act. As this section 18 was the only law then in existence giving the council power to reduce the salary of the city engineer as fixed by the act, it follows that section 13 of the act of 1883 repealed the law giving the council such power.

The rule is well settled that a statute providing that a previous one shall be amended "so as to read as follows" repeals everything contained in the original which is not re-enacted; and the amended statute is to be construed, as to any matter after the amendment, as if the statute had been originally enacted in the amended form. Suth. St. Const. § 133. It is not claimed by the defendant that any legislative authority has been given to the council to reduce the salary of the engineer since the act of 1881. Chapter 9, Sp. Laws 1891, fixes his salary absolutely at $5,000 per annum, and expressly repeals all inconsistent acts. The resolution passed by the council reducing the plaintiff's salary, pleaded in the answer, is void, because his salary is fixed by law, and all prior laws giving the council power to reduce it have been repealed. Order affirmed.

HOSKINS v. BAXTER.

(Supreme Court of Minnesota. April 23, 1896.)

HABEAS CORPUS—SUFFICIENCY OF PETITION—COURT COMMISSIONERS—ARREST.

1. The writ of habeas corpus, although a constitutional and imperative writ of right, does not issue, as a matter of course, to every applicant. The petition for the writ must show probable cause for issuing it, and where the petition, on its face, shows no sufficient prima facie ground for the discharge of the applicant, the writ may be legally refused.

2. Court commissioners of this state, by virtue of Gen. St. 1894, § 7132, have power to issue a warrant of arrest, and apprehend, examine, commit, or bail all persons charged with a crime.

(Syllabus by the Court.)

Appeal from district court, Otter Tail county, D. B. Searle, Judge.

Action by Frank Hoskins against L. L. Baxter. From a judgment for defendant, plaintiff appeals. Affirmed.

Francis H. Clarke and Frank Hoskins, for appellant. Parsons & Brown, for respondent.

START, C. J. This action is based upon Gen. St. 1894, § 6001, which is in these words: "If any officer herein authorized to grant writs of habeas corpus wilfully refuses to grant such writ when legally applied for he shall forfeit for such offence to the party aggrieved one thousand dollars." The complaint alleges that the defendant on February 13, 1893, was a judge of the district court of the Seventh judicial district of this state, and that on that day the plaintiff was restrained of his liberty and imprisoned in the county jail of Otter Tail county by the sheriff thereof; thereupon he presented his petition to the defendant, as such judge, for a writ of habeas corpus; and that the defendant willfully refused, in violation of the statute, to issue the writ. The answer admits that the defendant was and is a judge, as alleged in the complaint, but denies that the plaintiff ever legally applied to him for a writ of habeas corpus, and alleges that no application showing the plaintiff entitled to the writ was ever made to the defendant by or on behalf of the plaintiff, and denies the other allegations of the complaint. On the trial of the cause both parties moved for judgment on the pleadings, and the plaintiff appeals from a judgment, entered upon an order of the trial court, granting the defendant's motion, and refusing that of the plaintiff.

The only question raised by the defendant's motion is whether the complaint states a cause of action. The defendant claims that it does not, because it shows on its face that no legal application was ever made to him for the writ. The substance of the application is set forth in the complaint, and the cause and pretense of the plaintiff's restraint is therein stated to be a warrant of arrest for the offense of criminal libel, issued by R. H. Marden, as court commissioner of the county, and that such warrant was illegal in that Marden, as such court commissioner, had no right to issue the same. Or, in other words, the sole reason or claim stated in the petition why the writ should issue, and why the plaintiff's restraint was unlawful, was that the warrant was issued by a court commissioner, acting as a committing magistrate, and that such commissioners have no power so to act and issue a warrant to bring parties before them for examination. The plaintiff claims: First, that the allowance of the writ of habeas corpus is purely a ministerial act, and that the judge or officer to whom a petition for the writ is presented has no discretion, but must issue the writ, although the petition, on its face, fails to show probable cause for issuing it; second, that the court commissioner had no power to issue the warrant of arrest.

1. While it is true, as claimed by the plaintiff, that the writ of habeas corpus is a constitutional and imperative writ of right, for the protection of personal liberty, yet it does not issue, as a matter of course, to every applicant, unless it is so provided by express statute. If the writ issued as a matter of course, without inquiry or probable cause, its allowance would be a mere ministerial act, and the party claiming it might go to the clerk of the court and sue it out, as he might any other writ or process which issues as a matter of course. If the granting of the writ is a ministerial act, and it must be allowed, under a penalty of $1,000, whenever applied for, as claimed by the plaintiff, then the courts are under the control of all offenders against the laws of the state; for, whenever any of them find life in prison monotonous, and desire to attend the sittings of the court for recreation, all that it is necessary for them to do is to apply for a writ of habeas corpus. If such is the law, "a sentence to solitary confinement would be a sentence that the convict should travel for a limited time up and down the state, in company with the officers who might have him in charge. By the same means the inmates of the lunatic asylums might be temporarily enlarged, much to their own detriment, and every soldier or seaman in the service of the country could compel their commanders to bring them before the court six times a week." Williamson's Case, 26 Pa. St. 9. Except in those states where the statute makes it the absolute and imperative duty of the court or officer to grant the writ in all cases, the rule is too well settled to justify serious argument that an application for a writ of habeas corpus must show probable cause for the issuing of the writ, and that the court or judge may refuse the writ when the petition shows on its face that there is no sufficient ground, prima facie, for the discharge of the prisoner. The court will not go through

the idle ceremony of bringing before it the petitioner, if it is apparent from his application that he must be immediately remanded. Williamson's Case, 67 Am. Dec. 395, and notes. Our statute relating to the writ of habeas corpus does not change this rule. To prevent frivolous applications for the writ, the petition must be verified by the applicant, or some person in his behalf; and it must show probable cause for issuing the writ, by stating the cause or pretense of the party's restraint; and, if it is claimed that the imprisonment is illegal, the petition must state in what the illegality consists. Gen. St. 1894, § 5998. To prevent evasions, and to secure and enforce the constitutional right to the writ, a penalty of $1,000 is imposed on any officer who willfully refuses the writ when legally applied for. Gen. St. 1894, § 6001. When the writ is applied for substantially in the manner provided by section 5998, it is legally applied for, even if it is technically defective, and the petitioner's right to the writ is absolute and imperative; and the penalty is incurred, if, in such a case, the writ is willfully refused. If the petition does not so comply with the statute, and show probable cause, it is not legally applied for, and the writ may be lawfully refused.

2. This brings us to the question whether the petition in question disclosed upon its face probable cause for issuing the writ; that is, did it show, prima facie, that the plaintiff was unlawfully imprisoned? The only ground stated in the petition why the plaintiff's imprisonment was illegal was that the court commissioner had no power to issue the warrant of arrest on a charge of criminal libel against the plaintiff. If court commissioners of this state are authorized to apprehend, examine, and commit for trial or bail offenders, the plaintiff's petition showed on its face that he was not illegally restrained of his liberty, and the writ was properly denied; otherwise it ought to have been issued. Have court commissioners such power, under the constitution and laws of this state? We answer the question in the affirmative. The constitution and the statute confer upon such officers the judicial power and jurisdiction of a judge of the district court at chambers. Const. art. 6, § 15; Gen. St. 1894, § 824. The power and jurisdiction of a judge at chambers are precisely those of a judge in vacation. The term "chambers" means the private room or office of a judge, where, for the convenience of parties, he hears such matters and transacts such business as a judge in vacation is authorized to hear, and which do not require a hearing by the judge sitting as a court. The chambers of a judge are not an element of jurisdiction, but of convenience. For the purposes of jurisdiction, the chambers of a judge are wherever he is found within his district, and any business he is authorized to do as a judge in vacation is chamber business. 4 Enc. Pl. & Prac. 337. The powers of a judge in vacation are often confounded with those of a court in vacation, under our statute (section 5388, Gen. St. 1894), which declares the district courts of the state to be always open for all business except the trial of issues of fact. Gere v. Weed, 3 Minn. 352 (Gil. 249). A judge in vacation has no power to hear and determine any matter which the court only can hear. When, under the statute, he hears such matters in vacation, he sits as a court, and not as a judge in vacation or at chambers. A judge of the district court in vacation has power to issue a writ of habeas corpus, and determine the legality of the imprisonment of the petitioner. Therefore a court commissioner has such power. Gen. St. 1894, § 5996; State v. Hill, 10 Minn. 63 (Gil. 45). A judge of the district court in vacation is a conservator of the peace, and has power to apprehend, examine, and commit or bail, all persons charged with crime. Gen. St. 1894, § 7132. The legislature could not enlarge the powers of court commissioners by enlarging the powers of a judge at chambers; that is, in vacation. Hence, if, at the time of the adoption of the constitution, judges in vacation were conservators of the peace, and had power, when not sitting as a court, to apprehend offenders, then court commissioners of this state, under the statute cited, have the same power in the premises; otherwise not. At common law, all of the justices of the court of king's bench were conservators of the peace throughout the whole kingdom, with power, in vacation, by warrant, to apprehend, examine, commit, or bail persons suspected of crime. 1 Cooley, Bl. 350; 1 Bish. Cr. Proc. § 225. The same power was conferred in this state upon judges of the district court in vacation, prior to the adoption of the constitution. Rev. St. 1851, c. 114, § 1 (Gen. St. 1894, § 7132). It follows, therefore, that court commissioners have power to issue warrants of arrest, and act as committing magistrates, and that the plaintiff's application for a writ of habeas corpus was properly denied. Judgment affirmed.

CORNFIELD v. ORDER OF BRITH ABRAHAM.

(Supreme Court of Minnesota. April 27, 1896.)

ASSOCIATION — ACTION AGAINST — MEMBERSHIP — BURDEN OF PROOF.

1. Any association of persons transacting business by a common name may be sued by such name. Gen. St. 1894, § 5177.

2. Where a fraternal or benevolent association issues a certificate of membership which, by its terms, is to continue in force so long as the member complies with the rules of the association, the presumption is that it continues until the contrary is made to appear; and, if the membership has ceased, the burden is on the association to prove it.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; J. J. Egan, Judge.

Action by Hanna Cornfield against the Order of Brith Abraham. Judgment for plaintiff. Defendant appeals. Affirmed.

Stevens, O'Brien, Cole & Albrecht, for appellant. B. H. Schriber and Kueffner & Fauntleroy, for respondent.

MITCHELL, J. This action was brought by the plaintiff, as beneficiary of a certificate of membership alleged to have been issued to her husband by the defendant. The certificate was to the effect that her husband was a member of Solomon Lodge No. 114, "of the Order of Brith Abraham," and entitled to the benefits provided for by the laws of the order; that it was granted and issued to him upon condition that he in the future complied with all the laws, rules, and regulations of either his own" subordinate lodge or the "United States Grand Lodge of the Order Brith Abraham, or its executive committee"; "that, the above condition being complied with," the "Order of Brith Abraham agrees to pay from moneys collected for endowment benefits, by its endowment committee, as speedily as possible, the sum of five hundred dollars upon the death of said brother," to the beneficiary named and provided for in the by-laws of the order. The concluding clause of the certificate was as follows: "In witness whereof, the United States Grand Lodge of the Order Brith Abraham has hereunto affixed its seal, and caused this certificate to be subscribed, by its grand master, and attested to and recorded by its grand secretary." Then followed the subscription and attestation, respectively, of these two officers. It is conceded that plaintiff's husband had died, and that she was the beneficiary of the certificate if it still remained in force. The complaint alleged that defendant was a corporation organized under the laws of New York. The defendant appeared by the name by which it was sued (the Order of Brith Abraham), and answered, denying that it was a corporation, and alleging that it was an unincorporated fraternal order, composed of a large number of individuals, none of whom were parties to the action, and that, for this reason, there was a defect of parties defendant; that said individuals are organized into unincorporated subordinate lodges, which are affiliated with the United States Grand Lodge of the Order of Brith Abraham, whose name and seal are affixed to the certificate, and which is a corporation organized under the laws of New York. The answer further alleged that the deceased had, in his lifetime, been stricken from the rolls, for the nonpayment of dues, and was not a member of the order at the time of his death.

We agree with counsel for defendant that the "fluid" state, as he terms it, is the condition of many of these benevolent and fraternal associations. Their organization, as well as manner of doing business, is usually so informal that it has been the plague of the courts to define their character or construe their contracts. As near as we can make out from the very meager record before us, the Order of Brith Abraham is a mere voluntary and unincorporated association of individuals, who are grouped together in numerous subassociations, called "lodges"; that the grand lodge, composed of delegates from these local lodges, is incorporated for the purpose of acting as the agent of the order in issuing certificates of membership, and receiving and disbursing the funds contributed by the members of the association or order, in accordance with its rules or by-laws.

1. If we understand defendant's first defense, it is—First, that an unincorporated voluntary association cannot be sued as such, that the suit should be against the individuals composing it; second, that the certificate was the contract of the "Grand Lodge of the Order of Brith Abraham," and not of the "Order of Brith Abraham." Neither point is well taken. The obligation of the certificate is that the "Order of Brith Abraham" will pay; and no question is made as to the authority of the grand lodge to issue the certificate in behalf of the order. The defendant contracted by the name of the "Order of Brith Abraham," and it appears and answers by that name. It held itself out and contracted under the name by which it was sued, and it is wholly immaterial whether it is a corporation or a mere voluntary association. Perine v. Grand Lodge A. O. U. W., 48 Minn. 88, 50 N. W. 1022. Being the latter, it may be sued by the common name under which it transacted business. Gen. St. 1894, § 5177.

2. It being admitted that the certificate of membership had been duly issued, the presumption would be that it continued in force. If the deceased had been suspended or expelled from the order for nonpayment of dues, the burden was on the defendant to prove it. There was an entire absence of competent evidence either that defendant had defaulted in the payment of dues, or that he had been suspended or expelled from the order. Judgment affirmed.

HAZLITT v. BABCOCK et al.

(Supreme Court of Minnesota. April 27, 1896.)

OWNERSHIP — EVIDENCE — CHATTEL MORTGAGE — PRESUMPTION OF FRAUD.

1. *Held* that, under the evidence, it was a question for the jury whether the husband was cultivating his wife's land for her benefit, or on his own account, under an agreement or understanding between them to that effect.

2. The presumption, arising from the continued possession of the mortgagor, that a chattel mortgage was not executed in good faith (Gen. St. 1894, § 4129), obtains only in favor of creditors and purchasers of the mortgagor.

(Syllabus by the Court.)

Appeal from district court, Wadena county; G. W. Holland, Judge.

Replevin by Isaac Hazlitt against L. W. Babcock and others. There was a verdict for defendants, and plaintiff appeals. Reversed.

Coppernoll & Willson, for appellant. A. G. Broker, for respondents.

MITCHELL, J. Action of replevin, the plaintiff claiming the property under a chattel mortgage executed by one Oscar Pelton, and the defendants claiming it under a levy on execution upon a judgment against Barbara E. Pelton, the wife of Oscar Pelton, plaintiff's mortgagor.

The only issue in the case was whether the property originally belonged to Oscar Pelton, or to Barbara, his wife. It consisted of grain raised on land owned by the wife; but, of course, the land might belong to the one, and the crops to the other. When the plaintiff rested, the court directed a verdict for the defendants. This was error. From the evidence admitted, it appeared that the husband, with the knowledge and consent of his wife, had for years farmed the land, furnished the seed and labor, mortgaged or sold the crops, and used the proceeds as his own. The particular crop in controversy was raised by one Wiltsie, under a contract for working the land on shares, made with the husband in his own name, and in his own right, by the terms of which he was to do the plowing, and to have one-half the crop. The wife herself testified that she did not own any part of the crop, but that the half due from the cropper belonged to her husband. Upon this state of the evidence, it was at least a question for the jury whether the husband was cultivating the land for his wife, or for himself, under an agreement, express or implied, to that effect, between him and his wife. The fact that there was no express lease of the land, or no agreement for the payment of rent by the former to the latter, was not conclusive upon the question of the ownership of the crops. A wife may, if she chooses, give her husband the use of her land for his own benefit, and, if she does, the crops raised on the land will be his, and not hers. The evidence tending to show that the husband was cultivating the farm on his own account, under an agreement or arrangement to that effect with his wife, was much stronger than that offered in Duncan v. Kohler, 37 Minn. 379, 34 N. W. 594, or Heartz v. Klinkhammer, 39 Minn. 488, 40 N. W. 826, cited and relied on by the defendants. The court also erred in excluding much of the evidence offered by the plaintiff. While not, of itself, sufficient to prove that the husband was cultivating the farm on his own account, most of it was competent, as tending to corroborate other and more direct evidence of that fact.

There is nothing in the point that the plaintiff failed to prove that his mortgage was executed in good faith, and not for the "purpose of defrauding any creditor." Gen. St. 1894, § 4129. The statute cited has no application to the case. The presumption, arising from the continued possession of the mortgagor, that the mortgage was not executed in good faith, obtains only in favor of the creditors and purchasers of the mortgagor; and those thus claiming under him are the only persons who can raise the question. In this case the defendants are not claiming under the title of the husband, but in hostility to it. Order reversed, and new trial granted.

GALE v. BAXTER.

(Supreme Court of Minnesota. April 27, 1896.)

LOAN—EVIDENCE.

Evidence *held* to justify the findings.

(Syllabus by the Court.)

Appeal from district court, Rice county; Thomas S. Buckham, Judge.

Action by Louie E. Gale against George N. Baxter. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. N. Baxter, in pro. per. H. S. Gipson, for respondent.

MITCHELL, J. The trial court found that the $150 set up as plaintiff's second cause of action was a loan by plaintiff to defendant; and the only question presented by this appeal is whether this finding was justified by the evidence. We discover no reason why the finding should be disturbed. The state of the evidence is quite fully and fairly stated in the memorandum of the trial judge, attached to his findings, and it is unnecessary for us to repeat it. Defendant takes exception to the statement of the judge that he had not, in his testimony, denied that he made an express promise to repay the money at the time he received it. It is true that defendant did in form deny this, but he admitted that he had no recollection of what was said on that occasion, and that his denial was a mere inference, from the fact that his understanding of the transaction, and the impression which it made on his mind, had always been that it was not a loan, and was not to be repaid. In view of past favors conferred by defendant upon plaintiff, there were, perhaps, reasons which might have induced her to make him a gift of this money; and there are some things in her subsequent conduct tending to show that she did not then expect that it was to be repaid. But these were all matters of evidence, for the trial court. The evidence would have justified a finding either way, and we cannot say that it did not reasonably tend to support the finding made. Judgment affirmed.

LYNCH v. FREE et al.

(Supreme Court of Minnesota. April 27, 1896.)

MUNICIPAL COURTS—JURISDICTION—COUNTERCLAIM—PLEADING—CROSS-EXAMINATION.

In an action by the indorsee after maturity of a promissory note, an indebtedness of the payee to the maker, existing at the date of the transfer of the note, is not a counterclaim, but a defense; and the fact that the indebtedness thus set up as a defense exceeds $500 does not oust the municipal court of Duluth of jurisdiction to try the action. *Held*, that the court erred in striking out portions of defendant's answer, and also in refusing to allow defendant to cross-examine one of plaintiff's witnesses upon a material point.

(Syllabus by the Court.)

Appeal from municipal court of Duluth; W. D. Edson, Judge.

Action by Margaret Lynch against Albert Free and James Sheridan. Judgment for plaintiff. From an order denying a new trial, defendant Sheridan appeals. Reversed.

M. H. Crocker, for appellant. Edson & Hanks, for respondent.

MITCHELL, J. This action was brought upon a negotiable promissory note for $300, executed by the defendant and one Free to Edward Lynch, and alleged to have been by the payee indorsed and transferred to the plaintiff before maturity, for a valuable consideration. The answer sets up two defenses: First, that the note was mere accommodation paper, and that it was transferred to plaintiff, if at all, long after maturity, and without consideration; second, that the note was transferred to the plaintiff, if at all, long after maturity, and that at the date of such alleged transfer the payee was indebted to the defendant in the sum of $500 and interest, for money paid by him at the instance and for the benefit of such payee, which has never been repaid. The answer concludes as follows: "That this defendant will set off his said claim of $500 and interest against said pretended claim of said Edward Lynch, and that this defendant demands a judgment against the said Edward Lynch herein for the difference in his favor between said pretended claim and said claim of $500 and interest. Wherefore defendant demands judgment that he have his costs and disbursements herein."

1. The first assignment of error is that the court erred in striking out paragraphs 5 to 11 (except the sixth) of the answer. These paragraphs included all of defendant's second, and part of his first, defense. On what ground the court struck out these portions of the answer, we are unable to understand. The answer is far from being a model pleading, and some of its allegations may be immaterial or redundant; but it contained two legal defenses, which the defendant had a right to set up, and it was error to strike them, or either of them, out. As, on the trial, the court seems to have permitted the defendant to introduce evidence to maintain both defenses, it may, so far as that trial is concerned, have been error without prejudice; but, as a new trial must be granted for other errors, we call attention to it at this time.

2. There is nothing in the point that the municipal court had no jurisdiction to try the action because "judgment is claimed in the answer for more than $500." Defendant's demand against plaintiff's assignor was not a counterclaim. Gen. St. 1894, § 5237. It was a mere defense, which, if true, showed that plaintiff never had any cause of action against the defendant. Notwithstanding defendant's remarkable prayer for relief, he could not have obtained any affirmative judgment against plaintiff, and, of course, none against her assignor, who was not a party to the action. Whether a defendant can oust the court of jurisdiction even by setting up a counterclaim for more than $500 is a question on which we express no opinion.

3. A very important, perhaps the most important, question in the case, was the alleged transfer of the note to plaintiff; particularly its date, and the consideration for it. This was material upon both defenses. The relations of plaintiff and the payee of the note to each other, as husband and wife, together with various circumstances tending to cast grave doubt upon the accuracy of their version of the transaction, made a case that entitled defendant to great latitude in cross-examining them. The husband, as a witness for his wife, had testified that he transferred the note to the plaintiff, shortly after its execution, in payment of a debt which he owed her; that he gave the note to her; and that she shortly afterwards returned it to him, to keep for her. He admitted that he subsequently (without her knowledge, as he claims) hypothecated it at bank, as collateral to his own note; that, after he took it up, he returned it to the possession of his wife. It also appeared that the plaintiff had taken no steps to enforce its collection for more than four years after its maturity, and no satisfactory excuse was given for this delay. Defendant's counsel then attempted to cross-examine the witness in regard to this transaction between him and his wife. Having asked him when he first gave it to her, he then asked him the following question: "How many days or how many months did she have the note in her possession?" to which plaintiff's counsel objected as incompetent, irrelevant, and immaterial. The court sustained the objection, and the plaintiff excepted. Defendant's counsel then said to the court, "I desire to examine the witness as to the incidents of the alleged transfer." The court "refused the request," and counsel again excepted. This amounted to an explicit ruling by the court that it would not permit the witness to be cross-examined in reference to the alleged transfer of the note, and counsel did all he was required to do, in order to save the point, by taking an exception. After so distinct a ruling by the court, it would have been almost disrespectful

to it for counsel to have propounded any further question to the witness.

The other errors, if any, are not of a kind likely to be repeated on another trial, and therefore need not be considered. Order reversed, and new trial ordered.

TREDWAY v. RICKARD et al.

(Supreme Court of Minnesota. April 27, 1896.)

APPEAL—WEIGHT OF EVIDENCE.

Held, that the evidence justified the verdict.

(Syllabus by the Court.)

Appeal from district court, Chippewa county; Gorham Powers, Judge.

Action by A. B. Tredway against L. E. Rickard and others. There was a verdict for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

C. A. Fosnes, for appellant. Oluf Gjerset, for respondents.

MITCHELL, J. The only question in this case is whether the evidence justified the verdict of the jury to the effect that the note in suit was usurious. On this point there was a sharp conflict between the testimony of the plaintiff and that of the principal defendant, Rickard; and, as the jury were at liberty to accept the latter as true, we cannot disturb their verdict, approved, as it has been, by the trial judge, in refusing to grant a new trial. Order affirmed.

NEW ENGLAND FURNITURE & CARPET CO. v. BRYANT et al.

(Supreme Court of Minnesota. April 27, 1896.)

REPLEVIN — JUDGMENT—ACTION ON BOND — LIABILITY OF SURETIES—BURDEN OF PROOF.

1. In an action of claim and delivery, the defendant, with sureties, executed a bond, as provided by Gen. St. 1894, § 5278, and obtained a return of the property. The plaintiff obtained a verdict and judgment against the defendant merely for the value of the property. In an action upon the bond, the only breach of its conditions alleged being the nonpayment of this judgment, *held*, that the sureties were not liable.

2. In order to render the sureties liable on such a bond, the judgment must be one authorized by Gen. St. 1894, § 5420, and which can be satisfied by a return of the property.

3. Whether, in an action of claim and delivery, it may be proven that the property has been destroyed or lost, and cannot be returned, and in such case an absolute judgment rendered for its value, quære.

4. But, assuming that this may be done, the burden would be on the plaintiff, in an action on the bond against the sureties, to allege and prove these exceptional facts, which authorized the rendition of a judgment not in the statutory form.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; S. H. Moer, Judge.

Action by the New England Furniture & Carpet Company against Sarah L. Bryant and others. From a judgment for certain defendants, plaintiff appeals. Affirmed.

Alford & Hunt and Merrick & Merrick, for appellant. Phelps, Towne & Harris and Stanford & Arbury, for respondents.

MITCHELL, J. The complaint alleges that the plaintiff, having commenced an action of replevin against defendant Bryant, and the sheriff, upon the proper requisition, having taken the property, thereafter the sheriff redelivered it to Bryant upon the execution, by himself as principal, and the defendants Stevens and Routh as sureties, of a bond, conditioned, as provided by Gen. St. 1894, § 5278, that "if the property shall be delivered to the plaintiff, if a delivery is adjudged, and if said plaintiff shall be paid such sum as for any cause may be recovered against the defendant [Bryant] then this obligation to be void,—otherwise, to remain in full force"; that thereafter, in that action, the plaintiff obtained a verdict and judgment against Bryant for $134.50. The nonpayment of this judgment is the only breach of the bond alleged. It is stipulated that "the verdict and judgment referred to was a money verdict and judgment, and that they were not, or either of them, in the alternative."

We take it for granted, in accordance with what seems to be conceded or assumed by both sides, that this verdict and judgment were for the value of the property. The court ordered judgment on the pleadings in favor of Stevens and Routh. This was correct, for the complaint stated no cause of action against the sureties on the bond. The judgment for the plaintiff in the replevin suit should have been in the alternative; that is, for the possession of the property, or the value thereof in case possession could not be obtained. Whatever may be the rule, under other statutes, in other jurisdictions, it is settled that, under the statutes of this state, in an action of claim and delivery, a party has no election to take a mere money judgment for the value of the property. Such a judgment would be erroneous. Gen. St. 1894, § 5420; Kates v. Thomas, 14 Minn. 449 (Gil. 343); Berthold v. Fox, 21 Minn. 51; Sherman v. Clark, 24 Minn. 37; French v. Ginsburg, 57 Minn. 264, 59 N. W. 189. The bond must be read and construed in connection with the provisions of the statute, which enter into and become a part of it. Thus read and construed, the obligation of the sureties to pay the value of the property was not absolute, but only conditional in case a return could not be had. The expression, "such sum as for any cause may be recovered against the defendant," must be construed as meaning such sum as may, in connection with a judgment for a delivery of the property, be recovered as damages for its detention, or, perhaps, for any injury to it, and

also, conditionally, the value of the property in case a return cannot be had. Gallarati v. Osser, 27 N. Y. 324. See, also, Dwight v. Enos, 9 N. Y. 470 and Fitzhugh v. Wiman, 9 N. Y. 559.

The liability of the sureties could not be changed or enlarged by any act of the plaintiff in accepting or entering a judgment not authorized by the statute. Their contract was only to pay the value of the property in case a return could not be had. The judgment entered could not be satisfied by a return of the property, even if the sureties or their principal had it ready and in condition to be returned. It could only be satisfied by the payment of money. That is not the judgment which the sureties obligated themselves to satisfy. Gallarati v. Osser, supra. It is no answer to this to say that the judgment was merely erroneous, and not void, and cannot be attacked collaterally. That is true as to the defendant in that action, but the sureties were not parties to it. None of the cases cited by plaintiff sustain its position, unless it be Mason v. Richards, 12 Iowa, 73, with the reasoning of which we are unable to agree. It seems to us that the fallacy in the position consists in assuming that, as the sureties contract with reference to the judgment that may be rendered in the action, therefore their liabilities are identical with those of the defendant, and that, for whatever he becomes liable, no matter under what circumstances, they are necessarily liable, also. This is a misapplication of the rule that the judgment in a replevin suit is, in the absence of fraud, conclusive upon the sureties. This is only true provided the judgment is one authorized to be entered in such cases. There are cases, of which Sweeny v. Lomme, 22 Wall. 208, is one, which hold that, when the judgment is merely for the return of the property, the sureties on the bond cannot avail themselves of the fact that the judgment is not in the alternative, for the value in case a return cannot be had. But this is a very different question from the one before us, and need not now be considered. Such a judgment can be satisfied by a return of the property. The failure to return it is, in itself, a breach of the conditions of the bond; and it is not very apparent how the sureties are prejudiced by the omission to fix the value of the property in the replevin suit, and to render an alternative judgment therefor,—a thing which we have repeatedly held is intended for the benefit of the party, and which he may waive. Stevens v. McMillin, 37 Minn. 509, 35 N. W. 372; Thompson v. Scheid, 39 Minn. 102, 38 N. W. 801.

It is urged, however, that the law is settled in this state in accordance with plaintiff's contention by the case of Robertson v. Davidson, 14 Minn. 554 (Gil. 422). It must be admitted that the ground upon which the decision in that case rests, and the reasoning of the court in support of it, are not very satisfactory. No authority is cited except the nisi prius decision in Gallarati v. Osser, which was reversed by the court of appeals in 27 N. Y. 324. The decision seems to be based on the form of the undertaking in the replevin suit, to which the defendant was not a party, and in which the obligors were not described as sureties, the court saying: "The undertaking given by the defendants is, as between them and the plaintiff, an original obligation, and the defendants were not sureties, but original promisors or obligors. The principles applicable to sureties therefore do not apply." Whether this was or was not sound, it has no application to the present case, for, by the express terms of the bond, Stevens and Routh contracted as sureties for Bryant.

The only proposition about which we have had the least doubt is one that is not suggested by counsel for the plaintiff, and may be stated thus: That, while it is true that there can be no absolute judgment for the value if there can be a delivery of the property, yet, if it is made to appear, on the trial, that a delivery of the property cannot be made because of its irretrievable loss or destruction, or the like, the court may render an absolute judgment for its value, and that, in the absence of anything in the record to the contrary, the presumption is that the judgment is regular, and that, before its rendition, the court had become judicially satisfied that a return of the property was impossible. We have found no case in which this was ever done. No such implied exception to the statutory requirements as to the form of the judgment in actions of claim and delivery is even suggested in any of the decisions of this court. On the contrary, in Sherman v. Clark, supra, in which it appeared that a return could not be made, it was said—obiter, it is true—that the judgment should have been in the alternative. Any such departure from the general practice is wholly unnecessary as well as useless, and is liable to result in serious practical difficulties. As suggested in Fitzhugh v. Wiman, supra, evidence as to whether the property can be returned is wholly foreign to any issue in the case. The only support which we have found for any such practice under a statute like ours is in Boley v. Griswold, 20 Wall. 486, and Brown v. Johnson, 45 Cal. 76. It will be noted that in both of these cases the question arose between the parties to the replevin suit, and the force or effect of such a judgment against sureties on the delivery bond was not involved. In the first case, the court placed its decision upon a construction of the statute of Montana, similar to ours, at variance with the views of this court. They seem to have construed it as meaning that an inquiry should be had upon the trial as to whether a return of the property could be made, and that the form of the judgment should depend upon the result of that inquiry. We have always construed it as hav-

ing exclusive reference to the form of the judgment.

But, even assuming that it might be shown, on the trial, that a return of the property could not be made, and that, in such case, an absolute judgment for its value might be rendered, and that such a judgment would, as against a party to the action, be presumed to have been regularly rendered, yet no such presumption ought to be allowed to obtain as against sureties on the delivery bond who were not parties to the action. Therefore, assuming, without deciding, that plaintiff might recover against the defendants by proving that the destruction or irretrievable loss of the property was established in the replevin suit, and that, on that ground, a judgment merely for its value was rendered, yet it would be incumbent on the plaintiff to allege and prove the exceptional facts which authorized an exceptional judgment. As against these sureties, the judgment is, at least, presumptively, not one authorized by statute, and not one with reference to which they contracted. Judgment affirmed.

WASHINGTON LOAN & TRUST CO. v. McKENZIE et al.

(Supreme Court of Minnesota. April 27, 1896.)

TAX TITLE—ACQUISITION BY MORTGAGOR—EFFECT ON MORTGAGE.

1. A mortgagor cannot, as against the mortgagee, acquire a tax title to the mortgaged premises through a breach of his own covenant to pay the taxes. And in that respect his grantee stands in no better position than the mortgagor himself.

2. M. executed a mortgage to W., in which he covenanted to pay all taxes on the mortgaged premises. M. having defaulted in the performance of this covenant, the premises were sold for taxes, and purchased by L. Subsequently, but before the time of redemption from the tax sale had expired, L. obtained a quitclaim deed of the premises from M., under which he immediately went into possession, and thereafter took steps to perfect his tax title by causing notice to be given of the expiration of the time of redemption. No redemption having been made, L., in an action by W. to foreclose his mortgage, set up his tax title, claiming that it had extinguished the lien of the mortgage. *Held*, that, after purchasing from the mortgagor, L. was disqualified from acquiring, as against the mortgagee, any new or additional rights under his inchoate tax title.

3. Whether, in view of the fact that he acquired his tax-sale certificate before he owed the mortgagee any duty to protect the land from taxes and tax sales, equity would not keep it alive, as a lien superior to plaintiff's mortgage, for the amount required to redeem from the tax sale, quære.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; Page Morris, Judge.

Action by the Washington Loan & Trust Company, administrator of Maria T. Stoddard, deceased, against Johanna McKenzie and others. From a judgment for plaintiff, reduce it have been repealed. Order affirmed.

William C. White, for appellants. Stanford & Arbury and S. T. & Wm. Harrison, for respondent.

MITCHELL, J. In February, 1889, the defendants McKenzie, as security for the payment of $1,200 and interest, executed to plaintiff a real-estate mortgage containing a covenant, among others, that the mortgagors would pay all taxes on the mortgaged premises. They failed to pay the taxes for 1889, and by reason of such default the premises were sold therefor in May, 1891, and bid in for the state. In April, 1893, one Spevers paid into the county treasury the amount for which the premises had been sold, together with all subsequent taxes, penalties, etc., and obtained from the county auditor an assignment of the interest of the state, as authorized by statute. In May, 1894, Spevers assigned the auditor's certificate to other parties, who, in turn, assigned it to defendant Lynott, in August, 1894. On November 26, 1894, the McKenzies, the mortgagors, for the consideration of $100, executed to defendant Lynott a quitclaim deed of the premises, under which he immediately entered into, and still continues in, possession. It does not appear that this quitclaim deed contained any exceptions or covenants, or made any mention of either the mortgage, or the taxes on the land. Almost immediately after the execution of this quitclaim, Lynott caused notice to be given of the expiration of the time of redemption from the tax sale; the notice being served on the defendant Johanna McKenzie, in whose name the premises were assessed. No redemption was made, and, a few days after the expiration of the period for redemption, Lynott executed a mortgage to the defendant Ballard to secure payment of $2,000. All the conveyances and instruments above referred to were duly recorded in the order of their execution.

In this suit to foreclose plaintiff's mortgage, the defendants Lynott and Ballard insist that it is no longer a lien on the premises, having been extinguished by the tax title. Ballard's rights as mortgagee are, of course, dependent upon Lynott's title; and the question is whether, under the circumstances, Lynott was in a position to acquire a tax title, so as to defeat plaintiff's mortgage. There are certain classes of persons, who, from their connection with the title to real estate, or in consequence of their relations to others having an interest in the property, are disqualified from purchasing the land at a tax sale. This rests, not on anything peculiar to the law of tax sales, but upon certain broad and general principles of equity, the fundamental one being that a person will not be permitted to acquire any right founded on his own default or neglect of duty. In supposed accordance with this principle, it had been frequently, if not generally, held that the owner in possession, and who therefore owed to the state

the duty of paying the taxes, could not fortify his existing title, or acquire a better one, by allowing the land to be sold for taxes, and buying it at the sale. As this duty is one due only to the state, it is difficult to see why it is against equity to allow the owner of the land to acquire a tax title to it, as against one to whom he owes no such duty. This question has been set at rest by our statute, which provides that, "if the owner purchase, the sale shall have the effect to pass to him every right, title and interest of any and every person free from any claim, lien or incumbrance except such right, title, interest, lien or incumbrance as the owner so purchasing may be legally or equitably bound to protect against such sale or the taxes for which such sale was made." Gen. St. 1894, § 1599. While the owner, merely as such, is no longer disqualified from purchasing at a tax sale, the question whom and what interests he is legally or equitably bound to protect against taxes and tax sales remains to be determined by the same principles of equity as before the enactment of the statute. Whether there are any circumstances under which the mortgagor can acquire a tax title, as against his mortgagee, it is not now necessary to consider, but it is elementary that he cannot acquire or build up a tax title upon a default in or breach of the conditions or covenants of his own mortgage. Allison v. Armstrong, 28 Minn. 276, 9 N. W. 806. Hence the McKenzies, who covenanted to pay the taxes, could not themselves have acquired a tax title, so as to defeat plaintiff's mortgage. It is equally well settled that, where the mortgagor cannot do so, no one claiming under him can do it. His grantee will stand in no better position than the mortgagor himself. MacEwen v. Beard, 58 Minn. 176, 59 N. W. 942. The fact that he may not have expressly covenanted to pay the taxes, and may not be personally liable for their payment, would make no difference. Defendants' counsel concede that, if Lynott's tax title had had its inception after he purchased from the mortgagors, the case last cited would be decisive of the present; but they seek to distinguish the cases, in that Lynott obtained an assignment of the auditor's certificate while he was still a stranger to the title of the mortgagors and mortgagee, and owed no duty to either to protect their interests against taxes and tax sales. Undoubtedly Lynott was at that time qualified to acquire a tax title, as against the plaintiff; and, if his relations to the parties and their title had remained unchanged, he could unquestionably have perfected his inchoate tax title, so as to extinguish plaintiff's mortgage. But the vital and pivotal fact in the case is that before the tax title had become absolute, and while certain steps remained to be taken to make it such, and while the auditor's certificate constituted a mere lien on the land, Lynott changed his relations to the title and to the plaintiff, by purchasing from, and going into possession under, the mortgagors. From that moment he became disqualified to acquire a tax title, as against the plaintiff. In accepting a quitclaim deed, he purchased the land subject to the existing lien for taxes. As between him and his grantors, the duty of paying these taxes devolved on him. By thus relieving the mortgagors from their payment he assumed the duty himself. If, at the time of this purchase, the tax-sale certificate had been outstanding in a third party, he could not, by purchasing it, have acquired a tax title, as against plaintiff. His purchase would, as to plaintiff, have been held to operate as a redemption. But there is no difference in principle between buying in an outstanding tax title, and perfecting an inchoate one which he already held. From the moment he became the grantee of the mortgagors, he became disqualified from acquiring any new or additional rights under any tax title. He was thereafter equitably bound to protect plaintiff's mortgage from taxes and tax sales. Whether, in view of the fact that he acquired the tax certificate before he owed any such duty, equity would not keep it alive as a lien, superior to plaintiff's mortgage, for the amount required to redeem the land from the tax sale, is a question which has not been raised or discussed, and which we therefore do not consider. But, after defendants' purchase from the mortgagors, he could acquire no new or additional rights, as against the plaintiff. Judgment affirmed.

PIERCE v. WAGNER (PABST BREWING CO., Intervener).

(Supreme Court of Minnesota. April 27, 1896.)

CHATTEL MORTGAGES—CHANGE OF POSSESSION.

A mortgage on a stock of liquors and saloon supplies *held* void as to creditors, on the ground that, under the agreement between the parties, the mortgagor was to retain possession, with the power to use the proceeds of the property in maintaining the business and in his own support and for his own benefit, without satisfying the mortgage debt.

(Syllabus by the Court.)

Appeal from municipal court of Duluth; W. D. Edson, Judge.

Action by Harold E. Pierce against W. A. Wagner. The First National Bank of Commerce was garnished, and the Pabst Brewing Company intervened as a claimant. Judgment for plaintiff. From an order refusing a new trial, the claimant appeals. Affirmed.

Austin N. McGindley, for appellant. Wilson & Wray, for respondent.

MITCHELL, J. The defendant, being engaged in the saloon business, and having borrowed of the claimant $1,000, with which to pay his license, executed to it a chattel mortgage on his stock of liquors and saloon

supplies, of the value of $1,500, to secure the loan and interest, payable in 12 monthly installments, according to the conditions of 12 promissory notes. Seventy-three dollars of the receipts from the sales of the liquors and supplies in the saloon having been deposited with the garnishee by defendant to his own credit as "agent," the plaintiff garnished it as defendant's property. Thereupon the claimant intervened, and claimed the money under its mortgage. The plaintiff contends that the mortgage was fraudulent and void as to the creditors of the defendant. The trial court found that this contention was true; and whether this finding was justified by the evidence is the only question presented by this appeal.

The only provisions of the mortgage that are material were substantially as follows: The mortgagor covenanted that, until the full payment of all the notes secured by the mortgage, he would, by purchases from time to time, keep the stock of at least the average value of $1,500. To that end, it was provided that the proceeds of sales in the saloon should be used by the mortgagor in the purchase of new stock as far as necessary to keep the stock of the value of $1,500; also, that the mortgage should be a lien upon the new stock, as well as that then on hand. The residue of the proceeds of sales by the mortgagor was to be used by him in defraying and paying all necessary expenses in carrying on and conducting the saloon, and the balance to be used alone in payment of the notes secured by the mortgage, and not to be diverted to any other purpose. The mortgagor covenanted to pay over to the mortgagee such surplus of the proceeds of sales. The mortgagee appointed the mortgagor its agent to sell the liquors and supplies at retail, to purchase supplies for the saloon from time to time, to pay off the necessary expenses connected with the carrying on the saloon, and to pay over the surplus of the proceeds of sales, from time to time, to be credited on the notes. The oral evidence in the case clearly shows that the mortgagor conducted and carried on the business precisely as if absolute proprietor, selling the liquors at retail, using the proceeds in paying his rent, hired assistants, lights, and other incidental expenses, and buying new stock, and, in addition thereto, $45 or $50 a month for his own support. The mortgagee exercised no control or supervision over the business, except, to use the expression of its agent, to keep sufficient "tag" of it to see that the mortgagor kept up the stock, and paid his notes as they fell due and his monthly bills for beer which it was furnishing him for his trade. It is perfectly manifest from the evidence that, so long as he continued to do these things, it did not attempt or expect to interfere with or control the business, but that the mortgagor was at liberty to run it as his own, and in his own way. What stock he should buy, the prices he should sell at, what rent he should pay, what help he should employ, what other expenses he should incur, how much he might use for his own support, were matters left wholly to the mortgagor's discretion, and over which the mortgagee neither cared nor expected to exercise any control, so long as the mortgagor kept up his stock and paid his notes and "beer bills." The evidence also amply justifies the conclusion that this mode of dealing with the property and conducting the business was in exact accord with the intention and expectation of the parties at the time the mortgage was executed.

That such an agreement reserves benefits to the mortgagor, and prejudices other creditors, seems to us too plain for argument. It ties up the property, so as to prevent its being reached by other creditors, and enables the mortgagor to go on with his business, and draw from it the means of conducting it, and of his own support, while the mortgage still remains unpaid. It opens the door for fraud, and permits the mortgagor to use the property for his own benefit, utilizing the mortgage as a shield against other creditors. Calling the mortgagor the mortgagee's agent does not help the matter. Where the mortgagor of a stock of merchandise is allowed to remain in possession, and sell the property at retail, in the ordinary course of business, the only rule that is just as to other creditors is that, in order to render the mortgage valid, the debtor must part with all right to appropriate the property or its proceeds to his own use during the existence of the lien of the mortgage. From the early case of Chophard v. Bayard, 4 Minn. 533 (Gil. 418), down to date, this court has rigidly adhered to the doctrine that a mortgage is void as to creditors which provides for the retention of mortgaged personalty by the mortgagor, accompanied with the power to dispose of it for his own benefit without satisfaction of the mortgage debt. The agreement between the parties in this case clearly comes within that rule. How such a scheme would or might be made to operate is very apparent. The mortgagor could, as was the fact in this case, continue and conduct his business precisely as if there was no mortgage in existence, support himself out of it, and so regulate the expenses of the business that there would be no surplus. It would thus take a year to pay off the mortgage, and at the end of that time, by borrowing another $1,000 to pay his license for the next year, and executing a new mortgage, he could continue his business indefinitely, in the meanwhile supporting himself out of it, while his property would be shielded by the mortgages from other creditors. Order affirmed.

FLENNIKEN v. LISCOE.

(Supreme Court of Minnesota. April 27, 1896.)

MECHANIC'S LIEN—WAIVER—ACCEPTANCE OF NOTE.

1. A mechanic's lien is waived or discharged where the parties enter into a special agreement inconsistent with the existence of the lien; as, for example, by the laborer or material man extending credit to the owner beyond the statutory period for bringing an action to enforce the lien.

2. This rule is not changed by Gen. St. 1894, § 6243 (providing that the taking of a promissory note for labor or material shall not discharge the lien), where, by the terms of the note, the time of payment is extended beyond the date fixed by statute for bringing an action to enforce the lien.

(Syllabus by the Court.)

Appeal from district court, Todd county; L. L. Baxter, Judge.

Action by R. B. Flenniken against Charles Liscoe. Judgment for defendant, and plaintiff appeals. Affirmed.

J. D. Jones and Longueville & McCarthy, for appellant. B. F. Hartshorn and Coppernoll & Willson, for respondent.

MITCHELL, J. This was an action to enforce a mechanic's lien for labor and material furnished by the plaintiff to the defendant for building a mill. According to the terms of the contract, plaintiff's compensation was to be paid, part at the date of the contract, part when certain machinery was delivered, and the balance one year after the completion of the mill by defendant, giving plaintiff his promissory note therefor, "to be paid on or before one year after date." The first and second payments were made according to the contract. The mill was completed on April 21, 1893, that being the day on which, according to both the lien statement and the complaint, the last item of labor or material was furnished. Thereupon defendant executed to plaintiff his negotiable promissory notes for the balance due on the contract. These notes bore date April 21, 1893, and, by their terms, were payable "on or before one year after date." This action was commenced on April 20, 1894. The demand for which a lien is claimed is the same as that represented by these notes.

The only question presented by this appeal is whether plaintiff's right to a lien was waived or discharged by his accepting the promissory notes. The statute provides that every action to enforce a mechanic's lien shall be commenced "within one year from furnishing the last item of labor," etc., "for which such lien is had." Gen. St. 1894, § 6238. Also, that "the taking of a promissory note or other evidence of indebtedness for labor performed or skill, material or machinery furnished under the provisions of this act shall not discharge the lien thereby given for the same, unless expressly received in payment therefor and so specified in such note or other evidence of indebtedness." Id. § 6243. As a lien in favor of laborers and material men is expressly given by statute, it ought not to be considered waived except by plain acts. But it is a right that may be waived by the express agreement of the party in whose favor it exists. It may also be waived by implication arising from his conduct. If he makes a special agreement inconsistent with the right to a lien, the lien will be destroyed; or, otherwise expressed, if he enters into a special contract inconsistent with the operation of the lien, the lien is waived by the legal effect of such contract. This is a general principle, applicable to all liens created by operation of law. A familiar example of its application is where credit is given by contract to the shipper for the price of transportation beyond the time when the property is to be delivered and placed out of the carrier's control. The principle is too well settled to require the citation of authorities. Hence it has been, so far as we are advised, universally held that, if credit has been given extending beyond the statutory period for instituting a suit to enforce a lien, the lien is waived. Phil. Mech. Liens, § 281; Willison v. Douglas, 66 Md. 99, 6 Atl. 530; Ehlers v. Elder, 51 Miss. 495; Pryor v. White, 16 B. Mon. 605; Quinby v. City of Wilmington, 5 Houst. 26; The Highlander, 4 Blatchf. 55, Fed. Cas. No. 6,475; Scudder v. Balkam, 40 Me. 201. In connection with the last citation, see, also, Mehan v. Thompson, 71 Me. 492. This is not upon the ground merely that credit has been given, but because no action could be maintained for the purpose of enforcing the lien until after the statutory period for doing so had expired. Of course, it needs no argument to show that the acceptance of a promissory note for a debt, even although not taken as absolute payment, suspends the right of action for the recovery of the debt until the maturity of the note. It is also well settled that no action can be maintained for the purpose of enforcing a lien when it could not be maintained for the recovery of the debt for which the lien is claimed.

Under the statute, an action to enforce plaintiff's lien had to be brought within a year from April 21, 1893. The notes taken by him were entitled to three days' grace. Gen. St. 1894, § 2237. Hence no action could have been brought against the defendant either to recover the debt or to enforce a lien until April 24, 1894, even under the rule most favorable to plaintiff, which is that an action may be brought on the last day of grace. Therefore, the credit given extended beyond the time within which an action could be brought to enforce the lien; and, under the rule suggested, the plaintiff must be deemed to have voluntarily waived his lien, and relied on the personal credit of the defendant, to whom the credit was given. Counsel, however, urges that this rule is changed or abolished by the provision of statute that the taking of a promissory note for the labor and material shall not discharge the lien. Counsel, we think, misapprehends the scope of the

statute. Its purpose was to set at rest the much-mooted question how far the mere acceptance of a promissory note for the debt discharges the lien; but it was never intended to change the rule, of universal application to all liens created by law, that a special agreement inconsistent with the right of lien waives or destroys the lien. Plaintiff's lien was not destroyed because a promissory note was taken, but because the credit was extended to the defendant beyond the period within which an action to enforce a lien must be brought. If the note had matured within that period, the lien would not have been waived; while, on the other hand, if an extension of credit beyond that period had been given in some other way than by accepting a promissory note, the lien would have been destroyed. If parties enter into a special contract inconsistent with the existence of a lien, the statute was never intended to operate so as to create or preserve the lien, and thereby destroy the special contract. In Maryland, where there was a similar statute, this matter was considered and decided in Willison v. Douglas, supra. It is quite apparent from what is said in Schmidt v. Gilson, 14 Wis. 514, and White v. Dumpke, 45 Wis. 454, that it never occurred to the supreme court of that state that the statute would have the effect of saving the lien where the credit given by the promissory note would not expire until after the lapse of the time for bringing an action to enforce the lien.

It may work a hardship in this particular case to hold that plaintiff has discharged his lien by extending a credit to defendant three or four days more than one year after the completion of the work, but no other result can be reached except by wholly disregarding well-settled rules of law. Judgment affirmed.

ST. PAUL & M. TRUST CO. v. HARRISON et al.

(Supreme Court of Minnesota. April 30, 1896.)

CONTRACTS — INTERPRETATION — PAROL EVIDENCE.

The plaintiffs sold a stallion for the purpose of begetting colts, and warranted him to be a "breeder." *Held*, that it was competent to permit witnesses familiar with the business of breeding and raising stock to testify as to how the term "breeder" was used and understood by farmers, horsemen, and stockmen engaged in such business.

(Syllabus by the Court.)

Appeal from district court, Grant county; C. L. Brown, Judge.

Action by the St. Paul & Minneapolis Trust Company against H. K. Harrison and others. There was a verdict for defendants, and from an order denying a new trial plaintiff appeals. Affirmed.

Mason & Hilton, for appellant. C. J. Gunderson, for respondents.

BUCK, J. On the 12th of May, 1891, Webber & Matthews, payees in the note sued upon, sold to the defendants a stallion for the sum of $1,800, and, in payment therefor, took from the defendants three nonnegotiable notes, of $600 each, drawing interest at the rate of 6 per cent. per annum, payable, respectively, as follows: December 1, 1892; December 1, 1893; and December 1, 1894. Before the maturity of the note first due, and herein sued upon, the same was, for value, sold and transferred to the plaintiff, who brings this action. The defendants made a payment of $133.33 upon this note before its transfer to plaintiff. Upon nonpayment of the note, the plaintiff brought this action upon it against these defendants, and they answered, setting up a warranty, in the following words: "Fergus Falls, Minn. May 12th, 1891. We hereby guaranty the imported English shire stallion Stuntney Matchless to be a breeder, provided he is properly fed, handled, and cared for. [Signed] E. J. Webber. J. Matthews." The defendants further allege a breach of the warranty, in this: that the stallion was worthless as a breeder at the time of the sale and execution of the warranty, and that the damages thereby sustained should be set off against any amount which might be found due upon the note sued upon. The jury found a verdict in favor of the defendants.

Upon the trial of the action, a controversy arose as to the meaning of the word "breeder," as used in the warranty, it appearing that 36 mares were served by this stallion during the season of 1891, and that only 12 of them had colts. The defendants called several witnesses, who testified that they were familiar with the management of stallions; that, among horsemen, stockmen, and farmers, the word "breeder," when applied to a stallion, was one understood by them to be capable of producing 60 to 65 per cent. foals from the number of mares served. They also testified that they understood this word in the same sense. The admission of this testimony is alleged to be error. The facts show that the stallion was sold and purchased for a specific purpose, viz. for the purpose of begetting colts. As an inducement for the defendants to make such purchase, the payees in the note guarantied or warranted that the stallion was a "breeder." From the face of the instrument, a court or jury would probably find it difficult, if not quite impossible, to determine the precise meaning of the term "breeder" as there used. Hence, while the parties to the contract might fully understand the meaning of the term, and unquestionably did understand it, yet, when such a contract is sought to be enforced in a judicial proceeding, it is competent to permit witnesses familiar with the meaning of the term, as used in the business to which it is applicable, to testify as to such meaning, and as to how those who employ the term use and understand it. This is not varying the terms of a written instrument, but is a mode of ascertaining the intention

of the parties at the time when they entered into the contract. Persons, such as farmers, horsemen, and stockmen, engaged in breeding and raising stock, doubtless well understood the signification of the term "breeder," as used in this guaranty; and it would not, therefore, be uncertain or ambiguous as to them. The defendants bought this stallion for a "breeder," and the fair inference is that they understood the business for which he was bought, and the meaning of the term used in the warranty. Some of the defendants so testified. It is a reasonable and safe rule to permit witnesses who fully understand the meaning of the term used in a specific business to explain it to the jury or court engaged in the trial where such questions or issues are involved.

Upon the question of the value of the stallion, we are not so well satisfied with the evidence. It is meager and unsatisfactory. There are some fifteen defendants, and only one testified upon this point. In their answer, they admit its value to be $300, and that they made a tender of payment of $4.20 upon this note, which they allege that they have been willing at all times since the 19th day of December, 1892, to pay, and that when they verified their answer, August 31, 1893, they were still willing to pay this amount. As they had already paid $133.33, it will be seen that, considerably more than two years after the purchase of the stallion, they were still willing to allow a payment in all of $553.33 on this $600 note. And this acknowledgment was made after they had the service of the horse for the seasons of 1891, 1892, and 1893. At least, the presumption is that they had him during all that time, and had him at the time of the trial, for there is no evidence that they ever sold him, or that he died. That they should still keep this stallion during all of this time, and make the admissions to which we have referred, and then only one of the fifteen defendants testifies upon the question of value, is a very significant fact, and one which makes the testimony very unsatisfactory.

It is true that, at the close of the plaintiff's testimony, the defendants' counsel asked leave of the court to amend the answer, and allege that the stallion was worthless as a breeder, which amendment was allowed by the court, although it does not appear whether this amended answer was again verified by the defendants. If we presume that they did so, still it is a notable fact that only one of them testified as a witness to the value of the stallion. Nevertheless, it appears that the plaintiff did not even cross-examine this witness upon the question of value, nor did he introduce any testimony in his own behalf upon the subject. The testimony of the defendants' witness who testified in regard to value is susceptible of different meaning; and, while it is therefore quite unsatisfactory, the jury doubtless understood it in the light most favorable to the defendants; and we conclude not to disturb the verdict, especially as the two other notes are still outstanding, and over which, if litigation shall arise, more satisfactory evidence may, perhaps, be presented by one party or the other. The order denying the motion for a new trial is affirmed.

ADAMEK v. PLANO MANUF'G CO.[1]

(Supreme Court of Minnesota. April 30, 1896.)

CONTINUANCE—ENGAGEMENTS OF ATTORNEY—DISCRETION OF COURT.

1. Litigants are entitled to a speedy trial of the issues involved.

2. *Held* that, where there are no unusual or extraordinary features in the case, the fact that an attorney is professionally engaged elsewhere, in the trial of another action, cannot be regarded as an absolute right to a postponement or continuance of the cause. Generally, the continuance of an action is discretionary with the trial court, which discretion this court will not undertake to control.

(Syllabus by the Court.)

Appeal from district court, Renville county; B. F. Webber, Judge.

Action by Thomas Adamek against the Plano Manufacturing Company. Judgment for plaintiff. From an order denying a new trial, defendant appeals. Affirmed.

Spooner & Flaherty, for appellant. McClelland & Tifft, for respondent.

BUCK, J. Action to recover the value of certain personal property, which plaintiff alleges was converted by the defendant. There was a trial of the action in the district court at Olivia, the county seat of Renville county, in the month of April, 1895, and a verdict rendered in favor of the plaintiff; but, on account of an erroneous ruling of the trial judge, he set aside the verdict, and granted a new trial, on motion of the defendant. The cause being upon the calendar of the general term of the district court commencing October 22, 1895, the defendant made application to the court to postpone the trial until October 26th, or some day later in the term, or else continue the case over the term. Three affidavits were used in support of this application,—one dated October 19, 1895, made by M. A. Spooner, defendant's attorney; one by his law partner, S. A. Flaherty, dated October 22, 1895; and one by E. B. Edgar manager of defendant's business, at Minneapolis, dated October 18, 1895. The affidavit of Spooner tended to show that he was the defendant's only attorney in the case, having tried it once, and was familiar with the facts and the law bearing thereon, and intended trying the action again, but that he would be prevented from being present at the early part of the term, because of the fact that on October 1st the supreme court of North Dakota ordered a return to be made, and a hearing to be had, in a habeas corpus case, on October 21, 1895, which would occupy two or three days, in

[1] Rehearing denied.

which case Spooner was the petitioner's attorney, and could not have the hearing set for a different date, and that he would necessarily be absent during the early part of the Renville county term of the district court, and that his presence at the trial of the case at bar was absolutely necessary. Flaherty's affidavit showed that he was not familiar with the facts in the case, and that he would necessarily be absent in trying other suits, in another county, during the first week in October, 1895. Edgar's affidavit was corroborative of that made by Spooner. Counter affidavits were made in behalf of the plaintiff by his attorneys, showing, among other things, that they had not received any intimation, knowledge, or notice that a continuation would be moved by the defendant; that plaintiff resided about 10 miles distant from the place of trial, at which place he was present, with three witnesses, ready for trial; and that deponent, as attorney for the plaintiff, resided 50 miles distant from the place of trial, and had attended, expecting that said cause would be reached on the second day of the term, and at all times insisted that it should be tried when the same should be reached. Various other statements are contained in the affidavit of the plaintiff's attorney tending to show grounds upon which the application should be denied. The court refused to continue the cause, or to pass the same until October 26, 1895; and it refused to reinstate the cause on the calendar when application was made therefor by the defendant, on October 28, 1895. When the cause was reached in its regular order on the calendar, October 23, 1895, the defendant did not appear; and, upon the evidence and proper findings, judgment was ordered in favor of the plaintiff for the sum of $300. Defendant subsequently moved for a new trial, and from an order denying the same this appeal is taken. The material ground urged by the defendant's attorney in behalf of his motion for a new trial is an alleged abuse of discretion of the trial court in denying the defendant's motion for a continuance.

Absence of counsel on other professional business is not always of itself sufficient ground for the postponement or continuance of a cause. In the case of Brock v. Railroad Co., 65 Ala. 79, the court says: "We hold that, when a cause is regularly called for trial, the absence of counsel in another court, necessitated by conflicting professional engagements, however urgent, is not necessarily ground for a new trial, but is a matter of discretion with the lower court, which this court will not undertake to control." Several other authorities sustain this position. "It is only in cases presenting very unusual features that a continuance or postponement, for the reason that attorneys are professionally engaged elsewhere, can be claimed as a matter of right, and a denial of the application is generally sustained as an exercise of sound discretion." 4 Enc. Pl. & Prac. p. 843. There are no unusual features in this case. The issues were not intricate, and could be readily and easily comprehended and understood. A local attorney was employed to make the motion for a continuance, and why he or some other competent attorney could not have been engaged to try the case does not appear. Spooner's affidavit is dated October 19, 1895, several days prior to the commencement of the court in Renville county; and he must necessarily have known that he could not attend that court if he attended the habeas corpus case before the supreme court of North Dakota; and he made no attempt to notify the plaintiff's attorney that he desired a continuance of the cause. Relying upon the fact that the cause was regularly on the calendar, plaintiff was put to the trouble and expense of attending court, with his attorney and witnesses, without even a suggestion from Spooner that he desired a continuance. It would have been a great hardship to the plaintiff to have the cause continued. He was entitled to a speedy trial, and because Mr. Spooner was professionally engaged in earning a fee in another state did not justify him in imposing a burden upon the plaintiff, by compelling him to submit to the expense, delay, and vexation of a continuance of the cause. We can readily understand that in many instances it would be a wise and judicious act upon the part of a trial court to continue a cause where the attorney was elsewhere professionally engaged, but the facts in this case do not present a strong and exceptional case for the application of this rule.

The trial court was fully justified, upon the facts, in saying, in the order denying the motion for a new trial, that "the issues and questions of law involved in the case were apparently simple; and, in my opinion, any competent attorney would have had ample time to acquire the necessary information, and try the case properly, in the absence of Mr. Spooner. It did not appear from the affidavits introduced on the motion for a continuance when Mr. Spooner was retained in the case in North Dakota, or in the case in Meeker county, or whether he was retained before or after he was retained in this action." Litigants are entitled to a speedy trial of the issues involved, and the frequent delays are not only vexatious and expensive, but tend to bring reproach upon judicial proceedings. The better and safer rule to adopt is that, where there are no unusual or extraordinary features in the case, the fact that an attorney is elsewhere professionally engaged in another action should not be regarded as sufficient ground, as a matter of right, for the continuance of the cause, but that, generally, such application should rest in the discretion of the trial court. The order denying the motion for a new trial is affirmed.

GRANT v. GRANT.

(Supreme Court of Minnesota. April 24, 1896.)

DIVORCE—DESERTION—EVIDENCE.

Evidence considered, and *held* that it sustains a finding of the trial court that the defendant was not guilty of deserting the plaintiff.

(Syllabus by the Court.)

Appeal from district court, Rice county; Robert D. Russell, Judge.

Action by Samuel Grant against Alice C. Grant. From a judgment for defendant, plaintiff appeals. Affirmed.

George N. Baxter, for appellant. A. R. Pfau, for respondent.

CANTY, J. This is an appeal by the plaintiff from a judgment denying him any relief in an action for divorce brought on the statutory ground of willful desertion of him by defendant for three years immediately prior to the commencement of the action. Plaintiff and defendant were married at Faribault, Minn., February 4, 1891. He was then 27 years of age, and she was 21. They spent the next five or six weeks on a wedding trip, on which they began to have petty quarrels. On their return they took up their residence at his father's house, in Faribault; but from that time, until after they separated, plaintiff spent the greater part of his time at Duluth, Minn., where he was engaged in his father's business, of railroad building. Defendant spent the time until April 24th between his father's house and her father's house, which were on adjoining parcels of land at Faribault. Then she went to Duluth with plaintiff, and remained with him at an hotel until May 4th, when she went on a visit to St. Paul, Minneapolis, and Mankato, against his protest; returning to him at Duluth, May 13th, where they remained until May 24th, when they both returned to Faribault. During this time they had several petty quarrels,—on one occasion, as to what sort of a dress she should wear at the theater; on another, as to whether he would take her to the theater; had some little difference as to his refusal to put away her hat when they arrived there, and her requesting another gentleman accompanying them to put it away. They both left Duluth on the 24th, in ill humor. She wanted to remain longer, to entertain friends whom she had invited to dine that evening, and to attend a party to which she and plaintiff had been invited for the next evening. But he suddenly took a notion to come home, to Faribault, and she was much put out at his refusal to stay a day or two longer. On their arrival at Faribault she ordered her trunk sent to her father's house. They called first on his family, and then on her family, with whom she remained all night, refusing to return with him to his father's house, to which he returned, and remained there all night. He came over in the morning, and tried to get her to return to his father's house, but she still refused. Some time previous to this, in one of their quarrels, he had told her that his sisters (who resided at his father's house) could hardly treat her decently, and he did not blame them. She testified that he then promised that he would not ask her longer to live there, and gives these facts as the reason for her refusal to go back to live with his family. He returned to Duluth in a day or two, where he remained until May 30th, when he again returned to his father's house, where she also returned, on the solicitation of his father, mother, and sister, and remained with plaintiff until the morning of June 2d, when he was again about to depart for Duluth. As to what occurred that morning, defendant testified as follows: "I asked him where he was going that morning, and he said he was going to the devil, and violently slammed the door. I knew I must ask no more questions, but I got up and dressed, and went down to breakfast with him, alone. No one else was up in the house, and he went and got his grips, and came out in the hall, and kissed his sister good-by; and I stepped forward and said, 'Good-by, Samuel;' and he said, 'God damn you; go to the devil,' pushing me very violently against the door, and I kind of fell down; and Kate, his sister, says, 'Samuel Grant, you ought to be ashamed of yourself.' I think it was she, and I think that is what she said. It was simply more than I could stand, so I finally picked up my things and went home. * * * He came back the following Saturday night, and came over to the house, and wanted to know if I would go over home; and all this time the entire family had been going by our house, and not speaking to me, and I sitting there all the while; and always before that they had looked towards the house, and towards me. I told him I couldn't go; that it was impossible; that they had refused to speak to me, and had not spoken to me for over three days, except his mother and one sister. And he said that it was his home, and I should go there. I told him I would go any place, and suggested two or three places in town,—hotels. He stated that I should go there, or no place." This was June 6th or 7th. She further testified that the Grant family had treated her well up to the time she went to Duluth. But, said she: "I had been tolerated, but I could see a feeling back of it; and I asked him not to let me go back, and he said he would not." On June 10th he again asked her to return, but she refused. Says she: "I pleaded with him to take me somewhere else. I told him I would go anywhere else." This was their last interview. During this time several members of plaintiff's family tried, evidently in the best of faith, to bring about a reconciliation; but, when they could not immediately accomplish this result, they joined in to make the breach wider. The follow-

ing communications subsequently passed between the parties:

"Faribault, Minn., June 14th, 1891. To Mrs. Samuel Grant—My Dear Wife: As I expect to leave for Duluth in the morning, to attend to my business, and having no opportunities of seeing you, I would like to say to you that I have provided a place for you to live, at my father's home, until such time as our own home is completed. Hoping this will prove satisfactory to you, I am, truly, your devoted husband. Samuel Grant."

"Faribault, Minn., July 14, 1891. My Dear Samuel: Are you still desirous of having me live at your father's home? Before you decide, I beg that you will give me an interview. If I have done wrong, I beg your pardon,—it seemed to be the only way. Hoping to hear from you soon, I remain your wife. Alice N. Grant."

"Duluth, Minn., July 21st, 1891. To Mrs. Sam Grant, Faribault, Minn.—My Dear Wife: Your letter of July 14th rec'd, and contents noted. You received my letter of June 13th or 14th, saying where you would find your home. You may still follow those instructions, if you so desire. No interview is necessary. I will be down when I get a chance to leave my business. Your husband. Sam Grant."

Soon after their marriage, plaintiff commenced the erection of a new house at Faribault, intended as their future home, but soon after their separation he abandoned it. He continued back and forth from Faribault to Duluth until December, when he went to Sioux Falls, S. D., for the purpose, it would seem, of gaining a residence and obtaining a divorce. He commenced a divorce suit there in September, 1892, and got judgment by default in December; but she appeared, and the judgment was set aside on her motion. The parties subsequently went to trial, and his action was dismissed. In the meantime she commenced an action for divorce in this state, which, after he was defeated in Dakota, she dismissed. He returned in March, 1893, to live permanently at Faribault, and has since brought this action.

There is not a great amount of conflict in the evidence as to any of the foregoing matters, and it is on these refusals of defendant to return and live with plaintiff, at his father's residence, that he predicates his claim of desertion on her part. From the memorandum of the judge of the court below, it seems that he based his decision for defendant on the ground that, under the circumstances, plaintiff's demand that she live with him at his father's house was unreasonable. We are of the opinion that the decision is justified by the evidence. A large discretion must be given to the trial court in cases of this kind. As a matter of common knowledge, it is often the case that a married person cannot live peaceably in the family of his or her father-in-law and mother-in-law. While the foregoing statement of the main facts disclosed by the evidence is sufficiently favorable to the plaintiff, it leaves out a large amount of the details and much of the atmosphere of the case, and in our opinion the divorce could easily have been denied on a broader ground. After reading all the evidence, it is hard to escape the conclusion that these parties entered into the marriage relation without any appreciation of its duties or responsibilities. They acted after marriage like a pair of spoiled children, ready to quarrel over the most frivolous matters. They did not seem to be able to rise above their petty differences, and the slightest offense, real or imaginary, was nursed until it grew to be a mountain. They exhibited towards each other altogether too much false dignity, and too little real manhood and womanhood. It is hard to say, from this record, that either ever cared much for the consequences. If he was very anxious for a reconciliation, or even regarded the matter as anything more serious than the cost, in time and money, of procuring a Dakota divorce, it is hardly probable that he would have refused his wife's request for an interview, or insisted that she live at his father's house at that particular time. He could easily have taken her back to Duluth with him, and kept her there, or somewhere else, until the relations between her and his family were more cordial, or until his new house was finished. On the other hand, it is hard to say that she ever met him with the deep desire of a true wife for a genuine reconciliation. On the contrary, her conduct, on many occasions, would indicate that she was indifferent as to their future relations; and even on the morning when she offered to kiss him good-by, and he pushed her away, it would seem, from all the evidence, that she approached him in an indifferent, insincere manner, to demand that on his departure he recognize her as well as he had recognized his sister. She was indifferent to the appeals of his father, mother, and sister that she return to him, and neither of the parties seemed to have had much concern about the outcome of the matter. While the parties did not mutually agree to live apart, the evidence would strongly support a finding that they mutually refused to live together, and the reason given by each for such refusal was a mere pretext. In such a case neither party would be entitled to a divorce. We make these comments because this is a type of case altogether too common in our divorce courts. Judgment affirmed.

WARREN v. GREAT NORTHERN RY. CO.

(Supreme Court of Minnesota. April 24, 1896.)

RAILROAD COMPANIES—LIABILITY FOR FIRES—EVIDENCE—APPEAL—REVIEW.

1. *Held*, the verdict is sustained by the evidence.

2. Defendant stipulated on the trial that, if plaintiff was entitled to recover, she was entitled to recover a certain amount. By a subsequent stipulation of the parties, also made on the trial, it appeared that her damages were a much less amount; but defendant never asked to be relieved from its first stipulation, or attempted to show that it was induced to enter into the same by fraud or mistake, or that it was in any manner misled when it entered into the same. *Held*, defendant is not in a position to assail its own stipulation in this court.

(Syllabus by the Court.)

Appeal from district court, Clay county; D. B. Searle, Judge.

Action by Ella J. Warren against the Great Northern Railway Company. There was a judgment for plaintiff, and from an order denying a new trial defendant appeals. Affirmed.

M. D. Grover, C. Wellington, and J. W. Mason, for appellant. Chas. S. Marden and M. R. Tyler, for respondent.

CANTY, J. Plaintiff recovered a verdict against defendant as damages for the negligence of its sectionmen in setting a fire on its right of way, in the course of their employment, which fire, it is claimed, was negligently permitted to escape, and to spread over the prairie, until it reached plaintiff's property, some three miles away, and burned the same. Defendant appeals from an order denying its motion for a new trial.

1. It is urged as a ground for reversal that the verdict is not sustained by the evidence. It is conceded that the sectionmen set a fire in the angle between the side track and the main track at Downer Station, the place in question, between 9 and 10 o'clock in the morning of September 25, 1894, the time in question, presumably for the purpose of burning up the dry grass and vegetation there, so as to prevent it from catching fire from passing trains, and spreading the fire to the adjacent lands. But it is claimed by appellant that the evidence conclusively shows that this fire was put out, and another fire was in some manner started in the afternoon, which spread and burned plaintiff's property. We are of the opinion that the jury were justified in finding from the evidence, as they must have done, that the fire which the sectionmen set in the morning burned and smoldered, blazed up anew and again smoldered, continuously, in spite of the efforts of the sectionmen to put it out, until about 2:45 p. m., when it escaped across the track, and spread over the prairie, as before stated. If the jury believed the plaintiff's witnesses, they were justified in finding that there was fire and smoke continuously between these tracks during all this time, and that it was all to be attributed to the fire started that morning by the sectionmen. The evidence also tends to prove that there was a very high wind all day, and that the sectionmen were negligent in setting the fire, and in failing to extinguish it completely, during all the time it was so burning and smoldering, before it escaped and got beyond control.

2. Appellant also urges that it appears by plaintiff's own admission that her title failed to some of the property so destroyed by the fire, and that damages should not be allowed her for the portion which she did not own, as was done by the verdict. At the opening of the trial, the parties made the following stipulation in open court: "It is admitted that the plaintiff was the owner of the property described, and that the same is of the value of $998.50; and, if plaintiff is entitled to recover, she will be entitled to recover that amount." At the close of plaintiff's case, the following admissions were made, and the following proceedings were had: "It is conceded that the title to the real estate described in the complaint was by the United States patented to Stephen Parks on the 16th day of April, 1890; that Stephen Parks and wife, on the 1st day of April, 1892, mortgaged the real estate described in the complaint to Gary Chambers, for $650, which mortgage was duly recorded; that on the 20th day of April, 1894, Chambers foreclosed the said mortgage, bidding in the property for $788, and that there has been no redemption from said foreclosure sale; that on the 15th day of July, 1892, Stephen Parks and wife, by quitclaim deed, conveyed to the plaintiff, Ella J. Warren, the real estate described in the complaint; that said deed was duly recorded on the 10th day of October, 1892. It is agreed that, of this amount, $998.50, agreed upon as the value of the property described, $400 is for building and trees, and the balance for personal property. Plaintiff rests. Defendant now moves that this action be dismissed so far as it relates to the real estate, upon the ground that the plaintiff has not shown herself entitled to recover; but, upon the contrary, it appears that she has no right of recovery, which motion the court denied, and the defendant then and there excepted." Appellant contends that, under this stipulation, the verdict is excessive to the amount of $400, and that the order appealed from should, for that reason, be reversed. The time to redeem had expired before the trial. It is admitted by the last stipulation that plaintiff has been awarded more damages than she appears to have suffered. But the award is strictly in accord with defendant's first stipulation that she is entitled to recover $998.50, if she is entitled to recover at all. Defendant has never applied to the court below to be relieved from this part of the first stipulation, and has never attempted to make it appear that it was induced to enter into the same through fraud or mistake, or that it was in any manner misled when it entered into the same. Defendant is not in a position to assail its own stipulation, and the order appealed from must be affirmed. But under the circumstances, unless the purchaser at the foreclosure sale, or those holding his interest, re-

lease that interest to the defendant within five days after filing the mandate in the court below, by proper instrument in writing, leave is given to the defendant to apply to the court below to be relieved from its said first stipulation, and, in case it is so relieved, that a new trial be granted, unless plaintiff remit the amount that the verdict is found to be excessive. Order affirmed, with costs and disbursements to respondent.

In re SKOLL.[1]

SWEDISH NAT. BANK OF MINNEAPOLIS v. DAVIS.

(Supreme Court of Minnesota. April 24, 1896.)

INSOLVENCY—SECURED CREDITOR—ALLOWANCE OF CLAIM.

1. Under our insolvency law, the creditor, before he has exhausted his security, or surrendered it to the assignee, is entitled to file his secured claim, and have the amount and validity of the same determined by the assignee or the court on appeal, but he is not entitled to share in the distribution of the insolvent estate until he has so exhausted or surrendered his security.

2. The creditor held, as collateral security, negotiable notes made by one third party, and indorsed by another; obtained judgment thereon against the maker, at his place of residence, in another state; issued execution, which was returned, "No property found"; then sold the judgment at public auction; but never had any power of sale from the insolvent pledgee. *Held*, the sale was unauthorized, and not a proper way to realize on the security. *Held*, further, if it appeared that the collateral security was wholly uncollectible, and yet of some considerable prospective value, the court, in the insolvency proceeding, might, as conditions on which it would allow the creditor to share in the distribution on the balance of his claim, allow him, under proper restrictions, to sell the collateral judgment, instead of surrendering the security to the assignee.

3. The court might also, on proper showing, after the sale, ratify it, and allow the creditor so to share in the distribution. But *held*, in this case, no such showing was made, and the order allowing the creditor so to share in the distribution is for that reason reversed.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Robert D. Russell, Judge.

Proceeding by the Swedish National Bank of Minneapolis against Joseph M. Davis, assignee of Joseph Skoll, insolvent, for the allowance of a claim. From an order of allowance, and an order denying a new trial, the assignee appeals. Order of allowance reversed, and order denying new trial affirmed.

Merrick & Merrick, for appellant. A. Ueland, for respondent.

CANTY, J. In December, 1894, the insolvent, Skoll, made an assignment for the benefit of his creditors under the insolvent law of 1881, and acts amendatory thereof. He was then indebted to the respondent bank in the sum of $2,053. The bank held, as collateral security for this indebtedness, two negotiable promissory notes, for the aggregate amount of $2,834, made by one Golden, a resident of Chicago, Ill., to the Northwestern Iron & Metal Company, and by the latter indorsed in blank to Skoll. The bank brought an action on these notes, at their maturity, against Golden, in the circuit court of Cook county, Ill., and on July 13, 1895, obtained judgment against him thereon for $2,963.81; and on the 23d day of the same month an execution was issued thereon, out of that court, to the sheriff of that county, who on the 4th of October, thereafter, returned it, "No property found." In the meantime the bank had filed its claim against Skoll with his assignee, who disallowed the same. The bank appealed to the court below, and thereafter, on October 30, 1895, an order was made allowing the claim. It was further ordered that the bank was entitled to share in the distribution of the insolvent estate, on assigning its said judgment against Golden to the assignee before distribution was ordered; "that in case plaintiff shall not assign said judgment to said assignee before the time mentioned, but shall, before said time, dispose of and realize on the same, according to law, plaintiff is entitled to share with the other creditors in the distribution of said insolvent estate, for the full amount of its said claim, less the sum so realized on said judgment." The assignee made a motion for a new trial, which was denied by the court. On November 7, 1895, the Golden judgment was sold by the bank, at public auction, at the office of one Heap, in a certain building at Chicago, for the sum of $505, to one Wolf. Notice of this sale was given by publishing the same once in a daily newspaper in Chicago on October 28th, and on the same day mailing copies of the notice to Golden and his attorney, at Chicago, and to the insolvent, the assignee, and his attorneys, at Minneapolis, Minn., where all of the latter resided. Thereafter, on the application of the bank, the court, on December 12, 1895, ordered that after deducting from the bank's claim against Skoll the amount for which said judgment sold, less certain expenses incurred by the bank in procuring the judgment and making the sale, the balance of the claim share with the claims of the other creditors of Skoll in the distribution of the insolvent estate. From this order the assignee appeals, and also appeals from the order denying his said motion for a new trial.

1. It is contended by appellant that the court erred in allowing the claim of the bank against Skoll at all, until the bank had either exhausted its collateral security, or surrendered it to the assignee, and that, therefore, his motion for a new trial should be granted. We cannot agree with appellant. In providing for the filing, allowance, and payment of claims, the statute makes no distinction between secured and unsecured claims, except as found in section 4234, Gen. St. 1894. This section provides the order in which claims shall be paid, and at the end of the section is added the following: "Provided, that no debts

[1] Rehearing denied.

for which the creditor holds a mortgage, pledge or other security, shall be so paid until the creditor shall have first exhausted his security, or shall release the security to the assignee or assignees." This simply prohibits the payment of the secured claim, not its filing and allowance; and we see no reason why such a claim should not be filed and allowed, but its payment refused or prohibited until the creditor has first exhausted his security or surrendered it to the assignee.

2. Skoll did not give the bank any power of sale authorizing it to sell the collateral, and it is well settled that, without such a power, it could not, without the aid of the court, have sold the collateral notes before they were merged in the judgment. Cleghorn v. Trust Co., 57 Minn. 341, 59 N. W. 320. We are also of the opinion that it had no more right thus to sell the judgment than it had to sell the notes. When, however, such a judgment is wholly uncollectible, but has some considerable prospective value, we see no reason why the court, in the exercise of its equitable discretion, cannot aid the creditor to exhaust his security by a sale of the judgment, instead of requiring a surrender of it before participating in the insolvent estate. We are of the opinion that in a proper case, on a proper showing, and under proper restrictions, the court, in the assignment proceeding, may give the creditor leave to sell the collateral judgment, and thereupon be allowed to take a dividend on the balance of his claim. This would not be a sale by the court, or a judicial sale at all, but a sale in pais, on which the court would, in advance, impose proper restrictions, and, after the sale, inquire into its fairness, and the sufficiency of the amount bid, as the conditions on which it would allow the creditor to take such dividend. We are also of the opinion that even where the sale of the collateral judgment is made without any previous hearing or leave of the court, but it sufficiently appears that this has not in any manner prejudiced the assignee or the other creditors, and the sale was fair, the price received adequate, and if a sufficient showing is made as to the uncollectibility of the collateral security, the court may ratify the unauthorized sale, and allow the creditor to take a dividend on the balance of his claim. Applying these principles to the case at bar, it is plain that the bank never brought itself within these requirements. The only thing it has shown as to the uncollectibility of this security is that an execution was returned unsatisfied on the judgment against Golden. This would be sufficient to enable the bank to proceed against Golden by supplemental proceedings or creditors' bill, but would not, in such a case as this, be sufficient to enable it to dispense with such proceedings without showing that they would avail nothing. The bank is asking special, and somewhat extraordinary, relief, and it should make a satisfactory showing. But even if the return of the execution, "No property found," raised the presumption that Golden was insolvent, the court does not find that he was, or that the judgment, or some part of it, could not, by proper means and proper diligence, be collected. That is not all. It appears that the collateral notes were indorsed in blank by the iron and metal company, and were, before their maturity, delivered to the bank, with these indorsements on them. It does not appear whether the bank ever took proper steps to hold this indorser, or that this indorser is insolvent. Then it certainly does not appear that the bank has made proper efforts to exhaust its collateral security in the regular and ordinary way before attempting to exhaust it in this extraordinary way. It must make as strong a showing here as it would have to make if it were proceeding to attain the same, and by bill in equity to foreclose and sell the collateral security, in order to be allowed to participate in the distribution of the insolvent estate.

For these reasons the order allowing the bank to share with the other creditors in the distribution of the insolvent estate is erroneous. But in our opinion the above-quoted prior order, made on the trial of the appeal, permitting the bank to share in the distribution in case it shall "dispose of and realize on" its judgment "according to law," did not, as contended by respondent, authorize it to sell the judgment as it has done. The order denying a new trial was therefore not erroneous. The order denying a new trial is affirmed. The order permitting the respondent to share in the distribution of the insolvent estate is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

FIRTH et al. v. BRACK et al.

(Supreme Court of Minnesota. April 24, 1896.)

APPEAL—AFFIRMANCE—INSUFFICIENT RECORD.

Order appealed from affirmed, for failure to make it appear that all the records and proceedings considered on the motion have been returned to this court.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; J. J. Egan, Judge.

Action by Firth & Kraus against D. D. Brack and others. From an order denying a motion to be subrogated to the rights of certain lien claimants, plaintiffs appeal. Affirmed.

William F. Carroll, for appellants. T. R. Palmer and Warner, Richardson & Lawrence, for respondents.

CANTY, J. Judgment was entered in a mechanic's lien suit in favor of plaintiff and another lien claimant for the amounts of their respective liens. Plaintiff bid off the property at a subsequent foreclosure sale for the amount of both liens and costs, paying to the sheriff the amount due the other lien

claimant, and the sheriff paid this amount over to the latter. Thereafter the court set the sale aside. Thereupon plaintiff made a motion to be subrogated to the rights of the other lien claimant, and to be allowed to retain the latter's share of the proceeds of another sale. The motion was denied, and plaintiff appeals.

Plaintiff made his motion on "all the files, records, and proceedings in said action," and on the affidavit of plaintiff's attorney; but only the judgment and affidavit have been returned to this court, and no certificate of either the judge or clerk as to the papers considered on the motion, or on file in the action, has been procured. Respondents urge this as a reason for affirmance. Under the rule laid down in Hospes v. Car Co., 41 Minn. 256, 43 N. W. 180, the objection is well taken, and the order appealed from should be affirmed. So ordered.

OLMSTEAD et al. v. FIRTH et al.[1]

(Supreme Court of Minnesota. April 24, 1896.)

NOTICE OF TRIAL—SERVICE—COSTS.

1. After the commencement of this action the defendants and their attorney removed from this state. *Held*, under the provisions of section 5217, Gen. St. 1894, a notice of trial served on the attorney at his place of residence in another state was properly served.

2. *Held*, the awarding of costs on a motion to set aside a judgment is in the discretion of the court.

(Syllabus by the Court.)

Appeal from municipal court of St. Paul; John Twohy, Jr., Judge.

Action by Stanley C. Olmstead and others against Oliver J. Firth and others, in which there was a judgment for plaintiffs. From an order denying a motion to set aside the judgment, defendants appeal. Affirmed.

William F. Carroll, for appellants. S. C. Olmstead and John W. Best, for respondents.

CANTY, J. It sufficiently appears that both of the defendants and their attorney were residents of this state when this action was commenced and the answers served. The case was pending for a considerable length of time, and thereafter, and before it was noticed for trial, they all left the state. Thereafter, on the 5th of March, 1894, plaintiff served notice of trial by mail on defendants' attorney by depositing the same in the post office at St. Paul, addressed to him at Chicago, Ill., where he then resided, postage prepaid. Defendants did not appear at the trial, and plaintiff had judgment. This is an appeal from an order denying defendants' motion to set aside the judgment, on the ground, among others, that such service of notice of trial was not authorized by statute, and was irregular and void.

We are of the opinion that this mode of service was authorized by statute. Among the provisions for service of notices in an action is the following, found in section 5217, Gen. St. 1894: "But if the attorney shall have removed from the state such service may be made upon him personally, either within or without the state, or by mail to him at his place of residence, if known, and if not known, then by mail upon the party, if his residence is known, whether within or without the state. And if the residence of neither the party or attorney are known, the service may be made on the clerk for the attorney." We are not called upon to decide whether or not this statute would apply if it affirmatively appeared that the attorney had abandoned the case, had refused to act further, and had so notified the opposite party (see section 6193), or if the action had been neglected by all parties for so great a length of time as to show a mutual intention to abandon it. The affidavit of service showed that the notice of trial was served pursuant to statute, the affidavits in support of the motion, showed that no such notice was ever received, through the mail or otherwise, at Chicago or elsewhere, by defendants' attorney. Whether or not such proof of service can be rebutted by showing that the letter containing it, and so claimed to have been sent, was never received, we need not now consider. In any event, the most that can be said in defendants' favor is that such rebuttal proof raised an issue of fact, which has been decided against them by the court below, and that decision is conclusive here.

The awarding of costs on the motion was in the discretion of the court below. This disposes of all the questions raised worthy of consideration, and the order appealed from is affirmed.

RATZER v. BURLINGTON, C. R. & N. RY. CO.

(Supreme Court of Minnesota. April 24, 1896.)

CARRIERS OF GOODS—DELIVERY—PLEDGE OF BILL OF LADING.

The shipper of goods consigned them to himself, and received a bill of lading from the railway company accordingly. The railway company delivered them, with a proper waybill, to the next connecting railway company, who, at the shipper's request, delivered the goods to him in transit at an intermediate point, without the surrender or cancellation of the bill of lading, which he thereafter, and before the goods would have arrived at their original destination if the transit had continued, pledged, in the usual course of business, to an innocent pledgee, for value. *Held*, the latter railway company is liable to the pledgee for failure to deliver the goods at the place of destination, and is estopped from showing such intermediate delivery to the shipper.

(Syllabus by the Court.)

Appeal from district court, Hennepin county; Robert D. Russell, Judge.

Action by John Ratzer against the Burlington, Cedar Rapids & Northern Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

[1] Rehearing denied.

J. F. McGee, for appellant. A. E. Clarke and W. F. Booth, for respondent.

CANTY, J. The Morrison Grain & Lumber Company shipped three car loads of oats, two from Britt, and one from Forrest City, Iowa, to New York City. One of these cars was shipped on January 5, and the other two on January 7, 1895. A bill of lading was issued for each car by the initial carrier. In each bill the shipper is named as consignee, with the addition, "Notify John Ratzer;" and the destination named is New York City. The initial carrier transported the cars to Livermore, Iowa, and there delivered them (with proper waybills, showing New York to be the destination) to the defendant, the next connecting carrier, with whom and a subsequent carrier it had through traffic arrangements. The defendant carried the cars on its line towards their destination until they reached Morrison, Iowa, on January 8th or 9th, and there delivered all of the oats (of the value of $1,336) to the shipper, on its demand, without requiring a surrender or cancellation of the bills of lading. The shipper at this point converted the oats to its own use. Within a day or two after the oats were so delivered at Morrison, the shipper indorsed each of the bills of lading, "Deliver to the order of John Ratzer," and signed them. The shipper also drew drafts on said Ratzer, this plaintiff, in favor of the Bank of Reineck, for the amount of the purchase price of the oats, attached the drafts to the bills of lading, and delivered all of the same to the bank, who cashed the drafts in good faith, in the regular course of business, relying on the attached bills of lading. The bills of lading were, in the regular course of business, forwarded by the bank to New York, and presented to Ratzer, a commission merchant there, dealing in grain, who on January 14 and 16, 1895, in the regular course of business, paid the drafts in good faith, relying on the attached bills of lading, which he then and there received. If the three cars of oats had continued to New York, their destination, in the usual course of transportation, they would have arrived there between January 23d and 30th. The shipper, the Morrison Company, is wholly insolvent. Plaintiff brought this action to recover $804.94, the amount so advanced by him on the faith of the bills of lading. The case was tried by the court below, without a jury. The court found all of the foregoing facts, and thereon ordered judgment for defendant. From the judgment entered thereon, plaintiff appeals, and urges, as a ground for reversal, that the judgment is not sustained by the findings of fact.

We are of the opinion that, on the facts found, the plaintiff is entitled to judgment. A vast portion of the produce of this country is moved from the agricultural districts to the commercial centers and the seaboards by the aid of advances made on the security of such bills of lading. A well-established custom has grown up in commercial circles by which such bills of lading are treated as the symbols of title to the property in transit, are taken as security for money advanced, and indorsed and delivered as a transfer of the property. This is well understood by the railroad companies and every one else. To allow the railroad companies to ignore this custom would be to destroy the custom itself. This would cause great hardship, revolutionize business methods, and drive all buyers and shippers of small means out of the business, as they could no longer give ready and available security on commodities in transit, and thereby turn their limited capital sufficiently quick and often to enable them to do much business. This, in turn, would destroy competition, and leave the business in the hands of a few concerns with unlimited capital. Neither have the railroad companies any right to ignore this custom. On the contrary, it must be held that these companies have been doing business with reference to this custom as much as the shippers themselves and the consignees, banks, commission merchants, and others who are continually advancing money on the faith of the security of these bills of lading. The effect of this custom, independent of section 7649, Gen. St. 1894, is to make bills of lading to some extent and for some purposes negotiable, and to give superior rights to innocent transferees for value in the usual course of business. It is hardly necessary to cite authorities to the general proposition that, when a bill of lading is outstanding, the railway company delivers the goods at its peril, without a production of the bill of lading; and, if it so delivers them to some one other than the bona fide holder for value of the bill of lading, it is liable to him for conversion of the goods. What limitations or exceptions there may be to this rule we need not now consider. The following authorities show the universality of the rule as applied to transportation both on land and by water. See The Thames, 14 Wall. 98; North v. Transportation Co., 146 Mass. 315, 15 N. E. 779; Forbes v. Railway Co., 133 Mass. 154; Furman v. Railway Co., 106 N. Y. 579, 13 N. E. 587; City Bank v. Rome, W. & O. Ry. Co., 44 N. Y. 136; Railway Co. v. Stern, 119 Pa. St. 24, 12 N. E. 756; Boatmen's Sav. Bank v. Western & A. Ry. Co., 81 Ga. 221, 7 S. E. 125; National Bank v. Atlanta & C. Air Line Ry. Co., 25 S. C. 216; Midland Nat. Bank v. Missouri Pac. Ry. Co. (Mo. Sup.) 33 S. W. 521; Armentrout v. Railway Co., 1 Mo. App. 158; Gates v. Railway Co. (Neb.) 60 N. W. 583; Garden Grove Bank v. Humeston & S. Ry. Co., 67 Iowa, 526, 25 N. W. 761; Tindall v. Taylor, 4 El. & Bl. 219. See, also, as bearing on the question: Halsey v. Warden, 25 Kan. 128; Meyerstein v. Barber, L. R. 2 C. P. 38; Lee v. Bowen, 5 Biss. 154, Fed. Cas. No. 8,183; Hieskell v. Bank, 89 Pa. St. 155; Bass v. Glover, 63 Ga. 745;

Bank v. Dearborn, 115 Mass. 219; Dows v. Bank, 91 U. S. 618; Conard v. Insurance Co., 1 Pet. 386; Weyand v. Railway Co. (Iowa) 9 Am. St. Rep. 512, note, 39 N. W. 899. In the case of National Bank v. Chicago, B. & N. Ry. Co., 44 Minn. 224, 46 N. W. 342, 560, it was held that the railroad company was not liable to the pledgee of the bill of lading. This was held solely on the ground that, as no grain was delivered to the agent of the railroad company when he delivered the bill of lading, he had no authority to issue it, and the company was not liable. That question is not involved in this case.

Respondent contends that the consignee is only obliged to produce the bill of lading, but not to surrender it when receiving the goods; and that as the Morrison Company held the bill of lading when the oats were delivered to it in transit, and it did not negotiate the bill of lading until afterwards, the defendant is not liable for so delivering the oats without requiring a surrender of the bill of lading. Whether or not the carrier can compel a surrender of the bill of lading when it delivers the goods it is not necessary here to decide. If the holder of the bill of lading insists on retaining it as a muniment of title, or for any other purpose, and has a legal right to do so, he can, at least, be required to produce it for cancellation, so that it will cease to be on its face a live bill of lading. And, in our opinion, it was the duty of the defendant at least to require this. It is immaterial that these bills of lading were negotiated to the bank and plaintiff after the oats were so delivered to the shipper. The bills were so negotiated before they had become stale, and even a considerable length of time before the oats would, in the ordinary course of transportation, have arrived at New York, their destination. The defendant permitted these bills to remain outstanding, with all the appearances of live, valid bills of lading. There was nothing to put any one dealing with the Morrison Company on his guard. The facts in the case are quite similar to those in the case of Railway Co. v. Johnston (Neb.) 63 N. W. 144, where the defendant was held liable though the grain was delivered in transit at an intermediate point before the bills of lading were negotiated. In the case of Wells v. Railway Co., 32 Fed. 51, the railway company was also held liable to the pledgee of the bill of lading for delivering the goods to the shipper in transit. In Armentraut v. Railway Co., supra, the railway company was held liable to the transferee of the bill of lading for delaying the transportation at the request of the shipper for a few days after it had issued the bill, thereby causing damage to the goods. In Tindall v. Taylor, supra, it was held that after the carrier had received the goods and issued a bill of lading for them to the shipper, and before the transit had commenced, it was not liable for refusing to redeliver the goods to him without a surrender of the bill. It was the duty of the defendant to see that the bills of lading were canceled when it redelivered the oats to the shipper, and its failure to perform that duty enabled the shipper to perpetrate a fraud on the bank and plaintiff. It is a case, for the application of the doctrine of equitable estoppel, that, where one of two innocent persons must suffer by reason of the fraud of a third party, he by whose negligent act or omission such third party was enabled to commit the fraud ought to bear the loss. Under this rule, the defendant is estopped from showing that it delivered the goods to the shipper at the intermediate point, and is liable to plaintiff for failure to deliver them to him at the place of original destination. This disposes of the case. The judgment is reversed, and judgment ordered for plaintiff, pursuant to this opinion.

OMAHA BREWING ASS'N v. WUETHRICH et ux.

(Supreme Court of Nebraska. April 10, 1896.)

REVIEW ON APPEAL—CHANGE OF DEFENSE.

1. Cases will, as a rule, be reviewed in this court upon the theory upon which they prosecuted or defended in the court of original jurisdiction.

2. One who, in an action for the conversion of personal property, defends upon the sole ground of his alleged superior title, and by his conduct disclaims any special interest in such property, or lien thereon, will not, on petition in error in this court, be heard to complain on the ground that he should have been permitted to recoup the amount of a lien existing in his favor upon the property in controversy against the damages awarded for its conversion.

(Syllabus by the Court.)

Error to district court, Douglas county; Ogden, Judge.

Action by John Wuethrich and Margaret Wuethrich against the Omaha Brewing Association. Judgment for plaintiffs, and defendant brings error. Affirmed.

Lake, Hamilton & Maxwell, for plaintiff in error. F. W. Fitch, for defendants in error.

POST, C. J. This was an action by the plaintiffs below, John Wuethrich and Margaret Wuethrich, against the defendant therein, the Omaha Brewing Association, for the conversion of certain property, consisting chiefly of saloon fixtures and furniture used by the plaintiffs in their business as saloon keepers. The defenses relied upon were two in number: First. That said property was delivered to the plaintiffs by Storz & Iler, to whose rights the defendant has succeeded, under and by virtue of a written agreement, by the terms of which the title thereof remained in said Storz & Iler until paid for in full, said agreement being in the following words: "Articles of agreement made and entered into this second day of August, 1889, by and between Storz & Iler, parties of the

first part, and Mrs. John Wuethrich, party of the second part, all of said parties being in the city of Omaha, county of Douglas, state of Nebraska, witnesseth: Said parties of the first part agree to sell, and said party of the second part agrees to purchase, the following described property, situated in the county of Douglas and state of Nebraska, to wit: All the fixtures and furniture belonging to the saloon and billiard hall, and also all the furniture belonging to the rooms in the second and third story of the three-story brick building situated on the southwest corner of 15th street and Capitol avenue, in the city of Omaha, as described in an inventory hereto attached. The said Mrs. John Wuethrich agrees to pay to said Storz & Iler for said described personal property the sum of forty five hundred ($4,500.00) dollars, in payments as follows: One thousand ($1,000.00) on delivery of this contract; two thousand ($2,000.00) dollars on the fifteenth day of November, 1890, according to one certain promissory note of even date herewith; fifteen hundred ($1,500.00) dollars on the fifteenth day of May, 1891, according to one certain promissory note of even date herewith,—both notes payable at First National Bank, Omaha, Neb., with interest at the rate of eight (8) per cent. per annum from date. So soon as said purchase money and interests shall be fully paid, then and in that case Storz and Iler agree to make to said Mrs. John Wuethrich, her heirs or assigns, a good and sufficient bill of sale of said personal property. In case the said Mrs. John Wuethrich shall fail, refuse, or neglect to pay said sums (notes), or any part thereof, or interests thereon, she shall forfeit any rights she may have in this contract for the purchase of said property, and shall also forfeit any moneys she may have paid as herein stipulated to said Storz & Iler. * * * The said parties of the first part agree that, whenever said Mrs. John Wuethrich has fully complied with this contract, they will transfer to her all their rights, interest, and title to the lease they now hold on said premises. Witness our hands and seal, this 2nd day of August, 1890. Storz & Iler. Margaret Wuethrich. John Wuethrich." It appears that the plaintiffs paid on said contract the sum of $1,000 on the day of its execution, as therein stipulated, and also the sum of $2,000 and interest maturing November 15, 1890. It is, however, alleged that they failed to pay the sum of $1,500, with interest, which matured May 15, 1891, whereby they forfeited to the defendant the amounts previously paid by them, and from which it is argued that, in seizing and disposing of the property above described, the defendant merely asserted its rights under said contract. The second defense is an alleged agreement whereby the plaintiffs, on the 29th of May, 1891, finding themselves unable to make payment of the sum of $1,533.58 then due and owing by them to the defendant, turned over and delivered to the latter all of the property in controversy, in satisfaction of their said indebtedness. Upon a trial of the issues in the district court, there were a verdict and judgment for the plaintiffs therein in the sum of $1,678.19, and which has, by appropriate proceeding, been removed into this court for review.

Although the petition in error contains numerous assignments, counsel rely for a reversal of the judgment upon a single proposition, viz. that the defendant below was entitled to recoup, against the damage assessed in plaintiffs' favor, the unpaid portion of the purchase price of the property in controversy, and that the district court accordingly erred in approving of a verdict for the value of the property converted, with interest. There are, it must be confessed, authorities which appear to sustain the proposition that one holding a lien upon personal property is, in an action by the lienor for conversion thereof, entitled, even under a general denial, to have so much of such indebtedness as remains unpaid deducted from the amount which the latter would otherwise be entitled to recover, as bearing directly upon the question of damage. Such a case is Cushing v. Seymour, 30 Minn. 301, 15 N. W. 249. But we do not understand that case or the authorities there cited to hold that it is the duty of the court to direct the allowance of a credit in such case upon its own motion, without any suggestion from the party entitled thereto, or, as in the case at bar, contrary to the theory upon which the defense was conducted. A rule frequently recognized by this court is that cases must be reviewed here upon the theory on which they are prosecuted or defended in the court of original jurisdiction. See Smith v. Spaulding, 40 Neb. 339, 58 N. W. 952; Norton v. Loan & Trust Co., 40 Neb. 394, 58 N. W. 953; Woodard v. Baird, 43 Neb. 310, 61 N. W. 612. The defendant, judging from the evidence in the record, not only failed to assert a lien upon the property in controversy, but appears to have disclaimed any such contention. We observe, for instance, the following offer, shown by the bill of exceptions: "The defendant offers to the plaintiff and now makes a tender of a note of $1,500, marked 'Exhibit 3' [admitted to be the note above mentioned], which was paid and satisfied by settlement between the parties, as set up in defendant's answer." The cause appears to have been submitted to the jury upon the precise theory indicated by the answer, and the verdict responds to every contention made by the defendant during the trial. Having elected to waive any lien it may have had upon the property by virtue of the original agreement, it will be required to pursue its remedy by an action on the note, and will not be heard to complain on the ground that such lien was not recognized and enforced in this cause. Judgment affirmed.

CHURCHILL v. BEETHE et al.

(Supreme Court of Nebraska. April 10, 1896.)

MUNICIPAL CORPORATIONS — EMINENT DOMAIN — DEFLECTION OF SURFACE WATER—INJUNCTION.

1. Under the common-law rule prevailing in this state, the proprietor of lands may, by a proper use and improvement upon them, deflect surface water; and for consequent damage to his neighbor he is not liable, in the absence of negligence. Morrissey v. Railroad Co., 56 N. W. 946, 38 Neb. 406, followed.

2. This rule applies to counties and municipalities exercising the right of eminent domain.

3. For an unlawful diversion of surface water there is a remedy by an action for damages, or by injunction, against a private individual. But a county or municipality, in the exercise of a right of eminent domain, may divert water in a manner which would be unlawful if done by an individual. In such case just compensation must be made for all damage inflicted.

4. All damages, immediate or prospective, which may flow from the proper construction and maintenance of an improvement carried on under the power of eminent domain, must be compensated in the original condemnation proceedings.

5. The proceedings by which a highway is opened call for a settlement and payment of all damages which may arise from such proper construction and maintenance of the highway; taking into consideration such fills, cuts, ditches, and culverts as a proper construction and maintenance may require.

6. An action will not lie to enjoin a county from constructing a culvert across a highway, when such culvert is reasonably necessary to a proper maintenance of the road, damages consequent from such construction being presumed to have been satisfied when the highway was opened.

(Syllabus by the Court.)

Appeal from district court, Johnson county; Babcock, Judge.

Action by Thomas Churchill against Charles H. Beethe and others for injunction. From a judgment for defendants, plaintiff appeals. Affirmed.

T. Appelget, for appellant. J. Hall Hitchcock, for appellees.

IRVINE, C. The appellant brought this action against the defendants, who are the county commissioners of Johnson county, and the overseer of a road district therein, to restrain the defendants from building a certain culvert across a highway, and from otherwise changing the natural course of surface water. There was a general finding for the defendants, and a judgment of dismissal. The petition alleges that the plaintiff is the owner of certain described land, and that along the west border thereof lies a public highway; that the defendants raised an embankment along said highway in such a manner as to change the course of surface water accumulating on the land west of the highway, so as to cause it to flow upon the lands of the plaintiff, whereas, before the embankment was constructed, such water flowed over the lands north of plaintiff's. The petition further alleges that the defendants are about to build a culvert across the highway, in such a manner as to turn the accumulated surface water from the lands to the west, in a body, upon plaintiff's land. It appears that the highway in question has long been a public road, and that several years before the action was brought a fill was made, of two or three feet, along the highway to the west of plaintiff's land, for the purpose of improving the road. This is the embankment complained of. Its effect in diverting surface water we cannot understand from the written record, for the reason that the witnesses refer continually to certain maps in evidence; evidently accompanying their words with indications and gestures referring to maps and points thereon, but not in such a manner that they can be followed without the aid of these indications and gestures. As to this feature of the case, however, this defect in the record is not important, because we are satisfied that the petition does not, in this respect, state a cause of action. It is not alleged that the embankment was not a necessary or a proper improvement of the highway. It is not alleged that there was any negligence in the design or manner of its construction. It is not even alleged that the effect of the embankment is to accumulate surface water upon other lands, and discharge it in a body on the lands of the plaintiff. It is merely alleged that the embankment has diverted the natural flow of surface water so as to turn it over plaintiff's lands. On this state of facts, the rule established in Morrissey v. Railroad Co., 38 Neb. 406, 56 N. W. 946, is directly applicable, and a reference to that case avoids the necessity of further discussion.

The latter part of the petition, charging the purpose to construct a culvert which will discharge accumulated surface waters, in a body, on plaintiff's lands, presents a somewhat different question. The evidence tends to show that a creek flows through the south part of plaintiff's land. The natural surface of the land rises from the creek for about 200 feet, and then gradually falls to a point near the plaintiff's northwest corner, from which point it again rises toward the north. The embankment or fill in the highway crosses this depression or basin in the surface of the land. It operates as a sort of a dam: the water flowing both from the north and from the south to this low point, where it accumulates to the west of the highway. It also appears that the depression is such that if a ditch were constructed along the west side of the road to the creek, instead of draining this accumulated surface water into the creek, the grade is such that the ditch would empty the creek into the basin referred to. In this state of affairs, the water rises so as to cover the highway at the lowest point: and it is the purpose of the commissioners to avoid this inconvenience by placing a culvert at the low point, which would permit the water to flow beneath the highway, and upon plaintiff's lands. It is needless to say that such an act by a private proprietor would

be unlawful, and that relief could be had against it. Jacobson v. Van Boening, 47 Neb. —, 66 N. W. 998, and cases there cited. But this work is to be done by the county for the improvement of a highway, for the purpose of constructing and maintaining which it enjoys the power of eminent domain. It is not alleged that the culvert is not a proper or necessary work for the purpose of maintaining the highway in proper condition for travel. There can be no doubt that when the highway was first opened the culvert might have been put in, notwithstanding any injury it would cause the plaintiff; the only condition, in inflicting such damage upon him, being that just compensation should be paid him therefor. It is now the settled law of the state that, for all injuries which may arise on account of the proper construction or future operation of an improvement, an adjoining proprietor must be compensated in the original condemnation proceedings. Railroad Co. v. Moschel, 38 Neb. 281, 56 N. W. 875; Railroad Co. v. Todd, 39 Neb. 818, 58 N. W. 289; Railroad Co. v. Bates, 40 Neb. 381, 58 N. W. 959; Railroad Co. v. O'Connor, 42 Neb. 90, 60 N. W. 326. In Railroad Co. v. Todd, supra, it was said that: "In an inquiry whether, and how much, the part of a farm not taken for railroad right of way is depreciated in value by the appropriation of a part, evidence as to the size of the farm; the purpose for which it is used; the improvements thereon, and how located; the direction of the road across the farm; the cuts and fills made or to be made in the construction of the road; the width of the right of way; the height of embankments; the depth of ditches; the inconvenience of crossing the track from one part of the farm to another; the liability of stock being killed; the danger from fire from passing trains,—are all facts competent for the jury's consideration in determining the depreciation in value of the remainder of the farm." The cases are all those of railroads, but the same principles govern the exercise of the right of eminent domain by counties or municipalities, in the absence of qualifying statutes. The effect of the cases is that in assessing damages for the construction of a railroad the jury has in view all facts affecting the value of the land which may arise from the proper construction and operation of the railroad, —not merely in the manner in which it may be first constructed, but for any proper and appropriate extensions or improvements, so long as the original use is not changed. So with a highway. The owner of adjoining lands is entitled to compensation, not only for such injuries as might result from the use of the land appropriated in its natural state, but for all which would result from the proper construction, improvement, and maintenance of the highway; taking into consideration such embankments, cuts, bridges, culverts, and ditches as shall be required or warranted for the purpose of a proper construction and maintenance. Applying these principles to the present case, it would seem that the fill and culvert are not only a proper, but apparently a necessary, improvement, for the purpose of properly maintaining the highway; and while, if plaintiff's lands will suffer an injury thereby, he was entitled to compensation therefor, it must be presumed that he received such compensation, or at least had an opportunity to receive it, when the highway was originally constructed. He is not entitled to any further condemnation proceedings. Much less is he entitled to a perpetual injunction to restrain such highway improvement. Judgment affirmed.

JACOBSON v. VAN BOENING.

(Supreme Court of Nebraska. April 10, 1896.)

SURFACE WATER — DEFLECTION — INJUNCTION — WHEN ISSUED—DEFENSES.

1. In this state the common-law rule prevails that a proprietor may, by barriers or otherwise, protect his land from surface water coming from across adjacent lands; and, for injuries occasioned to others from a proper exercise of that right, he is not responsible. Morrissey v. Railroad Co., 56 N. W. 946, 38 Neb. 406, followed.

2. If, in the execution of such object, such proprietor is guilty of negligence which is the natural and proximate cause of injury to the adjoining proprietor, he is accountable therefor. Association v. Peterson, 60 N. W. 373, 41 Neb. 897, followed.

3. One may not accumulate surface waters on his own land, and, by means of a ditch, discharge them in a volume upon the land of another. Railroad Co. v. Marley, 40 N. W. 948, 25 Neb. 138, followed.

4. The former decisions of this court reviewed, and *held* to be in harmony with the foregoing principles.

5. Against a continuing injury to land caused by an unlawful discharge of surface waters by an adjoining proprietor, equity will afford relief by injunction.

6. In such case it is not necessary for the plaintiff to prove that actual injury occurred before the suit was brought. The remedy is in such case preventive, and will be granted on proof that the acts complained of, unless restrained, will result in damage.

7. To such an action it is no defense that the injury is in part threatened by the acts of another. The plaintiff has his remedy against each one contributing thereto.

8. Where one has a valid cause of action against another, his motive in instituting it is immaterial, and the fact that it is inspired by malice is no defense.

(Syllabus by the Court.)

Appeal from district court, Adams county; Beall, Judge.

Action by Peter Jacobson against John Van Boening. From a judgment for plaintiff, defendant appeals. Affirmed.

A. H. Bowen and J. B. Cessna, for appellant. Smith & McCreary, for appellee.

IRVINE, C. This was an action by the appellee against the appellant for the purpose of obtaining an injunction restraining the appellant from maintaining a certain ditch, whereby it was alleged that waters

collected on the lands of appellant were discharged upon the lands of plaintiff, to plaintiff's damage. The evidence is hopelessly conflicting, and in some parts very obscure. As there was a general finding for the plaintiff, we must take it in the light in which it most strongly tends to support the allegations of his petition. So considered, it appears that the parties are owners of adjoining farms, the plaintiff's lying west of defendant's. Along the north line of these farms there is a highway. On the defendant's farm, and near the northeast corner thereof, there lie what the witnesses style two "lagoons." A review of the evidence discloses, however, that this term is used according to a local signification, and means merely a slight depression in the land, wherein, in wet seasons, surface water accumulates. It is quite evident that these are not permanent ponds or lakes. At some time in the past, a ditch was constructed near the middle of the highway, whereby the surface water from the vicinity was collected, and flowed along the highway westward into a ravine, or as we shall hereafter style it, using another local term, more accurately descriptive than any word of general use, a "draw." This draw crosses the highway north of plaintiff's land, passes over his land, and across defendant's, towards the east. Shortly before this action was commenced, in accordance with some action by the county authorities, this ditch was filled up, and another one nearer the south side of the highway was constructed for the same purpose, and having the same outlet. The so-called "lagoons," by means of smaller ditches, were connected with this ditch in the highway. The damage alleged is that, whereas the natural drainage from the lagoons is southeast, these ditches divert it to the north, and thence along the highway to the draw, discharging a large body of water thereby across plaintiff's lands, cutting trenches, and covering them with accretions. It also appears that, by the construction of a ditch much shorter than the one now maintained, the defendant might discharge the water from the lagoons into this same draw upon his own land.

One point urged in support of the appeal is that there is no evidence that, down to the time of the trial, any large quantity of water had been discharged by reason of the ditches in question, or that plaintiff's lands had been in fact injured. It is true that there is very little evidence to the contrary, but we regard this as immaterial. The plaintiff was not obliged to wait until the injury had been inflicted. There is ample evidence tending to show that such an injury, in the event of a wet season, would be the result of maintaining the ditches, and the remedy sought is preventive, and not compensatory. Another point urged is that the action should properly be against the county, because the damage, if any, is directly inflicted by the ditch in the highway. While the prayer of the petition seems to extend to all the ditches, the district court granted the injunction only so far as to restrain the defendant from maintaining the ditches connecting the lagoons with the ditch in the highway. Assuming for the moment that any wrong was committed by maintaining this system of ditches, the defendant was the responsible person to the extent of the water discharged by the ditch the maintenance of which was restrained. The fact that the plaintiff may have a remedy against the county or against other proprietors for similar acts contributing to the same injury does not deprive him of his remedy against the defendant for his share therein.

Another minor point may here be disposed of. The district court excluded testimony accompanied by an offer to show that the plaintiff and others had conspired together to institute criminal and civil actions against Van Boening, contributing to the expense thereof, and with the purpose of harassing him until he should leave the township. This would be no defense to this action. If, as a matter of fact, the plaintiff had a good cause of action against the defendant, his motives in prosecuting it are immaterial.

With these preliminary matters cleared away, the question remains whether the plaintiff was entitled to relief against the defendant for discharging surface water through a ditch, in a volume, upon plaintiff's land, contrary to the natural course of drainage; and the proof showing that as effective and as convenient a method of discharging water might have been availed of without discharging it on the highway or on plaintiff's land. That, for a wrong of this kind, injunction is an appropriate remedy, was held in Davis v. Londgreen, 8 Neb. 43. That one's right to protect his land against surface water does not extend so far as to permit him to collect it in a volume, and by means of a ditch, to discharge it upon the land of another, has been several times decided. Railroad Co. v. Marley, 25 Neb. 138, 40 N. W. 948; Railroad Co. v. Adams, 41 Neb. 737, 60 N. W. 83; Bunderson v. Railroad Co., 43 Neb. 545, 61 N. W. 721. There are other cases applying the principle, but we do not cite them, for the reason that they seem rather to relate to the diversion of water courses than of surface water. The announcement of the rule referred to is sufficient to dispose of this case. But, as it developed upon the argument that an impression prevails that the different decisions of the court have not been altogether harmonious upon the subject, it seems well to review these cases, which to our minds are in complete harmony, and to as clearly as possible state the principle which has governed all the decisions.

Prior to 1893 there was no case dealing with the general principles of law on the subject. Davis v. Londgreen, supra, was much

like the present, except that it would seem that the pond which had been drained was permanent in its character, and not a mere depression, in which surface water occasionally collected. It was held that such water could not lawfully, by means of a ditch, be discharged upon the lands of one's neighbors. Pyle v. Richards, 17 Neb. 180, 22 N. W. 370, was a case for the diversion of a stream; and, while it has been cited in several surface-water cases, it was in fact governed by different principles. Stewart v. Schneider, 22 Neb. 286, 34 N. W. 640, depended for its solution entirely upon the effect of a prior decree fixing the rights of the parties, the correctness of which was not, and could not have been, then questioned. Morrissey v. Railroad Co., 38 Neb. 406, 56 N. W. 946, is perhaps the leading case on the subject. It was there announced that the common-law rule prevails, and that, therefore, one has the right to defend himself against surface water, and that incidental damage inflicted upon another by such acts is damnum absque injuria. It is this case which is thought to be in conflict with some of the others. The opinion is entirely too long to abstract here, but an examination of the case discloses that the court had always in view the fact that there was neither allegation nor proof that the railroad embankment which had caused the injury had been unnecessarily or negligently constructed. The district court gave an instruction to the effect that one might upon his own land erect such barriers as he deemed necessary to keep off surface water falling upon it or coming from adjacent lands, and for any consequent injury to other lands he would not be responsible; but that such waters as fell upon his own lands, or came thereon by surface drainage, he must keep within the boundaries, or permit them to flow off without artificial interference, unless, within the limits of his own lands, he could turn them into a natural watercourse. Commenting upon this instruction, this court, through Commissioner Ryan, said: "In the latter part of this instruction it is barely possible that the court may have erred, as against the defendant, in holding that it was the affirmative duty of the proprietor to keep within his boundary, or permit to flow off without interference, such waters as fall in rain or snow on his land, or come there by surface drainage, unless, within the limits of his own land, he can turn them into a natural watercourse. It is unnecessary to determine this question." In many of the cases cited in the opinion the distinction was clearly drawn between a proper defense against surface water and a negligent defense. This case, then, merely established the general rule; but there was kept constantly in view the fact that no negligence appeared, and that the existence of negligence might be a controlling feature. In Railroad Co. v. Adams, supra, while the rule was very briefly stated in accordance with former opinions that a proprietor may not collect surface waters on his own estate in a ditch, and discharge them in a volume on the land of his neighbor, it is quite evident that the same principle was in view, and that this was deemed a negligent method of protecting one's self. In Association v. Peterson, 41 Neb. 897, 60 N. W. 373, a proprietor, in order to protect himself against surface water, filled in his lots, but in such a manner that water which otherwise would have passed off in another direction accumulated and entered the ice house of plaintiff through a privy vault. The rule in Morrissey v. Railroad Co., supra, was stated; and the court, through Judge Post, said: "Subject to that rule, every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose; and, unless he is guilty of some act of negligence in the manner of its execution, he will not be answerable to his neighbor, although he may thereby cause the surface water to flow upon or from the premises of the latter, to his damage. The injury in such case is but a mere incident to the proper use of the owner's property; but if, in the execution of the enterprise in hand, he is guilty of negligence, which is the natural and proximate cause of injury to the adjoining proprietor, the law holds him accountable therefor. Such is the essence of the authorities cited in Morrissey v. Railroad Co., supra, and undoubtedly the law of this case." In Bunderson v. Railroad Co., supra, it was held that the construction of a railroad embankment whereby water had been backed up upon the lands of a superior proprietor was no cause of action, and this for the reason that to have made an opening or culvert would have discharged the water in a volume upon the lands of an inferior proprietor, which would have been tortious. In Railroad Co. v. Sutherland, 44 Neb. 526, 62 N. W. 859, the railroad company was held liable because of its negligence in the construction of an embankment; and the words above quoted from Association v. Peterson, supra, were quoted with approval, as controlling the case. In City of Beatrice v. Leary, 45 Neb. 149, 63 N. W. 370, it was said: "The doctrine of this court is the rule of the common law that surface water is a common enemy, and that an owner may defend his premises against it by dike or embankment; and, if damages result to adjoining proprietors by reason of such defense, he is not liable therefor. But this rule is a general one, and subject to another common-law rule, that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor; and therefore every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow on the premises of the latter, to his damage; but if, in the execution of such enterprise,

he is guilty of negligence, which is the natural and proximate cause of injury to his neighbor, he is accountable therefor."

We think the foregoing review of the cases shows that, instead of there existing any conflict in the decisions, it has been the settled and uniform rule, applied in every case, that, while one may protect his land from surface water, he is responsible for any negligence in so doing occasioning damage to his neighbor. The case is no different from the exercise of any other undoubted right. I have as much right to drive along the highway as I have to defend my land from surface water; but if I drive negligently, and injure some one, I am responsible. We think, in view of this principle, the evidence amply sustained the finding and decree of the district court. Judgment affirmed.

CITY OF KEARNEY v. THEMANSON.

(Supreme Court of Nebraska. April 10, 1896.)

SURFACE WATER—INTERFERENCE WITH FLOW—WITNESS—REFRESHING MEMORY.

1. The doctrine of this court is the rule of the common law that surface water is a common enemy, and an owner may defend his premises against it by dike or embankment; and, if damages result to an adjoining proprietor by reason of such defense, he is not liable therefor.

2. But this rule is a general one, and subject to another common-law rule, that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor.

3. And therefore every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow on the premises of the latter, to his damage; but if, in the execution of such enterprise, he is guilty of negligence, which is the natural and proximate cause of injury to his neighbor, he is accountable therefor. Association v. Peterson, 60 N. W. 373, 41 Neb. 897; Railroad Co. v. Adams, 60 N. W. 83, 41 Neb. 737; Railroad Co. v. Sutherland, 62 N. W. 859, 44 Neb. 526; City of Beatrice v. Leary, 63 N. W. 370, 45 Neb. 149; Jacobson v. Van Boening (Neb.) 66 N. W. 993,—followed and affirmed.

4. A memorandum which, it appears, was prepared at the time of the fact in question or soon afterwards, which the witness knew to be correct at the time it was made, may be used by the witness to refresh his memory. Railroad Co. v. Lawler, 58 N. W. 968, 40 Neb. 356.

(Syllabus by the Court.)

Error to district court, Buffalo county; Holcomb, Judge.

Action by Akey Themanson against the city of Kearney, in which there was a judgment for plaintiff. On plaintiff's death, the action was revived in the name of Caroline Themanson, administratrix. Defendant brings error. Affirmed.

F. E. Beeman and E. C. Calkins, for plaintiff in error. B. O. Hostetler, for defendant in error.

RAGAN, C. Caroline Themanson sued the city of Kearney, in the district court of Buffalo county, for damages. For cause of action, she alleged that in the year 1883 the city built an embankment about three feet high in the street in front of the property occupied by her, without first having established the grade of the said street by ordinance; that, prior to the building of said embankment, the surface water from a large area of territory had been accustomed to flow eastward north of her building, and across the street the grade of which the city raised; that the city, when it built the embankment, negligently neglected to build a culvert or other opening in the embankment; and that in April, 1884, during a heavy rain, such surface waters were stopped by the embankment, and flowed back into her cellar, and injured a large amount of groceries stored therein. This case has been twice before in this court, and, for a more extended statement of the facts and issues made by the pleadings, the reader is referred to City of Kearney v. Thoemason, 25 Neb. 147, 41 N. W. 115, and Themanson v. City of Kearney, 35 Neb. 881, 53 N. W. 1009. Mrs. Themanson had a judgment in the court below, and the city of Kearney has brought the same here for review.

1. The first argument in the brief, in effect, is that if it be admitted that Mrs. Themanson's property was damaged by surface water flowing into her cellar; that this surface water was stopped in its course, and turned back into the cellar, by the embankment made by the city in the street; and that such damage and such turning back of the surface water were caused by the negligence of the city in not building a culvert or an opening in the embankment,—yet, nevertheless, the city is not liable, because it is protected by the rule of the common law that surface water is a common enemy, and that an owner may defend his premises against it, and, if damages result to adjoining proprietors by reason of such defense, he is not liable therefor. But the facts averred by the plaintiff as a cause of action against the city if proved, exclude the plaintiff in error from the protection of this general common law rule. The case at bar falls within, and is governed and controlled by, the decisions of this court in Railway Co. v. Adams, 41 Neb. 737, 60 N. W. 83; Association v. Peterson, 41 Neb. 897, 60 N. W. 373; Railroad Co. v. Sutherland, 44 Neb. 526, 62 N. W. 859; City of Beatrice v. Leary, 45 Neb. 149, 63 N. W. 370; Jacobson v. Van Boening, 47 Neb. —, 66 N. W. 993. This rule of the common law was invoked as a defense in each of those cases, but the conclusion reached by the court was that, while the common-law rule as to surface water was in force in this state, it was a general one, and that it was subject to another common-law rule, namely, that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbors; and that, therefore, every proprietor might lawfully improve his property by doing what was reasonably necessary for that

purpose, and, unless guilty of some act of negligence in the manner of its execution, would not be answerable to an adjoining proprietor, although he might thereby cause the surface water to flow on the premises of the latter, to his damage; but if, in the execution of such enterprise, he was guilty of negligence, which was the natural and proximate cause of injury to his neighbor, he would be accountable therefor. We do not feel called upon to re-examine these cases. We are satisfied that they correctly state the law, and we accordingly adhere to them. The mere right of a proprietor to defend himself against surface water, without being responsible for the consequences, has never been denied by this court. But there may be a difference between the possession of a right and the manner of its exercise. In the case at bar it may be conceded that the city had a right to grade the street in question, to build the embankment therein. This right we do not call in question. It is only the manner of the exercise of that right that is involved in this litigation.

2. The next assignment of error which we notice is the ruling of the district court in permitting the witnesses Orrin and Albert Themanson to testify from a memorandum as to the goods that were injured or destroyed. It appears from the record that the water flowed into this cellar in the night, and that very soon thereafter the memorandum of the goods injured and destroyed was made. To lay the foundation for permitting these witnesses to testify from this memorandum, Orrin was examined as follows: "Q. You may state to the jury whether or not you, in connection with others, made an inventory of the goods that were in the cellar. State what you did about that. A. We took an inventory of the goods, and Albert Themanson wrote it down; the amount that was in the cellar. * * * Q. Did you assist? A. Yes, sir. Q. Do you think you would recognize the inventory if you should see it? A. Yes, sir; I would recognize the articles. Q. Look at that paper, and see if that is the inventory you refer to. A. Yes, sir; as near as my memory would serve me. Q. Did you see the paper made? A. Yes, sir; I was there at the time it was made. * * * Q. Did you at that time examine the paper, and know that it contained an exact list of the articles damaged? A. Yes, sir." Albert Themanson was then called, and testified as follows: "Q. Do you remember the fact of the cellar of your father being flooded on the 1st of April, 1884? A. Yes, sir. Q. State whether or not there was an inventory made of the goods that were in the cellar at the time of the flood. A. Yes, sir; there was an inventory made shortly after. Q. Examine that paper, and state whether that is the inventory or not that was made at that time. A. Yes, sir; that is the inventory. Q. Did you make that yourself? A. Yes, sir; I did. Q. In whose handwriting is that part which is written in ink? A. That is mine. Q. Who was with you when you did it? A. Mr. Orrin. Q. Did some one call off, and you set it down? A. Sometimes they would, and sometimes I would take the number down myself. Q. In whose handwriting are the pencil marks at the right of the goods? A. That is my handwriting. Q. When did you make that? A. That was made at the time. Q. State whether or not you examined that paper at the time it was made. A. Yes, sir. Q. Do you know whether it was correct at that time? A. Yes, sir; to the best of my knowledge." We do not think the court erred in permitting these witnesses to use this memorandum. In Railroad Co. v. Lawler, 40 Neb. 356, 58 N. W. 968, this court said: "A memorandum which it appears was prepared at the time of the fact in question, or soon afterwards, which the witness knew to be correct at the time it was made, may be used by the witness to refresh his memory."

3. It is also insisted that the verdict of the jury is not supported by sufficient evidence. It is not disputed that Themanson's goods were damaged. It is not insisted that the amount of damages awarded her by the jury is excessive. It is not claimed that the city had ever established by ordinance the grade of the street in which it built the embankment; that, when it built said embankment, it put a culvert or other opening therein for the escape of surface waters that were accustomed to flow east across the street; nor that the property of Mrs. Themanson was not damaged by surface waters. But the argument that the verdict lacks sufficient evidence to support it is based on the contention that there were windows in Mrs. Themanson's cellar; that these windows extended below the level of the ground on which the building was erected, and that the windows were not protected by embankments or bulkheads; and that the water which flowed into the cellar, and damaged the goods, did so because the windows were not thus protected. There are two answers to this argument: (1) There is some evidence in the record that the windows were protected by embankments or bulkheads. (2) The evidence justifies a finding by the jury that the presence of the water in the cellar was due to the negligence of the city in failing to put a culvert in its embankment, and not to a want of bulkheads around the windows in the cellar.

Counsel for the city complain of some instructions given by the trial court, and some instructions which the court refused to give. It is not necessary to quote these instructions, and it must suffice to say that the action of the court was entirely proper. There is no error in the record, and its judgment is affirmed. Affirmed.

GILMORE v. ARMSTRONG.

(Supreme Court of Nebraska. April 10, 1896.)

EASEMENT—PAROL GRANT—PERFORMANCE—VALIDITY.

1. A court of equity will give effect to a parol grant of an easement, where there has been a valid consideration, where the grant is certain in its terms, and where there has been such a performance on the part of the grantee as would, in the case of a contract for the sale of the fee, take the case out of the statute of frauds.

2. A. and B., proprietors of adjoining lands, agreed that a dam should be constructed across a draw, where the draw crossed the division line, and that a ditch should be constructed along the division line to carry off the water. The object was to better drain the lands of both proprietors. Both took part in locating the dam and the ditch, and both contributed to their construction, but, by mistake as to the location of the division line, the ditch did not follow it, but lay mostly on the land of A., but partly on that of B. The dam and ditch were so maintained for seven years. *Held*, that an injunction should not be granted to restrain B. from further maintaining the dam and ditch.

(Syllabus by the Court.)

Appeal from district court, Jefferson county; Babcock, Judge.

Action by William M. Gilmore against William M. Armstrong. From a judgment for defendant, plaintiff appeals. Affirmed.

Letton & Hinshaw, for appellant. John Heasty and S. N. Lindley, for appellee.

IRVINE, C. The appellant brought this action against the appellee to restrain the latter from maintaining a certain dam and ditch, which, he alleged, diverted a water course, which would otherwise drain plaintiff's land, and pass across the land of the defendant, in such manner as to throw the water back upon plaintiff's land, to its damage. The defendant, by answer, pleaded that the dam and ditch had been constructed under an agreement between the parties to that effect, and had been their joint work; that plaintiff had wrongfully obstructed the ditch,—and defendant therefore prayed for an injunction restraining the plaintiff from further obstructing it. The district court found for the defendant, denied the plaintiff the relief he sought, and also denied relief to the defendant, on the ground that there was no evidence of an intention on the part of plaintiff to further obstruct the ditch. The plaintiff appeals, and the defendant, also, in his brief, asks that the decree be modified so as to grant him the relief prayed in his answer.

While the evidence on some points is in conflict, there is sufficient competent evidence tending to show the following state of facts: The plaintiff is the owner of the northwest quarter of a certain section. The defendant is the owner of the west half of the northeast quarter, and the plaintiff is the owner of the northeast quarter of the northeast quarter. The defendant's land, therefore, lies between two tracts belonging to the plaintiff. A draw, which, for the purposes of this case, we assume to be a natural water course, takes its rise some place near plaintiff's south line, and crosses to defendant's land about 900 feet north of the center of the section. The northern part of the section is bottom land, adjoining the Little Blue river. The water collected in this draw formerly passed across defendant's land, and poured out upon the bottom land in the northeast quarter of the northeast quarter belonging to plaintiff, and was a serious inconvenience to both parties. By parol agreement between the parties, a dam was constructed at the point where the draw crossed the line between the northeast and northwest quarters, and a ditch was constructed from the western end of the dam, almost north, so as to discharge the water at a point near this line, instead of upon the northeast quarter of the northeast quarter of the section. It seems that this has the effect of overflowing, in wet seasons, a portion of Gilmore's land in the northeast part of the northwest quarter, while it relieves the northeast quarter of the northeast quarter and Armstrong's farm of an excess of water. It also appears that it was the intention of the parties to construct the ditch along the line between the two quarter sections, and that it was staked off by both parties, and the work, both upon the dam and the ditch, was contributed to by both parties, but was chiefly done by the defendant. A survey, however, disclosed that their intention of keeping the ditch upon the division line was not carried out, but that the greater part of its course was by mistake laid upon the land of Gilmore. Assuming these facts as established by the findings of the court, notwithstanding the conflicting evidence, the question presented is whether or not the construction of the dam and ditch, under the parol agreement referred to, is a defense to the action, because, in the absence of such agreement, it is clear that the plaintiff would be entitled to relief against such a diversion of the waters. Davis v. Londgreen, 8 Neb. 43; Railroad Co. v. Marley, 25 Neb. 138, 40 N. W. 948; Jacobson v. Van Boening, 47 Neb. —, 66 N. W. 993, and cases there cited.

The appellant contends that the agreement referred to, if proved, would establish an easement, and therefore must be proved either by grant, which in this state means by written deed, or by prescription, neither of which is pleaded or proved; and, further, that, if it be treated as a license, which may be established by parol, it was one which was revocable at the will of the licensor, and had been revoked. There are certain cases which support this contention, but they lose sight of two principles. The first is that a license upon sufficient consideration, carried into execution by the incurring of expense by the licensee, is usually not revocable. The other is that, in a court of equity, part performance is frequently sufficient to take the case out of the statute of frauds.

These principles have been frequently recognized in similar cases, and we refer especially to the elaborate and carefully considered opinion of Justice Hanly in Wynn v. Garland, 19 Ark. 23. Other cases, recognizing the principle, are Snowden v. Wilas, 19 Ind. 10; Stephens v. Benson, Id. 367; Wiseman v. Lucksinger, 84 N. Y. 31; Lacy v. Arnett, 33 Pa. St. 169; Cronkhite v. Cronkhite, 94 N. Y. 323; Johnson v. Skillman, 29 Minn. 95, 12 N. W. 149. As said by Judge Dillon, in a similar case (Beatty v. Gregory, 17 Iowa, 109), in meeting a similar argument as to the power to revoke such a license: "It would be a shame and reproach to the law if this could be done." The cases we have cited, while differing as to the requirements, in the way of part performance, which are sufficient to take the case out of the statute of frauds, all recognize the doctrine that a parol grant of an easement is, in equity, out of the statute, when the circumstances are such that a contract for the conveyance of the fee would be taken out of it. In this case, the evidence tends to show that the dam and ditch were constructed, principally at defendant's expense, along defined and ascertained lines, fixed by the parties, chiefly on plaintiff's land, but partly on defendant's, and with the purpose of benefiting both parties. They had been maintained for about seven years before this suit was brought, and we think, under the circumstances, the contract is clearly one which a court of equity will enforce. Much more will it refuse affirmative relief to the party who seeks to disregard it.

As to the cross appeal, we think the action of the district court was justified by the evidence. The finding is such that the decree refusing defendant an injunction would be no bar to an action for a similar purpose if plaintiff should in the future threaten his rights. The decree is therefore in all things affirmed.

CANNON et al. v. SMITH.

(Supreme Court of Nebraska. April 10, 1896.)

VERDICT—SUFFICIENCY—ISSUES INVOLVED.

A verdict, in order to sustain a judgment, must respond to the issues made by the pleadings, or to the allegations of the successful party.

(Syllabus by the Court.)

Error to district court, Greeley county; Harrison, Judge.

Action by John Cannon and Ellen Cannon against Margaret Smith. Judgment for defendant, and plaintiffs bring error. Reversed.

J. R. Hanna and T. J. Doyle, for plaintiffs in error. M. B. Gearon, for defendant in error.

POST, C. J. This was an action of ejectment in the district court for Greeley county, in which judgment was entered in favor of the defendant in error, who was also defendant below, and which has been brought to this court for review by means of the petition in error of the unsuccessful party.

The petition below is as follows: "The plaintiffs, John Cannon and Ellen Cannon, complain of the defendant, Margaret Smith, for that the plaintiffs have a legal estate in, and are entitled to the possession of, the following described premises, to wit: The east two hundred feet of the northeast quarter of section twenty-one in township eighteen, range eleven, situated in Greeley county, Nebraska; and the said defendant, ever since the 15th day of May, 1889, has unlawfully kept, and still keeps, the plaintiffs out of possession of said premises. Second. The defendant, while unlawfully in possession of said premises, has received the rents and profits thereof from the 15th day of May, 1889, to the commencement of this action, amounting to the sum of $100. The plaintiffs therefore pray judgment for the delivery of the possession of said premises to them, and also for the sum of $100, rents and profits, and for costs of suit." To the foregoing petition an answer was filed, in the following words: "Now comes the defendant, by her attorney, M. B. Gearon, and, for answer to plaintiffs' petition, denies each and every allegation therein set forth, except that the plaintiffs are the owners in fee of said premises, which defendant admits." The issues thus made were tried to a jury, by which the following verdict was returned: "We, the jury in this case, being duly impaneled and sworn, do find and say that the plaintiff has not a legal estate in, and is not entitled to the possession of, the premises described in the petition."

Numerous errors are alleged as grounds for a reversal of the judgment, but one of which will be noticed at this time. It is contended that the verdict responds to no issue of the pleadings, and will not therefore sustain the judgment complained of. By a careful analysis of the pleadings, it will be observed that the only question at issue was that of the possession of the defendant below, and as to which the verdict is silent. It would seem, therefore, that the objection is well taken, and that the district court erred in rendering judgment upon the verdict. It is, however, strenuously insisted that the insufficiency of the verdict was not relied upon below. We observe in the record evidence tending strongly to corroborate that statement, although the question is presented by sufficient assignment of the motion for a new trial, and also by the petition in error. It follows that the judgment must be reversed, and the cause remanded for further proceedings in the district court. Reversed.

HARRISON, J., not sitting.

CHICAGO, B. & Q. R. CO. v. HAGUE.

(Supreme Court of Nebraska. April 10, 1896.)

CARRIERS — ACTION FOR DEATH OF PASSENGER — PLEADING—PRESUMPTION—CRIMINAL NEGLIGENCE—EVIDENCE.

1. Under the provisions of section 3, art. 1, c. 72, Comp. St., it is only necessary, to a right of recovery against a railroad company, to show that the person injured was, at the time, being transported as a passenger over the defendant's line of railroad, and that the injury resulted from the management or operation of said railroad. A presumption thereupon arises that such management or operation was negligent, and it can be met only by showing that the injury arose from the criminal negligence of the party injured, or that it was the result of the violation of some express rule or regulation of said railroad company actually brought to the notice of the party injured. Railroad Co. v. Baier, 55 N. W. 913, 37 Neb. 235, followed.

2. Criminal negligence, as the term is used in the statute, means such negligence as amounts to a flagrant and reckless disregard of one's own safety, and a willful indifference to the injury liable to follow. Railroad Co. v. Chollette, 49 N. W. 1114, 33 Neb. 143, followed.

3. Evidence examined, and *held* to so clearly disclose criminal negligence on the part of the person injured as to permit no reasonable inference to the contrary.

(Syllabus by the Court.)

Error to district court, Kearney county; Beall, Judge.

Action by L. W. Hague, executor of Robert P. Stein, deceased, against the Chicago, Burlington & Quincy Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

W. S. Morlan, J. L. McPheeley, and Marquett & Deweese, for plaintiff in error. L. W. Hague and Stewart & Munger, for defendant in error.

IRVINE, C. This was an action under Comp. St. c. 21, by Hague, as executor of Robert P. Stein, deceased, against the Chicago, Burlington & Quincy Railroad Company, on account of injuries causing the death of decedent. The plaintiff had a verdict and judgment for $4,000. The sufficiency of the evidence to sustain the verdict is presented for review by a direct assignment of error, and also by an assignment based on the refusal of the court to give an instruction directing a verdict for the defendant. In support of these assignments the railroad company contends—First, that the evidence does not in any manner tend to charge it with negligence; and, secondly, that the uncontradicted evidence discloses that Stein was guilty of contributory negligence.

The first argument is completely answered by the uncontradicted proof that Stein was a passenger, lawfully riding on a train of the railroad company, when the injury was inflicted. Chapter 72, art. 1, § 3, Comp. St., provides: "Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the persons injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice." The railroad company contends that the phrase, "damages inflicted upon the person of passengers," indicates that, in order to charge the railroad, it must appear that the injury was the result of some negligent omission or commission on the part of the railroad. This construction is not tenable. In Railroad Co. v. Baier, 37 Neb. 235, 55 N. W. 913, it was held that, under this statute, it is necessary to prove only that the injured person was a passenger being transported over the line of railroad of the defendant, when damages were inflicted upon the person of such passenger; that proof of such facts raises a presumption of negligence on the part of the railroad company, which can be rebutted only by proof of negligence on the part of the passenger, or the violation by him of some express rule or regulation of the railroad actually brought to his notice. This construction has been followed in Railroad Co. v. Porter, 38 Neb. 226, 56 N. W. 808, in Railroad Co. v. Hedge, 44 Neb. 448, 62 N. W. 887, and in other cases, and it is undoubtedly correct. It was therefore unnecessary for the plaintiff to prove that Stein's death was caused by any specific negligence on the part of the railroad.

We preface a consideration of the evidence with relation to the second argument with the remark that, the case being within the statute, it was insufficient for the railroad company merely to establish such a degree of negligence on the part of Stein as would prevent a recovery in ordinary cases of personal injuries. The statute requires, as a defense, that the person injured should have been guilty of "criminal negligence." In Railroad Co. v. Chollette, 33 Neb. 143, 49 N. W. 1114, this court approved an instruction to the effect that "criminal negligence," as the term is used in the statute, means gross negligence,—such negligence as would amount to a flagrant and reckless disregard of one's own safety, and a willful indifference to the injury liable to follow. In later cases the foregoing has been accepted as a correct interpretation of the statute. It must also be borne in mind that it is the settled law of this state that, even where the facts are undisputed, the question of negligence is for the jury, where different minds may reasonably draw different inferences from those facts. This rule has been many times announced, and was applied in Railroad Co. v. Landauer, 36 Neb. 642, 54 N. W. 976, and Id., 39 Neb. 803, 58 N. W. 434, where the court examined the evidence in a similar case, and held that it permitted no reasonable inference except that of criminal negligence on the part of the person injured. Therefore, the question presented to us is not whether, to our minds, the evidence here discloses that Stein was guilty of criminal negligence, as above de-

fined, but rather whether, under the facts disclosed, any other inference is reasonable. If so, we could not disturb the verdict. With these principles in view we pass to an examination of the evidence.

Stein lived at Minden. He boarded a westbound freight train, carrying passengers, at Hartwell, the first station east of Minden, for the purpose of returning home. The passengers, including Stein, were in the caboose, at the rear end of the train. The train arrived at Minden about 2 a. m. The night was misty and dark. About 1,300 feet east of the station at Minden, there is a bridge, some 20 feet high. Five hundred feet east of the station there is a switch leading to a side track. As the train approached Minden, it stopped at such a point that the caboose stood upon the bridge. It seems that this stop was made for the purpose of taking the side track, to permit a passenger train to pass, and that it was made at this point because the front end of the train was then at the switch. The passenger train not being due for about 10 minutes, the interval was availed of for the purpose of uncoupling the engine and running it on to the station for water. This maneuver left the caboose upon the bridge for several minutes, and, during that period, while there is no direct evidence on the subject, it is quite clear, from inference, that Stein passed out the rear door of the caboose, and fell to the ground beneath the bridge, probably in an attempt to alight from the train. The railroad company claims that the evidence shows that Stein had received, and had understood, an express warning that the caboose was on the bridge, and that he attempted to alight in spite of that warning. The plaintiff contends that, on this point, there was a conflict of the evidence, which must be resolved in his favor, in accordance with the verdict of the jury. On the argument it was practically conceded that the question of contributory negligence turned on this point. The plaintiff frankly conceded that, if Stein attempted to alight in spite of an express warning as to the situation of the caboose and the danger of the attempt, negligence on his part would be established. On the other hand, it was practically conceded that his attempt to alight, in the absence of knowledge on his part of the situation, would not present so clear a case as to justify the withdrawal of the issue from the jury. The conclusion we reach is such that we may assume, for the purposes of this case, that the latter position is correct. There is no doubt that the conductor gave a general warning to the passengers not to get off, stating, as a reason, that the caboose was on a bridge; and our effort is therefore to ascertain whether or not there was a conflict in the evidence as to whether Stein understood this warning. If the evidence was conflicting, the finding of the jury for the plaintiff must, on this branch of the case, be taken as conclusive.

There were, in the caboose, when the train stopped, the conductor and five passengers. At the east (the rear) end was what is termed the "cupola." The conductor had been sitting in this. From this cupola west extended seats, on either side, on which the passengers were sitting or reclining. Mr. Martin, one of the passengers, was not a witness. We have the testimony of the other passengers and of the conductor. The conductor was called by the defendant. He testified that, when the train stopped, he saw that he was on a bridge. He descended from the cupola, and told the passengers that they were at Minden, but not to get out as they were on a high bridge. Then he stepped to the east door, and Stein stepped up beside him. Then he went to the west door. He then returned and reascended to the cupola, when he heard a groan, and descending, found that Stein was missing. Then comes this testimony: "Q. What, if anything, did you say to the passengers or to Mr. Stein before you went up in the cupola? A. I told them not to get off; we was on a bridge. Q. What, if anything, did Mr. Stein say to you? A. He says, 'Thank you. Thank you.' He thanked me two or three times. I do not remember just the words that he used." This rather obscure testimony is much cleared up by the cross-examination: "Q. What did you say you did the first thing when the train stopped? A. I was up in the cupola when the train stopped, and I got down. Q. At once? A. Yes, sir. Q. Then what did you do? A. I told the people that we were at Minden, and not to get off; that we were on a bridge, and to wait until we got up to the depot. Q. Then where did you go? A. I walked to the east door. Q. Did you stop there awhile? A. Yes, sir; probably half a minute. Q. What part of the car were you in when you told the passengers not to get off? A. Well, about the center of the car. Q. You were not at the west door of the car when you said that? A. No, sir. Q. You did not go out the west door of the car after you said that? A. Yes, sir. Q. Not immediately? A. No, sir. Q. You went back to the east door? A. First. Q. And afterwards went out of the west door? A. Yes, sir. Q. How long did you say you stayed at the east door? A. Half a minute. * * * Q. Mr. Stein spoke to you on the rear platform, and thanked you,—he thanked you, some place, for telling him that he was on a high bridge? A. I say the east door; he thanked me, first, when I got down, and thanked me a second time." Mr. Kelley, one of the passengers, says that his attention was first called to Stein when he noticed him standing in the middle of the car, acting as if he was about to get out; that the conductor then told him that they were not at Minden yet, but were on a bridge, and would pull in on a side track to let an express go by; that Mr. Stein thanked him two or three times. The conductor then started for the front end of the car. Kelley does not know what then became of Stein. The foregoing is the testi-

mony on which the railroad company relies. Following is the testimony adduced by plaintiff, and which, he claims, presents a conflict: Mr. Smith says he was on the north side of the caboose near the middle. When the train stopped, the conductor, preparing to go out over the train, said: "Don't get off; the caboose is standing on a high bridge." He was in the act of going out to the west when he said this. The witness was asleep, and the words of the conductor awakened him. He thinks Stein also sat on the north side of the car, and east of him. On cross-examination he says that, when the conductor spoke, he was just a few steps from the witness, and, he thinks, nearer the west end of the car than the center. Mr. Johnson was on the south side of the car, near the cupola. Mr. Martin, he says, was on the same side. Johnson also had been asleep. When he awoke the conductor was a short distance west of where he was lying. As Johnson awoke, the conductor made the remark which the other witnesses testify to. He then went out the west door. Another feature of the testimony of this witness is significant. When he awoke there were only two men on the north side. These were Smith and Kelley. Within a minute and a half of the time the conductor left the west door, Johnson saw some one go out the east door. This must have been Stein, although Johnson could not identify him.

The writer, after a somewhat careful examination of the evidence, was at first of the opinion that there was something of a conflict between the testimony of the conductor and Kelley on the one side, and that of Johnson and Smith on the other; and this because Johnson and Smith both seem to insist that the conductor's words were spoken as he was in the act of passing out the west door,—a fact inconsistent with the evidence as to the conversation with Stein, which, from the conductor's testimony, would seem to have occurred near the east door. Serious doubts having arisen, the evidence has been carefully re-examined; and we now are of the opinion that the testimony offered by the plaintiff in no wise conflicts with that offered by the defendant, to the effect that Stein heard the conductor's warning, and thanked him for the information. While the language of Smith especially would indicate that the conductor gave the warning as he was passing out of the front end of the car, and immediately before he went out, on cross-examination he says, not that the conductor was at or near the west door, but that he was nearer the west door than the center of the car; but he also says that he was only a few steps from Smith. Kelley was between Smith and the west end of the car. So that his testimony in this respect is not materially different from that of the conductor and the other passengers, who say that the conductor was about in the center of the car when he spoke. Now, Smith says that Stein had been on the north side of the car, and east of Smith, which would place three men on the north bench. Smith does not seem to have observed Stein at all after this stop was made. Johnson says that, when he awoke, there were only two men on the north bench and these were Smith and Kelley. Therefore, Stein must have arisen from the north bench before Smith and Johnson awoke; and he must have been standing towards the east end of the car, or the other witnesses, who observed the conductor a little west of them, would have seen Stein also. Moreover, Johnson saw Stein go out the east door. The probabilities are that this movement would have been noticed by some of the other passengers if he had not been already near the east door, and away from his seat, when the others were awakened. Another fact is that Johnson and Smith both testify that they were asleep when the train stopped; and Smith's testimony is positive that it was the conductor's voice, and not the stopping of the train, which awakened him. This would seem to be true, also, of Johnson, because, as he awakened, he saw the conductor west of him. The conductor had, then, descended from the cupola, and passed westward, before Johnson awoke. It is not unnatural that these two witnesses should not have observed or recalled such an incident as Stein's thanking the conductor for the warning, when it must have occurred as they were awakening from sleep. Finally, neither Smith nor Johnson was asked whether the incident with Stein did occur. If their testimony could be taken as denying its occurrence, it would be merely by inference, from their relating what did occur, omitting this incident. They testified in chief before the conductor had testified or Kelley's deposition was read. Their attention was in no wise called to this conversation, and the case is in that respect far different from what it would have been if their attention had been directly called to it, and if they had denied its occurrence. We think, therefore, that the testimony, without contradiction, shows, not only that the conductor gave the warning, but that it was understood by Stein; and, if so, we think his act, in attempting to leave the car in the face of such warning, was so clearly and so grossly negligent as to permit no other reasonable inference to be drawn. Reversed and remanded.

COAD v. READ.

(Supreme Court of Nebraska. April 10, 1896.)

JUDGMENT—CERTAINTY—TRIAL BY COURT—FINDINGS.

1. In an error proceeding in the district court to set aside as an entirety a judgment for $125 and interest thereon from a fixed date anterior, rendered by a justice of the peace, it is *held* that there was sufficient certainty, at least as to the sum of $125, to justify the refusal of said district court to grant the relief prayed.

2. Upon the trial of questions of fact, it is not necessary for the court to state its findings,

except generally for the plaintiff or defendant, unless there is a request for a special finding, under the conditions stated in section 297, Code Civ. Proc. It is accordingly *held* that a general finding of a justice of the peace for plaintiff is sufficient to sustain a judgment as against an attempt to set it aside in the district court, upon proceedings in error therein brought for that purpose.

(Syllabus by the Court.)

Error to district court, Douglas county; Ferguson, Judge.

Action by Guy R. C. Read against John F. Coad. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Martin Langdon, for plaintiff in error. Guy R. C. Read, in pro. per.

RYAN, C. This error proceeding from the district court of Douglas county is prosecuted to reverse a judgment by it rendered sustaining a judgment of a justice of the peace in favor of the defendant in error against the plaintiff in error, rendered December 14, 1892. The first ground urged for the reversal of the judgment of the justice of the peace presented in the district court was that the justice of the peace had no jurisdiction of the defendant, for the reason that there was a defect in the copy of the summons, which copy was submitted with the petition in error in the district court. This question was not presented to the justice of the peace, on a motion to vacate the judgment or otherwise. The alleged copy of the summons was brought into the record only by a bill of exceptions purporting to have been allowed by the justice of the peace who rendered the judgment complained of; and, from this alleged bill of exceptions, we are unable to even surmise why there was an attempt to preserve as evidence the aforesaid copy of the summons. If it had been submitted in support of a motion to open the judgment, it is conceivable that it was competent; but it had no such relation to any question presented to the justice of the peace. As it was, this alleged copy of the summons amounted to nothing more than an independent offer of evidence to impeach the judgment rendered by the justice of the peace.

It is insisted that it was erroneous to render on December 14, 1892, a judgment for $125, with 7 per cent. interest thereon from June 6, 1892, for it is urged this was not for a present sum definite. This proceeding was to vacate the entire judgment, and not to review a failure upon motion to correct it. As to the sum of $125, there was sufficient certainty for every purpose. We need not, therefore, consider the question of interest urged as constituting an uncertain matter, for it cannot be suffered to impair the validity of what is certain.

The language of the docket entry made by the justice of the peace, it is said, did not contain a finding which would sustain the judgment rendered. His finding was as follows: "This cause, coming on for hearing upon the bill of particulars and the evidence, was submitted to me, upon consideration whereof I find in favor of the plaintiff." It is provided by section 1000 of the Code of Civil Procedure that, "if the defendant fail to appear at the return day of the summons, * * * the cause may proceed at the request of the adverse party, and judgment must be given in conformity with the bill of particulars and proofs." This special provision as to proceedings before a justice of the peace seems, from the record quoted, to have been literally complied with. By section 1085 of the Code of Civil Procedure, it is provided that "the provisions of this Code, which are in their nature applicable, and in respect to which no special provision is made by statute, shall apply to proceedings before justices of the peace." Section 297 of the same Code is in this language: "Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its findings, except generally for the plaintiff or defendant, unless one of the parties request it," etc. In Crossley v. Steele, 13 Neb. 219, 13 N. W. 175, this court held that the judgment then under consideration was voidable, because it was without the support of any finding whatever, and the applicability of sections 297 and 1085 of the Code of Civil Procedure to proceedings before justices of the peace was unequivocally recognized. In the same opinion, however, occurred this language: "The necessity of a finding seems to be as great in cases tried before justices of the peace as in cases tried in courts of record. The finding takes the place of the verdict of a jury, and shows upon what facts the justice bases his judgment. There must therefore be a finding of facts in all cases tried before a justice of the peace where a jury is waived." This, as will be readily seen, was entirely foreign to the facts involved in the case actually presented and decided. How much value attaches to it by reason of its intrinsic logic will readily appear when we consider separately each step by which was approached the inconsequential result reached by the language above quoted. First, the statute was quoted whereby it was enacted that, upon the trials of questions of fact by the court, it shall not be necessary for the court to state its findings, except generally for the plaintiff or defendant. This provision was next held applicable to justices of the peace, so that, in respect to the necessity of a finding to sustain its judgment, every court is bound by the same rule. The next step was to give reasons why any finding whatever was necessary, and they were said to be because a finding of the court takes the place of a verdict of a jury, and shows upon what facts the court bases his judgment. The conclusion finally deduced from this course of reasoning was that the statute requires a special finding of facts to sustain a judgment, whether rendered by a justice of the peace or by the district court.

In other words, if there was a mere finding for the defendant generally, this would be an insufficient basis for a judgment, because there was not set out as part of this finding a statement of the facts upon which the court bases its judgment. To conform to this rule, the statute should have provided that, in the trial of all questions of fact by the court, it shall be necessary for the court to state its findings, and that a finding generally for plaintiff or defendant shall be insufficient, and the requirement of a request for a finding should have been omitted. It is not necessary to retrace the several steps by which the illogical result indicated was attained, merely for the purpose of discovering what particular deduction was erroneous, for the language criticized was, at most, mere obiter. Our concern in this matter is solely with a clearly expressed statutory provision, whereby it is required only that there shall be a general finding for the plaintiff or for the defendant. As the language quoted from the above-cited case exacts more than is required by statute, we have been at some pains to illustrate what might have been done in briefer terms, and that is that this court does not assume to modify unambiguous statutory provisions by judicial construction or rational interpretation. Stoppert v. Nierle, 45 Neb. 105, 63 N. W. 382. Counsel for the plaintiff in error have cited Sprick v. Washington Co., 3 Neb. 255, Smith v. Silvis, 8 Neb. 164, and Foster v. Devinney, 28 Neb. 421, 44 N. W. 479, in support of the contention that, notwithstanding the statute, there must, to sustain a judgment, be found specially the facts upon which the judgment is predicated. In neither of these cases was there a finding of any kind; hence, tested by this express provision of the statute, there was lacking a general finding for the plaintiff or defendant. As pointed out by counsel for the defendant in error, the views which we have just expressed were recognized as correct in Haller v. Blaco, 14 Neb. 195, 15 N. W. 348; Degering v. Flick, 14 Neb. 448, 16 N. W. 824; and Dye v. Russell, 24 Neb. 829, 40 N. W. 416.

There is a line of cases not relied upon by either party which has been understood to countenance the rule that a finding, to sustain a judgment, must be as specific as should be the verdict of the jury. Of these, the first in the series was Ransdell v. Putnam, 15 Neb. 642, 19 N. W. 611, in which the entry in the docket of the justice of the peace was as follows: "After hearing and duly weighing the testimony and authorities, it was found by this court that the plaintiff have and recover of the defendants, Ransdell and Reed, the sum of twenty-nine dollars and fifty cents, as due him for services and labor done and performed, and for costs of suit, taxed as follows," etc. This language was held to imply the same finding as would have been implied by a verdict of a jury in the following form: "We, the jury, find for the plaintiff, and assess his damages at twenty-nine dollars and fifty cents." It was therefore concluded that the finding was sufficient. In the case at bar the entry of the justice of the peace was as follows: "This cause, coming on for hearing upon a bill of particulars and the evidence, was submitted to me, upon consideration whereof I find in favor of the plaintiff. It is therefore considered and adjudged by me that the plaintiff recover from the defendant the sum of $125, with seven per cent. interest thereon from June 6, 1892, and costs of suit." If the final judgment is considered in connection with the general finding for the plaintiff, it will be seen that there is in the record under consideration at least as much of a finding of facts as in the case of Ransdell v. Putnam, supra, for in the latter case the language was: "It is found by this court that the plaintiff have and recover from the defendants, Ransdell and Reed, the sum of twenty-nine dollars and fifty cents," etc. The next of this series of cases was McNamara v. Cabon, 21 Neb. 589, 33 N. W. 259, in which it was held that a judgment in the following form was not void, to wit: "After hearing the proof, it is the opinion of the court that the defendant, Anton Cabon, is indebted to the plaintiff in the sum of $100, * * * with interest from December 20, 1883, and costs of this suit, taxed at $3.15." In this case it was said that "in Ransdell v. Putnam, 15 Neb. 642, 19 N. W. 611, it was held that the finding of facts by a court where a jury is waived need not be more specific than would be required of the verdict of a jury." This court made no application of the principle invoked, for it merely held that the language, "It is the opinion of the court that the defendant, Anton Cabon, is indebted to the plaintiff in the sum of $100," amounted to a sufficient finding. The incongruity of attempting to apply the analogies of a verdict to the requirement of a finding appears by stating the above finding in the form of a verdict, as was done in Ransdell v. Putnam, which case it is sometimes supposed to follow. Such a form of the verdict would be: "We, the jury, are of the opinion that the defendant, Anton Cabon, is indebted to the plaintiff in the sum of $100." It can scarcely be claimed, therefore, that this case is an authority for the proposition that, upon the trial of questions of fact by the court, it shall be necessary that the court state its findings with the same fullness required in the verdict of a jury. In Rhodes v. Thomas, 31 Neb. 848, 48 N. W. 886, Cobb, C. J., in the syllabus, stated the rule thus: "When an action at law is tried to a court without a jury, the finding of fact by such court is a substitute for, and stands in lieu of, a verdict of a jury, and need be no more specific than the verdict of a jury upon the same pleadings and evidence." It can scarcely be overlooked that this language does not require that the finding of fact shall be as

specific as the verdict of a jury, but that it need not be more so. This is not a mere fanciful construction of the language of the syllabus, as will appear from the following facts involved in the case decided: Originally, the justice entered his judgment as follows: "October 17, 1888, 9 a. m. Court convenes, and defense proceeds with examination of witnesses, after which case is argued by attorneys, and submitted to the court, with the following finding: 'October 17, 1888. After hearing the evidence, it is therefore considered by me that the plaintiff have and recover from defendant the sum of $69.15, together with costs, taxed at $49.15.'" In the district court there were stricken out of the transcript, as having been improperly interlined, the words "of $69.15, due from defendant to plaintiff," which followed immediately after the word "finding." After the elimination of these interpolated words, the record stood as above quoted, and the district court held the judgment good without any further finding, and this judgment was affirmed in this court. In the course of the opinion, it was said, however, as to the requirements of a finding, "that it should be as specific as, and stand in the place of, a verdict." This was the first positive enunciation of this requirement in the line of cases which we are following, and, in view of the facts upon which the case was really decided, this principle was entirely irrelevant. This will appear very clearly from two distinctive considerations, of which the first is that, immediately following the requirement that a finding must be as specific as a verdict, this language is found in the opinion: "We consider that portion of the plaintiff in error's argument referring to certain words of the justice's transcript and findings ordered to be stricken out in the district court as not material to the consideration of the case." The other argument as to the finding being as definite as a verdict takes the entries of the justice of the peace after the elimination of the finding held immaterial, and as was done by Cobb, J., in Ransdell v. Putnam, states the substance of such finding in the form of a verdict, thus: "It is therefore considered by us that the plaintiff have and recover from the defendant the sum of $69.15, together with costs, taxed at $49.15." It would, of course, be objected that this is, in form, rather a judgment than, in any sense, a finding upon which to base a judgment. If this is true,—and no one can gainsay the correctness of this classification,—there was in fact no finding by the justice of the peace, and yet his judgment was sustained by this court. Whatever other proposition this case may sustain, there is one thing certain, and that is that it has no tendency towards sustaining the principle that a finding, to sustain a judgment, must be as specific as, and stand in the place of, a verdict. This closes the list of cases which seem to sustain this doctrine, and in none of them is it discoverable that this test of the sufficiency of a finding has ever been applied, much less enforced. It is noticeable that in none of the cases of this class was there a reference to the Code of Civil Procedure, which recognizes the necessity of a finding of any kind. This review of cases would scarcely be complete without mention of Kirkwood v. Bank, 40 Neb. 484, 58 N. W. 1016, in which were noted all the cases cited by counsel on this branch of the case, and perhaps some others on the same lines; but as the questions therein determined were only that the district court had no power to require indemnity to be given as a condition on which the character of its judgment was dependent, in the absence of a finding which would sustain this requirement, it has but little bearing upon the question hereinbefore considered.

The extended examination of the cases bearing upon the subject under discussion has served to impress upon us very strongly the wisdom of accepting the provisions of the statute as we find them, and of giving effect to them according to their terms, uninfluenced by mere fanciful analogies. The requirement of section 297 of the Code of Civil Procedure is that, upon the trial of a question of fact by the court, it shall not be necessary for the court to state its findings, except generally for the plaintiff or defendant, except upon request under certain conditions; and the judgment of the justice of the peace under consideration was in strict conformity with this requirement. The judgment of the district court is therefore affirmed.

CROSBY v. RITCHEY.

(Supreme Court of Nebraska. April 10, 1896.)

FRAUD — PLEADING — ACTION ON NOTE — FAILURE OF CONSIDERATION — BURDEN OF PROOF.

1. In pleading fraud it is necessary to set out the facts relied upon for relief. Mere epithets or conclusions of fraud, without any statement of the facts upon which such charge is predicated, are insufficient.

2. Answer examined, and *held* to charge a failure of consideration only, and not fraud in the inception of the notes sued upon.

3. Where the only defense alleged in an action by an indorsee of a promissory note is the failure of consideration, the burden is upon the defendant to overcome the presumption that such note was transferred before due, for value, in the usual course of business. Violet v. Rose, 58 N. W. 216, 39 Neb. 660; Kelman v. Calhoun, 61 N. W. 615, 43 Neb. 157.

(Syllabus by the Court.)

Error to district court, Cass county; Chapman, Judge.

Action by Samuel M. Crosby against J. T. Ritchey. Judgment for defendant. Plaintiff brings error. Reversed.

Beeson & Root, for plaintiff in error. M. C. Sloan and E. H. Wooley, for defendant in error.

POST, C. J. This was an action upon two promissory notes executed by the defendant in error, Ritchie, for $75 and $37.50, respectively, both payable to the order of A. T. McLaughlin, and indorsed in blank by the payee. To the petition, which is in the usual form, the defendant below answered as follows: "The defendant, for answer, denies that he is indebted to plaintiff in any sum upon the pretended notes sued on, and avers that such notes were obtained by A. T. McLaughlin, as the president of the Omaha Medical Institute, without consideration, and by fraud and false representations, in this: That, as such officer or president of said institute, he agreed to furnish medical services for six (6) months, from about February 23, 1891, to August 23, 1891; that such services and medical attendance and advice were the only consideration for such pretended notes, and a contract for such medical services and advice being made at same time, and are but one contract with the notes, and nothing was to be paid until such medical services had been done and completed; that such medical services were not done nor furnished as so agreed, nor was anything done whatever, though requested to be done; that, at the time such pretended notes were obtained, this defendant was led to determine, and did determine, that the whole matter was but a contract for such medical services and attention, to be given in about six months' time. It now appears that all was but a scheme and a device to swindle and defraud this defendant. It is further averred: That plaintiff is not an innocent owner of such pretended notes sued on. The plaintiff knew the consideration of said notes had failed, before he obtained the same. That the plaintiff is really not the rightful owner and holder of such notes, and the plaintiff has no right to sue this defendant." The reply is, in effect, a general denial. A trial of the issues thus joined was had, resulting in a verdict and judgment for the defendant below, which we are asked to reverse on account of alleged errors, to be hereafter noticed. Among the instructions given by the court on its own motion, and to which exception was duly taken, are the following: (2) "In this case you are instructed that the burden of proof is upon the plaintiff to satisfy you, by a fair preponderance of the evidence, that he is the owner and holder of the promissory notes in question, for a valuable consideration, and that the burden of proof is upon the defendant to satisfy you, by a preponderance of the evidence, of the want of consideration for said promissory notes, and that the same were obtained from the defendant by fraud and deceit." (3) "You are further instructed that, as a matter of law, if you find from the evidence that the plaintiff purchased the notes in controversy in this action before the day the same became due and payable, and in the usual course of trade, for a valuable consideration, without notice of any defense that defendant might have or claim to have thereto, in such case your verdict should be in favor of the plaintiff, unless you further find from the evidence that, at the time defendant signed said notes, he was misled by the fraud and artifice of the original payee, or his agents, and that defendant was not guilty of any neglect whatever, in signing the same."

The first question suggested by the assignment relating to the foregoing instructions is the character of the defense alleged. The answer appears to have been, by the district court, interpreted as charging fraud on the part of the payee, in the inception of the notes. But in that view we are unable to concur, since a careful scrutiny of the answer fails to disclose any allegations of fact upon which to predicate the charge of fraud. Mere epithets and conclusions of fraud, without the statement of facts, constitute no basis for relief upon that ground. Tepoel v. Bank, 24 Neb. 815, 40 N. W. 415; Railroad Co. v. Fitzgerald, 33 Neb. 137, 49 N. W. 1100; Thomas v. Thomas, 33 Neb. 373, 50 N. W. 170. The mere allegation is insufficient. Facts showing the fraud relied upon, or from which it may be inferred, must be stated. Leavenworth, L. & G. R. Co. v. Commissioners of Douglas Co., 18 Kan. 169; Kinkead, Code Pl. § 607 et seq. Another rule recognized by the court is that fraud cannot be predicated upon a mere promise not performed, but, in order to be available as a cause of action or defense, it is essential that there be a false assertion with respect to existing matters. Perkins v. Lougee, 6 Neb. 220. The most favorable construction of which the answer in this case is susceptible, from the standpoint of the defendant below, is that it charges a failure of consideration, on account of the alleged neglect and refusal of the payee of the notes to render the promised medical services and attendance. The case is therefore governed by the rule recognized by this court in Violet v. Rose, 39 Neb. 660, 58 N. W. 216, and Kelman v. Calhoun, 43 Neb. 157, 61 N. W. 615, viz. that, where the defense alleged in an action by an indorsee of a promissory note is the failure of consideration only, the burden is upon the defendant to overcome the presumption that such note was transferred before due, for value, in the usual course of business. The direction of the court appears to conflict with the authorities here cited—First, in submitting to the jury the question of fraud in the inception of the notes; and, second, in imposing upon the plaintiff below the burden of proving that he was a bona fide holder thereof.

The other assignments relate to rulings of the court during the trial, and present questions of practice only, which, in view of the conclusion stated, do not require notice at this time. But for reasons above stated the judgment will be reversed, and the cause remanded for trial de novo. Reversed.

OMAHA ST. RY. CO. v. MARTIN.

(Supreme Court of Nebraska. April 10, 1896.)

CONTRIBUTORY NEGLIGENCE—WHAT CONSTITUTES—QUESTION FOR JURY—BURDEN OF PROOF.

1. In an action, the basis of which is negligence, if the plaintiff can prove his case without disclosing any negligence on his part, his negligence then becomes a matter of defense, the burden of proving it being on the defendant. Stock-Yards Co. v. Conoyer, 59 N. W. 950, 41 Neb. 617, and cases there cited, followed.

2. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence, or not, the determination of the matter is for the jury; but, where the facts are such that all reasonable men must draw the same conclusion from them, the question of negligence is one of law, for the court.

3. Whether the act of a party in attempting to board a moving street car is negligence, or not, is generally a fact to be determined by the jury, taking into consideration all the circumstances in evidence in the case.

4. It is for the court to say what act or omission is evidence of negligence, but generally it is for the jury to say whether the evidence establishes negligence.

5. The law requires every reasonable man to exercise caution commensurate with the obvious peril with which he is confronted, but this means no more than that he is, under all circumstances, required to exercise ordinary care. Although a party may have negligently exposed himself to an injury, yet if the defendant, after discovering his exposed situation, negligently injures him, or is guilty of negligence in not discovering his dangerous position until too late, and the plaintiff is, because thereof, injured, he may nevertheless recover.

(Syllabus by the Court.)

Error to district court, Douglas county; Scott, Judge.

Action by Walter I. Martin against the Omaha Street-Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

John L. Webster, for plaintiff in error. Geo. W. Cooper, for defendant in error.

RAGAN, C. Walter I. Martin sued the Omaha Street-Railway Company, in the district court of Douglas county, for damages which he alleged he had sustained, by reason of the negligence of the employés of that company, while attempting to board one of its cars. Martin had a verdict and judgment, and the street-railway company prosecutes to this court a petition in error.

1. Martin, in his petition, alleged that the servants of the railway company negligently failed to stop its train of cars at the usual stopping place a reasonable and sufficient length of time to permit him to safely get on the cars, "and, just as plaintiff was in the act of ascending the steps of the * * * back car of said train, defendant's * * * servants * * * then in charge of * * * said cars * * * did so negligently and carelessly manage said train of cars * * * that said cars were suddenly and rapidly, and without notice or warning to plaintiff, started forward, * * * thereby violently throwing plaintiff to and upon the surface of the street, and under said moving car." The street-railway company, in its answer, among other things, alleged "that said plaintiff negligently and carelessly endeavored to board said train while it was in motion, instead of waiting for the same to come to a stop; * * * that said plaintiff, in so endeavoring to board said train while in motion, slipped and fell, and so was injured." On the trial, Martin himself testified as follows: "I took up my grip when I went to signal the car,—the motorman in charge of the car. I came over to the track, and, when the front car got along, it was going a little too fast to board, and I stepped out, and when the rear car came—the front end of the rear car came along—the car almost stopped, just about stopped; and I took hold of the hand rail, and put my foot on the step, and was raising myself up to put my right foot up the next step, and there was a sudden jerk, and it threw me on the street." The conductor of the car by which Martin, in attempting to board it, was hurt, testified as follows: "Well, sir, I noticed the motorman applying his brake, and I looked over and saw a man standing there. So I applied my brake to let a man off the train. At that time it was going a little slow, because we were going down grade, any way; and the first thing I saw was when we got to about the corner,—I saw Mr. Martin. I saw a man with a package. * * * As we slowed up to let him on the train came nearly to a perfect standstill. Mr. Martin,—I didn't know what his name was at that time,—he caught hold of the front end of the trailer with his right hand, and I saw then he couldn't get a good foothold with his left foot,—got a good foothold with his right foot; and I noticed that, and made a grab for him, and he slipped."

The first assignment of error argued in the brief is directed to the refusal of the district court to give certain instructions requested by the street-railway company, and it is insisted that the court erred in refusing to give these instructions, as they embodied the law of the case applicable to the testimony given in support of its theory of the accident. The instructions are as follows:

"(1) The jury are instructed that the plaintiff cannot recover in this action unless he satisfied you, by a preponderance of evidence, that the injuries received by him resulted from the negligence of the defendant company, and that the plaintiff was free from fault in the premises." The court did not err in refusing to give this instruction. It was not incumbent upon the plaintiff to prove, by a preponderance of the evidence, that his injury was not the result of negligence on his part. If Martin proved, by a preponderance of the evidence, that he was injured, and that his injury was the result of the negligence of the street-railway company, and in making these proofs it was not disclosed that his injury was the result of his

negligence, he made out his case. He was not required to prove, by a preponderance of the evidence, the negative proposition that his injury was not the result of his negligence. See Stock-Yards Co. v. Conoyer, 41 Neb. 617, 59 N. W. 950, where the rule laid down in Anderson v. Railroad Co., 35 Neb. 95, 52 N. W. 840, is quoted with approval, the rule being as follows: "In an action for negligence, where the plaintiff can prove his case without disclosing any negligence on his part, contributory negligence is a matter of defense, the burden of proving it being on the defendant."

The second instruction is as follows: "The jury are instructed that if you find from all the evidence that the accident to the plaintiff was caused or brought about by his attempt to get on board the train while the train was being brought to a stop, but before the train had come to a full stop, then he was guilty of contributory negligence, and cannot recover, and your verdict should be for the defendant." This instruction the court did not err in refusing to give. It was not for the court to say whether or not Martin was guilty of negligence in attempting to board this train while it was moving. The court might have properly told the jury that, if Martin attempted to step on the train while it was in motion, that was evidence tending to prove negligence; but it was for the jury to say what the effect of that evidence was. Railroad Co. v. Craig, 39 Neb. 602, 58 N. W. 209, was an action for damages, brought by Miss Craig against the railway company for injury which she alleged she had sustained through the negligence of that company in not bringing the car to a standstill when she was about to alight therefrom. The railway company's theory of the accident was—and its evidence tended to support it—that Miss Craig's injury was caused by her stepping from the car, while it was in motion, to the platform or footboard thereof, and not holding to the uprights at the ends of the seats. The eminent counsel who makes the argument for the street-railway company in the case at bar, in the Craig Case pressed this court to decide, as a matter of law, that if Miss Craig stepped from the car while in motion, and was thereby injured, this act raised against her a conclusive presumption of negligence. Answering that argument, the court said: "But we think that Miss Craig's stepping out on the platform of the car before it came to a full stop, at the time and under the circumstances, and her failure to avail herself of the hand holds on the uprights of the seats, were, at most, facts to be submitted to the jury as evidence tending to show negligence on her part. Reasonable men might honestly draw different conclusions as to whether this act or omission of Miss Craig's was, under the circumstances, negligence; and therefore it was for the jury to say whether the evidence of what she did, and what she omitted to do, warranted a conclusion of negligence on her part. It is for the court to say what act or omission is evidence of negligence, but it is for the jury to say whether the evidence establishes negligence."

The third instruction refused was as follows: "The jury are instructed that it was the duty of the plaintiff to wait until the train had come to a stop, before attempting to get on board the car; and if you find from the evidence that the train was being brought to a stop, but before the train had come to a full stop the plaintiff attempted to get on the car, and, in so doing, slipped and fell, then the plaintiff cannot recover, and your verdict should be for the defendant." What has just been said in reference to instruction No. 2 disposes of the assignment that the court erred in refusing to give this instruction.

The fourth instruction refused was as follows: "The jury are further instructed that, in determining whether the plaintiff attempted to get on board the train before the train had come to a full stop, you should take into account, not only the evidence of the defendant's witnesses, but also such witnesses as were called by the plaintiff, if any, who testified that the train had not come to a full stop when the plaintiff attempted to get on board." This was, in effect, asking the court to say to the jury: "One of the matters being litigated here is whether Martin attempted to board the train while it was in motion. The defendant's witnesses, and some of Martin's witnesses, have testified that he did. You should consider the evidence of all these witnesses." It was the duty of the jury to consider all the evidence of all the witnesses. The jury was sworn to try the case according to the evidence, and we will not presume they did not; but we do not think the district court was under any obligation—if, indeed, such a course would have been proper—to single out one point being litigated, and say to the jury, "All the witnesses on one side of the case have testified that a certain thing was done, and part of the witnesses on the other side have testified that this thing was done, and you should consider the evidence of these witnesses." This would have been not only to give too much prominence to one point being litigated, but to tell the jury to consider only the evidence directed to one side of the matter in dispute.

The fifth instruction refused, of which complaint is made, was as follows: "The jury are further instructed that the fact that the plaintiff was carrying a package, as described by himself and other witnesses, was a circumstance requiring upon his part a higher degree of care, while attempting to get on board the train, than if he had not been burdened or incumbered by such package." The plaintiff was required to exercise ordinary care, and nothing more. The law requires

every reasonable man to exercise caution commensurate with the obvious peril with which he is confronted; but this means no more than that he is, under all circumstances, required to exercise ordinary care, the danger and his knowledge thereof considered. City of Beatrice v. Reid, 41 Neb. 214, 59 N. W. 770.

2. It is next argued that the court erred in giving to the jury instruction No. 8, as follows: "You are further instructed that if you find that plaintiff attempted to board the train while carrying a bundle in one hand, and after it had passed over the street intersection, and while the train was in motion, and at the point where it was the duty of defendant's employés to bring the train to a stop, as hereinbefore explained to you, and you further find that plaintiff received the injury complained of by reason of his attempting to board the train while in motion, such act on the part of plaintiff would constitute contributory negligence on his part, as it was his duty not to attempt to board the train while it was in motion, carrying in one of his hands a bundle, and he could not recover in this action, unless you further find that an ordinarily cautious and prudent man, situated as plaintiff was, would, under like circumstances, have attempted to board the car, or that defendant's employés, by the exercise of ordinary care, could have avoided the injury after discovering the danger, if you find they did or could have discovered the danger by the exercise of ordinary care. In determining whether defendant's employés exercised ordinary care to avoid the injury after discovering the danger, should you find that they did discover the danger, and should you find that plaintiff, by his own negligence, contributed to the accident which produced the injury complained of, you will take into account, and give due consideration to, the fact (if you find such fact has been proven) that the conductor and motorman used every effort and all the means within their power to stop the train and avoid the injury to plaintiff, by applying the brakes, making an effort to catch the plaintiff to prevent his falling (if such facts have been proven), the position the train was in, with reference to grade and speed, and all other facts you find disclosed by the testimony bearing upon that question." We think this instruction was erroneous, but the street-railway company cannot complain of it. It was not prejudicial to it, but to Martin. One criticism of counsel is directed to that part of the instruction quoted in which the court told the jury, in effect, that, if they should find that Martin had negligently exposed himself to danger, yet he might recover, if the railway company, after discovering his danger, inflicted the injury upon him because of its failure to exercise ordinary care. This instruction was correct. See Railway Co. v. Mertes, 35 Neb. 204, 52 N. W. 1099; Railroad Co. v. Grablin, 38 Neb. 90, 56 N. W. 796, and 57 N. W. 522; Shear. & R. Neg. § 25. But counsel says that the instruction was erroneous because not applicable to the facts in evidence in the case: First, because the evidence did not show that Martin had placed himself in a position of danger. The evidence introduced in behalf of the railway company all tended to show that Martin attempted to board this train while it was in motion; and we think it a matter of common sense that a person, when about to step on or off a moving train, is in a situation of danger. The second argument is that the instruction was not applicable because the evidence does not disclose that the railway company knew that the plaintiff, Martin, was in danger. We have already quoted the evidence of the conductor of the train, to the effect that Martin attempted to step on the train while it was in motion, and that he (the conductor) saw that he was about to fall, and that he attempted to catch him. Another criticism made to this instruction is to that part of it by which the court told the jury that the railway company would be liable for Martin's injury if, after discovering his danger, it failed to exercise ordinary care, or if it did not discover his danger because of its failure to exercise ordinary care. In other words, the argument is that the railway company was only bound to exercise ordinary care after it discovered Martin's danger, and that its employés were under no obligation to observe Martin or his conduct until they found him in a dangerous situation. Under the circumstances in evidence in this case, we do not think the court erred in telling the jury that the railway company would be liable for Martin's injury if it failed to exercise ordinary care after discovering his dangerous situation, or if, through its want of ordinary care, it failed to discover his dangerous situation until too late. The evidence is undisputed that Martin signaled the train to stop; that the conductor and the motorman saw him, and slowed the train down, and that he had a grip in his hand; and that he was intending and attempting to board the train. Under these circumstances, it was incumbent upon the employés of the railway company to know that Martin was on the train before they started it. Railroad Co. v. Grablin, 38 Neb. 90, 56 N. W. 796, and 57 N. W. 522, was an action by Grablin, as administrator, against the railroad company, for negligently, as he alleged, causing the death of his child while trespassing on the railway company's track. The railway company requested the trial court to instruct the jury as follows: "You are instructed, * * * if you find that the negligence of the boy in going upon the track caused or contributed to the injury, you must find a verdict for the defendant, unless you further find that the company or its servants were willfully or recklessly negligent after the boy was discovered, or that the engineer willfully avoided seeing the boy on the track sooner than he

did see him." The refusal of the district court to give this instruction was assigned here as error, but the court sustained the action of the trial judge, and held that if the engineer could, by exercising such vigilant and careful lookout as was consistent with his other duties as engineer, have seen the boy in time to save him, then his neglect to exercise such careful and vigilant lookout was negligence.

These are the only assignments of error which we deem it necessary to notice. The judgment of the district court is in all things right, and is affirmed. Affirmed.

SHEASLEY v. KEENS.

(Supreme Court of Nebraska. April 10, 1896.)

DEED — RECORD — JUDICIAL SALE — PRIORITY — LIS PENDENS — CONSTITUTIONAL LAW.

1. A prior unrecorded deed, passing the legal title, made in good faith, for a valuable consideration, will take precedence of a title based on a judicial sale made under an attachment or execution, if such deed be recorded before the evidence of the title based on the judicial sale is recorded. Harral v. Gray, 4 N. W. 1040, 10 Neb. 186, followed.

2. The amendment of section 85 of the Code of Civil Procedure, passed and approved March 31, 1887, considered, and *held*: (1) That so much of said amendment as makes a lis pendens filed at the commencement of an action or cross action affecting the title to real estate constructive notice of such action to all persons, not parties thereto, who thereafter deal with the subject-matter thereof, is valid; (2) that so much of such amendment as makes a lis pendens filed at the commencement of an action or cross action affecting the title to real estate, or a lis pendens filed at any time after the commencement of such action or cross action, constructive notice of such action to the holders of liens, incumbrances, or conveyances of said real estate executed prior to the filing of such lis pendens, is unconstitutional and void.

(Syllabus by the Court.)

Appeal from district court, Buffalo county; Holcomb, Judge.

Action by George R. Sheasley against Francis G. Keens to quiet title. From a decree for plaintiff, defendant appeals. Affirmed.

R. A. Moore, for appellant. Fred A. Nye, for appellee.

RAGAN, C. On the 31st day of March, 1890, D. A. McElheney owned certain real estate in the city of Kearney, Neb., and on that date, for a valuable consideration, sold and conveyed it, by deed, to G. R. Sheasley. Sheasley did not record his deed until the 1st day of November, 1890. On the 19th of May, 1890, Keens sued McElheney, at law, in the district court of Buffalo county, to recover a sum of money which he alleged was due from McElheney on a contract in writing; and, at the time of filing his petition in that case, Keens caused an attachment to be issued, auxiliary to his law action, and levied upon the property which McElheney had conveyed to Sheasley. At the time of filing his petition and suing out his attachment, Keens, in accordance with the provisions of section 85 of the Code of Civil Procedure, filed in the office of the register of deeds of said Buffalo county a notice of the pendency of such action; reciting, among other things, that the real estate in controversy had been attached to satisfy whatever judgment might be rendered therein. Keens duly prosecuted his action, and judgment was rendered finding the amount due to him from McElheney, and sustaining the attachment, and ordering the real estate sold to pay the amount found due. The sale of the real estate was duly made, Keens becoming the purchaser. This sale was confirmed, and a deed ordered and issued to Keens for the property, which deed Keens put upon record after November 1, 1890. At the time Keens brought his suit, and filed notice under the statute, the property stood on the records of Buffalo county in the name of McElheney, and Keens had no knowledge or notice that Sheasley owned or claimed the property until about the time the order of sale was issued for the sale of the property under the attachment. At that time, however, Keens was notified that Sheasley claimed the property by an unrecorded deed from McElheney dated the 31st of March, 1890. This action was brought by Sheasley, to the district court of Buffalo county, to cancel, as a cloud upon his title, the deed held by Keens based on the judicial sale above mentioned. Sheasley had a decree as prayed, and Keens has appealed.

The question presented by the record is this: Which has the better title to the real estate in controversy,—Sheasley, who claims under the purchase and conveyance from McElheney, or Keens, who holds a conveyance of the property, based on the judicial sale made thereof under the attachment proceedings had while Sheasley's deed was unrecorded, and while Keens was entirely ignorant that Sheasley had any claim or title to the property?

Section 4108, Comp. St. 1895, provides that: "All deeds, mortgages and other instruments of writing which are required to be recorded, shall take effect and be in force from and after the time of delivering the same to the register of deeds for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice whose deeds, mortgages and other instruments shall be first recorded: provided, that such deeds, mortgages or instruments shall be valid between the parties." This statute has been in force since 1857, and was re-enacted by the legislature of 1887. The statute just quoted was first construed by this court in Bennet v. Fooks, 1 Neb. 465. In that case, Fooks made a mortgage on the 2d of October, 1857, upon certain real estate. This mortgage was not filed for record until

April 6, 1858. One Moffit obtained a judgment against Fooks in December, 1857, on which an execution was issued and levied upon the mortgaged real estate, and the same was sold to him on the 30th of January, 1858, and on that date the sheriff issued to him a certificate of the sale. Up to this time, Moffit had no knowledge of the existence of the mortgage. At that time the law did not require judicial sales to be confirmed by the court, and the certificate of sale issued by the sheriff to the purchaser at the judicial sale entitled the latter to a deed for the premises, unless the execution debtor redeemed them within a certain time. In a suit to foreclose the mortgage, brought subsequent to the date it was filed for record, the court held that the purchaser of the real estate at the execution sale had acquired a title divested of the lien of the mortgage. The construction of the section of the statute quoted above was again before the court in Galway v. Malchow, 7 Neb. 285; and in that case the court overruled Bennet v. Fooks, supra, and held, in effect, that a title or lien to real estate, based on an unrecorded conveyance thereof, would prevail over a title thereto based on a judicial sale of said real estate, provided the unrecorded conveyance should be filed for record before the conveyance based on the judicial sale was recorded. To the same effect are Mansfield v. Gregory, 8 Neb. 432, 1 N. W. 382; Harral v. Gray, 10 Neb. 186, 4 N. W. 1040; Mansfield v. Gregory, 11 Neb. 297, 9 N. W. 87; Hubbart v. Walker, 19 Neb. 94, 26 N. W. 713. To state the effect of the cases quoted above by paraphrasing the language of Cobb, J., in Harral v. Gray, supra: A prior, unrecorded deed, passing the legal title, made in good faith, for a valuable consideration, will take precedence of a title based on a judicial sale made under an attachment or execution, if such deed be recorded before the evidence of the title based on the judicial sale is recorded. Applying the doctrine of these cases last cited to the facts of the case at bar, it is clear that, if Keens' title depends upon the construction of the statute quoted above, it must fail, for two reasons: (1) The deed which he obtained to the real estate, in pursuance of the judicial sale made thereof, was not filed for record in the office of the register of deeds until after the deed made by McElheney to Sheasley was recorded; and (2) before the judicial sale was confirmed, on which Keens' title was based, he had actual knowledge that Sheasley claimed title to the real estate by virtue of the McElheney deed.

2. Section 85 of the Code of Civil Procedure, so far as the same is material here, is as follows: "When the summons has been served or publication made the action is pending so as to charge third persons with notice of pendency, and while pending, no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's title; provided however, that in all actions brought to affect the title to real property the plaintiff may either at the time of filing his petition or afterwards file, or in case any defendant sets up an affirmative cause of action and demands relief which shall affect the title to real estate, may at the time of filing such answer or any time afterwards, file with the clerk or register of deeds of each county in which the said real estate thus to be affected or any part thereof may be situated, a notice of the pendency of such action, containing the names of the parties, the object of the action and a description of the property in such county sought to be affected thereby. * * * From the time of filing such notice shall the pendency of such action be constructive notice to any purchaser or incumbrancer to be affected thereby and every person whose conveyance or incumbrance is subsequently executed or subsequently recorded shall be deemed to be a subsequent purchaser or incumbrancer, and shall be bound by all proceedings taken in said action, after the filing of such notice to the same extent as if he were made a party to the action." That part of section 85 of the Code of Civil Procedure quoted above, preceding the words "provided however," has existed in this state, for many years, as section 85 of the Code of Civil Procedure. In the year 1887 (see Sess. Laws 1887, p. 643) the legislature amended said section 85 by adding to it the words "provided however," and all the language which follows those words. Counsel for the appellant now contends that his client's title to the real estate in controversy does not depend upon said section 4108, Comp. St. 1895, quoted above, and the construction placed on said section by the decisions of this court above cited, as said decisions were all rendered prior to the said amendment of said section 85. Counsel's contention is that by reason of the lis pendens filed by Keens at the time he brought his suit against McElheney, and caused the real estate in controversy to be attached, Sheasley was, in effect, made a party to that action; that the lis pendens operated as constructive service upon Sheasley, and bound him by the judgment rendered in the suit of Keens against McElheney, in the same manner and to the same effect as he would have been bound had he been in fact a party defendant to that action, and served with constructive service; and that, as Sheasley made no defense to that suit,—did not appear therein and set up his claim of title,—he cannot now question in this, a collateral proceeding, appellant's title. This is doubtless a correct construction of said section 85 of the Code of Civil Procedure, as it now exists; and this brings us to a consideration of the provisions of the amendment to said section made by the legislature in 1887.

The section, as it stood prior to the amendment, was as follows: "When the summons has been served or publication made

the action is pending so as to charge third persons with notice of pendency and while pending no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's title." The Roman or civil law provided that "a thing concerning which there is a controversy is prohibited during the suit from being alienated." Benn. Lis Pend. 63. And one of the rules adopted by Lord Bacon, when chancellor of England, was in this language: "No decree bindeth any that cometh in bona fide by conveyance from the defendant before the bill exhibited and is made no party neither by bill nor order, but where he comes in pendente lite, and while the suit is in full prosecution, and without any color of allowance or privity of the court, there regularly the decree bindeth." Benn. Lis. Pend. 57. It will thus be seen that this section of the Code, as it existed prior to its amendment in 1887, was a legislative adoption of the equity rule of lis pendens that had existed from time immemorial. Doubtless, the rule owed its origin to considerations of public policy, and was designed to give force and effect to decrees affecting property, and to inspire confidence in titles based on such decrees. By the provisions of said section 85, as it existed prior to this amendment, third persons acquiring an interest in property in litigation were only bound by the judgment rendered in such action if they acquired their interest in the property after such action was pending, and the action was declared to be pending after the summons had been served or publication made on the defendants to the action. An analysis of the amendment made by the legislature shows that two things were attempted: (1) To make a lis pendens filed at the time an action or cross action was brought, affecting the title to real estate, constructive notice to persons, not parties to the suit, acquiring any interest in the subject-matter thereof, from the time of the filing of such lis pendens, instead of from the time when the suit pended as to the defendants therein. We know of no provision of the constitution which this part of the amendment violates. It is not amendatory of, nor does it conflict with, any other statute prescribing the time in which a suit shall be deemed pending as to persons not made parties thereto. It is not in conflict with section 19 of the Code of Civil Procedure, because that section of the Code prescribes the time in which an action shall be deemed pending as to the defendants thereto. But the amendment under consideration attempts to make a lis pendens filed at the commencement of an action or cross action affecting the title to real estate, or a lis pendens filed any time after the commencement of such action or cross action, constructive notice to the holders of unrecorded conveyances or incumbrances of such real estate, though executed prior to the time of the filing of such lis pendens. The holder of an unrecorded deed or mortgage affecting the real estate involved in the litigation in which the lis pendens is filed, though such mortgage or deed was executed long prior to the time of the filing of the lis pendens, is, by the amendment, in effect, made a party to the suit in which the lis pendens is filed, and declared to be bound by the judgment rendered in that action, in the same manner as if he was in fact made a party to the suit and served with notice by publication. Section 77 of the Code of Civil Procedure—in force when the amendment under consideration was enacted, and in force long prior to that time—defines in what cases constructive service may be had, and upon what persons; and, by this section, constructive service is limited to nonresidents of the state and foreign corporations, except where the defendant, being a resident of the state, has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of summons, or keeps himself concealed therein with a like intent. It will thus be seen that the legislature, by enacting the amendment to said section 85, has amended section 77 of the Code of Civil Procedure, providing for constructive service. The title to the act by which the section was amended is as follows: "An act to amend section 85 of the Code of Civil Procedure in regard to lis pendens and to repeal said original section." Nowhere in the title of this act is any reference whatever made to constructive service, or to the statutes upon that subject. The title of the act does not purport to deal with the subject of constructive service, nor amend section 77 of the Code of Civil Procedure. In other words, the legislation embraced in the amendment is entirely foreign to the object of the act as expressed in its title. It therefore violates section 11, art. 3, of the constitution, which declares that "no bill shall contain more than one subject and the same shall be clearly expressed in its title and no law shall be amended unless the new act contain the said section or sections so amended and the section or sections so amended shall be repealed." See, also, Smails v. White, 4 Neb. 353; City of Tecumseh v. Phillips, 5 Neb. 305; Sovereign v. State, 7 Neb. 409; State v. Pierce Co., 10 Neb. 476, 6 N. W. 763; State v. Lancaster Co., 17 Neb. 85, 22 N. W. 228; State v. Corner, 22 Neb. 265, 34 N. W. 499.

We reach the conclusions, therefore: (1) That so much of the amendment to section 85 of the Code of Civil Procedure, passed and approved March 31, 1887, as makes a lis pendens, filed at the commencement of an action or cross action affecting the title to real estate, constructive notice of the suit, to all persons not parties thereto, and thereafter dealing with the subject-matter thereof, is valid. And persons who acquire an interest in the subject-matter of a suit affecting the title to real estate will hold such in-

terest subject to the disposition made of the real estate by the judgment finally pronounced in the action. (2) That so much of said amendment as makes a lis pendens filed at the commencement of an action or cross action affecting the title to real estate, or a lis pendens filed at any time after the commencement of such action or cross action, constructive notice of such action, to the holders of liens, incumbrances, or conveyances of said real estate executed prior to the filing of such lis pendens, is unconstitutional and void. The decree of the district court is right, and is affirmed. Affirmed.

VAN ETTEN v. EDWARDS.

(Supreme Court of Nebraska. April 10, 1896.)

DIRECTING VERDICT.

It is error to direct a verdict for the defendant, when the evidence is sufficient to warrant a finding and judgment for the plaintiff.

(Syllabus by the Court.)

Error to district court, Douglas county; Scott, Judge.

Action by Emma L. Van Etten against Dell R. Edwards. Verdict directed for defendant, and plaintiff brings error. Reversed.

D. Van Etten, for plaintiff in error. McClanahan & Halligan, for defendant in error.

NORVAL, J. This was an action by Emma L. Van Etten against Dell R. Edwards to recover the sum of $397.77, with 8 per cent. interest thereon from April 9, 1890. At the close of the plaintiff's testimony the court instructed the jury to return a verdict for the defendant, which was accordingly done, and judgment was entered upon the verdict.

David Van Etten was the only person who gave evidence in the case. He testified that he offered to sell to the defendant, through her agent, John B. Edwards, three promissory notes, aggregating the sum of $400, given by J. Buls, dated March 17, 1887, and secured by a chattel mortgage; that Mr. Edwards said that he would look at the property securing the notes, and subsequently, on December 1, 1887, he came to Mr. Van Etten, and proposed to let him have $100 on the notes, saying that he would collect the mortgage and pay Van Etten all above $115. This proposition was accepted, the $100 was paid, and the following instrument was executed by the defendant: "Omaha, Nebr., December 1, 1887. I have this day bought of David Van Etten three promissory notes for one hundred and thirty three $^{33}/_{100}$ dols., one hundred and thirty three $^{33}/_{100}$ dols., one hundred and thirty three $^{33}/_{100}$ dols., respectively, signed by J. Buls, and payable to Mari Kochem, or order, and dated March 19, 1887, and secured by a certain chattel mortgage upon goods and chattels of said J. Buls, in Sarpy Co. I hereby agree with said David Van Etten to pay him all sums of money, notes, or securities realized upon a settlement with J. Buls, or a foreclosure of said mortgage, over and above the sum of one hundred and fifteen dollars and the expenses and costs of said settlement or foreclosure, provided said settlement or foreclosure is obtained on or before the expiration of sixty days from the date of this agreement, and I hereby agree to proceed under said mortgage within fifteen days from the aforesaid date thereof. Dell R. Edwards, by J. E. Edwards, Her Atty. in Fact." Before this action was brought, the foregoing instrument was duly assigned, for a valuable consideration, to the plaintiff, by Mr. Van Etten; Mr. Buls paid his note to the defendant without foreclosure of the mortgage; and the latter has failed and refused to account to the plaintiff for any portion thereof, although requested to do so. Mr. Van Etten further testified that the three notes signed by Buls were left with the defendant as collateral security for the loan of $100.

It was attempted to be shown on the witness' cross-examination that he gave a bill of sale of the notes to the defendant at the time the paper copied above was executed; but, if such a bill of sale was given, it was neither established by the evidence nor introduced on the trial. It appears, from the testimony, that the defendant did not proceed to collect the money from Mr. Buls by foreclosure within the time specified in the contract, but, on the contrary, that defendant's agent, Mr. Edwards, stated to Van Etten that he considered it better to collect the money without foreclosure, and the latter agreed to this. The answer sets up that Mr. Van Etten made certain false representations to the defendant, whereby she was induced to sign the instrument already mentioned, but no proof was offered in support of such averment. Under the evidence, a verdict should have been returned for the plaintiff for the difference between the amount collected by the defendant on the three notes of Buls, with interest thereon, less $115. It follows that the court erred in directing a verdict for the defendant, for which error the judgment must be reversed, and the cause remanded. Reversed and remanded.

SLOAN, Sheriff, v. BAIN.

(Supreme Court of Nebraska. April 10, 1896.)

TRESPASSING ANIMALS—LIEN—NOTICE.

1. One taking up stock trespassing upon his cultivated lands must, in order to preserve the lien allowed for his damages, comply substantially with the provisions of our herd law. Comp. St. c. 2, art. 8.

2. The question of reasonableness of the notice required to be given the owner of stock so taken up, if known, is generally one of fact, depending upon the circumstances of the particular case.

(Syllabus by the Court.)

Error to district court, Pawnee county; Bush, Judge.

Action by Brison Bain against J. G. Sloan, sheriff. Judgment for plaintiff, and defendant brings error. Reversed.

G. E. Becker and W. W. Giffen, for plaintiff in error. D. D. Davis and C. N. Mayberry, for defendant in error.

POST, C. J. This was an action of replevin, commenced before a justice of the peace for Pawnee county, from whence it was taken by appeal to the district court for said county, when a trial was had, resulting in a verdict and judgment for Bain, the plaintiff therein, and which has been removed into this court for review by means of the petition in error of Sloan, the defendant below.

The facts out of which the controversy arose are briefly stated as follows: One George Gartner, in the month of March, 1892, took up certain cattle, the property of the defendant in error, Bain, found trespassing upon his (Gartner's) cultivated land, in Pawnee county. Fifteen days later he caused Bain to be served with notice, of which the following is a copy: "Mayberry, Neb., April 12, '92. Mr. Brison Bain: You are hereby notified that on the 28th day of March, 1892, I took up some stock that I listed as strays, and, from information I have received, I am led to believe that they belong to you. I have ten now in my possession, and they are described as follows: * * *. Which animals did trespass upon my lands, and, as I thought that the said animals were strays, I took them up as strays, and listed them as required by law. The amount of damages said stock done I have placed at $25. You are required to pay the above charges within forty-eight hours from the delivery of this notice, or said stock will be sold as provided by law. I have appointed Mr. W. F. Parker to act as arbitrator, should you not feel satisfied with the amount of damages in the within notice. George Gartner." Bain, it appears, paid no attention to the foregoing notice, and Gartner in due time filed his claim, with proof of service, with Joseph Brown, a justice of the peace for said county, who found that the cattle in question had been taken up while trespassing upon Gartner's land, and ordered them sold to satisfy the damage of the latter, assessed at $25. A writ was thereupon issued to the defendant below, Sloan, commanding him, as sheriff, to sell said cattle as upon execution; but, before the day appointed for the sale, they were taken from his possession by virtue of the order of replevin in this cause.

Gartner, without doubt, had a lien upon the cattle in controversy, when taken up by him, for the amount of his damage. Hence our investigation involves a single inquiry, viz. whether such lien existed in his favor at the time this action was commenced. It has been frequently held that one taking up stock while trespassing upon his premises must, in order to preserve the lien allowed for his damages, comply substantially with the provisions of our herd law with respect to notice, etc. Comp. St. c. 2, art. 3; Haggard v. Wallen, 6 Neb. 271; Bucher v. Wagoner, 13 Neb. 424, 14 N. W. 160; Hanscom v. Burmood, 35 Neb. 504, 53 N. W. 371. Although, as said in the case last cited, notice must be given to the owner of stock so taken up, if known, within a reasonable time, the question is generally one of fact, depending upon the circumstances of the particular case; and it cannot be asserted, as a proposition of law, that the time in this case, 15 days, is unreasonable, there being no evidence tending to prove knowledge by Gartner of Bain's ownership previous to the date of the notice above set out. There was proof of a tender by Bain, before the commencement of this action, of the sum of three dollars, in satisfaction of Gartner's lien; but there was no evidence whatever tending to show the amount of the damage actually suffered by the latter. The evidence is entirely free from conflict, and suggests no reason for holding that the statutory lien upon the cattle impounded has been discharged by act of Gartner or by operation of law. It follows that the right of possession of the property in controversy was, at the time this action was commenced, in the plaintiff in error. The judgment is accordingly reversed, and the cause remanded for further proceedings in the district court. Reversed and remanded.

FARMERS' LOAN & TRUST CO. v. MEMMINGER, County Treasurer, et al.

(Supreme Court of Nebraska. April 10, 1896.)

TAXATION OF PERSONALTY — LIEN — PRIORITY — HARMLESS ERROR.

1. Taxes assessed on personal property are a lien from and after the delivery of the tax list to the county treasurer upon all the personal property owned by the person assessed. Reynolds v. Fisher, 61 N. W. 695, 43 Neb. 172, followed.

2. The lien of such taxes is paramount to the lien of a chattel mortgage executed after the delivery of the tax list to the county treasurer.

3. The admission of immaterial evidence in a cause tried to a jury is no ground for reversal, where it had no effect on the result, and the verdict could not have been different had the objectional evidence been excluded.

(Syllabus by the Court.)

Error to district court, Madison county; Allen, Judge.

Action by the Farmers' Loan & Trust Company against T. F. Memminger, as county treasurer, and the sureties on his bond. Judgment for defendants. Plaintiff brings error. Affirmed.

Wigton & Whitham, for plaintiff in error. Robinson & Reed, for defendants in error.

NORVAL, J. On the 13th day of December, 1888, James McMahon executed a chattel mortgage on certain personal property to the plaintiff, the Farmers' Loan & Trust Company, to secure the payment of $500, which was the next day duly filed in the county clerk's office of Madison county. To secure the said sum, on October 9, 1889, McMahon executed another mortgage to the plaintiff, upon the same property described in the prior mortgage, and also a pony and colt, and a copy of the instrument was duly filed the following day. Personal taxes were legally assessed and levied against said McMahon, in Madison county, for the years and amounts following: 1880, $10.31; 1881, $14.39; 1884, $13.50; 1885, $13.78; 1886, $10.14; 1887, $6.93; 1888, $4.81; 1889, $11.97. The tax list covering these taxes, with the warrants required by law duly attached, were delivered to the county treasurer of Madison county for collection; and, all of said taxes remaining unpaid, the defendant T. F. Memminger, as such treasurer, seized on January 27, 1890, the mortgaged chattels, for the satisfaction of the above taxes due the county, while the property was in the possession of plaintiff under its mortgages, and sold the same, applying the proceeds to the payment of said taxes. Plaintiff thereupon brought this action, on the treasurer's bond, for the conversion of the property, and from a verdict and judgment for the defendants the plaintiff prosecutes error to this court.

The petition in error contains 28 assignments, only three of which are argued in the brief of plaintiff, and the others must be regarded as waived, and will not be considered.

Objection is made to the following instruction given by the court on its own motion: "Under the law of this state, as it existed during the period covered by the transactions involved in this case, the taxes assessed upon the personal property of a citizen were a lien upon the personal property of such person from and after the time the tax books were received by the tax collector; and this lien would continue against all personal property owned and in the possession of the delinquent in the county, so long as the tax remained upon the tax books and unpaid, and a person taking a chattel mortgage upon any of such property would, by the record of such tax, be charged with the notice of such tax lien." It is argued in the brief that this instruction is erroneous, in stating that personal taxes are a lien on the personalty of the person assessed, from the date of the delivery of the tax list to the county treasurer. It is insisted that the lien of such taxes, in this state, does not attach until after the treasurer or tax collector receives the tax books or lists, a demand has been made upon the taxpayer for the payment of the taxes assessed, and a levy has actually been made by the officer. There is some support for this contention in the authorities cited from the state of Illinois, and the language used in the decision of this court in Hill v. Palmer, 32 Neb. 632, 49 N. W. 718. In Hill v. Palmer the property was purchased, without actual notice of the lien for taxes, two days prior to the date of the tax warrant issued by the township collector, and the levy thereunder. It did not appear when the tax books were delivered to the collector. The court held that the property sold was not subject to sale for the taxes assessed against the vendor. The case referred to was, in effect, overruled by the decision of Reynolds v. Fisher, 43 Neb. 173, 61 N. W. 695, where the precise question here involved was passed upon, adverse to the contention of this plaintiff. In that case the tax debtor executed chattel mortgages upon the property after the delivery of the tax book to the county treasurer. The possession of the property was delivered to the mortgagees, and the county treasurer brought replevin; claiming the right of possession, as such officer, under and by virtue of the statutory lien for the personal taxes previously levied against the mortgagor. No levy for the taxes had been made by the treasurer, nor was any payment of the taxes demanded until after possession had been taken under the mortgages. This court reversed the judgment of the district court; holding that personal taxes are a lien from the delivery of the tax list to the treasurer, not only upon the personalty assessed, but on all such property subsequently acquired by the taxpayer, and the lien for such taxes is paramount and superior to the liens created by the chattel mortgages executed after the tax list has come into the hands of the county treasurer. Section 139, art. 1, c. 77, Comp. St., which provides that "the taxes assessed upon personal property shall be a lien upon the personal property of the person assessed, from and after the time the tax books are received by the collector," was construed in that case, and we are entirely content with the interpretation then given it. The statute is too plain to admit of any other construction. To hold that personal taxes are not a lien until the property has been seized by the treasurer would be the rankest kind of judicial legislation. The instruction quoted is in harmony with the decision in Reynolds v. Fisher, supra, and was applicable to the evidence.

It is claimed that there was a balance in the treasurer's hands, arising from the sale of the property, of $16.73, after the payment of the taxes, and that plaintiff was entitled to a judgment for that sum. This contention is not tenable, since the action is for the conversion of the property, and not to recover any surplus that may be in the hands of the officer. There is no averment in the petition that there was such a surplus, nor is any demand for its payment alleged. The plaintiff brought its case upon the theory that the liens of the chattel mortgages were superior to the lien for taxes, and that was the issue tried.

Lastly, it is claimed that the court erred in

permitting to go in evidence Exhibit N, the record of the proceedings of the county commissioners of Madison county, under date of July 11, 1889, instructing the county treasurer to collect all delinquent taxes prior to the year 1888. We agree with counsel that that was wholly immaterial, since the law makes it the duty of the county treasurer to collect delinquent taxes without any orders or directions from the county board. Plaintiff, however, was not prejudiced by the introduction of this record; for, had it been excluded, no other verdict could have been returned, under the evidence properly admitted. Terry v. Starch Co., 43 Neb. 866, 62 N. W. 255. The judgment is clearly right, and it will be affirmed.

SMITH v. SMITH.

(Supreme Court of Nebraska. April 10, 1896.)

APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.

1. When the verdict is warranted by the proof, on conflicting evidence, it will not be set aside.

2. Evidence considered, and *held* to have been sufficient to sustain the verdict.

(Syllabus by the Court.)

Error to district court, Hamilton county; Bates, Judge.

Action by Welcome Smith against J. H. Smith. Judgment for plaintiff, and defendant brings error. Affirmed.

E. J. Hainer, for plaintiff in error. M. Randall, for defendant in error.

NORVAL, J. This was an action by Welcome Smith against J. H. Smith to recover the sum of $50, and interest thereon, alleged to be due from the latter to the former on account of a land deal. Upon a trial to a jury, the plaintiff recovered a verdict, upon which judgment was subsequently rendered, and the defendant has brought the record here for review.

No legal proposition is presented for our consideration. The only question in the case is whether or not the verdict is sustained by the proofs. The uncontradicted evidence discloses the following facts: In 1886, John Viotle commenced an action in the district court of Hamilton county against N.. B. Kizer, Welcome Smith (the plaintiff herein), and several others, to foreclose a mortgage upon certain real estate, situate in the said county, near the town of Phillips. Subsequently, Rebecca B. Hitchcock, through her attorney, J. H. Smith, the defendant herein, intervened, and filed an answer and cross petition in the cause, setting up a first mortgage upon the same premises, and praying a foreclosure thereof. On the 2d day of May, 1887, a decree was entered foreclosing both mortgages, the mortgage of Hitchcock being declared the first lien upon the premises for the sum of $566.95, and Viotle was awarded a second lien for the sum of $194.54,—both sums to draw 10 per cent. interest from the date of the decree. An order of sale was subsequently issued, and on the 17th day of September, 1887, the mortgaged real estate was sold thereunder, by the sheriff, to said Welcome Smith, for the sum of $800. No portion of the bid was paid down. On October 5, 1887, the defendant herein wrote a letter to plaintiff's attorney, W. R. Bacon, of Grand Island, but now located at Los Angeles, Cal., urging the payment by plaintiff of the amount of his bid at once. The next day plaintiff went to Aurora, and saw defendant in regard to the matter. Court was then in session, and the latter urged strongly the payment of the money, so the sale might be confirmed. It was finally arranged that plaintiff should pay $400 to the defendant, as attorney for Hitchcock, and plaintiff would negotiate a loan to raise the remainder of the purchase money. The $400 was paid as agreed. At the same time some sort of an understanding was had, between plaintiff and defendant, to the effect that, if the former could not raise the remainder of the purchase price, the latter would do so, and the bid was to be assigned to him. Plaintiff attempted to make a loan upon the premises, but did not succeed in his efforts. On October 11, 1887, plaintiff and his attorney, Mr. Bacon, went to Aurora to see the defendant for the purpose of making a settlement of the matter. They saw the defendant, an understanding between the parties was reached whereby the plaintiff transferred his bid to the defendant, and his interest in the premises, and the latter, on said day, returned to the former the $400 already mentioned. The defendant also agreed conditionally to pay plaintiff $50 as a bonus. The sheriff thereafter made return of the order of the sale, naming therein the defendant as purchaser. On the 8th day of May, 1888, the sale was approved and confirmed by the court. It is to recover the above sum of $50 that this action was brought, the plaintiff claiming that the condition or stipulation accompanying the agreement to pay said sum has been fulfilled, and therefore a cause of action has accrued in his favor for the money.

There is no dispute but that the defendant agreed to pay plaintiff $50 on account of the transaction already mentioned. The controversy is one over the condition or conditions accompanying the promise to pay. The plaintiff insists that the sole condition imposed was that the sale should be confirmed by the court in the name of the defendant as purchaser; while the defendant contends that he was to pay the plaintiff $50 providing the sale was confirmed, that the defendant should make sale of the premises to one Alfred W. Mason, at the time a prospective purchaser, and that Mr. Bacon should obtain a loan for the latter, on the land, of $700, at 8 per cent. interest. No sale of the property to Mason was effected, nor was the loan to

him made. So, if the agreement was as defendant insists, no recovery can be had in this case. There were but three persons present when the contract in question was made,—plaintiff, defendant, and Mr. Bacon; and they gave testimony upon the trial. The plaintiff testified, positively, that the sole condition attached to the agreement of the defendant to pay him $50 for his interest was that the sale should be confirmed in the name of the defendant. Mr. Bacon testified, by deposition, to the agreement of the defendant to pay the plaintiff the sum stated, if certain contingencies should happen, the nature of which the witness did not remember. The defendant's testimony sustains his own contention as to the terms of the agreement; and his is, to some extent, corroborated by the letters which passed between himself and Mr. Bacon subsequent to the date of the settlement, and which are found in the bill of exceptions. The defendant also gave testimony to the effect that, on May 7, 1888, prior to the confirmation of the sale, plaintiff came to see him about the payment of the $50, when defendant informed him that he did not intend to take the land, and urged plaintiff to raise the money, stating that, if he did not do so, defendant would have the sale set aside; that plaintiff replied: "If you don't have the sale confirmed, and let me go home, I think I can raise the money in two or three days. If I cannot raise the money, I will send you word, and you can have the sale confirmed in your name, and you take it at the bid." The witness further testified that they both went to Mr. Valentine, the then sheriff, and plaintiff stated to the officer that, if he sent the money, the sale was to be confirmed in his name,—otherwise, the defendant was to take the property at the bid, and pay nothing more, and the sheriff was to change his return on the order of sale, to show that defendant was the purchaser; that on the next day the following letter was received from the plaintiff, which was introduced in evidence: "Grand Island, May 8, 1888. Mr. J. H. Smith—Dear Sir: You can have the sale confirmed in your name, and I will see you when you come to Grand Island. Respt., Welcome Smith." The defendant is corroborated by the testimony of F. E. Valentine, the officer who made the sale, as to the conversation mentioned above as having taken place May 8th, while the plaintiff, in his testimony, denies that any such conversation occurred.

The testimony adduced is hopelessly irreconcilable, not only as to the terms of the contract entered into on October 11th, but whether the same was subsequently modified or rescinded by the parties. The jury heard the witnesses, weighed their evidence, and decided all conflict therein in favor of the plaintiff; and the trial court approved the same by refusing a new trial. Their finding cannot be disturbed by us, unless shown to be clearly and manifestly wrong, or without sufficient evidence to support it. We have thrice read the testimony, and find that that introduced by the plaintiff is not only reasonable and consistent in all its parts, but, if accepted as true, and disregarding the proofs on the other side, it makes out the cause of action alleged. Under the evidence the jury could have returned a verdict for the defendant; but, as there is not a total want of evidence upon any essential point to sustain the verdict, it must stand. This is in accordance with the well-established rule in this court. The judgment is affirmed.

LE HANE v. STATE.

(Supreme Court of Nebraska. April 10, 1896.)

CONTEMPT—WHAT CONSTITUTES—PROCEDURE.

1. It is the right of a party to an action, and of his counsel, to apply to the judge before whom the case would naturally come on for hearing, for the purpose of having another judge try the case, because of prejudice on the part of the first judge which would prevent an impartial trial.

2. The presenting of such an application, in respectful language and in a respectful manner, is not of itself a contempt of court.

3. Such an application must be supported by evidence, and the tender of such evidence is not a contempt of court, when made in good faith, for the purpose of proving such prejudice, and not for the purpose of reflecting upon the judge's honor, integrity, or character.

4. When such proof is of a documentary character, the presenting of the application, if it is so made in good faith, is not a contempt of court merely because the documents offered in evidence do reflect upon the character of the judge, and even though their original publication may have been contemptuous or libelous.

5. In a summary proceeding a person making such an application cannot be punished for contempt because of the character of the original publication of such documents, or of improper motives in making the application. Such a proceeding must be based on information as for constructive contempt.

6. An attorney at law applied to a district judge for an order transferring a cause to another judge for trial, because of prejudice on the part of the first. He supported the application by proof that he had published a libel of and concerning the judge to whom the application was made, and attached a copy of the libelous publication to his affidavit. The application was itself made in respectful language, and it did not appear that it was not presented in a respectful manner. *Held*, that the attorney could not be summarily convicted of contempt, without an information and trial, because of matter contained in the libelous publication.

(Syllabus by the Court.)

Error to district court, Gage county; Bush, Judge.

William C. Le Hane was convicted of contempt, and brings error. Reversed and dismissed.

L. M. Pemberton, E. O. Kretsinger, R. W. Sabin, S. D. Killen, and W. S. Summers, for plaintiff in error. A. S. Churchill, Atty. Gen., and Geo. A. Day, Dep. Atty. Gen., for the State.

IRVINE, C. The plaintiff in error was, in the district court of Gage county (Judge Bush presiding), adjudged to be guilty of contempt, and sentenced to pay a fine of $100, and to be imprisoned in the county jail, in the cell thereof, for the period of 10 days. The record discloses that the plaintiff in error is a member of the bar of Gage county, and represented plaintiffs in error in three cases brought on error to the district court from the county court. The plaintiff in error in each case was a corporation. Le Hane filed objections to the hearing of said cases, at the time when they had been set for hearing, for certain reasons, not necessary to be here set forth. These objections were by the court stricken from the files, whereupon Le Hane filed a motion for a change of venue, which was stricken from the files for the reason that it was unsupported by any evidence, or by statement of any reasons therefor. Le Hane then filed a formal motion, supported by his own affidavit, asking for an order transferring the cases in question to Judge Babcock, the other judge of the First district at that time, or to some other district judge, on account of prejudice alleged to exist on the part of Judge Bush against Le Hane and his clients. On the presenting of this application, Judge Bush caused these proceedings to be instituted, and, without information filed, trial, or hearing, made the finding and imposed the sentence complained of. The nature of the motion has been stated. It merely alleged prejudice in general terms. The affidavit of Le Hane in support of the motion was to the following effect (omitting portions which clearly could not have been considered by the district court as contemptuous, or connected with contemptuous conduct): That Le Hane had frequently heard Judge Bush express himself against corporations, as being opposed to the interests of the general public and the average individual, and that he believed Judge Bush to be prejudiced in favor of individuals and against corporations; that Le Hane had had cases in which he had represented corporations or nonresidents, as opposed to residents, of Gage county, and believed that Judge Bush, in trying said cases, was prejudiced against Le Hane's clients because they were corporations or nonresidents; and that such prejudice controlled his rulings, to the detriment of Le Hane's clients. Further, the affidavit set forth that Le Hane, for several months past, had been chairman of the Gage county Republican central committee, and that Judge Bush was a candidate for re-election as district judge on a ticket opposed to the Republican ticket; that, as chairman of such committee, it was Le Hane's duty to, and he did, assist in publishing a supplement to the Beatrice Times, a copy of which is attached to the affidavit; that Judge Bush had been much exasperated by the publication of said supplement; that, the evening that said supplement appeared, Mr. Charles E. Bush, a son of Judge Bush, had made an assault upon the editor of said Beatrice Times; that, later in the evening, Le Hane being in the office of the Times, assisting in publishing said supplement, Judge Bush and his son were in the office of the newspaper, and had full knowledge of Le Hane's connection with the supplement; and that at that time Mr. Charles Bush asked Le Hane where he expected to practice law after the 1st of January, indicating by what he said that Le Hane would be unable to practice before Judge Bush. Le Hane further averred in the affidavit that he had at no time "attempted to curry favor with said Judge J. E. Bush, by indicating to him in any way that he was not in sympathy with the statements contained in the Times," and that, on the evening in question, Le Hane had some controversy with Judge Bush in regard to that publication, in which Judge Bush said that the statements contained therein were untrue, and Le Hane insisted that they were true. It is unnecessary to set forth any of the matter contained in the so-called "supplement" attached to the affidavit. It is sufficient to say that the publication was, in general character, not unlike similar emanations from newspapers of various party affiliations, which have become, immediately preceding elections, so frequent that the toleration of their existence creates a serious doubt as to whether political managers are properly inspired with respect for sound public sentiment, or the law of libel. The finding on which the judgment of conviction was based is "that the said affidavit, together with the supplement to the Beatrice Times, which is attached and made a part of said affidavit, * * * is of itself, by reason of the contents therein contained, a contempt of this court, and it is a direct and uncalled-for and corrupt charge, without any reason, against the court, * * * and that said affidavit and supplement * * * tend to corrupt the administration of justice, and that it was and is a reflection upon the honesty and integrity of the court, * * * and that the filing and presenting to the court by the defendant is a contempt of this court." From this it appears that the court proceeded upon the theory that the filing and presenting of the affidavit, with the exhibit attached, were, because of the matter contained therein, in themselves, contemptuous, and warranted summary proceedings.

For acts contemptuous in their character, committed in the presence of the court, the court may inflict a summary punishment upon the offender, without information filed, or trial; but, when the acts constituting a contempt are not committed in the presence of the court, an information under oath, must be filed, and the defendant is entitled to a trial of the facts therein alleged. Gandy v. State, 13 Neb. 445, 14 N. W. 143; Ludden v. State, 31 Neb. 429, 48 N. W. 61; Hawthorne

v. State, 45 Neb. 871, 64 N. W. 359. It is a necessary consequence of this rule that where the act committed in the presence of the court is not of itself contemptuous, but its character as such can only appear through its connection with facts not so within the direct, personal cognizance of the court, an information is equally as necessary as where the whole act is committed outside the court's presence. Thomas v. People, 14 Colo. 254, 23 Pac. 326. A recurrence to this principle is necessary to a proper consideration of the case before us. The filing of a motion, supported by relevant proof, for the purpose of having another judge hear the cases in which Le Hane was engaged, was not, in and of itself, a contemptuous, or even an improper, proceeding. It is true that we have no express provision of law whereby a district judge is disqualified from sitting in a case because of bias or prejudice with regard to one of the parties. Comp. St. c. 19, § 37, provides that a judge is disqualified from acting as such, except by mutual consent of the parties, in any case wherein he is a party or interested, or where he is related to either party by consanguinity or affinity within the fourth degree, or where he has been counsel for either party in the action or proceeding. It will be observed that the basis of these grounds of disqualification is the presumption of prejudice arising from the facts. Perhaps the section is exclusive, in so far as it makes disqualification in such cases absolute, though this we do not decide. Section 61 of the Code provides that when it shall be made to appear to the court that the judge is interested, or has been of counsel in the case, or subject-matter thereof, or is related to either of the parties, or is otherwise disqualified to sit, the court may, on application of either party, change the place of trial to some adjoining county. We do not refer to these sections as controlling the proceedings in the case before us, but merely for the purpose of showing that there is nothing unwarranted by our law in applications for a purpose similar to that here made. Aside from these provisions, there are other provisions of the statute allowing judges of different districts to hold court for one another; and in the First district, where this action arose, there are two judges. Where, for any reason, a case is of such a character that there would be any impropriety in the judge before whom it would, in its orderly course, go for trial, presiding at the trial thereof, there is certainly nothing improper in—by a respectful application for that purpose—calling the facts to the attention of the judge, and requesting that another judge of that district, or of some other district, be called in to try the case. Certainly, if a prejudice of such a character as to prevent an impartial hearing exists against either party to a case, that would be sufficient reason for such an application; and the statement made to the court, in a respectful manner and in respectful language, of the reasons for such a course, could not sustain a conviction for contempt. Hawes v. State, 46 Neb. 149, 64 N. W. 699. As in the case last cited, there is nothing in this record to show anything improper or disrespectful in the manner in which this application was made.

As to the matter of the application, whether or not it was contemptuous depended upon circumstances. The gist of it was that the plaintiff in error believed Judge Bush prejudiced generally against corporations, to such an extent that his judicial conduct was influenced thereby, and, further, that the plaintiff in error had published, of and concerning Judge Bush, matter which, for the purposes of this case, we may assume to have been grossly libelous in its character, and that Judge Bush had exhibited a very natural resentment on account thereof. Now, the publication itself, as we have assumed, may have been libel, for which the plaintiff in error, under proper proceedings, should be punished. It may even have been a contempt of court. This we do not decide, because, if so, so far as the matter of the so-called "supplement" was concerned, the offense lay in its original publication; and, if it was a contempt, it was constructive, and could be punished only by trial on information. Having published it, to display it in support of the affidavit for a change of venue was not a contempt; at least, if the application was made in good faith, and the showing was made in an honest attempt to support the application with necessary proof. If objectionable matter was incorporated into the showing, not merely for its ostensible purpose of showing prejudice on the part of the judge, but also to reflect upon his honor, integrity, and character, the case might be different; but the presumption is that such proceedings were in good faith. Extrinsic evidence would have been necessary to establish such an improper motive; and therefore an information and trial would be necessary, to justify a conviction. These views are directly supported by Thomas v. People, 14 Colo. 254, 23 Pac. 326, and Mullin v. People, 15 Colo. 437, 24 Pac. 880.

To summarize the foregoing, a party to an action, or counsel, may, in good faith, apply to a judge, before whom a case would naturally come on for hearing, to have another judge try the case, because of prejudice on the part of the first judge which would prevent an impartial trial. Such an application, when presented in respectful language and in a respectful manner, is not, in itself, a contempt of court. Such an application must be supported by proof, and the tendering of proof in support thereof is not a contempt of court, when offered, in good faith, for the purpose of establishing the judge's prejudice, and not for the purpose of reflecting upon his honor, integrity, or character. When such proof is of a documentary character

the proceeding is not rendered contemptuous, when it is so conducted in good faith, merely because documents introduced do reflect upon the character of the judge, and even though their original publication might have been contemptuous or criminal; and finally, in a summary proceeding for contempt, the court cannot take notice of such original publication, or of such improper motive in making the application. To reach these matters the proceeding must be on information as for constructive contempt. Reversed and dismissed.

STORZ et al. v. FINKELSTEIN et al.

(Supreme Court of Nebraska. April 10, 1896.)

PLEADING—TIME FOR FILING—CONTINUANCE—INTOXICATING LIQUORS — ILLEGAL SALE — ACTION FOR PRICE—WRONGFUL ATTACHMENT—BURDEN OF PROOF.

1. The granting of permission to file a reply out of time, or during the trial, rests largely in the legal discretion of the trial court.

2. An order denying a continuance of a cause will not be reversed, except for an abuse of discretion.

3. Where intoxicating liquors are sold in this state for the purpose of enabling the person to resell them, contrary to, or in violation of, the laws of this state, and the vendor has the knowledge of the illegal purpose of the buyer, and participates with him in the illegal traffic, the sale is void, and no recovery can be had for the purchase price of the liquors thus sold.

4. In the absence of malice, an action for the wrongful suing out of an attachment can be maintained alone on the attachment bond. To maintain an action independently of the statute, and not on the bond, malice in suing out the writ, and want of probable cause, must be averred and shown. Jones v. Fruin, 42 N. W. 283, 26 Neb. 76.

5. In an action on an attachment bond, where the answer denies each allegation in the petition, the burden is upon the plaintiff to establish the execution of the bond, and to show that the attachment was wrongfully issued,—that is, that the ground stated in the attachment affidavit did not exist.

6. It is not enough that it be shown that the attachment was merely dissolved. Eaton v. Bartscherer, 5 Neb. 469, followed.

7. This court will not weigh the evidence to see if it sustains the verdict, when the bill of exceptions on its face reveals that a deposition introduced and read upon the trial has been omitted therefrom, even though the trial judge has certified that the bill contains all the evidence offered or given upon the trial.

(Syllabus by the Court.)

Error to district court, Douglas county; Keysor, Judge.

Action by L. M. Finkelstein against Gottlieb Storz and others in which there was a judgment for plaintiff. On the death of plaintiff, the judgment was revived in the name of Lena Finkelstein, administratrix, and John O. Malcolm, administrator. Defendants jointly and severally prosecute error. Reversed.

Lake, Hamilton & Maxwell, for plaintiffs in error. Estabrook & Davis and Chas. E. Clapp, for defendants in error.

NORVAL, J. This action was brought upon an attachment bond by Louis M. Finkelstein against Gottlieb Storz and Joseph D. Iler, as principals, and Theodore Olsen, as surety, upon said bond, to recover damages for the alleged wrongful suing out of a writ of attachment, and levying it upon certain personal property of the plaintiff. The petition contains the usual averments. Storz and Iler, in their answer, admit the bringing of the attachment suit, the filing of an affidavit for attachment, the issuing of the writ of attachment, the levying thereof on plaintiff's property, and that the court discharged the attachment. All other allegations in the petition they deny. They also aver that the affidavit for attachment was made in good faith, and that they had probable cause to believe the allegations therein contained were true. The answer further pleads, as a set-off, that plaintiff is indebted to Storz and Iler in the sum of $388.43, with interest thereon, on an account for beer sold and delivered to plaintiff at his request, for which amount, with interest, they pray judgment. The defendant Olsen answered by a general denial of each allegation contained in the petition. After the jury had been impaneled, a reply was filed by the plaintiff. The first and third paragraphs thereof were stricken out by the court, and the defendants filed a general demurrer to the second paragraph, which was overruled. There was a verdict in favor of the plaintiff for the sum of $999.92, and the defendants' separate motions for a new trial were overruled, and judgment rendered upon the verdict. Afterwards, on the death of the plaintiff, the judgment was revived in the name of Lena Finkelstein, his administratrix, and John O. Malcolm, his administrator. The defendants jointly and severally prosecute error.

The first error assigned is based upon the ruling of the trial court permitting the plaintiff to file a reply to the answer of Storz and Iler after the jury had been sworn. The matter of granting or refusing permission to answer pleadings, or to file pleadings out of time, or during the trial, rests largely in the legal discretion of the trial court; and this court will not interfere with a ruling in that regard, unless there has been an abuse of discretion. This is the settled law of this state. Hale v. Wigton, 20 Neb. 83, 29 N. W. 177; Brown v. Rogers, 20 Neb. 547, 31 N. W. 75; Ward v. Parlin, 30 Neb. 376, 46 N. W. 529; Blair v. Manufacturing Co., 7 Neb. 147. The discretion of the court below was not improperly exercised in allowing the reply to be filed.

Immediately upon the filing of the reply, the defendants asked the court to continue the cause, for the reason that they were unable to proceed to trial, on account of the reply putting in issue the averments in their answer, which request was denied by the court. In this it is claimed there was error, and section 147 of the Code of Civil Procedure

is cited to sustain the contention. This section provides that, "when either party shall amend any pleading or proceeding, and the court shall be satisfied, by affidavit or otherwise, that the adverse party could not be ready for trial in consequence thereof, a continuance may be granted to some day in term, or to another term of court." This section contemplates that a cause may be continued where a party, in consequence of the amending of the pleading of his adversary, is unable to go to trial. But the party seeking the postponement must satisfy the court of the existence of grounds therefor by affidavit or other testimony. An application for continuance is addressed to the discretion of the trial court, and it must appear that there has been a clear abuse thereof in denying it; else the ruling will not be disturbed in the appellate court. Trust Co. v. Hamer, 40 Neb. 281, 58 N. W. 695; Railroad Co. v. Conlee, 43 Neb. 121, 61 N. W. 111; Stratton v. Dole, 45 Neb. 472, 63 N. W. 875. The reply pleaded affirmative defenses to the set-off set forth in the answer, it is true; but the record fails to disclose that any showing was made in support of the motion for a continuance. The court below could not know, without such showing, that the defendants were unprepared to meet the issues tendered by the reply. If a postponement of the trial was desired, to meet the evidence which it was expected the plaintiff would adduce in support of the averments in his reply, the defendants should have made that fact to appear by proper testimony, giving the names of their witnesses, who were absent, the nature of their testimony, and that defendants expected to be able to procure the attendance of such witnesses or their testimony. In the absence of such showing, there was no error in refusing the continuance. Clark v. Carey, 41 Neb. 780, 60 N. W. 78; Insurance Co. v. Johnson, 43 Neb. 71, 61 N. W. 84; Corbett v. Bank, 44 Neb. 230, 62 N. W. 445; Dixon v. State, 46 Neb. 298, 64 N. W. 961.

The next contention is that error was committed in overruling the demurrer to the second paragraph of the reply, which is as follows: "(2) But said plaintiff avers that, upon the dates from July 1st to July 9th, inclusive, and in the meantime, said plaintiff had no license for the sale of malt or spirituous liquors; that such fact was well and fully known to said defendants; and that it was further known and understood between said parties, plaintiff and defendants, that such beer was purchased from said defendants by said plaintiff for the purpose of being bottled and resold by plaintiff. And plaintiff avers, by reason of such knowledge, and such understanding, and such fact, such sale was illegal and void, and no recovery thereon may be had by said defendants against said plaintiff. And plaintiff further says defendants entered into a written agreement, a copy of which is hereto attached and made a part hereof, whereby said defendants were to participate and profit in said illegal traffic, and did so participate and profit therein." The answer discloses that the account therein pleaded as a set-off, except as to three items, is for beer sold and delivered to the plaintiff between June 30, 1889, and July 10th of the same year. The defendants insist that the facts set up in the reply are insufficient to defeat a recovery for the purchase price of the beer sold between said dates, and numerous authorities are cited in the brief to the effect that the mere knowledge of the vendor that the vendee intended to put the liquors to an unlawful use, or to resell them in violation of the law, is not sufficient to render the sale void, or defeat an action brought by such vendor against the vendee to recover the purchase price of such liquors. We do not question the soundness of the adjudications to which the defendants have called our attention. Clearly, they are not applicable to the facts before us. The plaintiff does not rely upon the mere knowledge of the defendants that the beer was purchased for resale in violation of the laws of this state. Knowledge of the intended unlawful use is not only set up in the reply, but it is further averred that the beer was sold by Storz & Iler for the purpose that the law should be violated, and that they were to and did participate and profit in the unlawful traffic. The averments contained in the reply, if true, were sufficient to defeat a recovery of the purchase price of the beer sold between the dates above specified. Hence, the demurrer was properly overruled. Storz v. Finkelstein, 47 Neb. —, 65 N. W. 195.

It is contended that this action cannot be maintained against Storz & Iler for the reason they did not sign or execute the attachment undertaking. It is a fact that their names are not attached to said instrument, nor did they in any manner execute the same. Storz & Iler having procured the undertaking to be given, they thereby became liable to their surety for any and all damages he might be compelled to pay by reason of the wrongful suing out of the attachment; but it does not follow that they are parties to the instrument in such a sense that they are directly liable to the attaching defendant in a suit upon the undertaking. The statute does not require the attaching creditor to sign the attachment bond. It is sufficient if it be signed by the surety alone. Code Civ. Proc. § 200; Eckman v. Hammond, 27 Neb. 611, 43 N. W. 397; Howard v. Manserfield, 31 Minn. 337, 17 N. W. 946; Mercantile Co. v. Gardiner (S. D.) 58 N. W. 557; Pierse v. Miles, 5 Mont. 549, 6 Pac. 347. Should judgment be recovered on this bond against Olsen, the surety, and he should pay it, doubtless he could sue Storz & Iler, and recover from them the amount thus paid; but that is no reason why the latter are directly liable to the plaintiff on the bond. They may be, and doubtless are, liable for any damages that the plaintiff may have sustained if they

caused his property to be attached maliciously and without probable cause. But such remedy of the plaintiff is not upon the bond, but independent of it, in the way of an action for malicious attachment, in which case he would be compelled to allege and prove want of probable cause and malice. Jones v. Fruin, 26 Neb. 76, 42 N. W. 283. In an action upon the attachment undertaking, malice need not be either alleged or proved. We have no statute in this state which permits an attaching debtor to recover damages for the mere wrongful suing out of a writ of attachment except upon the bond; and, in the absence of such a statutory provision, such an action cannot be maintained. Jones v. Fruin, supra; Drake, Attachm. (7th Ed.) § 726; Tallant v. Gas Light Co., 36 Iowa, 262; Frantz v. Hanford, 87 Iowa, 469, 54 N. W. 474. This suit is upon the bond or undertaking given by the surety, which Storz & Iler have not executed. There is no averment in the petition that they maliciously, and without want of probable cause, procured the attachment to be issued and levied. Therefore, a cause of action is not made on paper as to Storz & Iler, and the judgment as to them must be reversed. The authorities are conflicting upon the question just discussed, but this court is committed to the rule stated, and it will be adhered to.

Error is assigned for the giving of the following instruction: "(1) In order that the plaintiff may recover in this action, he must satisfy you by a preponderance of all the evidence: First. That defendants Storz & Iler, in a suit brought by them against him, caused an attachment to be issued and levied on his bottling works. Second. That said attachment was dissolved in due course of law. Third. As to the amount of damages, if any, suffered by him as a direct result of the issuance and levy of said attachment. Fourth. That the attachment bond was duly executed by defendant Olsen." Section 200 of the Code of Civil Procedure provides that, "when the ground of attachment is, that the defendant is a foreign corporation, or a non-resident of the state, the order of attachment may be issued without an undertaking. In all other cases, the order of attachment shall not be issued by the clerk until there has been executed in his office, by one or more sufficient sureties of the plaintiff, to be approved by the clerk, an undertaking not exceeding double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay the defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained." The bond in this case is conditioned in accordance with the terms of the above section. Therefore, both under the bond and the statute, the surety is liable only for the damages resulting from the wrongful issuance of the attachment writ. In an action on an attachment bond, where the averments of the petition are put in issue by the answer, the burden is upon the plaintiff to establish that the writ was wrongfully obtained; in other words, that the ground stated in the affidavit for attachment did not exist, or was untrue. In case there is a failure to prove such fact, the suit must fail. It is not enough that it be shown that the attachment was dissolved, since the writ may have been discharged for omission or irregularities merely. It must further appear that the attachment was wrongfully issued; that is, no valid grounds existed for granting the writ. This is the rule stated by Lake, C. J., in Eaton v. Bartscherer, 5 Neb. 469. It follows that the instruction quoted was erroneous.

It is argued that the evidence is insufficient to sustain the verdict in two particulars: First, it was not established that the defendant Olsen executed the bond; and, second, the record fails to disclose that the attachment was wrongfully issued. The answer of Olsen having put in issue the execution of the bond, it devolved upon the plaintiff to establish such fact. Donovan v. Fowler, 17 Neb. 247, 22 N. W. 424; Hassett v. Curtis, 20 Neb. 162, 29 N W. 295. The evidence incorporated in the bill of exceptions fails to show that Olsen signed the instrument. While it is true there is attached to the bond a certificate of approval of the county judge who issued the attachment, any presumption that might arise therefrom is overthrown by the testimony of the witness Haubens, to the effect that but three persons were present when the bond was presented and approved, and that Olsen was not one of them. If there was no other evidence given on the trial on the matter of the execution of the bond, it would seem very evident that it would be insufficient to establish that the surety signed the bond in suit. An inspection of the bill of exceptions discloses that, on page 146 thereof, the deposition of one W. S. Crabb was introduced in evidence by the plaintiff, and read to the jury, which deposition does not appear in, nor is it attached to, the bill of exceptions in the case. Notwithstanding the trial judge has certified that the bill of exceptions allowed by him, and ordered to be made part of the record of the case, contains "all the evidence offered or given upon the trial of this case by either party," it is obvious that the deposition alluded to has been omitted from the bill. Therefore, the certificate of the judge will not control. Railroad Co. v. Hays, 15 Neb. 224, 18 N. W. 51; Oberfelder v. Kavanaugh, 29 Neb. 427, 45 N. W. 471; Schneider v. Tombling, 34 Neb. 661, 52 N. W. 283; Dawson v. Williams, 37 Neb. 1, 55 N. W. 284; Nelson v. Jenkins, 42 Neb. 133, 60 N. W. 311. Since the whole of the evidence is not before us, we must indulge the presumption that the execution of the bond was established on the trial by ample testimony.

Was the attachment resorted to without sufficient grounds? While the petition alleges that the attachment was wrongfully

obtained, yet this averment was put in issue by the answer. The burden was, therefore, upon the plaintiff to establish that the writ was wrongfully issued. The transcript of the county judge's docket shows that the attachment was dissolved, but upon what ground or grounds is not disclosed. The motion to discharge was not introduced in evidence. Hence, we do not know the grounds upon which the dissolution of the attachment was asked. If the decision was predicated upon omissions or irregularities, merely, in the granting of the writ, that would not justify an action on the bond. On the other hand, had the attachment been dissolved upon the ground that the affidavit on which the writ was procured was false or untrue, and the record had so shown, the decision would have been conclusive, in the action upon the bond, that the attachment was sued out wrongfully. We know that affidavits were filed in support of the motion to dissolve, and counter affidavits in resistance thereof; but the record is silent as to the scope of those affidavits, or whether they were read or not. Inasmuch as the bill of exceptions discloses, on its face, that it does not contain all the evidence adduced on the trial, we are unable to determine whether or not it was sufficient to show that the attachment was wrongfully issued. For the errors indicated, the judgment must be reversed, and the cause remanded for further proceedings. Reversed and remanded.

IRVINE, C., not sitting.

BUSH et al. v. JOHNSON COUNTY.

(Supreme Court of Nebraska. April 10, 1896.)

COUNTY TREASURER—LIABILITY FOR PUBLIC FUNDS—SURETIES—RELEASE—SETTLEMENTS WITH COUNTY BOARD—EFFECT.

1. An outgoing county treasurer turned over to his successor a certificate evidencing the deposit of county funds in a bank for safe-keeping, and the same was received by the incoming treasurer as a payment to him, to its amount, of such funds. The certificate of deposit was, by the new treasurer, delivered to the bank which had issued it, and was canceled, and the treasurer received in lieu thereof a certificate of deposit for a like sum, payable to him as county treasurer. *Held*, that the incoming treasurer and his bondsmen were chargeable on his bond for the amount of such payment, and a subsequent failure of the bank during the time the bank was continued, and his consequent inability to realize the money, did not relieve them of the liability.

2. The duty imposed on a county treasurer by law, and assumed by him, of safely keeping and accounting for and turning over the public funds which come into his hands by virtue of his office, is an absolute one. And, where his bond is conditioned for the faithful performance of the duties of the office by him, the sureties on the bond are bound and liable in like manner and their responsibility is the same as that of their principal; and it will be no defense for either of the parties, in an action on the bond to recover public funds, predicated on an alleged failure of the treasurer to account for or pay them over, that the funds have been lost or stolen without the fault or negligence of the treasurer.

3. It is the duty of the bondsmen of a county treasurer to see that the duties of that officer are properly discharged; and, if the county board shall be negligent or careless in the examination of the accounts or report of the treasurer, such examination and settlement will not be available as a defense to the sureties on his bond in an action for funds which the treasurer has failed to turn over.

4. The periodical settlements assigned by our statutes to be made between the county board and the treasurer of the county do not have in them the elements of a judicial determination of the subjects involved.

5. The case of Ragoss v. Cuming Co., 54 N. W. 683, 36 Neb. 375, examined, and distinguished.

6. A county treasurer, during his first term, had on deposit in a bank $6,000 of the public funds, such deposit being evidenced by a certificate of deposit. At the close of this term of office and the beginning of the second term, in his report to and settlement with the county board, he included and stated the amount of the certificate of deposit as so much cash; the board possessing no knowledge of the existence of the certificate, or of the deposit of the money. Before the close of the treasurer's first term, the bank failed. *Held*, that such settlement did not bind the county as an acceptance or approval of the certificate of deposit as so much cash accounted for; nor did its retention by the treasurer, or turning it over to himself as his own successor, constitute a paying over of the public funds, but was a failure to do so, which rendered him and the obligors on his bond for his first term liable.

(Syllabus by the Court.)

Error to district court, Johnson county; Bush, Judge.

Action by Johnson county against D. R. Bush and others on an official bond. There was a judgment for plaintiff, and defendants bring error. Affirmed.

T. Appelget, I. Reavis, and S. P. Davidson, for plaintiffs in error. J. Hall Hitchcock and E. W. Thomas, for defendant in error.

HARRISON, J. David R. Bush was elected treasurer of Johnson county at the election which was held during the fall of 1889, and took possession of, and commenced the performance of the duties of, the office in January, 1890; was re-elected in the fall of 1891; and in January, 1892, closed his first, and began his second, term as treasurer. The other plaintiffs in error were his bondsmen for the first term. Bush's immediate predecessor in the office of county treasurer, when he turned over the office and funds, in January, 1891, delivered to Bush some $40 or $50 in actual cash or money, in its strictest meaning, and gave him certificates evidencing deposits which the retiring treasurer had in banks, and also some checks. These were accepted by the incoming treasurer, and received, as between him and the outgoing one, as payment of the amounts stated in them. One of these certificates or checks was for the sum of $6,000, payable by the Bank of Russell & Holmes, at Tecumseh. Bush presented this at the banking office of Russell & Holmes, and, in lieu of it, received a certifi-

cate of deposit for the sum named. This he retained through and beyond the entire time and close of his first term as treasurer. In his report to the county board at or near the close of his first term, a certain balance was shown to be on hand. A portion of this balance was this sum evidenced by the certificate mentioned. The bank in which this money was deposited continued business in the regular manner until October, 1891, at which time it closed, a month or two before the expiration of Bush's first term. When the facts were discovered in regard to this and some other certificates of deposit (we have here particularly to deal with this one), action was instituted on the bond against plaintiffs in error, to recover the amount as an alleged shortage.

There were two principal questions raised by the pleadings: First, that Bush, the county treasurer, never received the money, the $6,000, to recover which was the object of this suit; second, that, at the expiration of his term of office, he made a settlement of his doings and accounts as county treasurer with the county commissioners, whereby the county became bound, and it cannot or should not be heard to assert any claim as against the treasurer or his bondsmen. A jury was waived, and a trial had. Judgment was rendered against the treasurer and bondsmen for the $6,000 and interest thereon. The case has been brought to this court by proceedings in error.

In regard to what transpired in January, 1889, between the outgoing treasurer and Mr. Bush, the incoming officer, in regard to the funds of the county, and their transfer from one to the other of the officers, Mr. Zutavern, the retiring treasurer, testified as follows: "Q. Mr. Zutavern, what official position did you hold in this county in the years '88 and '89? A. County treasurer. Q. Who was your successor? A. D. R. Bush. Q. Do you know how much money you turned over to Mr. Bush at the time you went out of the office? A. I do not know now. Q. You may state to the court how you delivered the things in the treasurer's office to Mr. Bush, at the time your term of office expired, with reference to the money on hand. A. I turned over all the money that belonged to the county to Mr. Bush. Q. How did you turn it over? A. Why, by checks, most of it. I guess I had a little cash on band, maybe $40 or $50, in the drawer; and I turned that over. I turned him over a few certificates. Q. State how it was you did not give him the money. A. I had the certificates, and asked Bush if he could use them,—whether they would answer as well as money; and he said they would. There was nothing said about me getting the cash, I do not think. State the facts as to whether they were equivalent to cash at that time, and for how long. A. There were. Q. Did Mr. Bush ever give you any information, in any form or manner, after this, that he could not use these certificates, or ask you to take them up, or any of the things you turned over, as the amount of money on hand? A. No, sir. Q. Why didn't you turn the money over in cash at the expiration of your term of office to Mr. Bush? A. I had these certificates, and showed them to Bush, and asked him if he could use them; and he said that he could. That was my reason. He said they would do him as well as money. Q. You were acquainted with the financial condition of the different banks upon which you had the bank certificates? A. I think I was. Q. You were acquainted with their condition, with reference to paying of their papers presented to them, for a year after that? From that time on for another year? A. I think I was. Q. Well, what was it? A. They were good. Q. They paid all of the demands made on them? A. Yes, sir." A portion of the testimony of Mr. Bush is as follows: "Q. Mr. Bush, you are the defendant, one of the defendants, in this case? A. Yes, sir. Q. You are the principal defendant, are you not, in this case? A. Yes, sir. Q. (handing witness plaintiff's Exhibit E). What is that paper you now have? A. It is a certificate of deposit on the Bank of Russell & Holmes. Q. Your are the person who is named in that certificate as payee, are you? A. Yes, sir. Q. You were county treasurer at that time? A. Yes, sir. Q. It was paid to you as county treasurer? A. Yes, sir. Q. The consideration of that check was county money? A. It was a check given me for county money. Q. And you took the check to the bank, and got that? A. Yes, sir. Q. At your own request? A. At the request of Mr. Charles Holmes. Q. Did you ask him for the cash? A. No, sir. Q. You did not want it? A. No, sir. Q. You could have got it? A. I do not know whether I could or not. Q. You have every reason to believe it? You had not known them to refuse any certificates, had you? A. No, sir. Q. You have got money out of there, as county treasurer, since that was deposited there, haven't you? A. Yes, sir. Q. That was a part of the funds you received from Zutavern, your predecessor? A. Yes, sir. Q. At the end of your first term, you did not turn that over except in the form of a certificate, as it appears there, to yourself? A. There was no change. Q. Just that certificate? A. Yes, sir. Q. When you settled with the county board at the end of your first term, January, 1892, you turned over that certificate in your report to the county commissioners, as part of the funds on hand? A. Why, I suppose you would call it that, simply in my own hands. Q. You turned it over to yourself as successor? A. I believe that is what it would be. Q. You never turned any cash over to represent that? A. No, sir."

In this connection it may be further said that all of the testimony introduced which had a bearing upon the question of whether the Bank of Russell & Holmes was, at the

time of the transaction between Zutavern and Bush, of date January, 1890, solvent, and meeting all demands for payments of money made upon it, tended to establish that it was so, and so doing and continued in such condition for more than a year subsequent thereto.

It is clear from the evidence that Mr. Bush, on assuming the duties of the office of county treasurer, received from the retiring officer a check or certificate of deposit, entitling him to demand from the Bank of Russell & Holmes the sum of $6,000, and that it was so accepted by him in such form, in lieu of the cash, either coin or legal-tender currency; that he did not demand any other or different payment, but waived it, and the check or certificate of deposit was by him delivered to the bank, and canceled; and, at the request of the banker, he received a new certificate of deposit for the sum named, payable to himself, as county treasurer. The title or right to the sum of money involved was, by the methods stated, transferred from Mr. Zutavern to Mr. Bush, the latter being the recipient of it, by reason of his occupancy of the office of county treasurer. The reception of this money from his predecessor was one of the duties which devolved upon the incoming treasurer, his due and proper performance of which, together with all others pertaining to the office, his sureties, by signing the bond, had guaranteed. Giving the bond was one of the essential prerequisites of his assuming the office, and without which he could not legally do so; and the sureties, by their signatures, enabled him to meet this requirement, and to acquire title or right to this money; and, having acquired it, he and the bondsmen became liable to the county for it. The fact that he elected to take a certificate of deposit evidencing the indebtedness of a bank to his predecessor in office for the amount, instead of coin or currency, and to have the certificate canceled, and a new one issued, payable to himself as county treasurer, and to let the money remain in the bank, and to carry the sum thus treated in his accounts as such treasurer, as moneys or funds on hand, could in no manner or degree affect his liability, or that of his bondsmen. He became possessed of the right to $6,000 of the funds of the county, and liable for its safe-keeping, and to account for it, and, at the request of the banker, left it in the bank. This was a sufficient reception by him of the money of the county to render him and his sureties liable for it under the conditions of this bond, within the rule announced in State v. Hill, 47 Neb. —, 66 N. W. 541.

What effect the transactions we have outlined between the two treasurers would have upon the rights of the county, if any, existing or arising therefrom, against Zutavern, the outgoing treasurer, and his bondsmen, is not involved in this case, and will not be discussed or decided. It is evident that Bush, the incoming treasurer, acquired the right to act in relation to the $6,000 of the county funds, and by his action it was left in the bank. This was such an act of right of control and disposition of the money as rendered him liable to account for it.

It is argued that the treasurer is only bound to use due and ordinary care for the safe-keeping and preservation of the money of the county, and if he deposited it in the bank after using reasonable and ordinary care and caution in ascertaining the standing and solvent condition of the bank, and was watchful in this particular so long as it remained there, if the bank failed, and the money was thereby lost to the county, in whole or in part, without any fault or negligence attributable to the treasurer, he was not liable for such loss, nor were his sureties so liable. There exists an irreconcilable conflict in the decisions of the courts in regard to the liability of public officers and their bondsmen for funds lost without fault or negligence on the part of the officers; but the weight of authority in this country is to the effect that a public officer and his sureties are to be held responsible for public funds lost, regardless of the question of fault or negligence on the part of the officer, where the law, in positive terms or from its general tenor, and without any limitation upon the obligation, requires that the officer pay over public funds which have been received by him and held as such.

Where the statutes impose the duty of payment, it is sufficient if the bond is conditioned for the faithful discharge of the duties of the officer, to render the sureties liable to the same extent as their principal. Our statutes on the subject, by their general tenor, if not in direct terms, require the retiring treasurer to account for or pay over the public moneys. The bond in this case was conditioned for the faithful discharge by the treasurer of the duties of the office, and for the faithful accounting for and paying over of all the moneys of the county which he received; and both he and his sureties became liable for any failure on his part to pay over any of the public money, notwithstanding it may have been lost without his fault or negligence. Board v. Jewell (Minn.) 46 N. W. 914, and cases cited, as follows: U. S. v. Prescott, 3 How. 578; U. S. v. Dashiel, 4 Wall. 182; Boyden v. U. S., 13 Wall. 17; Inhabitants of Hancock v. Hazzard, 12 Cush. 112; Inhabitants of New Providence v. McEachron, 33 N. J. Law, 339; Com. v. Comly, 3 Pa. St. 372; State v. Harper, 6 Ohio St. 607; District Tp. of Taylor v. Morton, 37 Iowa, 550; Thompson v. Board, 30 Ill. 99; Halbert v. State, 22 Ind. 125; Morbeck v. State, 28 Ind. 86; Ward v. School Dist. No. 15, 10 Neb. 293, 4 N. W. 1001; Wilson v. Wichita Co., 67 Tex. 647, 4 S. W. 67; State v. Nevin, 19 Nev. 162, 7 Pac. 650; State v. Moore, 74 Mo. 413; State v. Powell, 67 Mo. 395; Commissioners v. Lineberger, 3 Mont. 231; Redwood Co. v. Tower, 28 Minn.

45, 8 N. W. 907. The case of Ward v. School Dist. No. 15, 10 Neb. 293, 4 N. W. 1001, cited in the opinion of the Minnesota court just alluded to, in support of the doctrine of strict accountability of treasurers and their bondsmen, for public money intrusted to the care of the treasurers by virtue of their being such officers, may be said to be not strictly in point, for the reason that the money lost by failure of the bank, and sought in the action to be recovered of the treasurer and his bondsmen, had been deposited by the treasurer in the bank to his own individual credit. This court held: "The defendant, while treasurer of the plaintiff district, deposited the money in question with his banker to his own individual credit. The money was intended to meet certain bonds of the district, then about to fall due, and which were payable at that bank; and the defendant so informed the banker, and directed him verbally to so apply it when the bonds were presented. While in this condition, the bank failed, and the money was lost. Held, that the banker was the agent of the treasurer, and not of the district, and that the money was recoverable by the district in an action on the treasurer's bond." And it was said in the text of the opinion: "It was Ward's duty, under the law, to keep the money securely until properly directed, as before shown, to pay it over to the holder of the district bonds. The money was within his control, placed there by force of the statute, and, if he saw fit to intrust it to the care of another, he did so at his peril." In the opinion in the case of State v. Sheldon, 10 Neb. 452, 6 N. W. 757, in stating the liability of a treasurer for public funds, it was held: "The fact that the public funds have been stolen from the treasury is no legal justification for the failure of the treasurer to account for them." This was not a case, however, wherein the recovery of the public funds was the object of the action, but was one in the nature of a quo warranto to oust the defendant from the office of county treasurer of Greeley county; and, in reaching a conclusion as to whether the treasurer had been guilty of neglect of duty as an officer, it was observed: "This being the case, the county treasurer, having failed to account for the moneys in his hands, properly chargeable against him as treasurer, is guilty of willful neglect of duty, and may be removed from office; and the fact that the moneys were stolen is no legal justification for the failure to account for them." While it may be said that these cases are not in point, and cannot be said to support the rule which holds treasurers to a strict accountability in respect to public funds which come into their possession as officers, for the reason that, strictly speaking, it was not the main question involved in either case, but only incidentally, yet it was necessarily connected with the matters under discussion, and which were determined, and made it necessary to pass upon it; and the decisions show what the opinion of the court was in regard to the responsibility of the treasurers for public money which they handled as officers.

It is argued that if the delivery of the certificate of deposit or check by Zutavern to Bush, when the latter assumed the duties of the office, was a sufficient payment to render Bush and his bondsmen responsible to the county for the amount thus paid, inasmuch as at the expiration of the first term of his services as treasurer, and assumption of the duties of the second term, January, 1892, he turned this $6,000 certificate of deposit over to himself as his own successor, this released the sureties herein sued, who signed his bond for the first term, and the action must fail as to them. Whatever might be said of this contention had the certificate of deposit in question, at the time of the termination of the first term which Bush occupied the office of treasurer, retained its full force and vigor as a demand against the bank for the sum evidenced by its face, we must now recall to mind the fact that during the month of October, 1891, the bank, payor of the certificate, failed or quit business, had passed out of existence in the business world, and the certificate of deposit was no longer a demand against a living business being, but was merely evidence of a claim against what might at some time be realized of the assets of the bank which had failed, and was certainly not entitled to be considered as such a payment, when retained by Bush in making the change from his first to his second term of the amount of funds on hand, to him as his own successor, as to render or raise a liability for the amount of the certificate against him and his bondsmen for the second term, as a loss occurring during the second term, and certainly was not a paying over of the county funds which worked a release of the sureties who signed the bond for the first term. The failure to otherwise pay the sum expressed by the face of the certificate at the expiration of the first term of office was such a failure to faithfully discharge the duties of the office required by law, to faithfully account for and pay over all funds which had come into his hands or under his control by virtue of his office, as rendered him and the sureties for the first term liable therefor.

A further contention is made on behalf of plaintiffs in error that the board of county commissioners had settled with Mr. Bush, comprehending in such settlement all his actions as county treasurer during his first term, and had examined his final account, and approved it, and made such approval a matter of record; that this constituted an adjudication of all these matters, which was final and conclusive; hence this action will not lie. Our statutory law requires the county treasurer to make periodical reports, which must show, somewhat in detail, the main transactions, more particularly in re-

lation to disbursements of the public moneys and balances remaining on hand in the various funds; and these must be scrutinized and passed upon by the county board, and they make what is denominated a "settlement" with the treasurer. But, call it what you may, we are satisfied that it is nothing more than an examination of the account and report of the business acts of the treasurer during the period covered by it,—a scanning of such acts, a "checking up," if the expression is allowable, by the county commissioners, the parties designated by law to attend to it, made in the interest of the public and the county, and for the benefit of the public and the county. Its main object and purpose is to maintain an espionage and supervision over the finances of the county, and their management by the treasurer, and secure, by such means, as great promptitude and care and exactitude in their management as possible. It is not in any sense or degree on behalf of the sureties on the bonds of officers. Their contract is that the officer will perform his duties faithfully and properly, and for any failure so to do they become liable. The law does not contemplate that the officer shall be watched by the county or its officers for the benefit of the sureties. It is no part of the contract with the sureties that it shall be done; and, where reports and settlements are required by law, it does not change the obligation of the sureties, or enter into their contract. It is their duty to see to it that the duties of the officer are faithfully discharged; and if the county board should be negligent or careless or irregular in an examination of an account or report of a treasurer, or in what is termed a "settlement," it would be no available defense to sureties on his bond in an action to recover an amount of public funds which the treasurer had failed to pay over. These periodical settlements assigned by our statutes to be made with county treasurers do not have the elements in them of a judicial determination of the subjects involved. It would not be contended that if the county commissioners state, as a matter of record, as the result of one of these so-called "settlements," that the treasurer was short in his accounts in a stated sum, and consequently indebted to the county in such sum, this would constitute an adjudication of the whole matter; and, unless appealed from, it would be final and binding on the parties, and not open to attack. No more can the result obtained by the examination be said to be binding and conclusive upon the county in regard to the amounts reported on hand by the treasurer, being the exact true amounts; or their payments by the treasurer preclude the institution and successful prosecution of an action for any further sums which he has failed to report or to pay over. It can have no further or greater conclusiveness than any settlement made between private persons.

We are cited on this point in the case to the decision in the case of Ragoss v. Cuming Co., 36 Neb. 375, 54 N. W. 683, as sustaining the position of plaintiffs in error, but we do not so read it. It was held: "Where the county board has before it a matter which it may reject or allow, and its action thereon will be final unless appealed from, its order in the premises cannot be attacked collaterally, except for fraud,"—which is entirely correct; but, in passing upon the report of a county treasurer, the board do not reject or allow it in the sense in which these words were used in the case referred to. It is only approved or disapproved, and not conclusively. In the same decision it is observed: "An officer who has faithfully performed the duties of his office, and made a full settlement with the tribunal authorized to settle the same, should be permitted to rest on such settlement, unless there is fraud, mistake, or imposition in making the same." The rule announced in the third paragraph of the syllabus to the case, which we have quoted, had reference to an order of the county board allowing the county clerk deputies, and the application of the fees of the office to the payment of their salaries, as fixed by the board, and was entirely applicable. What was said in the opinion in regard to the settlement was substantially the same as herein stated. Any settlement is all right, and entitled to stand in favor of an officer who had faithfully performed the duties of his office, and when, in the settlement, there is neither fraud, mistake, nor imposition. In support of what we have said in regard to these reports, and their examination and approval and settlement, see Crawn v. Com. (Va.) 4 S. E. 721; Rose v. Douglass Tp. (Kan. Sup.) 34 Pac. 1046; Board v. Sheehan (Minn.) 43 N. W. 690; Britton v. City of Ft. Worth (Tex. Sup.) 14 S. W. 585.

In the case at bar it was shown by the testimony that, at the close of his first term, Mr. Bush made a report or account, which was examined by the county board. The statements of the commissioners' record in respect to the settlement had at that time were as follows: Under date January 29, 1892: "The county commissioners proceeded to settle with the county treasurer. The board adjourned to January 30, 1892." Under date of January 30, 1892: "The board then proceeded to settle with the county treasurer. Board adjourned to February 1, 1892." Under date of February 1, 1892: "The board proceeded to settle with the county treasurer. Pending settlement, the board adjourned to February 2, 1892." Under date of February 2, 1892: "The board completed with the county treasurer." The account indicated the proper and true amount which had come into the possession of the county treasurer, or had been paid to him, as on hand; but it, in fact, included this certificate of deposit for $6,000, issued by the bank, which had, subsequent to such

issuance, but prior to the time of settlement, failed. The fact that this was so included and counted by the treasurer as money on hand was not known by the county board. The funds were not asked for by the board, were not produced by the treasurer, and any approval of the account or report of the treasurer at that time was so made without any knowledge of the existence of the certificate of deposit, or that it figured or was claimed by the treasurer as a part of the moneys on hand. There was a mistake in the settlement, if any was made, to the amount evidenced by the certificate; and the paying over the funds shown by the report to be on hand by Bush to himself, to the extent that it consisted of his retaining this certificate, and counting it as so much money, was a failure to account and pay over the moneys of the county,—a failure to faithfully discharge the duties of his office, as required by law, and for which he and his bondsmen became liable. It follows that the judgment of the district court must be affirmed.

NORVAL, J., not sitting.

In re VOGLAND et al.

(Supreme Court of Nebraska. April 10, 1896.)

INFORMATION—FILING IN VACATION.

Under the provisions of chapter 108 of the Laws of Nebraska passed in 1885, the requirement that "all informations shall be filed during term, in the court having jurisdiction of the offense specified therein," is mandatory; and an information upon which the accused is to be tried for felony is void, if filed in vacation.

(Syllabus by the Court.)

Application for a writ of habeas corpus by Lewis Vogland and others. Writ granted, and petitioners discharged.

J. H. Broady, for petitioners. A. S. Churchill, Atty. Gen., and Geo. A. Day, Dep. Atty. Gen., for respondent.

RYAN, C. An application was made to this court, in this case, for a writ of habeas corpus, by Lewis Vogland, Salem T. Clark, and Charles H. Jackson, who alleged that they were unlawfully detained by George W. Leidigh, the warden of the penitentiary of this state. To the writ which thereupon issued, the warden answered, justifying his detention of the petitioners under a warrant for their commitment by virtue of certain proceedings, fully described in the exhibit attached to the petition of the applicants. To these averments of the answer there was filed a demurrer, by which is raised the sufficiency of the facts in said answer pleaded to justify the imprisonment of the petitioners in the state penitentiary. It would probably tend to obscure the facts if an attempt was made to describe, by copying, or even epitomizing, the pleadings, and we shall therefore state these facts as clearly and concisely as possible in the form of a narrative. On the 18th day of July, 1895, an information was filed with the county judge of Keya Paha county whereby the petitioners for habeas corpus were charged with stealing cattle in said Keya Paha county on June 26, 1895. There was a plea of guilty to this charge on the same day the information was filed, and thereupon the county judge committed the persons accused to the county jail, to await a hearing at the next succeeding term of the district court of Keya Paha county, to be held at the county court room in Springview, Neb. On the 20th day of July, 1895, the aforesaid Lewis Vogland, Salem T. Clark, and Charles H. Jackson, together with the county attorney of Keya Paha county, appeared at chambers in Bassett, in Rock county, Neb., before Hon. M. P. Kinkaid, the district judge of the Fifteenth judicial district of Nebraska, in which district are included the counties of Keya Paha and Rock, and requested that their plea to the charge of larceny in stealing cattle in Keya Paha county on June 26, 1895, might be received. When the request was made, the county attorney of Keya Paha county exhibited to Judge Kinkaid an information, which had been filed in the district court of Keya Paha county July 18, 1895, by which the said Vogland, Clark, and Jackson were charged with larceny of cattle, committed June 26, 1895, in said Keya Paha county. This, by direction of Judge Kinkaid, the said county attorney read to the parties therein accused; and thereto the defendants pleaded guilty, and were sentenced to be imprisoned at hard labor in the state penitentiary,—Vogland for the term of five years, and Clark and Jackson each for the term of six years. Warden Leidigh received the parties, sentenced as above, and their application for a writ of habeas corpus calls in question the sufficiency of the above proceedings to justify their detention in the penitentiary. In argument, several questions were discussed which we shall not attempt to consider, for there is one which, in our view, is decisive of this case. In 1885 there was passed and approved an act entitled "An act to provide for prosecuting offenses on information and dispense with the calling of a grand jury except by order of the district judges." Laws 1885, c. 108. By section 2 of this act it is required that "all informations shall be filed during term, in the court having jurisdiction of the offense specified therein," etc. It is conceded, in this case, that the district court of Keya Paha county was not in session when the information was filed, upon which Judge Kinkaid acted, two days afterwards, in Rock county. This information was therefore void, and upon it no plea could be received or acted upon. The requirement of filing in term is mandatory, and a filing in vacation cannot be substituted. The prayer of the petitioners must therefore be granted.

and the applicants for a writ of habeas corpus are accordingly ordered discharged from custody. Judgment accordingly.

GOLDSMITH et al. v. ERICKSON et al.

(Supreme Court of Nebraska. April 10, 1896.)

FRAUDULENT CONVEYANCE—WHAT CONSTITUTES—QUESTION OF FACT.

1. Where a purchase of an entire stock of goods, books of account, and fixtures of a merchant was made at a fair price, and with no knowledge that such merchant was at the time indebted to other parties, it should not be declared void, though the purpose of the purchaser was in part to secure payment of a debt due the bank of which he was at the time cashier.

2. The case of Bonns v. Carter, 31 N. W. 381, 20 Neb. 566, having been overruled, there was in this state no presumption of law that a transaction was fraudulent merely because the property was in effect all that the vendor owned.

3. Whether or not a transfer of property is fraudulent as against the creditors of the vendor is a question of fact, determinable solely upon the evidence adduced in each case.

(Syllabus by the Court.)

Appeal from district court, Douglas county; Walton, Judge.

Action by Adolph Goldsmith and others against Charles E. Ford, C. L. Erickson, and others. From the decree rendered, defendants appeal. Reversed.

James E. Macomber and Wharton & Baird, for appellants. Cavanagh, Thomas & McGilton, Bartlett, Baldrige & De Bord, Edgar H. Scott, W. H. Tunnicliff, J. W. Roudebush, L. F. Crofoot, Frank Heller, A. C. Wakeley, J. W. West, L. D. Holmes, and Montgomery, Charlton & Hall, for appellees.

RYAN, C. On the 30th day of December, 1891, Adolph Goldsmith, Weis & Oppenheimer, Wolf & Co., Heyman & Sweet, and the Middleton Plate Company, as plaintiffs, brought an action in the district court of Douglas county against C. L. Erickson, Charles E. Ford, and the Union National Bank of Omaha. The averments in this petition were in substance that on and prior to December 31, 1890, the defendant C. L. Erickson was indebted to the several plaintiffs in the amount described, and was the owner in possession of a large stock of jewelry, with the fixtures and other property connected therewith, and was carrying on a retail business in the city of Omaha; that said Erickson was indebted to the Union National Bank not to exceed $5,000; that on and prior to December 31, 1890, the various creditors of said Erickson were pressing him for payment; and that suits had been brought by some of the plaintiffs, and were then pending. The fraudulent conduct of the defendants was alleged as follows: "On the said 31st day of December, 1890, said Erickson, for the purpose of defrauding, hindering, and delaying his creditors, sold and transferred his said stock to said Charles E. Ford, and that said Charles E. Ford well knew of the intention on the part of said Erickson to hinder and delay his creditors, and that it was agreed between said Charles E. Ford, individually, and as an agent of said defendant the Union National Bank, that said Erickson should transfer the title to said property to said Ford, to hold the same for the Union National Bank, and sell said property, and satisfy the indebtedness due said bank from said Erickson, and it was agreed by and between Ford, as such cashier and individually, and said Erickson, that said Ford would account to Erickson for the balance over and above the amount sufficient to satisfy said defendant the Union National Bank; that there was no other or different consideration for such transfer paid by said Ford or the Union National Bank to said Erickson; that said Union National Bank and said Ford well knew of the fraudulent intention on the part of said Erickson, and conspired with said Erickson to defraud his said creditors; that on said 31st of December, 1890, said Erickson executed a bill of sale to said Ford for his said property, and that said Ford and said Union National Bank took possession of said property, and converted it to their own use; that said property was, as plaintiffs are informed, of the value of twenty-five thousand (25,000) dollars; that said property so converted by said defendants, and belonging to said Erickson, was all the property which said Erickson had in his own name, and subject to execution, all of which said Ford and said Union National Bank well knew." Following this language, there was a description in detail of the judgment or judgments had by each plaintiff against C. L. Erickson, and in respect to each it was alleged that an execution had been issued and returned unsatisfied; and, in general, it was alleged that said Erickson had no property in his own name on which an execution could be levied. The prayer of the petition was as follows: "Wherefore said plaintiff asks that said Union National Bank and said Charles E. Ford be required to account for the goods received by them from said Erickson, and that said plaintiffs have judgment against said Union National Bank and Charles E. Ford for the amounts of their claims against said Erickson." Between the date of the filing of the above petition and the trial, there were filed in this case the petitions of 15 interveners, to whom, it was stipulated on the trial, there was due the aggregate sum of $4,602.82. These interveners made allegations and claimed relief of the same nature as had been done in the original petition. The aggregate amount due the original plaintiffs, it was stipulated on the trial, was $2,192.50; so that, at the time the decree was rendered, on January 27, 1893, the total amount of indebtedness of C. L. Erickson as to which Charles E. Ford and the Union National Bank were held lia-

ble as trustees to the original plaintiffs and the interveners, before the decree, was $6,795.32. Subsequent to the entry of this decree, there were other petitions of intervention filed, in which, in each case, it seems to have been assumed that there was to be a general distribution of the value of the stock of C. L. Erickson whenever C. E. Ford and the Union National Bank should pay the same. This was not warranted by the original decree, for, after having made provision for the appointment of a referee to find and report the value of the goods, etc., transferred to Ford and the bank, and also "the amount now due the various creditors of Erickson who are parties in this suit," this decree contained this immediately following language: "And, upon the filing of the report of said referee and his findings in the case, the court will make a distribution of the amount of the value of said stock, fixtures, and book accounts, in the manner provided by law, and to the various creditors in this action entitled to said money." Notwithstanding this restrictive language, other alleged creditors of Erickson, as already stated, filed their petitions for the aggregate amount of $4,808.61, after the entry of the decree above referred to. Each individual of this class of interveners was, by the decree made upon the coming in of the report of the referee, adjudged entitled to share the amount of the value of the goods, book accounts, and fixtures pro rata with the others; and the rights of this class were decreed inferior and subject to those of the original petitioners and those creditors of Mr. Erickson who had intervened before the first decree was rendered. This made the entire amount of the claims with reference to which the bank and Mr. Ford were held to sustain the relation of trustees $11,603.93. The difference between this amount and the above-mentioned sum of $6,795.32 represents the aggregate amount of the claims presented by petitions filed after the first decree was entered. There was allowed Ford and the bank the sum of $2,000, for services rendered and expenses incurred in disposing of the goods, book accounts, and fixtures which Erickson had turned over to Ford. From the first decree, and from that part of the last which enforced their liability as trustees, Ford and the bank appeal; and, from the allowance of $2,000 in favor of Ford and the bank, and from their postponement as a class, the creditors of Erickson who filed their petitions after the entry of the first decree also appeal.

The theory upon which the original plaintiffs and those who intervened before the first decree drew their petitions is much more intelligible if it is borne in mind that the very commencement of this action was almost exactly a year after the date of the sale made by Erickson to Charles E. Ford. Meanwhile many of the goods had been sold, and it was probably impossible to reach those remaining. These petitions, while somewhat in the nature of creditors' bills, really had for their object the subjection to the debts of plaintiff and the interveners of the value of the goods, book accounts, and fixtures, rather than those particular articles in kind. From this it resulted that, while the good faith of the purchase was attacked, there was no attempt to set it aside. In a certain sense, the purchase was approved, and it was sought to hold the purchaser liable for the full value of the goods as though no payment had been made thereon. Under these circumstances, we do not feel called upon to determine whether or not there were sufficient formalities observed to vest the title in Charles E. Ford. The question to be considered will not therefore be whether or not the title passed to Ford, but, it being conceded to have passed, whether or not the purchaser should be held liable for the value of the property as though he had made no payments, those having been made being deemed no payments, because made in an alleged attempt to hinder, delay, and defraud the creditors of C. L. Erickson. Thus shorn of extraneous considerations, the propositions to be considered are: First, whether the evidence disclosed the existence of the alleged fraud as a matter of fact; and, second, whether, from the facts proved, the law raises a presumption of fraud.

The original petition, as well as those of the interveners, charged that the fraudulent transactions consisted in a sale by Erickson to Ford, with intent to hinder and delay the creditors of Erickson, shared by the vendor and vendee, and by an accompanying agreement that, when sufficient goods had been sold to satisfy the debt of Erickson due the Union National Bank, the remainder should be accounted for by Ford to Erickson. There was no attempt to make proof that in the purchase there was any condition requiring Ford or the bank to account for the value of anything whatever. The evidence has been very carefully examined since this case was submitted on oral arguments, and we have been able to discover no proof that Ford, who at the time was cashier of the Union National Bank, had any knowledge, when he purchased of Erickson, that the latter owed anything except the sum of $4,400 to the aforesaid bank, and the sum of $4,633.30 to the wife of C. L. Erickson. The note evidencing the indebtedness of C. L. Erickson to the bank fell due a few days before December 31, 1890, and, between the maturity of said note and the date last given, Mr. Ford had tried to have it paid or secured. It had been suggested repeatedly to Mr. Erickson that he should give a chattel mortgage on his stock to secure this debt, but this was as often refused. On the 31st of December, 1890, Mr. Ford visited Mr. Erickson's place of business, with the intention of having the matter settled in some way, and was told by Mr. Erickson that, if the bank or

Mr. Ford wanted the stock, it would be sold to either of them for the amount due the bank and the amount which Erickson owed his wife. Not being able to obtain security, Mr. Ford purchased the stock of goods, books of account, and fixtures on the terms proposed; and, having received Mr. Erickson's key to the store, he left Mr. Nelson in possession. On January 2, 1891, Mr. Ford gave Mrs. Erickson his check for the amount due her. Upon this, she thereupon received the money at one window over the counter of this bank, and, having carried it to another window, she, in exchange for it, received a certificate of deposit of the Union National Bank, payable to her own order, in the sum of $4,633.30. This certificate she left at the bank, under an arrangement between her husband and Mr. Ford or the attorneys for the bank by which this certificate was to be so left as an indemnity against any loss by reason of attachments which on January 1, 1890, had been levied upon the stock of goods notwithstanding the sale. These attachments aggregated the sum of $4,641.75, and the suits in which they had been issued were not ended until November 4, 1891, when an arrangement was made between the attaching creditors and Mrs. Erickson, by virtue of which their debts were paid by the use of her certificate of deposit, the amount of which thereupon Mr. Ford paid to said attaching creditors. There were other details attending this settlement which need not be described, for our present object is only to show in what manner Mr. Erickson sold his stock of goods, and to consider whether or not the sale was bona fide. It may not be amiss to suggest that the plaintiffs and the interveners in this action were probably influenced to delay these proceedings by the pendency of the attachment suits, and that the above-described settlement, perhaps, at least in a remote degree, suggested that a favorable time had arrived for the commencement of this action. There was no evidence tending in the least to show that the full sum of $4,400 was not due the bank. Mrs. Erickson testified positively that the sum above named as due her had been by her loaned to her husband, to enable him to extend his business; and in contradiction of this there was not a scintilla of evidence. It must therefore be accepted as an established fact that for the goods, fixtures, and book accounts Mr. Ford had actually paid the sum of $9,033.30 of the indebtedness of C. L. Erickson, in consideration of which the property purchased was delivered so as to vest in him the title. It is not deemed necessary to discuss the evidence as to the purchase, and the turning over of possession on the night of December 31, 1890, or the execution of a bill of sale the following day, or the manner in which the payment was made of the amount owing by C. L. Erickson to his wife, with reference to whether or not the sale was good as against the aforesaid attaching creditors; for, as we have already stated, these creditors have been paid, and their claim that the purchase was incomplete has no bearing upon the issues in this action.

The referee provided for in the first decree reported on April 14, 1893, that the value of the goods, book accounts, and fixtures, when taken possession of by Ford, was $10,700; that, at the time of filing the said report, Ford still had goods undisposed of, to the amount of less in value than $1,000; that the accounts collected and the amounts realized by him from the goods and fixtures were $6,860. Between the value of the goods found to exist on January 1, 1890, $10,700, and the aggregate of the two amounts paid by Ford, $9,033.30, there was but a difference of $1,666.70. If, therefore, he expended $2,000 for caring for and selling the goods, there was to him a loss rather than a profit in the transaction. The propriety of the allowance of this $2,000 is questioned by no one, except such parties as came into this case after the first decree as interveners; and they are in no position to object, for two reasons: First, the decree just spoken of provided for distribution among parties then in the action; and, second, these interveners served no notice of the pendency of their petitions of intervention, and in respect to them neither Ford nor the Union National Bank made an appearance. Hapgood v. Ellis, 11 Neb. 131, 7 N. W. 845; Manufacturing Co. v. Clark, 23 Neb. 702, 37 N. W. 628; Carlow v. C. Aultman & Co., 28 Neb. 672, 44 N. W. 873; Arnold v. Lumber Co., 36 Neb. 841, 55 N. W. 269; Schultz v. Loomis, 40 Neb. 152, 58 N. W. 693; Land Co. v. Leavenworth, 42 Neb. 715, 60 N. W. 954; Woodward v. Pike, 43 Neb. 777, 62 N. W. 230; Patten v. Lane, 45 Neb. 333, 63 N. W. 938; Havemeyer v. Paul, 45 Neb. 373, 63 N. W. 932.

If, however, we accept the referee's report of the value of the goods on hand, and his finding of the amount of the proceeds of those sold, as above given, and no plaintiff or intervener questions this, the result shows a greater loss still; for, while Ford paid out for the goods $9,033.30, he has to show for them only $7,860. In any event, it must be conceded that, for the goods, book accounts, and fixtures, their full value was actually paid by Ford. As he bought for a fair price, without knowledge of the indebtedness of Erickson, and therefore with no intention of defrauding or hindering Erickson's creditors, there is no sufficient ground for the contention that, from the facts established by evidence, this transaction should be held fraudulent, and that, therefore, Ford or the bank should be held liable for the value of the goods received from Erickson. What the intentions of Erickson in the transaction were could not be shown, for he had died before any proofs in this case were taken.

The next question is whether or not the purchase, as a question of law, must be deemed fraudulent as against the creditors of

C. L. Erickson. This inference in the first decree was doubtless deemed unavoidable, in view of Bonns v. Carter, 20 Neb. 566, 31 N. W. 381, then believed to embody the established rule of law in this state. In Dry-Goods Co. v. Bremers, 44 Neb. 863, 62 N. W. 1105, it was pointed out that the majority opinion in the case of Bonns v. Carter, supra, was contrary in its logic to Hershiser v. Higman, 31 Neb. 531, 48 N. W. 272, and Hamilton v. Isaacs, 34 Neb. 709, 52 N. W. 279. In Jones v. Loree, 37 Neb. 816, 56 N. W. 390, and in Smith v. Phelan, 40 Neb. 765, 59 N. W. 562, it was unequivocally announced that Bonns v. Carter was overruled. It has been repeatedly held that the existence of fraud is a question of fact; and in this case the conveyance was improperly found by the court, in its fifth finding, to be in conflict with the general assignment law of Nebraska, and therefore void.

This disposes of all questions necessarily involved, and the judgment of the district court is reversed, and this cause is remanded, with directions to the district court to dismiss all the petitions filed in this case, at the costs of plaintiffs and the interveners. Reversed and remanded.

IRVINE, C., not sitting.

GREEN v. BARKER et al.

(Supreme Court of Nebraska. April 10, 1896.)

PUBLIC LANDS — PATENT — PRESUMPTIONS — TOWN-SITE TRUSTEE'S DEED — COLLATERAL ATTACK — STATUTORY DEED — VALIDITY — DOCUMENTARY EVIDENCE.

1. The presumptions arise, from the existence of a patent, evidencing a grant of land from the United States, that all acts have been performed, and all facts have been shown, which are prerequisites to its issuance, and that the right of the party, grantee therein, to have it issue, has been presented to and passed upon by the proper officers; and such patent is not open to collateral attack.

2. Where property has been conveyed under the provisions of the act of congress of May 23, 1844, which may be termed the "Town-Site Act" (5 Stat. 657), by the United States, to the corporate authorities of a town or city, or a trustee designated by law, a deed executed by the trustee, or the party authorized by law to make the transfer, evidences the determination by the party executing it that all the preliminary steps have been taken and necessary requirements complied with, and that the person to whom the deed runs is the one entitled to receive it; and the question of the validity of the deed cannot be litigated in a collateral proceeding.

3. It is a presumption of law that every person performs his duty as an official until the contrary is shown.

4. A correct designation, in a deed, of the legislative act under and by virtue of which it was executed, *held* not essential to the validity of the deed.

5. A page of a book was identified as a part of the records of the minutes of the meetings of the Grandview Company. *Held* not an identification or foundation for its introduction, as showing proceedings had by the board of trustees of the city of Grandview.

6. Deeds were executed purporting to be conveyances of real property by the trustees of the city of Grandview, which were signed "A. B. Moore, Chairman." *Held* that, without proof that A. B. Moore, who signed the deeds, was chairman of the board of trustees of the city of Grandview, the deeds did not evidence the transfer purported to be made.

(Syllabus by the Court.)

Error to district court, Douglas county; Hopewell, Judge.

Ejectment by Joseph Barker and others against John Green. There was a judgment for plaintiffs, and defendant brings error. Reversed.

C. A. Baldwin and J. M. Woolworth, for plaintiff in error. H. D. Estabrook and E. W. Simeral, for defendants in error.

HARRISON, J. The defendants in error instituted this, an action of ejectment, in the district court of Douglas county, against the plaintiff in error. The petition filed was as follows: "And now come said plaintiffs, and for cause of action against said defendant say: That said plaintiffs, as tenants in common with said defendant, have a legal estate in, and are the owners in fee and entitled to the immediate possession of, the undivided interests hereinafter appearing of the following described real property, to wit, the block or tract of ground known as the 'Stone-Quarry Reserve' in the city of Grandview, Douglas county, Nebraska, and so designated upon the map of Omaha, as lithographed and published by Poppleton & Byers,—said Joseph Barker being the owner in fee of $^{19}/_{100}$ of said property; John L. Redick, $^{1}/_{100}$; George P. Bemis, $^{2}/_{100}$; Lewis S. Reed, $^{4}/_{100}$; Ferdinand Streitz, $^{14}/_{100}$; Andrew B. Moore, $^{14}/_{100}$; said Emma I. Jones, as widow of Henry O. Jones, deceased, who died intestate and without issue, of a life estate of $^{13}/_{100}$ of said property; and the said Dana G. Jones, Eva S. Jones, and Patty A. Holton, as the owners in fee of the $^{13}/_{100}$ interest, said last three named parties being the sole heirs at law of said Henry O. Jones, deceased. But the plaintiffs aver that said defendant unlawfully keeps them out of the possession of said property, and denies the rights of plaintiffs, herein set forth. Wherefore, plaintiffs ask judgment for the possession of the property and costs of suit." To this an answer was filed, in behalf of plaintiff in error, which, first, denied generally each and every allegation of the petition; also, specially traversed them, and pleaded affirmatively as follows: "And, further answering, defendant says that this action ought not to be prosecuted against him for the reason hereinafter stated; that is to say, that this defendant, and those under whom this defendant claims, have been in the actual, open, notorious, and hostile possession and occupation of said premises, and all of it, claiming it as their own, for more than ten years next before the institution of this action. And the de-

fendant pleads and relies upon the statute of limitation in such cases made and provided, in bar of the plaintiffs' right of recovery herein. Wherefore the defendant prays that he may be hence dismissed, with judgment for his costs in this action, and that he may have all other relief." To this there was a reply, a general denial. There was a trial before one of the judges of the district court and a jury, resulting in a verdict in favor of defendants in error as to the larger portion of the premises in controversy, upon which, after motion for new trial was heard and overruled, judgment was rendered. The case is presented here by error proceedings on behalf of the defendant in the trial court.

The defendants in error introduced in evidence a patent, conveying from the United States to "the trustees of the city of Grandview, and as the proper corporate authority thereof, in trust for the several use and benefit of the occupants thereof, according to their respective interests under said act of May 23, 1844, and to their successors and assigns in trust as aforesaid," certain lands, which included the tract in controversy in this case; also, deeds signed by "A. B. Moore, Chairman," and each containing a recital that it was the act of the trustees of the city of Grandview, by which there was purported to be conveyed certain undivided interests in the title to the stone-quarry reserve, together with other property, to parties who, according to the recitals of the deeds, had respectively become entitled to the conveyances; also, conveyances from these last-mentioned persons to others; and transfers were shown until the defendants in error had been reached, and the title to their respective interests vested in them. The several conveyances were objected to at the time they were offered in evidence. The trial judge instructed the jury, in respect to the patent and deeds, and what they established, as follaws: "The plaintiffs have introduced in evidence a patent from the United States to the trustees of the town of Grandview, covering the premises in controversy, and claim title through conveyances received by them or their grantors from A. B. Moore, chairman of such board of trustees; and you are instructed that they have introduced record evidence showing a legal estate in themselves as set out in their petition, and are therefore entitled to recover, unless the defense of adverse possession has been established by the defendant." This was excepted to, and is assigned for error.

In order to a proper understanding of the claims of plaintiff in error that the patent from the United States to the city of Grandview, and the deed made by A. B. Moore as "chairman," did not convey any title, or were not evidence of such transfers, we deem it proper to set forth here portions, at least, of the act of congress to which allusion was made in the patent, and of the acts of the territorial legislature which were passed to carry into effect the law enacted by congress. The act of congress reads as follows: "Whenever any portion of the surveyed public lands has been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the existing pre-emption laws, it shall be lawful in case such town shall be incorporated, for the corporate authorities thereof, and if not incorporated for the judges of the county court for the county in which such town may be situate, to enter at the proper land office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests, the execution of which trust as to the disposal of the lots in such town and the proceeds of the sales thereof to be conducted under such rules and regulations as may be prescribed by legislative authority of the state or territory in which the same is situated: provided that the entry of the land intended by this act be made prior to the commencement of the public sale of the body of land in which it is included, and that the entry shall include only such land as is actually occupied by the town and be made in conformity to the legal subdivisions. * * * Provided, also, that any act of said trustees not made in conformity to the rules and regulations herein alluded to shall be void and of none effect." 5 Stat. 657, c. 17.

The territorial enactment to prescribe the rules and regulations, which was passed February 10, 1857 (see Sess. Laws 1857, p. 133), is as follows:

"Section 1. That whenever any portion of the surveyed public lands has been or shall be settled upon, and occupied as a town site and therefore not subject to entry under the existing pre-emption laws, it shall be lawful and be the duty whenever required by the occupants and owners by deed, of the lots within the limits of such town, for the corporate authorities of the town, if incorporated, and if not incorporated, then for the commissioners of the county for the county in which such town may be situated * * * to enter at the proper land office the land so settled and occupied as a town site, in trust for the several use and benefit of the occupants, and those holding by deed or otherwise, according to the laws of this territory.

"Sec. 2. After the purchase of such land as above described it shall be the duty of the mayor of the town if incorporated, or if the town is not incorporated then of the commissioners of the county in which the town site is situate, to make out, execute and deliver to each person who may be legally entitled to the same a deed in fee simple for such part or parts, lot or lots of such land as each person may be entitled to. * * *"

Section 3 makes provision for hearing and determining disputes between contesting claimants. Sections 4 and 5 we need not no-

tice here. Section 6 provided for an appeal to the proper district court from a decision of a mayor or the commissioners.

In 1858, an act was passed, on this same subject, which repealed the act of 1857. See Laws Neb. 1858, p. 266. In sections 4 and 5 of the law of 1858 it was provided:

"Sec. 4. After the entry of the land settled upon and occupied as a town site, as hereinbefore prescribed, the corporate authorities or the county judge, as the case may be, having entered the land shall cause public notice to be given of the fact of such entry by posting written or printed notice in at least three public places in the town, and no deed for the land nor any part thereof shall be executed and delivered within the period of thirty days after the first day of the publication of such notice.

"Sec. 5. After the lapse of thirty days from the first day of the publication of such notice, the mayor of the town, or if there is no mayor the chairman of the board of trustees, if such town is incorporated, and if the town is not incorporated then the county judge of the county wherein the town is situated, shall on demand, execute and deliver to each person who may be legally entitled to the same, a deed in fee simple, for the part or parts, lot or lots of such land as the person demanding may be lawfully entitled to."

In regard to a patent issued by the proper officers of the United States, it was observed, in the case of Smelting Co. v. Kemp, 104 U. S. 636: "The execution and record of the patent are the final acts of the officers of the government for the transfer of its title; and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration, by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief—indeed, its only—value, as a means of quieting its possessor in the enjoyment of the lands it embraces." Polk v. Wendall, 9 Cranch, 87; Cofield v. McClelland, 16 Wall. 331; Moffat v. U. S., 112 U. S. 24, 5 Sup. Ct. 10. The principle is also recognized in Van Sant v. Butler, 19 Neb. 351, 27 N. W. 299 The supreme court of Colorado has said, on this same subject: "The doctrine announced was that the deed, upon its face, purported to have been issued in pursuance of the law, and was therefore only assailable in a direct proceeding to set it aside. Another proposition insisted upon it that it was admissible to attack the Hughes deed for fraud in its execution, and for this purpose the offer to prove that Hughes had never filed upon the lot in question should have been allowed. The fraud alluded to is imputed to the probate judge. The language of counsel is: 'That the action of Downing in issuing the deed in question to Hughes was a fraud upon the rights of plaintiff in this case will hardly be questioned.' Whether this charge be true or not, the proposition that, upon this ground, the validity of the deed was examinable in an action of this character, is in conflict with the leading cases on the subject. The doctrine is established by numerous decisions of the supreme court of the United States that, should the officers of the land department, in issuing a patent, err in respect to their duty, as to questions of fact or law, or even act from corrupt motives, the patent cannot be collaterally attacked for such cause, if, upon any state of facts, the patent might have lawfully issued; and that, against collateral attack, it will be presumed the necessary facts existed. Parties aggrieved by such error or fraud must resort to a direct proceeding to set aside the patent." Chever v. Horner, 11 Colo. 72, 17 Pac. 495, and cases cited.

It is settled doctrine, well supported by both authorities and reason, that, from the existence of the patent evidencing the grant, the presumption arises that all the acts have been performed, and all the necessary facts have been shown to exist, by the party to whom it was made, which were prerequisites to its existence, and that the proper officers have examined and adjudicated the question of the right of the applicant, and the patent, the evidence of such determination, is unassailable collaterally. The patent in this case ran to the trustees of the city of Grandview, and the deeds, purporting to convey title to the various claimants of lots and undivided interests in the stone-quarry reserve, were signed "A. B. Moore, Chairman." The recitals of these deeds, or such as we need notice, were as follows: "This indenture, made this fifth day of March, in the year of our Lord one thousand eight hundred and fifty-nine, witnesseth: That whereas, the congress of the United States passed an act entitled 'An act for the relief of citizens of towns upon lands of the United States, under certain circumstances,' approved May 23, A. D. 1844; and whereas, the legislative assembly of the territory of Nebraska, under and in pursuance of said act of the said congress, passed an act entitled 'An act regulating the disposal of lands purchased in trust for town sites,' approved February 10, A. D. 1857; and whereas, the trustees of the city of Grandview have paid for and received a title from the United States, in trust for the occupants and owners of the lots and pieces of land in the city of Grandview and territory of Nebraska, which city is located upon [here follows a description of the land]: Now, therefore, by virtue of the power in said board of trustees vested, by the two several acts, as

such trustees aforesaid, the said trustees of the city of Grandview, in consideration of the premises and of the sum of twenty-nine (being one-tenth of the costs of entry) dollars in hand paid, the receipt whereof is hereby acknowledged, do by these presents convey unto [here follows the name of the grantee and description of the property conveyed]. In witness whereof, I have hereunto set my hand this fifth day of March, A. D. 1859, by authority of the said board of trustees. Andrew B. Moore, Chairman."

It is argued by counsel for plaintiff in error that, inasmuch as the instruments state that they are executed under and by virtue of the provisions of the act of 1857, this must be accepted as true and binding, and, further, since the act of congress required the deeds to be executed in conformity to the rules and regulations prescribed by the legislative assembly of states and territories, and if not so executed they should be void and of none effect, and the territorial act of 1857 prescribed that the conveyances therein provided for should be made by the mayor of the town, if incorporated, and, if not incorporated, by the county commissioners, these deeds, being executed by neither, were void, unless the word "mayor," in the act, be construed as a generic term, and, as such, to include the chairman of the board of trustees of a town or city; and, if this last view be entertained, that it devolve upon the parties introducing the deeds, and whose success depended on their validity, in order to establish it, to show that the chairman of the board of trustees of the city of Grandview possessed such authority, and was empowered or required to perform acts and duties which usually appertain to the office of mayor of a city, and thus bring him within the scope of such appellation, viewed as a generic term. This argument is not tenable. It must be remembered, as we have hereinbefore stated and shown, that, by an act of the territorial legislature, passed in 1858, the act of 1857 was repealed, and those deeds were all executed subsequent to the passage of the act of 1858. At the time, then, of the making of these deeds, the law of 1857 had no further existence. The date of the entry of the land does not appear in the record. The date of the patent is April 1, 1859. So we cannot say whether the entry was made during the life of the act of 1857, or after the enactment of the law of 1858 on the subject. But, however this may have been, at the date of the conveyances in question the act of 1858 was in force, and the law of 1857 did not exist,—had been repealed; and the recital in the deed, referring to the act of 1857 as the basis or source of authority for their execution, had no other or greater force or effect than if there had been no recital, and no reference to any law as authorizing the performance of the act of making the deeds. If there had been no recital of the authority, it would not have invalidated the deeds. Burbank v. Ellis, 7 Neb. 156. The deeds must be viewed as executed under the authority and provisions of the act of 1858.

It is insisted that it should have been shown that the city of Grandview had been incorporated, and that the parties to whom transfers had been made were occupants of the premises or portions of the property conveyed to them; or, in other words, it was necessary that proof be made that the parties to whom the deeds were made were the proper ones, that all the acts to be performed had been done, or the facts required to exist by the statute were existent, at the time of the execution of the deeds. These were matters to be investigated and determined by the person holding the trust, and upon whom it devolved as a duty, on demand by the proper party, to make a deed,—in this case, the chairman of the board of trustees of the city,—and his settlement of the questions was not subject to collateral attack. As was said in the decision of the case of Taylor v. Railroad Co. (Minn.) 47 N. W. 453: "The execution of a deed of a part of the town site by the judge, who is trustee for that purpose, is analogous to the grant of a patent by that department of the government whose province it is to supervise the various steps necessary to be taken to obtain title. The execution of a deed by the judge is in the nature of an official declaration and determination by him that all the requirements preliminary to the execution of the deed have been complied with, and that the person to whom it is issued is the person entitled to it. The doctrine of presumptions in favor of official acts obtains,—that the judge did his duty in all respects, and had required the grantee to show, by legal proofs, that he was the party entitled to a deed and that he had complied with all the necessary prerequisites to its execution. Moreover, when a trustee, in whom is vested the land constituting a town site, in trust for the occupants, has executed a deed of a parcel of such land to one claiming to be a beneficiary of the trust, no one who is not a beneficiary of the trust, but a mere stranger to the title, as is the defendant here, can call in question the validity or regularity of such conveyance, or, by subsequent intrusion upon the possession, acquire any right to inquire into or litigate the question whether all the steps required by law were taken, or whether the party to whom the deed was executed was the person entitled thereto. Anderson v. Bartels, 7 Colo. 256, 3 Pac. 225; Murray v. Hobson, 10 Colo. 66, 13 Pac. 921; Chever v. Horner, 11 Colo. 68, 17 Pac. 495; Mathews v. Buckingham, 22 Kan. 166; Ming v. Foote (Mont.) 23 Pac. 515; Whittlesey v. Hoppenyan, 72 Wis. 140, 39 N. W. 355; Smelting Co. v. Kemp, 104 U. S. 640; Cofield v. McClelland, 16 Wall. 331-334." Tucker v. Railroad Co. (Wis.) 65 N. W. 515; Lamm v. Railroad Co. (Minn.) 47 N. W. 455. Nor was it necessary to prove the organization of the city in order to make the deeds properly re-

ceivable in evidence. Mathews v. Buckingham, 22 Kan. 166.

It is contended that it was necessary for the parties depending on the deeds from the trustees of the city as evidence of title to show that A. B. Moore, who signed the conveyance, was chairman of the board of trustees, before they should have been received in evidence, or, at least, before instructing the jury that they were competent evidence, and established one link in the chain of title. This was not one of the facts the existence of which, as a prerequisite to the execution of the transfer, he determined before making the conveyances. We have herein quoted portions of one of the deeds, and it was agreed that, in such statement as we have copied, they were all similar; and it will be remembered that it was not recited in the deed that A. B. Moore was chairman of the board of trustees, and he signed it "A. B. Moore, Chairman," with no statement of what body or organization he was chairman, with no reference to the board of trustees of the city of Grandview, unless it should be said that the deed, being one which, according to its recitals, was made by such trustees, and he signing it as "chairman," it must be presumed to be as such officer of the board stated in the deed. Had the recital of the capacity in which he executed the deeds appeared therein, or after his signature, it would have proved no more, as against plaintiff in error, than that he claimed to have executed them as such officer. It would not have been proof of the fact that he was such chairman. The acknowledgment identified Moore as chairman of the board of trustees of Grandview city; but this was but for the purposes of the acknowledgment, which was no part of the deed, and was not substantive proof of the fact as an independent fact.

During the trial there was introduced in evidence, over the objection of plaintiff in error, "page 14, Book of Corporation of Grandview," which, from its statements, would seem to be the minutes of the proceeding at a meeting of the board of trustees of the city of Grandview, and that, among other things which transpired at the meeting of date August 4, 1858, A. B. Moore was appointed chairman. This was identified by but one witness, who was asked: "Q. You remember an organization known as the Grandview Company?" To which he answered: "A. Yes, sir." And his examination was continued, in part, as follows: "Q. Were you a member of it? A. I was." He was shown a book, and stated: "That is the minutes or records of the meetings and transactions of the company,—of the board of trustees." And again, in answer to a question propounded by Mr. Baldwin, counsel for plaintiff in error, he answered: "I know that it is the book of the records of the transactions of the company." And again: "Why, it is the records of the proceedings of the company,—the Grandview Company,—kept by the secretary or secretaries of that company." From which it will be gathered that the page of the book introduced in evidence was not identified as being the minutes of a meeting of the board of trustees of the city of Grandview, but of the Grandview Company, and was not competent as evidence of the proceedings of the board of trustees of the city of Grandview. This witness also testified that he was a member of the Grandview Company, and at one time its secretary,—he thought its last one; that he knew who was chairman of the board of trustees of the company; that it was A. B. Moore; and that there was never any other. Proof that A. B. Moore was chairman of the board of trustees of an organization called the "Grandview Company" had no relevancy or competency in this case. Unless he was chairman of the board of trustees of Grandview city, he had no power or authority to act and execute the deeds transferring the title, held in trust by the board, to the beneficiaries of the trust; and, without proof that he was such chairman, the deeds were not evidence of the conveyance of the title. There being no proof of the fact of his chairmanship of the board of trustees of the city of Grandview, the court erred in instructing the jury that the defendants in error had shown a complete title, as these deeds, signed by "A. B. Moore, Chairman," constituted an indispensable link in the chain of each title to be proved.

On the facts or circumstances involved in the second or affirmative defense, viz. adverse possession for a sufficient length of time to bar any action for recovery of the possession or title of the premises, we will not now comment, as there must be a new trial, and they must again be submitted to the jury or a trial judge for determination. a discussion of them at this time is unnecessary, and might be prejudicial to the rights of one or the other of the parties in another trial. The judgment of the district court is reversed, and the cause remanded. Reversed and remanded.

IRVINE, C., took no part in the decision.

HOGUE v. CAPITAL NAT. BANK OF LINCOLN.

(Supreme Court of Nebraska. April 10, 1896.)

CORPORATIONS — ESTOPPEL TO DENY CORPORATE EXISTENCE—LIABILITY OF STOCKHOLDERS.

1. Where a corporation has had a de facto existence for a considerable time, its corporate character cannot be collaterally assailed by persons contracting with it in such capacity, relying upon the corporate credit, in order to hold stockholders thereof individually liable on account of the failure to observe the statutory requirements essential to constitute a technical de jure corporation.

2. The liability imposed by section 139, c. 16, Comp. St., as originally enacted, was penal in its character; and rights of action thereunder, not reduced to judgment, abated with the

repeal of said section without a saving clause. Chapter 13, Laws 1891.

(Syllabus by the Court.)

Error to district court, Sherman county; Holcomb, Judge.

Action by the Capital National Bank of Lincoln against John Hogue. Judgment for plaintiff, and defendant brings error. Reversed.

E. C. Lane, J. R. Scott, and J. H. Broady, for plaintiff in error. Nightingale Bros., for defendant in error.

POST, C. J. This was an action by the defendant in error, the Capital National Bank of Lincoln, in the district court for Sherman county, to recover from the plaintiff in error, Hogue, as a stockholder of the Sherman County Banking Company, the sum of $10,272.65, being the face value of 24 notes sold by said last-named corporation. Upon the back of each of the notes so sold appears the following indorsement: "For valuable consideration, we hereby guaranty to the Capital National Bank of Lincoln, Neb., or its assignees, the payment of the within note, waiving protest and nonpayment of the same. [Signed] Sherman County Banking Company, by E. E. Whaley, Pt." The ground of Hogue's alleged liability appears from the following statement of the petition: "The said Sherman County Banking Company on October 31, 1887, filed its articles of incorporation in the county clerk's office, and on November 1, 1887, commenced to transact business at Loup City, in said county, as a banking corporation, and continued to transact business as such until December 26, 1888, at which last date said banking corporation became wholly insolvent, and made a pretended assignment for the benefit of creditors, and, by assignment duly executed, conveyed all the corporate property of said banking company to Joseph F. Pedler, sheriff of said county. * * * The said Sherman County Banking Company was not a legally incorporated company, but has failed to comply with the provisions of chapter 16, Comp. St., entitled 'Corporations,' in relation to giving notice, and other requisites of organization, and thereby subjected its stockholders to the liability imposed by section 139 of said chapter. Such failure to comply substantially with the law affecting and regulating corporations is, more specifically, as follows: (a) The said Sherman County Banking Company wholly failed to publish notice of its incorporation or organization. (b) The whole of the capital stock of said banking corporation was not subscribed at the time of commencing business, on November 1, 1887, or at any time thereafter, as required by its articles of incorporation and by the general law. (c) The whole of the capital stock of said corporation was not paid for at the time of commencing business, nor at any time thereafter. * * * (e) The said Sherman County Banking Company wholly failed to post up, in a conspicuous place, at its place of business, subject to inspection, a copy of its by-laws, and the names of all of its officers appended thereto, and wholly failed to make, and govern itself by, by-laws. (f) Said corporation wholly failed to make and publish a quarterly statement of the assets and liabilities of said banking company, and to make and publish the annual notice of indebtedness required by law. (g) Said banking company failed to keep a record of its corporate proceedings, and its election of officers and board of directors; failed to open and keep a subscription book; failed to keep a stock ledger or stock transfer book, or any book in which the names of the said stockholders were entered, and the amount held and owned by each stockholder; and thereby concealed from the creditors of said banking corporation, from the patrons of said bank, and from the public in general, the fact that a large amount of the capital stock of said corporation was held and owned by insolvents, and persons of doubtful solvency. By reason of the aforesaid failure to comply with the provisions of law as to notice, and other requisites of organization, as herein set forth, the stockholders of said Sherman County Banking Company became and are jointly and severally liable for all the debts of said corporation." A general demurrer to the petition was overruled, and issues joined by answer and reply. A trial was had at a subsequent term, resulting in a verdict and judgment for the plaintiff below in the sum of $14,865.81, and which has, by appropriate proceedings, been removed into this court for review.

It is unnecessary, in the view we take of the questions presented for determination, to notice the allegations of the answer and reply. Among the facts shown by the petition, proof, and record, and as to which there is no controversy, are the following: (1) The Sherman County Banking Company had a de facto existence for more than a year, during which time the defendant in error had transactions with it, in its corporate capacity, amounting to many thousands of dollars, including the indorsements upon which it seeks to recover in this action. (2) The cause of action alleged and relied upon in the district court is the failure of the banking company to comply substantially with the provisions of the statute in relation to the giving of notice, and other requisites of organization, and not Hogue's primary liability as a stockholder of said corporation.

Counsel for the defendant in error, with a candor certainly to be commended, frankly admit that the situation, from their point of view, is complicated by the repeal in 1891, without a saving clause, of section 139, c. 16, of the general corporation law of the state, and, in a brief of unusual merit, insist that the repealing act should be given a prospective effect only, since to hold otherwise is to destroy vested rights, and accordingly vio-

lative of section 10, art. 1, of the constitution of the United States. But whatever view we might feel constrained to take of that subject, as an original proposition, it cannot, we think, be longer regarded as an open question in this jurisdiction. Section 139, as originally enacted, reads as follows: "If any corporation fail to comply substantially with the provisions of this sub-division in relation to giving notice and other requisites of organization, the property of all the stock holders shall be liable for the corporate debts." By section 2 of the act of 1891 the foregoing provision was amended to read as follows: "If any corporation fail to comply substantially with the provisions of this sub-division in relation to giving notice and other requisites of organization, after the assets of the corporation are first exhausted, then the property of any stock holder shall be liable for the corporate debts, to the extent of the unpaid subscription of any stockholder to the capital stock of such corporation, and in addition thereto, the amount of capital stock owned by such individual." By section 3 the original section was repealed, and by section 4 it is provided that: "Whereas an emergency exists, this act shall take effect from and after its passage and approval, and shall be held and taken to apply in any case now pending or hereafter brought in any court in this state." In Globe Pub. Co. v. State Bank, 41 Neb. 175, 59 N. W. 683, it was held that where an attempt is, in good faith, made to organize a valid corporation, and such body actually exercises corporate functions for a considerable time, unchallenged by the state, persons contracting with it in its corporate capacity, and in reliance upon its corporate credit, cannot hold stockholders thereof liable for its debt solely because, by mistake or omission not amounting to fraud, some act is left undone which is essential to constitute it a de jure corporation. In Kleckner v. Turk, 45 Neb. 176, 63 N. W. 469, it was held that the liability imposed by section 139, as originally enacted, was for the omission of acts which are not conditions precedent to the commencement of business by a corporation; that such liability existed solely by reason of the provisions of said section; that it was in the nature of a punishment; and that the right of action thereby conferred, unless reduced to judgment, did not survive, but was destroyed by its repeal. These decisions we regard as conclusive of the present controversy. It follows that the judgment must be reversed, and the cause remanded for further proceedings in the district court. Reversed.

STATE v. HAM.

(Supreme Court of Iowa. April 13, 1896.)

BURGLARY — POSSESSION OF STOLEN GOODS — INSTRUCTION.

An instruction that if goods were, by some person, stolen from a building in the night, by breaking and entering it, and were found within a few days in defendant's possession, the jury would be "warranted in concluding that they * * * were stolen by said defendant by breaking and entering such building in the nighttime," was proper.

Appeal from district court, Floyd county; P. W. Burr, Judge.

Indictment for burglary. Verdict of guilty, and a judgment from which the defendant appealed. Affirmed.

S. W. Woodhouse and Ellis & Ellis, for appellant. Milton Remley, Atty. Gen., for the State.

GRANGER, J. The indictment charges the offense as having been committed by breaking and entering a slaughterhouse, in which were kept, for sale and deposit, meat, hides, tallow, and other goods. The evidence tended to show that some of the hides were stolen from the building, and were afterwards found in the possession of the defendant. The court gave the following instruction: "If you find from the evidence in this cause, beyond a reasonable doubt, that the hides mentioned by the witnesses for the state, or any of such hides, were, by some person or persons, stolen from the slaughterhouse mentioned in the indictment, in the nighttime, by breaking and entering such building, and you further find that, within a few days thereafter, such hides, or any of them, were found in the possession of the defendant, John Ham, you would, in such case, be warranted in concluding that the hides, if any were found in the possession of the said John Ham, were stolen by said defendant, Ham, by breaking and entering said building in the nighttime, unless the facts and circumstances disclosed by the evidence raise in your minds a reasonable doubt as to whether he did not honestly come into such possession." The legal conclusion from the instruction is that if the hides found in the possession of the defendant had recently been stolen from the building, by breaking and entering in the nighttime, the jury could, from such facts alone, find the defendant guilty. The instruction is not that the jury should, but that it might, from the fact of such possession, find the defendant guilty. The question was considered, and different holdings on the question compared, in State v. Jennings, 79 Iowa, 513, 44 N. W. 799, and the rule of the instruction sustained. See, also, State v. Yohe, 87 Iowa, 33, 53 N. W. 1088. Following the rule, the judgment is affirmed.

MENEFEE v. CHESLEY.

(Supreme Court of Iowa. April 13, 1896.)

HUSBAND AND WIFE — NECESSARIES FOR WIFE'S CHILDREN—LIABILITY OF HUSBAND—APPEAL—NOTICE—ABSTRACT.

1. A husband who has separated from his wife is not liable as at common law for neces-

saries for the wife's children by a former husband, living with her, sold solely on the wife's credit; especially where it is not shown that the wife has no means with which to pay for them.

2. Nor is the husband liable in such case, under Miller's Code, § 2214, providing that the expenses of the family and the education of the children are chargeable on the property of both husband and wife, or either of them.

3. In an action against both husband and wife for necessaries, where no judgment is rendered against the wife, and there is nothing to indicate that she will be affected by an appeal by the husband from judgment against him, notice of an appeal by him need not be served on the wife.

4. Where a case on appeal goes to the supreme court on a certificate of questions of law, appellant need not abstract the pleadings.

Appeal from district court, Cass county; A. B. Thornell, Judge.

Action at law to recover of defendant the amount of a certain bill of goods sold to his wife. Judgment for defendant. Plaintiff appeals. Affirmed.

John Hudspeth, for appellant. Willard & Willard, for appellee.

DEEMER, J. The amount involved being less than $100, the case comes to us on a certificate from the trial judge. We need not set it out in full. The facts as found by the lower court are that in 1893 the plaintiff sold and delivered to Mrs. C. P. Chesley, defendant's wife, certain groceries, to the value of $81, on which there yet remains due the sum of $69. The goods were sold upon the order of, and credit was extended solely to, the wife. The goods so sold were used by the wife and her children by a former husband, who lived with her at the time. The defendant was married to the woman who purchased the goods in the year 1892. At the time of the marriage, she had three minor children, who lived with her in property owned by the wife. Immediately upon the marriage, defendant took up his residence with his wife and her children, and continued to live there until January, 1893. At this last-named date, trouble arose between the parties; and, as a result, the defendant, upon invitation of the wife, left, and went to an hotel, where he has since resided. When he quit living with his wife, he notified the merchants of the city where they both resided not to sell goods to his wife upon his credit. He did not, however, at any time object to the stepchildren living in his family; nor did he say anything to the merchants to whom he gave the notice that he did not wish to support these children. The wife had no income at the time she purchased these goods, and the husband refused to support or provide for her or her children.

On these facts, the following questions of law are propounded: First. Is the husband, C. P. Chesley, liable for the balance due upon said account, under the circumstances above given? Second. After the husband's departure from the household, under the circumstances above given, did he have a family remaining in the household, within the meaning of section 2214 of Miller's Code of Iowa? Third. Is the indebtedness arising from the sale of said goods to the wife one which can be said to constitute "family expenses," within the language of said section, as against the defendant, C. P. Chesley? Fourth. There having been kept no account of the particular groceries consumed by the wife, or of those used by the children, can the husband escape liability in this case, by reason of the fact that the children are not his own? Fifth. The plaintiff placed the wife upon the stand, and offered to contradict by her the husband's testimony with reference to what was said at the time of the quarrel, and also to show by her the fact that she had no means of support other than those coming from her husband. Counsel for the husband objected to the witness before she was sworn, and before she came upon the stand, upon the ground that she was the wife of the defendant, C. P. Chesley, and therefore her evidence was incompetent as against him. She is a co-defendant in this suit, but the trial of this case was against the husband, and the case against the wife was not being tried. Judgment had been entered against C. P. Chesley before a justice of the peace, from which judgment C. P. appealed. No judgment had been entered against the wife so far as I know. The court sustained said objection, to which ruling the plaintiff at the time excepted. Question: Was this action of the court prejudicial error?

It may be well before answering these questions to dispose of two questions of practice. It is insisted that the appeal should be dismissed, because no notice of appeal was served upon the wife. We do not see the necessity for such a notice. It does not appear that Mrs. Chesley was a party to the proceedings; certainly no judgment was rendered against her, and there is nothing to indicate that she would be affected by this appeal. The appellant's abstract does not set forth the pleadings. It is contended that this is fatal. As the case comes to us on certificate, it is not necessary for the appellant to abstract the pleadings. Noble v. Chase, 60 Iowa, 261, 14 N. W. 299.

Again, it is said that the certificate is not in proper form, because—First, the facts are not found by the judge; and, second, because no question of law is presented. We see no merit in either of these claims.

We now turn to the questions presented, and, instead of answering each seriatim, we group them together, and find that virtually two are involved: First. Is the defendant liable as at common law for the goods sold? And, second, is he liable under the statute (Miller's Code, § 2214). Little, if any, reliance is placed by appellant upon defendant's common-law liability. Indeed, we think he was not entitled to recover on this theory, for the reason that it is affirmatively shown that the goods were sold solely on the credit of the

wife, and for the further reason that it is not shown that the wife had no means with which to pay for them. It also appears that the goods were not only used by the wife (for whose support the defendant might, under certain circumstances, be held liable), but by her children, for whose sustenance he was not responsible after the family relation was severed. Is the defendant liable under the provision of the Code before cited? The section reads as follows: "The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately." The question turns upon the interpretation to be put upon the word "family." At law, it has a well-defined meaning. It is said to be a "collective body of persons who live in one home, under one head or manager." Tyson v. Reynolds, 52 Iowa, 431, 3 N. W. 469; Arnold v. Waltz, 53 Iowa, 706, 6 N. W. 40; Linton v. Crosby, 56 Iowa, 386, 9 N. W. 311. Under the facts found by the court, there certainly was a family which used the goods, and the account was for expenses of the family. But was it such a family as that defendant should be holden for the amount of the bill? It is manifest from a reading of the statute that the family for the expenses of which either husband or wife may be held liable is the family of such husband or wife, not some other family. Were the children of a former husband a part of the defendant's family after he ceased to live with them, and can he be held liable for their support? Clearly not, as we think. While he may have been liable for the expenses of such a family so long as he continued to live in and be a part of it, yet when he threw off these obligations towards his stepchildren, as he had the right to do, his liability for their support ceased. They were no longer a part of his family, and he should not be held liable for the support of persons to whom he owed no duty. Our conclusion finds support in the case of Schlesinger v. Keifer (Ill. Sup.) 22 N. E. 814.

A question as to the admissibility of certain testimony is presented by the certificate. We think the mere perusal of section 3641 of Miller's Code is sufficient to show that the court correctly excluded the testimony.

The lower court found for the defendant. Our consideration of the case leads to the same results, and the judgment is affirmed.

ALBERS v. WESTERN UNION TEL. CO.

(Supreme Court of Iowa. April 13, 1896.)

TELEGRAPH COMPANIES — DELAY IN DELIVERING MESSAGE—CONTRACT REQUIRING WRITTEN CLAIM FOR DAMAGES—VALIDITY—WAIVER—ACTION FOR DAMAGES—SUFFICIENCY OF PETITION.

1. A contract, between a telegraph company and the sender of a message, that the company will not be liable for damages or statutory penalties where the claim is not presented in writing within 60 days after the message is filed with the company for transmission, is valid.

2. Where a contract between a telegraph company and the sender of a message provides that the company will not be liable for damages, etc., where the claim is not presented in writing within 60 days, a waiver of such provision is not shown by mere verbal statements made to, and interviews with, the company's operators, and indefinite statements as to damages, in the absence of any claim for damages at the time, in the sense of a demand for payment of any sum.

3. In an action for damages for delay in delivering a message, the petition must show that plaintiff complied with a valid provision as to filing notice of claim.

Appeal from district court, Keokuk county; A. R. Dewey, Judge.

Action at law to recover damages for failure to transmit a telegraphic message. There was a demurrer to the petition, which was sustained. From a judgment dismissing the petition, the plaintiff appeals. Affirmed.

C. M. Brown, for appellant. McNett & Tisdale and Cummins & Wright, for appellee.

ROTHROCK, C. J. 1. It is unnecessary to set out the petition in full. It will be sufficient to give the substance of it, so far as it pertains to the single question which, we think, is decisive of the case. It appears, from the petition, that on the 30th day of June, 1894, the plaintiff filled one of the blanks of the defendant, at its office in Sigourney, in this state, with a message, directed to H. A. Albers, at Center Junction, Iowa, and delivered said message to the defendant's agent at Sigourney, and directed him to transmit it to H. A. Albers, at Center Junction, and that payment was made for the transmission of the message. It is averred that the defendant carelessly and negligently failed to transmit said message as directed, and that plaintiff sustained damages by reason of said negligence. The message and the indorsements thereon are set out as part of the petition, and for the purpose of showing that the defendant is liable for negligence. The contract, among other things, contains this stipulation: "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission." It is not averred in the petition that the plaintiff complied with this provision of the contract within any time, before or after the expiration of 60 days. One ground of the demurrer was that there was no averment in the petition that the plaintiff complied with this part of the contract. The claim is briefly made, in the argument in behalf of appellant, that a demurrer on this ground will not lie, but that the failure to present the claim within the time named must be specially pleaded. This position is not well taken. If there is any ground upon which this part of the contract can be avoided, it must be set out in the pe-

tition; and for failure to do this a demurrer is the proper pleading by defendant. Carter v. Insurance Co., 12 Iowa, 287; Moore v. Insurance Co., 72 Iowa, 414, 34 N. W. 183.

2. The claim is also made that the averments of the petition show that the stipulation under consideration was waived. We will not set out that part of the petition. It shows merely verbal statements made to, and interviews with, the operators of the defendant, and indefinite statements as to damages. No claim for damages, in the sense of a demand for payment of any sum, was made at any time. We do not think that the averments of the petition show a waiver, even if it should be conceded that the provision may be waived.

3. We come now to the question involving the validity of the stipulation requiring the claim to be presented in writing. It is urged, in behalf of appellant, that it is void, as being unreasonable and against public policy. An examination of the question, in the light of the arguments of counsel and authorities cited, leads us to the conclusion that this part of the contract is valid. There is really no reason why a telegraph company may not require notice of its defaults within a reasonable time before being held liable for alleged negligence. The nature of the business is such that a stipulation like this may be necessary to its protection against unfounded claims. There is nothing in the petition in this case from which it can be even inferred that the plaintiff was not advised of the failure to transmit the message long before the expiration of the 60 days. There is nothing unreasonable, and no infraction of a just public policy, in requiring a claim to be made within such time as the failure would be known to the sender of the message. Such conditions as this have been sustained by an almost unbroken line of authority. We need not name the cases. The citations may be found in 25 Am. & Eng. Enc. Law, 798–800. It is to be remembered that such a provision in the contract does not defeat the claim for damages, and it in no manner affects the operation of the statute of limitations, as appears to have been supposed in the case of Telegraph Co. v. Underwood (Neb.) 55 N. W. 1057. While this court has not determined this question in an action against a telegraph company, yet the same principle has been applied again and again in reference to insurance companies and railroad companies. Skinner v. Railroad Co., 12 Iowa, 191. In Moore v. Insurance Co., 72 Iowa, 414, 34 N. W. 183, it is said: "This court has, in repeated decisions, recognized the right of parties to policies of insurance to limit, by conditions therein, the time in which actions may be brought to recover for losses of property insured, and, sustaining such conditions, has held actions barred thereunder. This must be regarded as the settled doctrine of this court." This rule is far in advance of the question under consideration. We repeat that this part of the contract in no manner affects the statute of limitations. The limitations referred to in the case last cited do put a limit on the time for commencing actions.

4. Something is said in argument to the effect that, under our statute, the willful failure to transmit a message is a misdemeanor, and the defendant cannot contract so as to relieve itself from a misdemeanor. As this question is not argued, it is sufficient to say that this is not a prosecution for a misdemeanor; and the petition does not charge that the failure to transmit the message was willful. Other questions are discussed by counsel, which need not be considered, for the reason that what has already been said disposes of the case. The judgment of the district court is affirmed.

SMITH v. OMAHA & C. B. RAILWAY & BRIDGE CO. et al.

(Supreme Court of Iowa. April 9, 1896.)

BRIDGES—TAXATION IN AID OF—STATUTES—CONSTRUCTION—RECOVERY OF TAXES BY TAXPAYER.

1. Laws 21st Gen. Assem. c. 13, § 1, provides for aid by cities to any corporation formed under the laws of Iowa for the construction of bridges. Section 3 provides for payment of such aid to the treasurer of the company to whom it is voted. Section 2 provides that the terms and conditions expressed in the notice of the election shall be binding on such corporation, its "successors and assigns." *Held*, that such aid cannot be given to a foreign corporation.

2. The Omaha & Council Bluffs Railway & Bridge Company was organized in Iowa to maintain a bridge over the Missouri river between the two cities. The act of congress authorizing the bridge designated the company as the Omaha & Council Bluffs Railway & Bridge Company, "organized under the laws of Iowa and Nebraska," whereupon a Nebraska company was formed under the same name, to which the Iowa company conveyed all its franchises, together with the right to the aid voted it by the city of Council Bluffs for the construction of the bridge. The Nebraska company did not bind itself to build for the Iowa company the bridge which it subsequently constructed. *Held*, that the bridge was constructed by the Iowa company, and neither it nor the Nebraska company was entitled to receive the aid voted the Iowa company for the construction of the bridge. Laws 21st Gen. Assem. c. 13.

3. Taxpayers may sue to recover from a bridge company taxes paid by them pursuant to a vote to the company of aid in the construction of a bridge (Laws 21st Gen. Assem. c. 13) and received by the company, where the company has failed to comply with the conditions entitling it to such aid.

4. Laws 21st Gen. Assem. c. 13, § 4, providing that, should the taxes voted a bridge company to aid in the construction of a bridge remain in the treasury over a year, the right of the company thereto shall be forfeited, and the taxes shall be refunded to the taxpayers, does not affect the right of a taxpayer to recover such taxes when paid to the company without its having complied with the conditions entitling it to aid.

Appeal from district court, Pottawattamie county; H. E. Deemer, Judge.

This is an action at law, brought by the plaintiff on a claim of his own and as assignee of the claims of a number of other taxpayers of the city of Council Bluffs to recover certain taxes which he and they paid to aid in the construction of a bridge over the Missouri river between the cities of Council Bluffs, Iowa, and Omaha, Neb. The facts and issues will appear in the opinion. The case was tried to the court, and judgment rendered in favor of the plaintiff for $13,425.62. The defendants appealed, and assigned as error the entering of said judgment and certain rulings of the court in admitting and refusing to admit certain testimony. Affirmed.

Wright & Baldwin, for appellants. Harl & McCabe, for appellee.

GIVEN, J. 1. The defendant corporations being organized under the same name, we will, for convenience and brevity, designate one as the Iowa corporation and the other as the Nebraska corporation. There is but little to dispute as to the facts of this case, and the following is a sufficient statement of the facts for an understanding of the questions to be considered. The Iowa corporation was organized under the laws of Iowa in October, 1886. Its purpose, as expressed in its articles, is as follows: "To construct, operate, and maintain a bridge across the Missouri river at and opposite the cities of Omaha, Nebraska, and Council Bluffs, Iowa, and also a steam, electric motor, horse, elevated, cable, or other line of railway, and a public way across said bridge, and within the counties of Douglas, Nebraska, and Pottawattamie, Iowa, with the termini thereof in the said cities of Omaha and Council Bluffs." On October 29, 1886, the city of Council Bluffs passed an ordinance authorizing said Iowa corporation, "its successors and assigns, to construct, equip, maintain, and operate for the term of twenty-five years" a street railway in the streets of said city, as specifically set forth in said ordinance. Said ordinance was duly accepted by said Iowa corporation on the 30th day of October, 1886. On November 2, 1886, a special election was duly held in the city of Council Bluffs to determine whether a tax of 12 mills per centum on the assessed valuation of the property of said city should be levied for the purpose of aiding said Iowa corporation "in the construction of a highway bridge over the Missouri river at a point commencing at the foot of Broadway street, or within 300 feet thereof on either side of the city of Council Bluffs, Iowa, at and opposite the same in Iowa, and terminating opposite in the city of Omaha, Nebraska." A majority of the votes polled being for this taxation, the tax was thereafter duly assessed, levied, and collected. The Missouri river being navigable, and subject to the jurisdiction of the United States, congress passed an act March 3, 1887, authorizing "the Omaha & Council Bluffs Railway & Bridge Co., an incorporation organized under the laws of the states of Nebraska and Iowa, to construct and maintain a bridge across the Missouri river." This act also authorized said bridge to be used as a combined railway and wagon bridge. It will be observed that the authority conferred by congress was to "the Omaha & Council Bluffs Railway & Bridge Co., an incorporation organized under the laws of the states of Nebraska and Iowa," and that at that time only the Iowa corporation was in existence. It seems probable that because of this phraseology in the act of congress, and the fact that the bridge was to be constructed over a river dividing two states, it was thought necessary to organize a corporation under the laws of Nebraska. On April 1, 1887, the Nebraska corporation was organized for the purpose, as stated in its articles, as follows: "The general nature of the business to be transacted by the corporation shall be to construct, operate, and maintain a bridge across the Missouri river at and opposite the cities of Omaha, Nebraska, and Council Bluffs, Iowa, and also a steam, electric motor, horse, elevated, cable, or other line of railway, and a public way across said bridge, and within the counties of Douglas, Nebraska, and Pottawattamie, Iowa, with the termini thereof in the said cities of Omaha and Council Bluffs." On May 14, 1887, said corporation entered into a contract in writing, which was duly executed and acknowledged. Said contract, among other things, provided as follows: "First. The said Omaha & Council Bluffs Railway and Bridge Company of Council Bluffs, Iowa, for the consideration hereinafter named, hereby sells, assigns, transfers, and sets over to the said Omaha and Council Bluffs Railway & Bridge Company of Omaha, Nebraska, all that certain tax of twelve mills per centum on the assessed valuation of the property in the city of Council Bluffs, voted to the said Omaha & Council Bluffs Ry. and Bridge Co. of Council Bluffs, Iowa, by the electors of the said city of Council Bluffs, Iowa, on the 2d day of November, A. D. 1886, to aid in the construction of a highway bridge over the Missouri river between the cities of Omaha, Nebraska, and Council Bluffs, Iowa, together with the right and the authority to receive the same as and when collected by and from the treasurer of Pottawattamie county, Iowa, the same as the said party of the first part could do under the provisions of chapter 13 of the Laws of Iowa, passed in the year 1886, being the Session Laws of the Twenty-First General Assembly of the state of Iowa. And the said party of the first part agrees, if so requested, to receive said tax when and as collected by and from said treasurer, and pay the same over to the party of the second part when so demanded." By said contract the Iowa corporation leased to the Nebraska corporation for the

term of 99 years all its rights, interest, and property under said ordinance and act of congress. In consideration of this tax and lease, the Nebraska corporation agreed "to give in full consideration therefor to the said party of the first part, for the benefit of its stockholders, one-half of all the shares of the full paid up capital stock of the said Omaha & Council Bluffs Railway & Bridge Co. of Omaha, Nebraska, the receipt whereof is hereby acknowledged." A bridge, as contemplated, was constructed and completed in December, 1888, and has ever since been maintained as a motor-line and wagon bridge. Of the tax so voted and collected there is no question but that the plaintiff and his assigns paid a sum equal to the amount of the judgment rendered, and that this amount was paid by the treasurer of Pottawattamie county to "J. H. Millard, treasurer of the Omaha & Council Bluffs Railway & Bridge Co." There is some dispute as to whether this payment was to the Iowa or to the Nebraska corporation. The Iowa corporation never issued any stock, and after the execution of said contract did not transact any business in the way of constructing, maintaining, or operating said bridge or street railways. The stock given by the Nebraska corporation was issued directly to the subscribers to the stock of the Iowa corporation. The bridge was constructed under contracts made by the Nebraska corporation with other persons, and it and the street railways have ever since been maintained and operated by that corporation.

2. The tax in question was voted, assessed, and collected under the provisions of chapter 13, Laws 21st Gen. Assem. § 1, which is as follows: "Taxes not to exceed five per centum on the assessed value of any incorporated city having five thousand inhabitants, may be voted to construct, or to aid any company which is or may be incorporated under the laws of the state of Iowa, in the construction of a highway bridge, commencing or terminating in such city, across any navigable boundary river of the state of Iowa." The expediency of such legislation has often been doubted, and it has been uniformly held that such statutes should be strictly construed. Dean v. Charlton, 27 Wis. 525. It seems to us clear that this statute limits the giving of such aid to corporations organized under the laws of this state. Appellant contends that, as such bridges cannot be built without authority from the United States and the adjoining states, it must have been contemplated that corporations from both states must join in the enterprise, and, therefore, it was not intended to restrict the aid to the domestic corporation. The Iowa corporation had authority from its state and the United States under which it could build to low-water mark on the Nebraska shore, and it does not appear that it could not have obtained the right under the laws of Nebraska to have built upon the Nebraska shore. Appellant also refers to that part of section 2 of said chapter thirteen which provides that the terms and conditions expressed in the notice for the election "shall become obligatory and binding upon such company and its successors and assigns." It does not follow that, because the domestic corporation may have "successors and assigns," such aid may be given to foreign corporations. Said section 1 expressly limits it to Iowa corporations, and section 3 emphasizes the limitation by providing that the money is to be paid, not to a foreign corporation, nor to any corporation that may perform the conditions upon which it was voted, but "to the treasurer of such company to whom such aid is voted." It is certainly clear that such aid cannot be given to a foreign corporation, and that such a corporation cannot become entitled to aid voted to a domestic corporation by merely performing the conditions upon which it was voted.

3. There is no question but that the Iowa corporation was entitled to this aid upon performing the conditions upon which it is payable. This it was not required to do with its own hands, but might do by contracts with other persons or corporations, domestic or foreign, and assign its right to the aid payment. Appellant's contention is that this bridge was constructed by the Nebraska corporation under said written contract, for the Iowa corporation. Appellee contends that said contract is contrary to public policy, ultra vires, and void, and therefore neither party to it acquired any rights under it. By said contract the Iowa corporation sold, assigned, transferred, and set over to the Nebraska corporation "all of said tax, together with the right and authority to receive the same when collected by and from the treasurer of Pottawattamie county, Iowa," and leased for 99 years all its rights, interests, and property under said ordinance and act of congress. In return for this the Nebraska corporation made but a single promise, namely, "to give in full consideration therefor to the said party of the first part, for the benefit of its stockholders, one-half of all the shares of the full paid up capital stock of the said Omaha & Council Bluffs Railway & Bridge Company of Omaha, Nebraska." While to enjoy these franchises it was necessary that the Nebraska corporation should build the bridge, it surely did not obligate itself to the Iowa company to do so. For the tax and lease it gave one-half of its paid-up capital stock, and it remained with it to build the bridge or not, so far as the Iowa corporation is concerned; and, had it failed to do so, the Iowa corporation would have no grounds of complaint. Appellant cites State v. Omaha & C. B. Railway & Bridge Co. (Iowa) 60 N. W. 122,—an action to forfeit the charter and franchises of the Iowa corporation on the ground that it had abandoned its rights to corporate existence. We said in that case that the Iowa corporation

is the owner of said bridge and railway, subject only to the rights of the Nebraska corporation and its mortgagees therein. The question involved in that case was the right of the Iowa corporation to continue to exist as a corporation, and the rights that would revert to it on the termination of said lease were given as a reason why its corporate existence should not be ended. The ownership of the bridge was not involved, and the remark relied upon by appellant was applicable to the property and franchise held by the Iowa corporation, rather than to the bridge itself. It was not intended then, nor do we intend now, to determine who will own the bridge at the termination of said lease, as that question is not before us. Our present inquiry is whether the bridge was built under contract for the Iowa corporation, and our conclusion is that it was not. While we still think the Iowa corporation has the right to exist as such, to the end that it may exercise the franchises given it, when its lease thereof is terminated, it is plain that since the execution of said written contract it has transacted no other business, and had none other to transact, than the preservation of its corporate existence. It did not construct the bridge, nor have it constructed. It was constructed by the Nebraska corporation on its own motion, and for itself, and therefore it cannot be said that the Iowa corporation has earned the aid. If it has not earned it, then surely the Nebraska corporation was not entitled to it. As said written contract does not provide for the construction of the bridge, we need not determine whether it is void or not. The only conclusion that can be reached from this record is that the Nebraska corporation, having secured a lease of the Iowa corporation's franchises, went on, and built the bridge at its own expense, and for itself, and was not entitled to the aid voted to the Iowa corporation. It is said in argument that the tax was paid to the Iowa corporation. If so, it was paid to it by the Nebraska corporation, and, as neither was entitled to it, the matter of the payment is immaterial. It is also argued that, as the conditions upon which the aid was voted were fully carried out, there was a compliance with the spirit and intent of the statute. It is undisputed that statutes like this are to be strictly construed. Thus construed, it is plain that aid is limited to Iowa corporations, and to hold under the facts of this case that the Nebraska corporation is entitled to this aid is to ignore that part of the statute which limits its provisions to Iowa corporations. Appellants insist that it is immaterial by which corporation the bridge was built, and cite Reeves v. Traction Co., 152 Pa. St. 154, 25 Atl. 516. In that case the city council had by ordinance consented to the operation of a street railway by overhead electric wires, and the company owning the railway was specifically named in the ordinance, but the company to which it was leased for a term of years was not mentioned. It was held that the consent was that the thing should be done by the two corporations acting together as one, and that such consent was meant to be operative as to both corporations. The court says: "The scope of legislative acts, whether statutes or ordinances, is to be determined by the intention of the enacting body." As already stated, we think it was clearly the intention of the enacting body that only domestic corporations could become entitled to the aid provided for in said chapter 13. Appellants also cite Railroad Co. v. Horton, 38 Iowa, 33; Parsons v. Childs, 36 Iowa, 108; Railway Co. v. Shea, 67 Iowa, 729, 25 N. W. 901. These cases were decided under statutes authorizing the vote of the tax to aid in the construction of railways, without any limitation or reference to the person or corporation by whom to be constructed, and therefore are not applicable to this case.

4. Section 4 of said chapter 13 provides that: "Should the taxes levied under the act remain in the county treasury more than one year after the same shall have been collected, the right to them shall be considered forfeited and the same shall be refunded to the taxpayers." Appellant contends that this provision is the only one under which the taxpayers can recover the taxes paid by them, and that, as this tax did not remain in the treasury more than one year, plaintiff is not entitled to recover. This provision does not relate to a recovery from one who may have wrongfully received the tax. It simply fixes the time and conditions upon which the treasurer shall refund the tax, and is not to the exclusion of any right of action that may arise in favor of the taxpayer against other persons. Barnes v. Marshall Co., 56 Iowa, 20, 8 N. W. 677. "Where money is paid under the provisions of the law for voting taxes in aid of the construction of railroads, it has been held that such money in the hands of the treasurer is a trust fund, and that the taxpayer and the railroad company are both beneficiaries." Eyerly v. Supervisors, 77 Iowa, 472, 42 N. W. 374. In the same case in 81 Iowa, at page 193, 46 N. W. 986, it is said: "It is shown that Galusha, while treasurer, wrongfully paid out money to which plaintiff is entitled, and that such payment was made before this action was commenced. It thus appears that plaintiff can obtain no relief by mandamus which would not be afforded in the ordinary course of the law, and the relief in this action must, therefore, be denied." Until the money in question was earned as contemplated in said chapter 13, it remained the property of the taxpayers, held in trust to await performance of the conditions. The conditions not being performed as contemplated in said chapter, the taxpayers were not divested of their right in the money, and have a right to action to recover on account thereof from any person who wrongfully withholds it. We think the judgment of the

district court is correct, and it is therefore affirmed.

DEEMER, J., took no part.

SHAKMAN v. POTTER et al.

(Supreme Court of Iowa. April 13, 1896.)

DEPOSITIONS—EXHIBITS—WAIVER OF OBJECTIONS—ASSIGNMENT OF ERROR—TRIAL—REMARKS OF COURT—OPINION EVIDENCE.

1. Plaintiff cannot complain of rulings excluding exhibits attached to a deposition, where, after defendant withdrew all objection to such exhibits, plaintiff failed to read them to the jury.

2. When a motion to direct a verdict was based on several grounds, an assignment predicating error merely on the sustaining of the motion is insufficient.

3. In replevin, where the value of the goods was in issue, and a dispute arose as to the correctness of an answer, as read by plaintiff's attorney, in a deposition in which affiant testified as to the value, it was reversible error for the court to remark: "Upon listening to the reading of the deposition, I have no doubt but that Mr. B., plaintiff's attorney, was present at the taking of the deposition, or that the answers had been written out by him, or plaintiff's attorney."

4. On an issue as to the meaning of the words "on memorandum," inserted in an invoice, it was error to allow witnesses, who stated that they did not know their meaning, to give their opinion as to what was meant.

Appeal from district court, Howard county; E. E. Cooley, Judge.

Action of replevin to recover the possession of certain merchandise which it is claimed the plaintiff consigned to defendant Potter, to be sold on commission. Trial to a jury. Verdict and judgment for defendant Hoffman, and plaintiff appeals. Reversed.

John McCook, for appellant. H. T. Reed, for appellees.

DEEMER, J. The plaintiff claims that it consigned certain clothing to the defendant Potter, to be by him sold on commission; that defendants Hoffman and Hall hold possession of the same through a conspiracy or agreement between them and Potter, and that they, in fact, have no title thereto; that Hoffman holds a bill of sale from Potter for the goods; and that Hall has possession as agent of Hoffman, but that Potter had no right or title thereto which he could convey. Plaintiff alleges the value of the goods to be $228. Defendant Potter denies that he held the goods on commission; says that he made a bill of sale thereof to his co-defendant Hoffman, and that at the time he made it he was the absolute owner of the goods, and had the right to sell the same, and that he has no further interest therein. Defendant Hall disclaimed any interest in the goods. He further alleged that he was in the possession thereof as the agent of Hoffman. Hoffman denied the plaintiff's claim, and further averred that she was in the possession of the goods under a bill of sale from Potter; that she paid a valuable consideration therefor, and had no notice of the plaintiff's claim; that the property was and is worth the sum of $300; and that she was damaged by reason of the wrongful taking thereof by plaintiff in the sum of $50, and in loss of profits in the sum of $100. The plaintiff's reply was practically a general denial. Such were the issues on which the case was tried, with the result above stated.

1. The testimony of one L. A. Shakman, a member of the plaintiff firm, was taken by deposition. In this deposition he identified the correspondence which passed between plaintiff and the defendant Potter, testified to the shipment of goods ordered by Potter, and identified the goods taken on the writ of replevin as being a part of those shipped to Potter. He also testified to the value of the property delivered, and to the value of that part of it which was secured under the writ issued in the case. Many objections were interposed to the testimony of this witness, which were largely sustained; and some of the exhibits attached to his deposition were rejected, when they were offered, on the ground that they were not the best evidence. These rulings are complained of. It is no doubt true that the court was in error in excluding some of these exhibits; but the record discloses that defendants' counsel, after the reading of the deposition had been concluded, withdrew all objections to the exhibits attached to the deposition. If these exhibits had not already been read to the jury, it then became the duty of plaintiff's counsel to read them, if he wished the benefit thereof. As he failed to do this, he cannot now complain.

2. These exhibits show that all the negotiations between plaintiff and Potter were by correspondence. From this correspondence it appears that Potter ordered a certain bill of goods from plaintiff; that plaintiff refused to ship the goods without some assurance of Potter's financial responsibility; that it made inquiries from a commercial agency, and from merchants who had sold Potter goods, and finally shipped him the merchandise ordered, and sent him an invoice, which contained the following: "Milwaukee, Dec. 15, 1893. Mr. E. E. Potter, Cresco, Io. Bought of L. A. Shakman & Co., Wholesale Clothiers, 343-345 Broadway. On memorandum. Terms: 7/10—5/30—4/60. Shipped by express. All bills not paid at maturity are subject to sight draft and interest. Accounts due on demand, when purchaser suspends payment, receiver is closing out, or suit commenced." (Then follows a list of the goods.) The question in the case turned largely upon the meaning which should be given the trade terms, "on memorandum," appearing upon the invoice. Testimony was admitted by the court which tended to show that these words meant to the trade that the goods were shipped to be sold on commission; the dealer to have all

over and above the price fixed to the goods, as his compensation for handling the same. On the other hand, there was testimony tending to show that the words meant to the trade that the goods were shipped on approval, and that, as soon as accepted by the buyer, the goods became his property. And there was also testimony to show that the effect to be given the words was the same as if the goods had been delivered with the understanding between the parties that the title should remain in the seller until they were paid for, and that the transaction was, in effect, a conditional sale. At the conclusion of the evidence the defendant Hoffman moved the court to direct a verdict for her. The motion was based upon three distinct grounds. This motion was sustained, and the only question of fact which was submitted was as to the value of the property. Complaint is made by appellant of this ruling. We cannot consider the question thus presented, for the reason that the assignment of error relating to this matter is not sufficiently specific. The motion, as we have said, was based upon three grounds, and the assignment predicates error upon the sustaining of the motion. Under repeated decisions, this is not sufficient.

3. Complaint is made of the rulings of the court on objections interposed to the evidence of Shakman, which, as we have said, was taken by deposition. Such of the assignments of error as are argued do not seem to us to possess any merit. But, as the case must be reversed upon another ground, we may properly say that some of the objections interposed were erroneously sustained, and it is apparent from the rulings made, as well as from the remarks of the court, that plaintiff's case was not presented for its full worth. The court below evidently overlooked the provision of the Code (section 3751) which provides that "no objections to depositions other than for incompetency or irrelevancy shall be regarded unless made by motion filed by the morning of the second day of the first term held after the depositions have been filed," etc.

4. When the last answer of the witness Shakman was being read, a controversy arose between counsel as to the correctness of the answer, as read by the plaintiff's counsel. During the progress of this difficulty the court remarked, in the presence of the jury: "Upon listening to the reading of the deposition, I have no doubt but what Mr. Bloodgood, plaintiff's attorney, was present at the taking of the deposition, or that the answers had been written out by him, or plaintiff's attorney." This remark was excepted to by plaintiff's counsel. Manifestly, such a remark was not only erroneous, but highly prejudicial. If the witness had given no other testimony than that of the shipment of the goods, we might hold, in view of the condition of the record, that the remark was not prejudicial; but the witness testified also to the value of the goods, which was an issue in the case, and the remark made by the court could have no other effect than to demolish and destroy the whole of the witness' testimony. If such a statement had been embodied in the written charge of the court, it would clearly be erroneous; and, while it was not contained in the formal instructions, yet its effect, following so closely the reading of the deposition, was just as prejudicial to plaintiff's case as if it had been. State v. Stowell, 60 Iowa, 535, 15 N. W. 417; Cross v. Manufacturing Co., 121 Pa. St. 387, 15 Atl. 643; State v. Philpot (decided at present term) 66 N. W. 730.

5. Complaint is made of the instructions given with reference to the measure of damages. The argument made in support of the assignment of error raising this question is based upon a misapprehension of the effect to be given the language used by the court. When properly construed, the instruction is not erroneous.

6. Some of the witnesses called by the defendants, after having testified that they did not know what the terms "on memorandum" meant to the trade, when used as they appeared upon the invoice sent Potter, were permitted to give their understanding of them, against the objections of the plaintiff. This was so manifestly erroneous as to require no elaboration from us. Other errors are complained of in the admission and rejection of testimony. It is not important that we consider them, for it is not likely the questions will arise upon a retrial. For the reasons assigned the judgment is reversed.

GREEN v. WILKIE.

(Supreme Court of Iowa. April 13, 1896.)

NEGOTIABLE INSTRUMENTS—SIGNATURE OBTAINED BY FRAUD—LIABILITY OF MAKER.

1. In an action on a note and mortgage for $1,000, it appeared that they were given to F.'s wife, and by her assigned to plaintiff, without notice; that defendant, the maker, about to sell a piece of land given him by his father, and purchase another, went to the office of F., who was acting for the person to whom defendant was selling, and the sale and purchase were completed; that there had been a lease on the land in favor of defendant's father, whereby defendant was required to pay a certain rent while he remained single, and that this had been released, to enable defendant to sell; that afterwards, at F.'s suggestion, defendant agreed to make a new lease and note for $100, to his father, on the land purchased; that F., at his office, prepared, instead, the note and mortgage in suit, which defendant afterwards signed, thinking them to be the note and lease agreed on; that defendant could not read, and could write only his name; that he never received anything for the note, and never agreed to make it. *Held*, that the note never had an existence in the sense of the minds of the parties meeting to give it validity.

2. Since the business was between defendant and his father, there was no motive for F. to make the papers in any way, except as agreed

on, and defendant was not chargeable with negligence in not ascertaining the character of the instruments.

Appeal from district court, Marshall county; D. R. Hindman, Judge.

Action for the foreclosure of a mortgage. Judgment for plaintiff, and the defendant appealed. Reversed.

Anthony C. Daly and T. F. Bradford, for appellant. Binford & Snelling, for appellee.

GRANGER, J. This action is on a promissory note for $1,000, and to foreclose a mortgage given to secure the same. The note and mortgage were given to one Lena Fuerth, April 1, 1893. The note was assigned by Lena Fuerth to plaintiff, who resides in Massachusetts, about May 5, 1893, for a consideration of $950. The defendant does not deny that he signed the note and mortgage, but he bases his defense thereto on substantially the following facts: That Joe Fuerth is the husband of Lena Fuerth, and a real-estate agent at Marshalltown, Iowa; that he (defendant) was about to sell a piece of land given him by his father, and purchase another piece; that he went to the office of Joe Fuerth, who was acting for the man to whom he was selling, and the sale and the purchase were completed; that, as to the land given him by his father, his father had a lease or contract by which defendant was to pay a certain rent therefor while he remained single; that, to enable defendant to sell the land, the lease or contract was released; that afterwards Fuerth suggested that defendant give his father a lease of the land purchased, and a note in lieu of the one released, which defendant agreed to do; that defendant is illiterate, and cannot read writing or printing, and can only write his name; that Fuerth, instead of making the note and lease, wrote the note and mortgage in suit, which defendant signed, thinking them to be the note and lease agreed upon; that he never received anything from Lena Fuerth for said note, and never agreed to make any such note. The purchase of the note in suit was made by William Andrews as agent for the plaintiff, and it appears that the plaintiff knew nothing of the note till after it was purchased. The facts as to the fraudulent execution of the note are not in dispute. It may be stated as a fact that, when defendant signed the note and mortgage, he supposed he was signing a lease to his father and a note for $100.

There is something of a hopeless conflict of authorities touching the liability of persons whose names appear to negotiable paper, through fraudulent means, and the paper is in the hands of innocent holders. It would be useless to attempt a reconciliation of them. There are numerous cases in which parties, intending to sign a contract, have, through fraudulent misrepresentation, placed their signatures to negotiable instruments, which have fallen into the hands of innocent purchasers. There is a very respectable line of authorities holding that, in the absence of negligence, the maker of such an instrument is protected. Whitney v. Snyder, 2 Lans. 477; Walker v. Ebert, 29 Wis. 196; Anderson v. Walter, 34 Mich. 113; Bank v. Lierman, 5 Neb. 247; Puffer v. Smith, 57 Ill. 527. See, as bearing somewhat on the question, Bank v. Zelms (Iowa) 61 N. W. 483. This case is thought to be distinguishable from those because of the fact that in this there was an intent to give a promissory note. In this respect, also, there is something of a conflict of authority, but it is not so marked. The rule is many times stated that there is a distinction between cases in which a party, through fraudulent misrepresentations, signs an instrument which he intends to be a negotiable promissory note, and where, through such misrepresentation, he signs what he does not intend to be such an instrument; and much is claimed in this case because defendant intended to give a note. See Whitney v. Snyder, supra. The case of Douglass v. Matting, 29 Iowa, 498, is cited by appellee as explanatory of Chapman v. Rose, 56 N. Y. 137. The latter case announces the rule that before one whose name is fraudulently obtained to a note, upon misrepresentations that the instrument is something else, can be held, it must appear that it was not the result of negligence on the part of the signer. It will be well to notice in this connection that in Douglass v. Matting the rule of the case is announced on the theory of the culpable carelessness of the maker of the instrument. It is there said: "Now, it would be manifestly unjust to permit the maker, while admitting the genuineness of his signature, to defeat the note, on the ground that, through his own culpable carelessness while dealing with a stranger, he signed the note without reading it, or attempting to ascertain its true contents." Hopkins v. Insurance Co., 57 Iowa, 203, 10 N. W. 605, is a case between the parties to a note, as was also McCormack v. Molburg, 43 Iowa, 561, and hence they are not as directly in point as other cases. In Bank v. Steffes, 54 Iowa, 214, 6 N. W. 267, a note was given for a greater amount than agreed upon, through a fraud of the payee, and it was assigned before maturity. The issues did not involve the question of negligence in its execution. It is there said that it was incumbent on the maker to show freedom from negligence. It is then said that it is not certain that he could be allowed to set up fraud as against the plaintiff (an innocent holder) even by showing that he was free from negligence. It cites Whitney v. Snyder, supra, and later cites Griffiths v. Kellogg, 39 Wis. 290, in which a note intended to be given for $47.50 was, by fraud, made to read $76.25. The note passed into the hands of an innocent indorsee. It is said in the opinion that the note "was as little hers as if the transaction between her and the lightning rod man had

not taken place, and he had forged the note. If not forgery, it was akin to forgery." The liability of the maker was made to turn, when the fraud was established, on the fact of her negligence in placing her name to the paper. The case copies from Chipman v. Tucker, 38 Wis. 43, as follows: "The inquiry in such cases goes back to the questions of negotiability, or of the transfer of the supposed paper to a purchaser for value, before maturity, and without notice, challenges the origin or existence of the paper itself, and the proposition to show that it is not in fact or in law what it purports to be, namely, the promissory note of the proposed maker."

The facts of this case come within the rule of the Wisconsin cases, and do not contravene any rule announced in our own state. The defendant was an illiterate man, who could not read nor write, except that he could barely write his own name. He had no contractual relations whatever with Fuerth or his wife. There was nothing to put him on his guard against fraud being practiced upon him. The note and mortgage that he gave he had never contemplated in any way, and the doing of such a thing was as foreign to his purpose as if he had merely intended to lease or contract to his father without any note. It seems that the papers were prepared in the absence of defendant. In his testimony he says, speaking of Fuerth: "I met him on the street one day, and he said to me, 'The lease is already drawn up, and all you have to do is to sign it.' I went into the office with him, and asked him to read it. He said he was in a hurry, and wanted to go to dinner, and had some other business to attend to after dinner. I asked him if it was just a straight lease to my father for so much rent, and he said: 'Yes, it is. You can rely on my honor and word for it.' I then asked him to read it, and he said it was no need. I signed what he called a note and lease." This is in no way contradicted, and we are warranted in accepting it as truth. It is not denied in argument. There was nothing at that time to awaken suspicion as to Fuerth, and the case is peculiar in this: that, as the business was between defendant and his father, there could be no motive for Fuerth to make the papers in any way except as agreed upon. In most of the cases where negligence is considered, the party relieved has had an adverse interest, because of which one might the more readily anticipate that advantage would be taken. This was a case remarkably free from reason or grounds of suspicion. What was really done would not have been anticipated by any discreet person. In fact, the situation was such as to disarm one of suspicion, because of Fuerth's absolute want of interest in the business to be done. We think the case is free from negligence on the part of defendant. This being so, he comes within the rule by which a party may be protected. It is to be remembered that the rule we apply is not the usual one in which innocent holders of negotiable paper are protected against fraud in the inception of a note. In such cases there is a note, but the bona fides of it is questioned. In this case the note has never existed in the sense of the minds of the parties meeting to give it validity, and there is no negligence to render the defendant liable on other grounds. In Trambly v. Ricard, 130 Mass. 259, it is said: "A party who is ignorant of the contents of a written instrument, from inability to read, who signs it without intending to, and who is chargeable with no negligence in not ascertaining the character of it, is no more bound by it than if it was a forgery. There has been no intelligent assent to its terms," etc. The case cites Selden v. Myers, 20 How. 506, and Walker v. Ebert, 29 Wis. 194. Under these authorities,—and they have strong support,—we think the defendant is not liable on the note, because he was never a party to such a contract, and he has been guilty of no negligence by which the plaintiff has been misled. He has violated no legal obligation because of which another is injured. The plaintiff's petition should be dismissed. Reversed.

STEPHENS et ux. v. HAY et al.

(Supreme Court of Iowa. April 13, 1896.)

HOMESTEAD—OCCUPANCY BY SURVIVOR—PRESUMPTION OF ELECTION—DISTRIBUTIVE SHARE.

Code, § 2007, provides that, "upon the death of either the husband or the wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law"; section 2008, that "the setting off of the distributive share of the husband or wife in the real estate of the deceased shall be such a disposal of the homestead as is contemplated in the preceding section, but the survivor may elect to retain the homestead for life in lieu of such share," etc.; and section 2444, that an application to have the statutory distributive share set apart to the survivor may be made at any time after 20 days and within 10 years from death of decedent. *Held* that, in the absence of an unequivocal act or declaration of an election to retain the homestead, mere occupancy of a homestead by the survivor, for a period within section 2444, does not bar her right to the distributive share. Deemer and Kinne, JJ., dissenting.

Appeal from district court, Sac county; George W. Paine, Judge.

Action in equity for the partition of real estate. A demurrer to the petition was sustained, and, the plaintiffs refusing to plead further, judgment was rendered in favor of the defendants. The plaintiff W. B. R. Stephens appeals. Reversed.

F. M. Davenport and Earle & Prouty, for appellant. R. M. Hunter, for appellees.

ROBINSON, J. The material facts alleged in the petition and admitted by the demurrer are substantially as follows: Charles A

Hay died, intestate, on the 13th day of November, 1888, owning the S. W. ¼ of the S. W. ¼ of section 8, and the N. W. ¼ of section 17, all in township 86 N., of range 36 W., in Sac county, containing 200 acres. The land was subject to a mortgage for $1,650, and a commission mortgage for 1 per cent. of that sum. The decedent left a widow and four minor children, who are his only heirs, the eldest of whom was 14 and the youngest 6 years of age when the petition was filed, in August, 1894. The land was occupied by Hay and his family as a homestead, and, when he died, the title thereto vested in his widow and children. The widow was appointed administratrix of his estate, and, after settling it, was discharged, in April, 1891. Afterwards, at a time not shown, she married W. B. R. Stephens, and gave to him a deed for one-third of the land. She and her children occupied the land as a homestead after the death of Hay until her marriage to Stephens, and since that event she and her husband have occupied it as a homestead, and the children of Hay have lived with them. The plaintiffs are W. B. R. Stephens and his wife, and the defendants are the four children of Hay. The petition alleges that W. B. R. Stephens is the owner of an undivided one-third of the land; that each defendant is the owner of an undivided one-sixth of it; and that the plaintiff Jennie Stephens has a contingent interest in it as a homestead, and because of the right therein of her husband. The petition asks that the respective shares of the parties to the action, in the land, be settled; that it be partitioned so far as is practicable; and that so much of it as cannot be partitioned be sold, and the proceeds of the sale be divided; and that the costs of the action be taxed to the parties to it. The first ground of the demurrer is stated as follows: "(1) Said petition states facts which avoid a cause of action, in this: Because it states the title to the land described in said petition to have been in C. A. Hay, deceased, at the time of his death, and that it was his homestead, and was so occupied by him at the time of his death, and that it was the homestead of his wife and children after his death, and that it is their homestead at this time; that the petition does not show that the widow has ever elected to take her distributive share in the real estate described in the petition; that the petition shows on its face that W. B. R. Stephens has no title in and to the real estate set out in the petition, or any part thereof, and therefore cannot maintain the action; that the petition shows that Jennie Stephens has elected to occupy the homestead for life." This ground presents the controlling questions in the case, although the general equitable ground of demurrer is also set out.

The land in question comprises 200 acres, but the petition refers to it as though all of it were used as a homestead. The reference is somewhat ambiguous, and it is quite probable that the pleader did not intend to say that all of it was occupied as the statutory homestead. But, in view of the conclusions we reach, the intention of the pleader in that respect is not material.

Sections 2007 and 2008 of the Code are as follows:

"2007. Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law.

"2008. The setting off of the distributive share of the husband or wife in the real estate of the deceased shall be such a disposal of the homestead as is contemplated in the preceding section, but the survivor may elect to retain the homestead for life in lieu of such share in the real estate of the deceased."

It is not definitely stated that the conveyance from the widow of Hay to her present husband was of an undivided one-third of the land, but the averments of the petition as a whole warrant the conclusion that it was, and, for the purposes of this appeal, it will be so considered.

It was said in Egbert v. Egbert, 85 Iowa, 534, 52 N. W. 478, that it is the primary right of the survivor to take a distributive share in the estate of the deceased spouse; and in Wilcox v. Wilcox, 89 Iowa, 393, 56 N. W. 517, it was said that "in the Egbert Case, as well as others, the thought is prominent that the right to a distributive share is primary; that the election should be as to the homestead; and that a right to a distributive share is only defeated when a homestead election is made; but, of course, there may be an act indicating an election to take the distributive share, and that is what is meant when the term is used, and not that such an election is necessary to secure it." A rule of general application is that when the survivor has occupied the homestead for a reasonable time, without indicating an intention to take a distributive share of the estate of the deceased spouse, the presumption arises that there has been an election to retain the homestead for life. Egbert v. Egbert, supra. But what occupation of the homestead will authorize such a presumption will depend on all the facts in the case, and, when the presumption arises, it may be rebutted. Cases arising under the provisions of law in question were reviewed in Wilcox v. Wilcox, supra; and it was held, in effect, that continued occupation of the homestead by the survivor would not prevent the making of a contract in regard to the distributive share which would defeat the homestead right. In that case it appeared that the surviving widow and seven children occupied the homestead and other land from the death of her husband until the action was commenced. About six years after his death, the widow executed a mortgage on an undivided one-third of the land, for the consideration of $1,200; and nine months later she

executed a second mortgage, for a consideration of about $1,500. Ten months after the execution of the second mortgage, she filed a petition in the proper court, asking that one-third of the land be set off to her as her distributive share, and a decree to that effect was rendered. The decree was afterwards set aside, however, and her petition was then withdrawn. The mortgages were foreclosed, the mortgaged share of the land was sold, and sheriff's deeds therefor executed. The action referred to was then brought for the partition of the land, and it was sought to have awarded to the widow the right to occupy the homestead for life. But this court held that her acts constituted an express election to take a distributive share of the estate in lieu of the homestead for life, from which she could not recede, and that her occupancy of the homestead was only during the time her distributive share was being set off. The rule of that case is applicable in this. The petition does not show how long the widow of Hay occupied the homestead before she executed the deed to Stephens, but it was certainly less than six years. Nothing but the fact of occupancy is shown which tends to indicate an election to take the homestead for life in lieu of a distributive share in the real estate; and whether that occupation was brief, or whether it was continued for nearly six years before the conveyance to Stephens was made, does not appear. There is no inconsistency between the occupation of the premises by the plaintiffs and the defendants, which is shown, and the claim now made that the widow of Hay took a distributive share of his estate. It was natural and to be expected that she and the children would occupy the homestead together after the death of husband and father; and, while that occupation by the widow may have authorized the presumption that she had elected to take the homestead for life, yet her act in executing an irrevocable deed for an undivided one-third of the land to Stephens was evidence of a very satisfactory character that she intended to take a distributive share in the estate. That evidence was corroborated in the most solemn manner by her act in coming into court, and joining her present husband in declaring that she acquired from her former husband one-third of the land in question, that she conveyed that interest to her coplaintiff, and that he is now entitled to it. If these declarations are true, the fact that she and her grantee and the children occupy the entire premises as a homestead is immaterial to any question raised by the demurrer.

The appellees, to support the decision of the district court, rely chiefly upon two cases, the first of which is McDonald v. McDonald, 76 Iowa, 137, 40 N. W. 126. But the rule announced in that case was considered and its operation restricted in Egbert v. Egbert, supra. See, also, Wilcox v. Wilcox, supra. The second case upon which the appellees rely is that of Zwick v. Johns, 89 Iowa, 550, 56 N. W. 665. It appears in that case that the widow filed in the proper court a petition asking to have her distributive share in the estate of her deceased husband set off to her, but that she changed her mind, abandoned the proceedings, and determined to occupy the homestead in lieu of taking her distributive share. She contracted a second marriage, and, with her second husband, executed a quitclaim deed for their interest in the land, to secure a debt, and at the same time they executed a mortgage on her unassigned dower interest, to secure the payment of a note. In the spring of the next year, she leased the land for a term of two years, acting for herself and as guardian in so doing. The family then disposed of their personal property, except the bedding, and left the state, but with the intention of returning at the termination of the lease. This court found, notwithstanding the acts indicating an intention on the part of the widow of the decedent to take a distributive share in his estate in lieu of her homestead right, that she had elected to take the latter, because of her long continued occupation of the homestead, and her declaration of an intention to retain the homestead in lieu of a distributive share in the estate, continuously made after she dismissed the proceedings commenced to obtain such share. That case involved material and controlling facts not shown to have existed in this.

It is to be remembered that in this case the occupation of the homestead by the widow was not continued so long as to bring the case within the statute of limitations, as in Conn v. Conn, 58 Iowa, 748, 13 N. W. 51. Section 2444 of the Code permits an application by a widow, to have her distributive share in the estate of her deceased husband set off, to be made at any time after 20 days and within 10 years after his death. No unequivocal act or declaration of an election to retain the homestead is shown in this case, and, if there has been unnecessary delay by the widow in making known her intention to claim her distributive share, it is not shown that any one will be prejudiced by it. Nor is it shown that the conduct of the widow has been at any time inconsistent with the claim she and the appellant now make. We conclude that the demurrer should have been overruled, and the judgment of the district court is therefore reversed.

DEEMER, J. (dissenting). Charles Hay died, intestate, November 13, 1888. After his death, his widow continued to use and occupy the homestead, as such, until the commencement of this suit. Administration was granted on the estate of the deceased February 27, 1889, and the administrator was discharged in April, 1891. The widow made her conveyance to plaintiff March 6, 1894, more than five years after the death of her

husband, and four years after the appointment of the administrator. No explanation is given for the continued use and occupancy of the homestead by the widow, and no reason is offered why it should not be treated as an election to take the homestead in lieu of dower. According to the majority opinion, this unexplained occupancy does not create even a prima facie case of an election; and, under the rule adopted therein, there is no reason why the surviving widow may not have both homestead and distributive share; indeed, I think this is exactly what the opinion holds. All she need do is to convey the interest which might be set aside to her, in timely and proper proceedings, to her second husband, if she have one; and she may then continue to use and occupy the premises as a homestead during her natural life. Or, to state it differently, she may use and occupy the homestead for any length of time without being held to an election, and may at any time make a conveyance to a third person, which will carry an undivided one-third interest in the land. The other heirs are helpless, for the grantee of the widow is not bound to have the widow's share set aside. He may bring partition at any time until the statute of limitation bars him of relief, and, as the other heirs are tenants in common, the statute would not begin to run until there was an ouster. No election is presumed from the occupancy, and she cannot be compelled to take her distributive share. The opinion certainly holds that occupancy is no evidence of an election, and that the widow is not barred of her distributive share, no matter what she does, until the lapse of 10 years from the death of her husband, and that she is not then barred because of her possession of the property, but by reason of the statute (Code, § 2444).

I do not concur in any of these propositions. We have repeatedly held that the widow cannot have both homestead and distributive share, and that an election once made to take either the one or the other is binding and conclusive. Butterfield v. Wicks, 44 Iowa, 310; Meyer v. Meyer, 23 Iowa, 350; Briggs v. Briggs, 45 Iowa, 318; Stevens v. Stevens, 50 Iowa, 491; McDonald v. McDonald, 76 Iowa, 137, 40 N. W. 126; Zwick v. Johns, 89 Iowa, 550, 56 N. W. 665; and other cases following these. The cases of Holbrook v. Perry, 66 Iowa, 286, 23 N. W. 671, and Darrah v. Cunningham, 72 Iowa, 123, 33 N. W. 445. are also closely in point on this proposition. We have frequently and uniformly held that the continued occupancy of the premises by the surviving husband or wife will be regarded as an election to hold the property as a homestead, and that the making of a will or conveyance of or mortgage upon the undivided one-third interest of the property by the survivor does not amount to an election which will control as against the inference to be derived from the continued use of the property. Darrah v. Cunningham, supra; Burdick v. Kent, 52 Iowa, 583, 3 N. W. 643; Bradshaw v. Hurst, 57 Iowa, 745, 11 N. W. 672; Mobley v. Mobley, 73 Iowa, 654, 35 N. W. 691; Zwick v. Johns and McDonald v. McDonald, supra. In the Mobley Case the facts were that the husband died July 5, 1886, seised of 80 acres of land. The widow continued to use and occupy the homestead 40 up to the time of her death, December 25, 1886. She did not ask that her distributive share be set aside, but, prior to her death, made a will in which she devised all of her real estate to a daughter, under which state of facts we held that the daughter took nothing under the will of her mother, because her mother had elected to take the homestead in lieu of her distributive share. There was no reason for saying this except for the occupancy by the widow for the period of five months; yet in the case at bar the majority hold that occupancy for nearly six years creates no presumption even of an election. In the Zwick Case the husband died May 28, 1882, seised of 80 acres of land. The widow continued to use and occupy the homestead until the fall of 1883, when she married Prinkey. After that she continued to use the property as a homestead until early in the year 1888. Mrs. Prinkey died in 1888. A creditor of the Prinkeys recovered judgment against them, and sold an undivided one-third of the 80 acres in satisfaction thereof. The action was brought by a guardian of the minor children of Smith, the deceased, to restrain the purchaser at the execution sale from taking possession under the deed. It appeared in evidence that in 1884 the widow filed a petition asking to have her distributive share set aside, but that she afterwards changed her mind, and abandoned the same. In August, 1887, she and her husband quitclaimed all their right and title in the land to one Groff, the deed being made, however, to secure a debt; and at the same time they executed a mortgage on the unassigned dower interest of Mrs. Prinkey in the 80 acres, to the same party, to secure the payment of a note. In 1888 the widow leased the land to one Smith, for a term of years, and, just before she died, she promised to give a mortgage on her interest in the lands to a creditor. Under such a state of facts, we held there was an election on the part of the widow to take the homestead, and that the execution of the deeds, mortgages, and leases did not defeat it or change the rule. In that case we said, in considering the question as to what would constitute an election to take the homestead: "This rule is that when, under all the circumstances, the survivor has occupied the homestead for a reasonable time in which to make an election under the statute, and has failed to have the distributive share set apart, or otherwise made an election, the presumption of an election from such occupancy arises. Such presumption will then prevail, unless overcome by proof showing

election to the contrary." In that case the occupancy was for not quite six years. Five years after the death of the husband, she made a mortgage of her undivided one-third interest. In the case at bar the occupancy was for the same length of time, and the widow made a deed instead of a mortgage, nearly six years after her husband's death. In the one case we hold there was an election to take the homestead, by reason of the occupancy; and, in the other, that the occupancy of the homestead is no evidence whatever, and that the making of the deed was an election to take distributive share, although the widow remained in the possession of the homestead, even after the making of the deed. Why this distinction between the making of a mortgage and a deed I cannot understand. In the McDonald Case, in 76 Iowa, 137, 40 N. W. 126, the widow made a mortgage of her undivided one-third interest in the lands within three years of the death of her husband; yet she continued to use and occupy the homestead for the period of five years. We there held that the making of the mortgage was not an election, but that her possession for the term of five years was, and we confined her interest to a homestead for life. In that case five years' occupancy overcame a mortgage of an undivided one-third interest made within three years of the death of her husband. In this case we hold that a deed made six years after the death of the husband overcomes the presumption of an election, and that no inference can be drawn from the fact of possession alone. In the Darrah Case the wife died in 1884, seised of 58 acres of land. The husband continued to occupy the homestead for the period of 16 months. Fifteen months after the death of his wife, he made a will, in which he declared that he had not intended to take the homestead, but that he intended and desired to own and possess one-third in value of his wife's land. The will also directed the executors to sell his one-third interest in the land. The husband said repeatedly after the death of his wife that he intended to take one-third of her real estate. It was held in that case, as I understand it, that the husband took the homestead, and not the distributive share. No other reason can be given for the conclusion reached. The case of Bradshaw v. Hurst is along the same line. So, also, is the Burdick-Kent Case. In the Butterfield-Wicks Case we said that the occupancy of the property by the husband as a homestead may well be regarded as an election to hold it as a homestead, and not a part of it merely as dower; and it was further held that the husband in that case, from occupancy alone, had elected to take the homestead in lieu of distributive share, although he had made a mortgage upon his dower interest within two years from the death of his wife. In the case of Egbert v. Egbert, 85 Iowa, 525, 52 N. W. 478, we applied the rule of the McDonald Case, Mr. Justice Given writing the opinion, and we there said: "The language of that opinion as applied to the facts of that and like cases is correct. * * * She [Mrs. Egbert] had the right to occupy it for a reasonable time in which to make an election whether to retain such possession for life or take a distributive share,"—citing Cunningham v. Gamble, 57 Iowa, 46, 10 N. W. 278, and Thomas v. Thomas, 73 Iowa, 657, 35 N. W. 693. Continuing, the court says: "When the survivor has occupied after a reasonable time without having the distributive share set apart, or otherwise making an election, the presumption of an election from the occupancy arises."

I need not specifically refer to the other authorities I have cited. They are all in line with those quoted from, and it is apparent that the rule I contend for has been the law of this state for more than 25 years. It is a rule of property, and ought not to be disturbed at this late date, except for imperious necessity. The case of Wilcox v. Wilcox, relied upon by the majority, is not in conflict with the opinions I have quoted. It is fully explained in the case of Zwick v. Johns, and I need not take up the space needed to distinguish the case. The earliest as well as the latest decision of this court is with me, and, if there is any conflict in our authorities, it can all be reconciled by returning to the plain and reasonable rule announced in Thomas v. Thomas, 73 Iowa, 657, 35 N. W. 693.

To state it briefly, I would say that the primary right of the survivor is perhaps the distributive share, but that, after the expiration of the year for the filing of claims, the survivor, if he continues to occupy the premises, is put to an election as to which he will take, homestead or distributive share, and, if he remains in the possession of and occupancy of the homestead for more than a reasonable time in which to make such election after the expiration of the year for filing claims, such occupancy will be regarded as an election, which will conclude him; that an election once made is conclusive, at least until set aside by proper proceedings; and that, when his rights once become fixed, he cannot change them to the prejudice of the other heirs or the creditors. If the survivor should not remain in the possession or use of the premises, or should not continue therein for more than the reasonable time to make an election, then the primary right to take the distributive share passes the one-third in value to the survivor. It also follows that an unequivocal election to take the distributive share made at a proper time will be binding upon the survivor. These rules are equitable, reasonable, and just, and I think should be adhered to and definitely announced. I am firmly convinced that the decree of the lower court was right, and I think that it ought to be affirmed. If it is to be reversed, we ought to squarely overrule the cases I have cited, and not leave the profes-

sion in doubt as to what the rule is in such cases.

I am authorized to say that Mr. Justice KINNE concurs in this dissent.

PHILLIPS et al. v. WILMARTH et al.

(Supreme Court of Iowa. April 13, 1896.)

TAX TITLES — DELINQUENT TAX NOT INCLUDED IN SALE—TENANTS IN COMMON—STATUTE OF LIMITATIONS—LACHES.

1. A sale of land for taxes relieves the owner from liability for all prior taxes then due, and not included therein.

2. A tenant in common cannot extinguish the title of his co-tenant by acquiring a tax title to the common property, unless it is shown that the co-tenant has refused to contribute to the necessary expense; and, until such refusal, limitations will not run in his favor against his co-tenant.

3. The general statute of limitation contained in Code, § 2529, providing that an action to recover real property shall not be brought after 10 years from the time the cause of action accrues, cannot be invoked in favor of a tax title to land of which the holder has not held actual possession for 10 years.

4. Where an interest in land was inherited by residents of another state, who are not shown to have known of the land, or its location, and no demand for taxes appears to have been made on them by their co-tenants, they will not be barred of the right to maintain an action for its recovery, against their co-tenants, by the fact that they paid no taxes thereon for 18 years.

Appeal from district court, Wright county; D. R. Hindman, Judge.

Action in equity to quiet in the plaintiffs title to an undivided half of certain real estate, for a partition thereof, and for general equitable relief. There was a hearing on the merits, and a decree for the plaintiffs. The defendants appeal. Modified.

Nagle & Nagle, for appellants. William Milchrist and Frank Farrell, for appellees.

ROBINSON, J. The land in controversy comprises 120 acres which were purchased from the general government in July, 1856, by William Phillips and Hopewell Hepburn, as tenants in common. They resided in Pittsburg, in the state of Pennsylvania, where Phillips died intestate in April, 1874. He was never married, and survived his parents; and his only heirs were his brother, Robert B., and his sister, Eliza B. The sister died testate in March, 1877, and her will was admitted to probate in Pennsylvania and in Wright county, in this state. By a residuary provision, it devised to each of the six children of her brother Robert an undivided one-eighth of her interest in the land in question, and equal shares of it to Sarah M. Jarvis and Matilda Dallas Lee, each of whom was to hold the share devised to her during her natural life, and in case she died leaving issue the share was to vest in such issue, but in case of her death without issue it was to vest in the children of her brother. The brother died testate in April, 1889, and his will was duly probated in Pennsylvania and in this state. It gave to his wife a life estate in all his property, and to his children all of the remainder. One child died in the year 1891, unmarried and intestate, and the widow is dead. The five surviving children are the plaintiffs in this action. Hepburn is dead, and the defendants are his heirs. The plaintiffs ask that the respective shares of the parties to the action be established, that the title of the plaintiffs to an undivided half thereof be confirmed, and that partition of the land be made. The answer denies the allegations of the petition, and avers that the land was sold in the year 1876 for delinquent taxes, and that a tax deed therefor was issued to Julia A. Churchman in November, 1879, and duly recorded, and that she conveyed the land to the defendant Sarah C. Hepburn in May, 1880. The land was sold for delinquent taxes, and conveyed, as stated; and the principal question to be determined is whether the tax sale and the tax deed, and the subsequent conveyance to Sarah C. Hepburn, were effective to defeat the plaintiffs' title. The district court found that they were not, and decreed that the plaintiffs were the owners of an undivided one-half of the land, and that they were entitled to redeem from the tax sale by paying into the court one-half of the taxes paid and disbursements made by the defendants on account of the land, which amounted in the aggregate to $676.64. The cause was then continued for further action upon the prayer for partition.

1. The petition alleges that no taxes upon the land are due to the county or state. A stipulation shows that the taxes for the years 1873 and 1874 have not been paid, and it is urged that the plaintiffs are not entitled to maintain this action, by reason of the provision of section 897 of the Code, which reads as follows: "No person shall be permitted to question the title acquired by a treasurer's deed without first showing that he or the person under whom he claims title, had title to the property at the time of the sale, * * * and that all taxes due upon the property have been paid by such person or the person under whom he claims title as aforesaid." The fact that the taxes for the years named were not paid will not defeat this action. It was the duty of the treasurer, when selling the land in the year 1876, to sell it for all the taxes of the years preceding which were then due, and the sale made operated to relieve the owners of the land from liability for the taxes due which were not included in the sale. Hough v. Easley, 47 Iowa, 330.

2. One of the defenses upon which the defendants rely is the fact that this action was brought more than five years after the tax deed was executed and recorded. Section 902 of the Code provides that "no action for the recovery of real property sold for the nonpayment of taxes shall lie unless the same shall be brought within five years after the

treasurer's deed is executed and recorded as above provided." But that statute does not apply to a case of this kind. It is well settled that a tenant in common cannot acquire title to the subject of the tenancy, adverse to his co-tenant, by means of a tax title, and this is true whether the tax deed is executed to his tenant or his grantor. He will be presumed to hold the title thus acquired in trust for his co-tenants, until the presumption is shown not to be well founded, by the refusal of the co-tenants to contribute to the payment of the necessary expenses incurred to obtain the tax title. Sorenson v. Davis, 83 Iowa, 406, 49 N. W. 1004; Fallon v. Chidester, 46 Iowa, 593; Austin v. Barrett, 44 Iowa, 488; Weare v. Van Meter, 42 Iowa, 128. In this case it does not appear that the plaintiffs, or any one through whom they claim title, refused to contribute towards the expenses incident to the acquiring the tax title; and it is shown affirmatively that the land was permitted to go to tax sale by the owners of Hopewell Hepburn's estate for the purpose of extinguishing the title of his co-tenants, and that the tax sale and subsequent conveyances were for the benefit of the Hepburn heirs, who are the defendants in this case.

3. It is claimed that this action is barred by section 2529 of the Code, which provides that actions for the recovery of real property shall not be brought after the expiration of 10 years from the time the cause of action accrues. The land has at all times been unimproved and uninclosed prairie land, and a part of a range occupied by cattle. It has been pastured, and, for a number of years, grass has been cut and hay made upon it, but it is not shown that such use of it was made for 10 years before this action was commenced. The evidence fails to show that this action is barred by lapse of time.

4. The plaintiffs, and the persons through whom they claim, had not, for 18 years before this action was brought, paid taxes upon the land in question, and that fact is urged as an objection to their recovery. During the lifetime of Hopewell Hepburn, he attended to the business of paying the taxes. In June, 1873, demand was made upon William Phillips, in behalf of the Hepburn heirs, for one-half of the amount required to redeem from the tax sale several tracts of Iowa land, which included about 320 acres, and he was furnished the amount asked ($178.48) for that purpose. It does not appear that any subsequent demand was made upon him, nor upon any others who acquired his title, for tax money, nor that his brother or sister, or the plaintiffs, knew of the land, or were informed in regard to their duty with respect to paying the taxes. Under all these circumstances, we think that negligence sufficient to defeat the right of action of the plaintiffs is not shown.

5. The district court decreed that the plaintiffs were the owners, and entitled to an undivided one-half, of the land in question. That was erroneous. It is not shown that Sarah M. Jarvis and Matilda Dallas Lee, two of the devisees named in the will of Eliza B. Phillips, are dead. There is no evidence in regard to them. So far as is shown, they are alive, or, if dead, may have left issue, and in either case the plaintiffs have no claim upon their share. There is no presumption that they are dead, and that they died without issue. Therefore, with respect to their shares, the plaintiffs must fail. Those shares were, in the aggregate, one-fourth of the share of the testatrix, or an undivided one-sixteenth of the 120 acres of land in question. Hence the plaintiffs have shown themselves entitled to but an undivided seven-sixteenths of it, and the decree of the district court will be modified to conform to that portion. In other respects it will be affirmed. Modified and affirmed.

SCOTT v. SECURITY FIRE INS. CO.

(Supreme Court of Iowa. April 13, 1896.)

INSURANCE—WAIVER OF WRITTEN PROOFS OF LOSS—VALUE OF PROPERTY DESTROYED—EVIDENCE OF COST—EXCESSIVE VERDICT.

1. Evidence that, after loss, plaintiff called on the secretary of an insurance company for blank proofs of loss, and was told that they were unnecessary, and that there was nothing more for her to do, sufficiently shows a waiver of written proofs.

2. On an issue as to the value of the insured building at the date of the fire, where it appeared that it had no market value aside from the land, evidence of the cost of building it 20 years before the fire was admissible.

3. McClain's Code, § 1734, providing that the amount stated in the policy shall be prima facie evidence of the insurable value of the property at the date of the policy, and that, to maintain an action on the policy, it shall only be necessary to prove the loss of the building, and show proper notice of loss, applies where proofs of loss have been waived.

4. Where property was insured by a soliciting agent for $1,700, after examination, and the evidence as to value was conflicting, a verdict for plaintiff for $1,700, with interest, will not be disturbed as excessive.

Appeal from district court, Scott county; C. M. Waterman, Judge.

Action at law upon a fire insurance policy. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendant appeals. Affirmed.

Cook & Dodge, for appellant. Bills & Hass, for appellee.

ROTHROCK, C. J. 1. The policy upon which the suit was brought was issued on the 5th day of November, 1892; and the property insured was a dwelling house, a granary, cribs, and a barn, situated on a farm near the city of Davenport. The insurance was for one year, and on the 3d day of May, 1893, all of the insured buildings, except the cribs, were totally destroyed by fire. The policy was in the usual form, and plaintiff was

the owner of the property. It is true, there was a mortgage on the farm, but no claim is made that the application for the insurance did not fully disclose all material facts pertaining to the ownership of the farm and the buildings insured. The amount insured on the property was $1,200 on the dwelling house, $350 on the granary, $75 on the cribs, and $150 on the barn. The policy required written notice of the loss to be given to the defendant, and written proofs of loss to be made, within 60 days. It is averred in the petition that the plaintiff gave the defendant verbal notice of the loss, and that defendant waived a written notice, and undertook to investigate the facts of the loss for itself, and that it verbally waived the furnishing of sworn proofs of loss. The issues raised by the answer which appear to us to be necessary to be considered are: (1) A denial of the alleged value of the buildings burned, and an averment that the value of the dwelling house did not exceed $350; the granary, $115; and the barn, $25. (2) A denial that the defendant waived notice in writing of the loss and proofs of loss required by the policy. (3) That the application for the policy stated that the aggregate value of the insured buildings was $2,400, and that said statement was false, the fact being that the value of all of said buildings did not exceed the sum of $495, and that by reason of said false statement the said insurance was void, as provided by the express terms of the application and policy. Other false representations as to the condition of the property are set forth, which it is not necessary to consider. All of the questions discussed by counsel arise upon the issues, the substance of which we have briefly stated.

2. The first question to be considered is, did the defendant waive the written notice and proofs of loss? It is claimed by the plaintiff that the waiver was made by the secretary of the defendant company. It is not denied that the secretary had the power to waive the notice and proofs of loss. The court instructed the jury that under the evidence the secretary was the only person who had the right to waive these requirements. The question is one of fact, and we are to determine whether the evidence was sufficient to authorize the jury to find that the secretary, by his acts, conduct, and conversation, induced the defendant to omit furnishing written proofs of loss within 60 days after the loss, as required by the policy. We have carefully examined the evidence as set out in the abstract, and have studied the same as presented and analyzed in the argument of appellant's counsel; and accepting the testimony of the plaintiff and her sister, and one or two other witnesses, as true, which the jury had the right to do, our conclusion is that the evidence fully sustains the claim made by the plaintiff that these requirements were waived. It is not our practice to review the testimony of witnesses, especially where it is as voluminous as in this case. To do so would require many pages, giving details of interviews by the plaintiff and others with the secretary. The jury was fully warranted in finding that the plaintiff called upon the secretary, and requested blank proofs of loss, and that he told her that was unnecessary, that there was nothing more for her to do, and that she should wait until she heard from him; and that she relied on hearing from him until after the time for filing written proofs had passed. The evidence of waiver is stronger than that held sufficient in the cases of Carson v. Insurance Co., 62 Iowa, 433, 17 N. W. 650; Hollis v. Insurance Co., 65 Iowa, 454, 21 N. W. 774; Boyd v. Insurance Co., 70 Iowa, 325, 30 N. W. 585; Green v. Insurance Co., 84 Iowa, 135, 50 N. W. 558.

3. The court instructed the jury upon the question involving the value of the buildings as follows: "If you find that defendant waived its right to demand and receive the notice in writing and affidavit from plaintiff, then your next subject of inquiry should be as to the value of said buildings at the time of said fire, and this sum, when found, will be the measure of plaintiff's recovery; that is, she cannot recover more in this action than said buildings were worth at the time they were burned. The law presumes that each of said buildings was worth, at the time the policy in suit was issued, the sum for which it was insured, but this presumption is not conclusive. It may be rebutted or overcome by evidence showing that they were of less value. Stating the rule in different language, the plaintiff is, prima facie, entitled to recover the amount for which said buildings were insured; and, if defendant claims they were in fact worth less than this amount, the burden is upon it to establish such fact by a preponderance, or greater weight, of evidence. In order to determine the value of these buildings at the time they were destroyed, you may consider their condition at that time; their cost, age, and size; the material of which they were built; the uses to which they were put; their depreciation in value from wear and tear; the action of the elements, or any other cause; and also the cost of constructing new buildings like them at the date of the fire; and generally, I may say, any other facts in evidence bearing upon the matter. Keep in mind that the sole, ultimate object of your inquiry is to ascertain what these buildings were actually worth on the day when the fire occurred; and, when you have ascertained the value of each of said buildings so insured and destroyed, the total sum of such values, with interest added, will be the amount of plaintiff's recovery. While, as I have said, you may consider the original cost of the buildings, and also the cost of erecting on May 2, 1893, new buildings of similar character, you will understand that these facts, when found, are but preliminary.

They are merely starting points, from whence you are to reason, in the light of all the evidence, to the ultimate fact which you are to find, viz. the value of the burned buildings on May 2, 1893, in the condition they were in at that time. For instance, when you have ascertained the original cost of said buildings, you should allow for the difference, if any, in cost of labor and materials between the time when such buildings were constructed and May 2, 1893, and this would be one way of ascertaining the cost of erecting such buildings at the last-named date. When, in this way, or by any other evidence, you have ascertained the cost of the erection of said buildings on May 2, 1893, if you then deduct the difference in value between such new buildings and the buildings burned as they were at the time of the fire, you will have arrived, by one method, at the actual value of the property in question, and which would be the amount of plaintiff's loss." The defendant objected to the introduction of evidence of the original cost of the dwelling house, and excepted to the order of the court overruling the objection, and exception was taken to that part of the charge to the jury above set out. It appears that the house was erected more than 20 years before it was destroyed by fire. The position of counsel for the defendant is that because the building was erected at a time so remote, and the fact that the actual cost may have been more than the building could have been erected for, and in view of the great decrease in the cost of erecting buildings at the time of the trial from what it was 20 years ago, the evidence was wholly unreliable, and its only effect was to mislead the jury. We have set out the instructions in reference to this question, and after considering the arguments of counsel, and giving the due weight to the manner in which the evidence is guarded and explained in the instructions, we are of opinion that the evidence was properly received, and that the rule of the instructions is right. It is a well-settled doctrine that the value of property is to be established by evidence of what it is worth in the market. But the rule has no application to such property as has no market value. In 1 Suth. Dam. § 448, it is said: "When the property has no market value, proof may be made of such facts as exist tending to show value, or to aid the jury in estimating it. The cost of manufacturing a raw article, and transporting it to market, may properly be inquired into." The value of this house, apart from the land upon which it was situated, was not such as could be estimated by the ordinary rule of estimating values of merchantable and marketable commodities. The following authorities appear to sustain the principle upon which the instructions under consideration are founded: Brinley v. Insurance Co., 11 Metc. (Mass.) 195; Howard v. Insurance Co., 4 Denio, 502; Clement v. Assurance Co., 141 Mass. 208, 5 N. E. 847; Masterton v. Mayor, etc., 7 Hill, 61; Luse v. Jones, 39 N. J. Law, 707.

4. It is provided by section 1734 of McClain's Code that the "amount stated in the policy shall be received as prima facie evidence of the insurable value of the property at the date of the policy," and that in order to maintain an action "on the policy it shall only be necessary for the assured to prove the loss of the building insured and that he has given the company or association notice in writing of such loss, accompanied by an affidavit stating the facts as to how the loss occurred, so far as they are within his knowledge, and the extent of the loss, which notice shall be given within sixty days from the time the loss occurs." It is urged by counsel for appellant that the provision as to the prima facie effect of the amount named in the policy, and the proof required to make a prima facie case, has no application in any case except where proofs of loss have been duly made. This appears to us to be too strict a construction to apply to this statute. If the proofs of loss are waived, the rights of the plaintiff are precisely the same as if they were duly made as provided by law and by the policy.

5. The verdict was for $1,700, with interest. It is claimed that the amount was grossly excessive, and that it must have been given under the influence of passion or prejudice. We do not believe it to be our duty to reverse the judgment on this ground. There is a decided conflict in the evidence as to the value of the property, which made it a question for the jury. As we have said, this property was situated near the city of Davenport. An agent of the defendant went to the property with the plaintiff, before it was insured, for the purpose of examining the buildings. After being on the ground, he wrote the application for the insurance, in the amounts named therein. Without determining whether his acts in the making of the application were binding on the defendant, so far as the value of the property was involved, we think it was a strong circumstance, which the jury might well consider in estimating the amount of the loss. As a soliciting agent, his knowledge of facts acquired in performing that duty was binding on the defendant. Stitz v. Insurance Co., 71 Iowa, 710, 29 N. W. 605; Stone v. Insurance Co., 68 Iowa, 737, 28 N. W. 47. The judgment of the district court is affirmed.

TEAGUE v. FORTSCH et al.

(Supreme Court of Iowa. April 13, 1896.)

APPEAL—RECORD—CERTIFICATE OF EVIDENCE.

1. Under Code, § 2742, requiring all evidence on appeals in equitable actions to be certified by the judge, a certificate made by a judge after he has retired from office is insufficient.

2. Under Code, § 2742, the certificate must be made by the judge who tried the case, and one made by his successor in office is insufficient.

3. Code, § 2742, requires all evidence on appeals in equitable actions to be certified by the judge. Section 3184 provides that, in equitable actions tried upon written testimony, all depositions and papers which were used as evidence are to be certified, not by transcript, but in the original form. *Held*, that the certificate must be by the judge, notwithstanding the cause was tried on written testimony alone, the office of the clerk's certificate, under section 3184, being merely to identify and authenticate the record. Cross v. Railroad Co., 12 N. W. 71, 58 Iowa, 65, overruled. Runge v. Hahn, 38 N. W. 389, 75 Iowa, 734, followed.

Appeal from district court, Fayette county; W. A. Hoyt, Judge.

Appellees Mary H. Teague and Lewis Mohlis are the administratrix and administrator of the estate of Thomas Teague, deceased, and appellee Fortsch is the purchaser of the real estate sold by them as hereinafter stated. Appellant on September 29, 1891, filed a claim against said estate, which was allowed on April 7, 1893, in the sum of $2,173.56. He also held a claim against said estate, by assignment, in favor of Fred Teague, for $1,245. The deceased, Thomas Teague, left surviving him his widow, Mary H. Teague, the administratrix aforesaid, and his daughter, Elizabeth H. Teague, as his only heirs at law. In September, 1892, an order was entered by the district court of Fayette county, Iowa, authorizing said administrator and administratrix to sell all of the real estate left by decedent, except such as had been set off to the widow, for the payment of debts, including those held by plaintiff. Under the order, the real estate might be sold at either public or private sale. Notice of the application for an order for the sale was served only on said widow and daughter of the deceased. The land was duly appraised at $3,715, and sold to the defendant Fortsch, at private sale, for $3,725, and an administrator's deed, in the usual form, executed to him. A report of this sale was made to the court, and the sale and deed duly approved. The proceeds arising from the sale will not pay over 60 per cent. of the amount of the claims filed against the estate. May 11, 1893, plaintiff filed his petition to set aside said sale and deed, as being fraudulent and void as against the creditors of said estate, and because the consideration was grossly inadequate. The defendants answered, denying all allegations of fraud and allegations that the value of the land was greater than the amount they had sold it for. At the conclusion of the trial the court dismissed plaintiff's petition, and entered a decree against him for costs. Affirmed.

J. E. Cook, for appellant. Ainsworth, Hobson & Ainsworth, for appellees.

KINNE, J. 1. We first consider appellees' motion to strike the evidence and to dismiss the appeal, or to affirm the decree entered below, because said evidence has not been certified as required by law. This cause was tried below by the Honorable W. A. Hoyt, then one of the judges of the Thirteenth judicial district of Iowa. His term expired on January 1, 1895. December 22, 1894, Judge Hoyt determined said cause, and entered a decree dismissing plaintiff's petition. Within the time provided by law a certificate was filed in said cause by Judge L. E. Fellows, of said Thirteenth district, reciting fully and particularly all of the evidence introduced upon said trial, and identifying the same, from which it appears that the cause was tried upon certain depositions and other written evidence, and that no oral evidence was introduced upon said trial. Said certificate closes as follows: "All of which papers are now on file with the clerk of the district court of Fayette county, Iowa, as part of the records of said cause; the same being all the evidence offered or introduced in said cause, upon the trial thereof, and upon which the decision and decree of the district court was rendered. On strength of certificates and affidavits hereto appended, I sign this certificate. Dated May 13, 1895. L. E. Fellows, Judge of the 13th Judicial District." The certificates and affidavits mentioned by Judge Fellows are as follows: A certificate of the clerk of the district court, dated May 9, 1895, in which he states that this cause was, by order of the court, tried on evidence taken in the form of depositions; that no evidence was offered or introduced in the trial of said cause in open court, and that all of the evidence offered or introduced in the trial of said cause is described and identified in the certificate signed by Judge Fellows; and that all of said evidence is now on file in his office, and has been since and before the cause was submitted to the trial judge. W. A. Hoyt certifies, as of the same date, that his term of office as judge of the Thirteenth judicial district expired on January 1, 1895; that said cause was tried, by order of said district court, on written depositions, and no evidence was introduced in open court; that said cause was decided by him on December 22, 1894, and before his term of office expired; and that the evidence embraced in the certificate signed by Judge Fellows is all of the evidence offered or introduced on the trial of said cause, and was duly filed in the office of said clerk before the cause was submitted to him. J. E. Cook, the attorney for plaintiff, swears that the certificate signed by Judge Fellows embraces all of the evidence offered and received in the trial of said cause; that Judge Hobson, one of the present judges of the Thirteenth judicial district of Iowa, was and is one of appellees' attorneys, and L. E. Fellows is the other judge of said judicial district. From this state of facts, and the record and evidence, we are to determine whether or not the evidence is legally and properly certified to in this court, so that the cause may be here tried de novo. As Judge Hoyt was out of office at the time he made his certificate, it is clear that it is without force and effect.

Section 2742 of the Code requires that the certificate be made by the judge. We have often held that such certificates, made by a judge after he has retired from office, cannot be considered. Cross v. Railroad Co., 58 Iowa, 65, 12 N. W. 71; Educational Inst. v. Coad, 74 Iowa, 711, 39 N. W. 94; Burnett v. Loughridge, 87 Iowa, 327, 54 N. W. 238. Neither can the affidavit of the attorney be considered as in any way tending to show a compliance with the statute, as the law nowhere authorizes such an affidavit for the purpose of showing that the evidence was properly certified. It may be conceded that the certificate of Judge Fellows, in form, is in compliance with the requirements of the statute; that is, if he was authorized, under the law, to make such a certificate, it sufficiently identifies the evidence which was used upon the trial. It is said that this court has never decided that the certificate must be made by the trial judge, and it is insisted that as the statute reads, "certified by the judge," its demands are answered by a certificate made by any judge of the district. In Educational Inst. v. Coad, supra, we said that the statute "would seem to contemplate that the certificate must be made by the judge who tried the case." But the question was not expressly ruled in that case. In Runge v. Hahn, 75 Iowa, 734, 38 N. W. 389, it is said that the statute requires the trial judge, in equitable actions, to certify all the evidence introduced upon the trial. We do not think that the requirements of the statute are met or complied with by a certificate made by a successor in office of the judge who tried the case. The purpose of this requirement of the law, as is said in Runge's Case, is to "secure such identification of the items of evidence offered and introduced upon the trial that no question can fairly arise, upon appeal, as to what the evidence is." How can a judge who did not try the case certify, with any degree of certainty, as to what items of evidence were introduced before his predecessor? Take this case, and let it be admitted that all of the evidence was in the form of depositions, or other written evidence, and that it is on file in the clerk's office. Because depositions have been taken in a given case, it does not necessarily follow that they were actually used in the trial of the case. The certificate of Judge Fellows shows that, outside of depositions, 16 different items of written evidence were introduced upon the trial, consisting of deeds, reports, records of approval of them, claims, and record of their allowance, verdicts, judgments, petitions, notices, bonds, appraisements, and other papers and records. Now, Judge Fellows, so far as this record shows, could have had no knowledge whatever as to whether any of these depositions, papers, and records were in fact put in evidence, except as he presumed it from their being on the files of the case, or as he obtained it from the certificate of the clerk, or from that of his predecessor. Surely, it would tend to greater certainty, in such cases, to receive and rely upon the certificate of the judge who had tried the case and gone out of office, because he could speak with certainty as to what the evidence adduced before him in fact was, but we have properly held that such a certificate is not to be considered. We think that the law clearly contemplates that the judge who tried the case should make the certificate, and that he must do so while still in office. If a successor of the judge who tried the case may thus certify as to something of which he has no actual knowledge, there is no reason for limiting the right to a successor, for any judge in the state would be equally well qualified. Under the law, and the construction which this court has heretofore placed upon it, it works no hardship to require that the manifest intent of the statute be complied with, and the proper certificate be made by the trial judge. We are therefore of the opinion that the certificate of Judge Fellows is not in compliance with the statute, and hence cannot be considered. See Acts 19th Gen. Assem. c. 35, § 2.

2. It is urged that as this cause was, by consent of parties, tried upon written evidence, there was no necessity for a certificate of the judge; that, when the depositions were filed in the clerk's office, they became a part of the record in the case, just as much so as the pleadings; and that in such a case all the evidence may be certified by either the clerk or judge. It may be conceded that the certificate of the clerk in this case is, in form and substance, sufficient, if any certificate by the clerk can be said to be a compliance with the provisions of the statute. In view of some of the decisions of this court, this question is not free from difficulty. In March, 1878, section 2742 of the Code was repealed, and the following, enacted in lieu thereof, took effect: "But in equitable actions wherein issue of fact is joined, all the evidence offered in the trial shall be taken down in writing, or the court may order the evidence or any part thereof, to be taken in the form of depositions, or either party at pleasure may take his testimony or any part thereof by deposition. All the evidence so taken shall be certified by the judge *in term or vacation*, be made a part of the record and go on appeal to the supreme court, which shall try the case anew." Acts 17th Gen. Assem. c. 145. The Nineteenth general assembly repealed the above provision, and enacted in lieu thereof a provision of the same tenor, and, except in one or two immaterial respects, in the same language, except that the italicized words were left out, and in lieu thereof the following appears: "At any time within the time allowed for the appeal of said cause, and." This act went into effect by publication in March, 1882, and has not since been changed. McClain's Code, § 4414 (section 3184 of the Code), reads: "In an action

by ordinary proceedings, and in an action by equitable proceedings, tried in whole or in part on oral testimony, all proper entries made by the clerk, and all papers pertaining to the cause and filed therein, except subpœnas, depositions, and other papers which are used as mere evidence, are to be deemed part of the record. But in an action by equitable proceedings tried upon written testimony, the depositions and all papers which were used as evidence are to be certified up to the supreme court, and shall be so certified, not by transcript but in the original form. * * *" This section is the same, in substance, as section 3512 of the revision of 1860. Under section 3512 of the revision, it seems to have been considered that when a case had been tried upon written evidence and depositions, and all papers used in evidence properly certified by the clerk, no certificate by the judge was necessary. Baldwin v. Tuttle, 23 Iowa, 71. In Cross v. Railroad Co., 58 Iowa, 65, 12 N. W. 71, it appeared that there was no certificate of the judge, but the cause had been tried upon written evidence. It was held that the certificate of the clerk was all that was necessary to entitle the parties to a trial de novo in this court. It was held that the act of the Seventeenth general assembly, then in force, did not operate to repeal section 3184 of the Code, and that, when oral evidence was introduced at the trial, it must be certified by the judge, but when the evidence consisted of depositions, or other papers, on file, either the judge or clerk might certify the same to this court; thereby both sections of the statute were given effect. In Runge v. Hahn, 75 Iowa, 734, 38 N W. 389,—an equitable action,—it was held that section 2742 of the Code, as amended by chapter 35, Acts 19th Gen. Assem., required the trial judge to certify all the evidence offered and introduced upon the trial. It was also said that the object of that provision was to identify the evidence offered or introduced upon the trial, and that the certificate of the judge "cannot, in the matter of identification, be supplemented by the certificate of the clerk. The office of the certificate of the clerk required by section 3184, since the enactment of chapter 35, Acts 19th Gen. Assem., is to identify and authenticate the record. Before that enactment, depositions and other papers used merely as evidence were not deemed part of the record, and could be identified by the clerk's certificate, but its effect clearly is to change that rule. Cross v. Railroad Co., 58 Iowa, 63, 12 N. W. 71, arose before its enactment, and it is not now an authority on the question." We are unable to see why the Cross Case was not as good authority under the act of the Nineteenth general assembly as prior thereto. It would seem that the writer of the opinion in Runge's Case must have overlooked the fact that the only effect of the act of the Nineteenth general assembly was to fix a definite time within which the judge must certify the evidence. If the rule was changed as is held in Runge's Case, it was done as early as the act of the Seventeenth general assembly took effect, and it was in force when the Cross Case was decided. It seems to us that it is not possible to reconcile the holdings in these two cases. We incline, however, to the opinion that the rule adopted in Runge's Case is the better one, and that the two sections may both stand,—section 2742, as amended, requiring that, in all equity causes triable de novo in this court, the judge shall certify the evidence, whether it be taken orally, or in the form of depositions or other written evidence, and that the office of the certificate of the clerk, under section 3184, is to identify and authenticate the record. It must be apparent that no one, save the judge trying the case, can always know just what writings or depositions were offered or received as evidence in the case. We conclude, therefore, that the two sections of the statute under consideration are properly construed in Runge's Case; and, in so far as the Cross Case is in conflict with the views herein expressed, it is overruled.

As the evidence has not been properly certified, we cannot consider the case on its merits. The motion to strike the evidence is sustained, and the judgment below is affirmed.

KEARNEY MILLING & ELEVATOR CO. v. UNION PAC. RY. CO. (CITIZENS' STATE BANK, Intervener).

ELM CREEK ELEVATOR CO. v. SAME.

(Supreme Court of Iowa. April 13, 1896.)

SALE — RESCISSION BY SELLER — STOPPAGE IN TRANSITU—VENDOR'S LIEN—ELECTION OF REMEDIES—NOTICE TO BUYER OF INTENT TO RESELL.

1. A seller of grain on credit, who learns, while it is in transit, that the buyer is insolvent and intends to get possession with intent to defraud, may rescind the sale. Deemer, J., dissenting.

2. Where a seller of grain, on learning that the buyer is insolvent and intends to get possession with intent to defraud, elects to rescind the sale, and stops the grain in transit, he cannot thereafter claim that by the stoppage he acquired a lien for the price, as against one to whom the bills of lading had been transferred by the buyer as collateral. Deemer, J., dissenting.

3. Evidence that a seller of grain, on learning of the insolvency of the buyer, ordered the carrier not to deliver it to the consignee, stopped the grain in transit, and sold it as his absolute property, with full knowledge of all the material facts, sufficiently shows an election to rescind the sale. Deemer, J., dissenting.

4. A seller, on rescinding a sale and stopping the goods in transit, should give notice to the buyer of an intention to resell.

Kinne, J., dissenting.

Appeal from district court, Pottawattamie county; A. B. Thornell, Judge.

Action at law to recover the possession of certain car loads of grain. The Citizens' State Bank intervened in each case, and claimed to be the owner of the grain. By

agreement of the parties the two actions were tried together, as one. After the evidence had been submitted, a motion for a verdict for the intervener in each case was sustained, and verdicts were returned and judgments rendered in accordance with that ruling. The plaintiffs appeal. Affirmed.

Sims & Bainbridge, for appellants. Harl & McCabe, for appellees.

ROBINSON, J. In November, 1891, the Brown Bros. Grain Company, a corporation, was engaged in the business of buying and shipping grain, and had its principal places of business at Council Bluffs and Omaha. About the 12th day of that month the plaintiffs sold to the company several car loads of wheat and rye. The grain so sold was delivered to the Union Pacific Railway Company, at stations in Nebraska, to be transported to Council Bluffs, and there delivered to the purchaser. Bills of lading, in which the grain company was named as consignee, were issued by the railway company, and delivered to the plaintiffs. They were forwarded by mail to the consignee, and drafts on it for the price of the grain were drawn, and forwarded through banks for collection. The bills of lading were delivered by the consignee to the intervener in exchange for other bills of lading, to be held as collateral security for the payment of two promissory notes made by the consignee to the intervener, for the aggregate sum of $12,000. The drafts drawn by the plaintiffs were not paid, and on or about the 18th day of November, learning that the grain company was insolvent, and that the grain was still in the cars, and in the actual possession of the railway company, the plaintiffs notified it not to deliver the grain to the consignee. A few days later these actions were commenced. The grain was obtained by means of them, and sold by the plaintiffs without any notice of any kind to the grain company or to the intervener. The first petition filed in each case alleged that the plaintiff therein named was the absolute and unqualified owner of the property sought to be recovered. In January, 1892, the intervener filed a petition of intervention in each case, alleging that it was entitled to the grain in controversy, to be held as collateral security for the payment of the indebtedness on account of which the bills of lading had been delivered to it. In February, 1893, the plaintiffs filed to the petition of intervention their answer, in which they alleged that before the grain reached Council Bluffs they learned that the consignee was insolvent, and was disposing of its property for the purpose of defrauding its creditors, and was intending to get possession of the grain, if possible, and transfer it, with the intent to cheat and defraud the plaintiffs out of the purchase price; that the plaintiffs elected to rescind the sale by stopping the grain in transitu; and that they did so stop it, and obtained possession of it by the process of replevin. In December of the same year the plaintiffs filed amended and substituted answers, in which were set out more fully the matters pleaded in the original answers. In February, 1894, the plaintiffs filed amended and substituted petitions, in which they alleged the sale of the grain in question to the grain company; that while the grain was in transit they learned that the purchaser was insolvent and unable to pay for the grain, and that, thereupon, they notified the railway company not to deliver the grain to the consignee, and elected to stop it and regain possession of it, for the purpose of asserting and regaining their lien thereon for the unpaid purchase price; that the consignee was in fact insolvent and unable to pay for the grain, but that the plaintiffs had no knowledge of the insolvency and inability to pay for the grain until after it had been shipped; that by reason of the facts stated the plaintiffs became entitled to the immediate possession of the grain. At the same time they filed second substituted answers to the petition of intervention, and filed amendments thereto a few days later. In these the most of the statements of the first and second answers are repeated, in substance; and it is alleged, further, that the intervener had full knowledge of the condition and fraudulent intent of the grain company, and received the bills of lading to aid it in delaying, hindering, and defrauding its creditors, and that the transfer of the bills of lading to the intervener was without consideration. The averments of the substituted petition in regard to the election of the plaintiffs to stop the grain in transit, for the purpose of securing the payment of the purchase price, are, in substance, repeated, and a lien upon the grain paramount to any right thereto of the intervener is alleged. In its replies to the final answers to the petition of intervention, the intervener alleges that, for reasons stated, the plaintiffs are estopped to assert any right to or interest in the grain adverse to it; that they elected to and did rescind the contract of sale, and cannot now assert a lien on the grain by virtue of a stoppage in transitu. The motion for a verdict in each case was based upon two grounds, of which the first was, in substance, that the plaintiffs had elected to rescind the sale, and therefore could not enforce a lien for the purchase price; and the second was that the title acquired by the intervener through the transfer of the bills of lading had not been impeached. The claim of the appellee in regard to the matters included in the first ground of the motion are that the plaintiffs as against the grain company, had the right to select either of two remedies, to wit: (1) To rescind the contract of sale, and recover the grain, as its absolute and unqualified owners; or (2) to stop the grain in transit, and enforce their vendors' lien for the pur-

chase price. It is further claimed that these remedies are so inconsistent that an election to pursue one terminates the right to resort to the other, and that the plaintiffs made an irrevocable election to rescind the sale; therefore, that they cannot enforce a vendors' lien in this action. The appellants deny that they had a choice of remedies, and insist that the change in their claims of interest in the property were permissible under their right to amend the pleadings.

1. The rule in regard to the election of remedies is stated in Thompson v. Howard, 31 Mich. 312, as follows: "A man may not take two contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again." "Any decisive act of the party, with knowledge of his rights and of the fact, determines his election, in the case of conflicting and inconsistent remedies." Washburn v. Insurance Co., 114 Mass. 175; Sanger v. Wood, 3 Johns. Ch. 421; Rodermund v. Clark, 46 N. Y. 354; Sloan v. Holcomb, 29 Mich. 160; Crompton v. Beach (Conn.) 25 Atl. 448; Crook v. Bank (Wis.) 52 N. W. 1133; O'Donald v. Constant, 82 Ind. 213; Bish. Cont. §§ 678–680, 683; 6 Am. & Eng. Enc. Law, 250; Heinze v. Marx (Tex. Civ. App.) 23 S. W. 704; Thomas v. Joslin, 36 Minn. 1, 29 N. W. 344; Morris v. Rexford, 18 N. Y. 552. In Connihan v. Thompson, 111 Mass. 272, it was said: "The defense of waiver by election arises when the remedies are inconsistent, as where one action is founded on an affirmance, and the other on a disaffirmance, of a voidable contract, or sale of property. In such cases any decisive act of affirmance or disaffirmance, if done with knowledge of the fact, determines the legal rights of the parties once for all." Where a vendor elects to rescind the sale of goods on the ground of a fraud, and recovers possession of them by an act of replevin, he cannot afterwards, on failing to obtain adequate relief in that action, claim of the assignee of the insolvent purchaser as for goods sold. One theory is totally at variance with the other. "If one elects between two inconsistent remedies, the right to pursue the other is forever lost." Farwell v. Myers, 59 Mich. 182, 26 N. W. 328. A contract of sale obtained by fraud is not void, but voidable, and the contract "continues until the party defrauded has determined his election by avoiding it, and, when once rightfully determined, it is determined forever"; and the bringing of an action to recover the property sold is such an election. Powers v. Benedict, 88 N. Y. 609. A party cannot both affirm and rescind a contract, and the commencement of an action, with full knowledge of the facts, is an election which is final, and the discontinuance of the action is immaterial. "When it becomes necessary to choose between inconsistent rights and remedies, the election will be final, and cannot be reconsidered, even when no injury has been done by the choice, or would result from setting it aside." Terry v. Munger (N. Y. App.) 24 N. E. 272; 2 Herm. Estop. §§ 1045–1051. In Bulkley v. Morgan, 46 Conn. 393, it appeared that one Brennan had purchased goods of the plaintiff by fraud, which would have authorized him to rescind the sale and reclaim the goods. With knowledge of the fraud, he commenced an action for the value of the goods, and attached them to secure his claim. He afterwards discovered that his action was prematurely brought, and dismissed it, and then brought an action of trover for the goods. It was held that he had affirmed the contract, with full knowledge of all the facts, and could not afterwards rescind it. See, also, Acer v. Hotchkiss, 97 N. Y. 406. If an agent for the purchase of stock exceed his authority, his principal may ratify his act; and any expression of assent on his part, either by words or conduct, would bind him, "not on the principle of estoppel, but as in other cases of election." Metcalf v. Williams, 144 Mass. 454, 11 N. E. 700. "Where a man has an election between several inconsistent courses of action, he will be confined to that which he first adopts. The election, if made with knowledge of the facts, is in itself binding. It cannot be withdrawn without due consent. It cannot be withdrawn, though it has not been acted upon by another by any change of position." Bigelow, Estop. 673. "The defrauded party to a contract has but one election to rescind the same. If he once determined his election, it is determined forever. Hence, if it be shown that he has at any time after knowledge of the fraud, either by express words, or by unequivocal acts, affirmed the contract, his election is irrevocable." Bigelow, Fraud, 436. "Ratification or election, once made, expressly or impliedly, is irrevocable, and binds, not only the party, but all claiming under him." Herm. Estop. § 1065. It was said in Pence v. Langdon, 99 U. S. 578, in regard to a fraudulent sale of shares of stock, "The election to rescind or not to rescind, once made, is final and conclusive." The election to rescind waives the right to sue on the contract. Tiff. Sales, 120, 121. "A statement in a plea, by the party from whom the property passed, that he claims back the property on the ground that he was induced to part with it by fraud, is as unequivocal a determination of his election to avoid the transaction as could well be made. * * * After succeeding by means of such a plea, the person pleading it could never successfully set up the contract as still valid." Clough v. Railway Co., L. R. 7 Exch. 36. The assignee in bankruptcy of a person who made a fraudulent conveyance of property "has an election, not of remedies merely, but of rights. But an assertion of one is necessarily a renunciation of the other." The assignee may demand the

property on the ground that the sale was void, or he may demand the price, but he cannot do both. If he commence an action for the price, and cause the property of the purchaser to be attached to secure it, this is an unequivocal assertion that the sale is not impeached, and, if done with knowledge of the facts, is conclusive. Butler v. Hildreth, 5 Metc. (Mass.) 49. The rule we have been considering is not confined to contracts for the sale of property, but is of general application. Thus, a party holding personal property by virtue of a mortgage or pledge may waive his claim under the mortgage or pledge, and attach the property in a suit to recover the debt for which the mortgage or pledge was given. Such an attachment is in itself a waiver of the claim under the mortgage or pledge. The lien created by the latter is essentially different from that created by the attachment, and the two cannot exist at the same time. Evans v. Warren, 122 Mass. 303. See, also, Whitaker v. Sumner, 20 Pick. 404; Wingard v. Banning, 39 Cal. 453; Libby v. Cushman, 29 Me. 429; Jacobs v. Latour, 5 Bing. 130; Sensenbrenner v. Mathews, 48 Wis. 253, 3 N. W. 599. The commencement of an action to enforce a lien on certain machinery, although the action was dismissed by the plaintiffs without a trial on the merits, was inconsistent with their ownership of the property, and was an election to treat the title as not in them. Van Winkle v. Crowell, 146 U. S. 42, 13 Sup. Ct. 18; Lehman v. Van Winkle (Ala.) 8 South. 870. Where the owner of land sues for the value of timber taken therefrom, he cannot afterwards maintain an action for the conversion of the timber, even though the court in which the first action was brought did not have jurisdiction of the defendant in that action. Nield v. Burton, 49 Mich. 54, 12 N. W. 906. The decisions of this court are in harmony with the authorities cited. Klocow v. Patten (Iowa) 61 N. W. 926; Schneitman v. Noble, 75 Iowa, 124, 39 N. W. 224; Bank v. Dows, 68 Iowa, 460, 27 N. W. 459.

It is clear, under the rules of the cases we have been considering, that, if the right to elect existed, the action of the plaintiffs in taking the grain in controversy, and selling it, under a claim of absolute ownership, with full knowledge of all the material facts, was an election of rights and remedies which was final and conclusive. The claim under which these actions were commenced in November, 1891, was that the plaintiffs were the absolute and unqualified owners of the grain. Taking possession of it, and acting on that claim, they sold it forthwith as their own, and did not modify their claim of ownership until February, 1894, when the amended and substituted petitions were filed. It is not averred in the pleadings as amended, nor is it shown by the evidence, that the claim of absolute ownership was made under any mistake. So far as we are informed, it was made with full knowledge of all material facts, and it necessarily involved the conclusion that the contract of sale had been rescinded. The grain was sold as the property of the plaintiffs, without notice of any kind to the grain company or to the intervener. It is true, the right to sell may not have depended upon the giving of notice. But it is the better practice for the vendor who exercises the right of stoppage in transitu to give a notice of an intention to resell the goods, when it is practicable to do so. Holland v. Rea, 48 Mich. 223, 12 N. W. 167; Van Brocklen v. Smeallie, 140 N. Y. 75, 35 N. E. 415; Ullmann v. Kent, 60 Ill. 271; Saladin v. Mitchell, 45 Ill. 85; Hickock v. Hoyt, 33 Conn. 558; Brownlee v. Bolton, 44 Mich. 221, 6 N. W. 557; Benj. Sales (Bennet's 6th Ed.) 775; Tiff. Sales, 228. And the fact that such notice is not given, if unexplained, tends to show an intention to rescind the sale. Redmond v. Smock, 28 Ind. 370. According to the weight of authority, the mere exercise of the right of stoppage in transitu does not operate to rescind the sale; but that conclusion is for the benefit of the vendor, as it may be to his advantage to resell the goods, under proper conditions, and hold the vendee for the loss, if any, sustained by his failure to perform the contract. But until the sale is rescinded the vendee, or his assignee, has the right to take the goods on payment of the contract price; and, if the vendor does not then deliver them, he is responsible for the damages which result from his failure to do so. Diem v. Koblitz, 49 Ohio St. 52, 29 N. E. 1124. But, when the vendor rescinds the contract of sale, the right of the vendee to the goods sold is at an end. The rights and liabilities of the parties to a contract of sale which has been rescinded are entirely different from those which exist where the right of stoppage in transitu only is exercised. From November, 1891, until February, 1894, the plaintiffs asserted, in effect, by their pleadings and by their conduct, that the contract of sale had been rescinded, and prevented the grain company and the intervener from paying the contract price and taking the grain, had they desired to do so. Certainly, this was conclusive evidence of rescission, so far as it could be effected. But it is said that the relief which the plaintiffs have at all times sought was obtainable by an action for the recovery of the grain, and that it was within their right to modify their claim as to their interest in the grain by amending their pleadings at any time before the trial. Their right to amend is not disputed, but the effect of the amendment is another matter. The fact that the property in question might have been recovered by an action of replevin, whether the plaintiffs were the absolute owners of the property or were merely entitled to the possession of it for the purpose of enforcing a lien, is not decisive of their right to recover, even if the averments of the pleadings as amended are sustained. The controlling considerations are that, with knowledge of the facts, they

elected to rescind the contract of sale, and acted upon that election, and that their subsequent attempt to revive the contract, and treat it as in force, is wholly inconsistent with the election as first made. They sought to recover the property, in each case, it is true, but in the first case on the ground that they had not sold it, and in the other on the ground that they had sold it, and were entitled to it, as a means of securing payment of the price. As we have seen, they cannot affirm the contract, after having elected to disaffirm it.

2. The appellants deny that they had a choice of remedies, and insist that the facts set out in their pleadings did not show that they were entitled to rescind the sale, but only to stop the grain in transit for the purpose of enforcing against it their demands for the unpaid purchase price. It may well be questioned whether the plaintiffs, after having derived all possible benefits from their election to rescind, should be permitted to avoid the effects of their election on the ground that what they did was in violation of law. But we do not find it necessary to determine that question. Ordinarily the effect of the exercise of the right of stoppage in transitu is to vest in each party to the contract of sale the rights he had before the possession of the goods sold was delivered to the carrier. Cox v. Burns, 1 Iowa, 68; Babcock v. Bonnell, 80 N. Y. 248; Tiff. Sales, 226; Story, Sales, § 320; 2 Kent, Comm. 540; 1 Pars. Cont. 598; 23 Am. & Eng. Enc. Law, 932. And it is perhaps true that the mere insolvency of the buyer will not authorize the seller who has effected a stoppage in transitu to rescind the sale. 2 Benj. Sales, §§ 1166–1299, note. It is also probably true, as a general rule, that the intent of the buyer, formed after the sale of the goods, and their completed delivery to him, not to pay for them, would not be sufficient to authorize the seller to rescind the sale on the ground of fraud. Starr v. Stevenson (Iowa) 60 N. W. 217; Burrill v. Stevens, 73 Me. 400; Tied. Sales, § 170. But it is well settled that when goods are sold on credit the seller has the right to rely on the presumption that the buyer intends to perform his obligations by paying for the goods; and, if the latter then has a secret intention not to make payment, that intention, and his failure to disclose it, will entitle the seller to rescind the sale and recover the goods, even though they have passed into the possession of the buyer. Reid v. Cowduroy, 79 Iowa, 170, 44 N. W. 351, and cases cited therein; Burghman v. Bank (Pa. Sup.) 28 Atl. 211; 2 Pom. Eq. Jur. § 906. In this case the admitted facts show that the plaintiffs did not know of the insolvency of the grain company, nor of its contemplated fraud, when the sale was made; that the plaintiffs learned those facts while the grain was in transit; and that they then notified the carriers not to deliver the grain to the grain company, and recovered the actual possession of the grain. The question, on this branch of the case, which we are required to determine, is whether the plaintiffs had the right to rescind the contract of sale. We are of the opinion that they did have the right, as against the grain company. If the company had been insolvent, and unable to pay for the grain, when the sale was made, and if it then had the intention not to pay for the grain, and if these facts had been concealed from the sellers until after the sale and delivery of the grain, it is clear that the plaintiffs could have rescinded the sale and recovered the grain. We think it logically follows that if such facts were discovered after the sale, but before the delivery, the seller could have refused to deliver the grain, and rescinded the sale. In the case as it is submitted to us, it appears that the plaintiffs rightfully prevented a delivery of the property, and secured possession of it. When that had been done they knew that the buyer could not pay for the grain if it were delivered, and that they intended not to pay for it. We know of no rule of law which could compel the sellers to treat the contract of sale as in force, under such circumstances. Ordinarily, if a party to a contract is unable or refuses to proceed with it, the other party may rescind it. Bish. Cont. § 827. If a contract of sale is not completed, by reason of the failure of the buyer to comply with his part of the agreement, the seller may treat the goods as still his property, and sue the buyer for damages. Tied. Sales, § 333. In Morris v. Rexford, 18 N. Y. 552, it was said that "a vendor may reclaim his goods after a delivery upon a sale for immediate payment, if the vendee, on getting the property into his possession, refuses to make payment. If there be no terms of credit expressed or implied in the delivery, the delivery in such case is deemed to be conditional, and subject to revocation on the refusal or failure of the purchaser to pay the price." See, also, Palmer v. Hand, 13 Johns. 435. In Henry v. Vliet (Neb.) 54 N. W. 122, it was held that where goods were sold on condition that they were to be paid for on delivery, and they were delivered without payment being made, the seller could reclaim them. It is not necessary to go so far as do some of the cases cited to sustain the right of the appellants to rescind the sales. Time was not given for the payment of the grain in question, but it was to be paid for on the presentation of the drafts, which were presented for payment before the grain had reached its destination, and possession had been taken by the appellants before there had been any actual delivery to the buyer. They found themselves entitled to the possession of the grain, without liability to surrender it to the buyer, excepting under a contract of sale which the buyer could not and would not perform on its part. Under the circumstances, the sellers were fully authorized to rescind the contract. Having

done so, and sold the grain under a claim of absolute ownership, their election was final. On the trial of the case they relied upon an alleged right to a lien which was shown not to exist, and, as there was no material conflict in the evidence in regard to it, the motions for verdicts were properly sustained.

3. The questions we have determined are controlling, and it is unnecessary to consider other questions discussed. It is proper to say, however, that we incline strongly to the opinion that the result reached effects, substantially, justice between the parties. The plaintiffs might have secured their claims for the grain by sending the bills of lading, with the drafts drawn for the purchase price, to the banks, for collection; but they failed to do so, and, by sending the bills of lading to the grain company, enabled it to exchange them for similar bills held by the intervener as collateral security. There is nothing in the record which shows lack of good faith on the part of the intervener. Its transactions with the grain company were in the ordinary course of business, without knowledge of the fact that the price of the grain in question had not been paid. It may be that the plaintiffs would have been entitled to recover, as against the intervener, had there been no election to rescind; but, if so, it would have been on technical grounds. For the reasons shown, we are satisfied with the judgment of the district court, and it is affirmed.

DEEMER, J. (dissenting). I do not think there was an election of remedies, nor do I think the plaintiffs had any right of rescission. If they made any election, it was, in the first instance, to stop the goods in transit.

KINNE, J. I dissent from the conclusions of the majority.

ROSS v. CAMPBELL.

(Supreme Court of Iowa. April 13, 1896.)

COUNTIES—SELECTION OF OFFICIAL PAPER—CONTEST—FRAUD.

1. Code, § 307, provides that the supervisors shall select as official newspapers those two having the largest circulation in the county, and that in case of contest the applicants shall file a certified statement of the names of bona fide subscribers, the two applicants showing the most subscribers to be the official papers. *Held*, that there is a "contest" when more than two statements are filed, with applications to have specified newspapers selected as the official papers of the county.

2. Under Code, § 307 (providing that, in case of contest over the selection of official newspapers, two applicants shall be selected whose certified statements show the largest bona fide circulation, and, in case fraud is charged by an aggrieved publisher, the supervisors shall seek other evidence, and the aggrieved publisher shall have the right of appeal to the district court, etc.), a publisher is aggrieved when an adverse application, based on a fraudulent list, is filed; and, unless the charge of fraud is brought to the attention of the board before any selection is made, it cannot be heard on appeal to the district court. Ashton v. Story, 64 N. W. 804, followed.

Appeal from district court, Hardin county; S. M. Weaver, Judge.

The plaintiff is the publisher of the Eldora Herald, and the defendant is the publisher of the Eldora Ledger, both of which are weekly newspapers, published in Hardin county. In January, 1895, the parties named and the publisher of the Eldora Enterprise, another weekly newspaper of the county, applied to the board of supervisors to have their respective papers selected as official newspapers, under the provisions of section 307 of the Code. The board selected the Ledger and Enterprise. The plaintiff, failing to secure a rehearing, appealed to the district court, which tried the cause, and found that the Herald was entitled to be selected in lieu of the Ledger, and adjudged that substitution be made. The proprietor of the Ledger appeals. Reversed.

H. L. Huff and J. H. Scales, for appellant. Albrook & Lundy, for appellee.

ROBINSON, J. The material facts shown by the record submitted to us are substantially as follows: On the 10th day of January, 1895, the board of supervisors examined the applications for the selection of official newspapers then on file, five or more in all, and, finding that sworn statements showing the number of subscribers within the county had not been filed by any applicant, continued the hearing of the applications to the 28th day of the month. At that time, sealed applications from five newspapers were opened. The sworn statement of the appellant showed that the Ledger had 1,024 subscribers, living and receiving the paper in the county. The sworn statement of T. O. Walker, the publisher of the Enterprise, showed that it had 997 such subscribers, and the sworn statement of Ross showed that the Herald had 990. The applications were opened between 1 and 2 o'clock in the afternoon, and further action in regard to them was deferred until 7 o'clock in the evening, to permit examinations and objections to be made. At the appointed time, they were taken up by the board. It does not appear that any objection had been made to any application, nor that time was asked by any one for further investigation, nor that evidence was offered to contradict any showing made. The board counted the names on each list, and made the selection stated. In the afternoon of the next day, the plaintiff appeared before the board, with an attorney, and filed a petition, in which he asked that the matter of selecting the official papers be opened; that a time for the further consideration of the applications be fixed; and that the petitioner be permitted to show, what he alleged to be true, that the selection made was erroneous, because the lists furnished by the proprietors of the Ledger and Enterprise contained names of persons who were not bona fide annual subscribers, as required by law; and that the list of the Her-

aid contained more names of such subscribers than any paper published in the county. The petition stated that the petitioner was aggrieved by the fact that he had no notice of the time when the board would open the lists filed, and that, had he been informed of the examination which was made, he would have appeared, and made the charges of fraud indicated in his petition. After considering the petition, the board declined to grant it, and the plaintiff then appealed to the district court. On the 25th day of February, he filed in that court a statement to the effect that a large number of persons named on the list of the defendant did not reside in Hardin county; that a large number of others whose names appeared in the defendant's list refused to receive the Ledger, and were not subscribers for it; that the paper was sent to a large number of other persons, whose names were in the defendant's list, without compensation, and without expectation of compensation, as a gratuity; that the names of the classes of persons specified were placed in the list fraudulently, for the purpose of inducing the board of supervisors to select the Ledger as an official paper. The defendant filed in the district court a motion to dismiss the appeal, which was overruled; and another to strike from the files the statement to which we have just referred, on which no ruling is shown; and objections to the taking of testimony, which were overruled. Testimony was introduced, which fully justified the conclusions of the district court that the Herald had more bona fide yearly subscribers in Hardin county than the Ledger had. We do not understand that to be controverted, but it is urged that the district court was not authorized to receive the evidence, or determine the case on its merits.

The portion of section 307 of the Code which is material to a determination of this controversy is as follows: "The board of supervisors shall, at its January session of each year, select two newspapers published within the county, * * * having the largest number of bona fide yearly subscribers within the county, which circulation shall be determined as follows: In case of contest the applicants shall each deposit with the county auditor, on or before a day named by the board of supervisors, a certified statement, subscribed and sworn to before some competent officer, giving the names of the several post offices and the number and the names of the bona fide yearly subscribers receiving their papers through each of said offices, living within the said county, such statements to be in sealed envelopes and opened by the county auditor upon direction of the board of supervisors to do so, and the two applicants thus showing the greatest number of bona fide yearly subscribers living within the county shall be the county official papers. * * * In case charges of fraud are made by an aggrieved publisher, the board shall seek other evidence of circulation, and the aggrieved publisher shall have the right of appeal to the circuit [now district] court for redress of grievance. * * *"

When more than two statements are filed, with applications to have specified newspapers selected by the board of supervisors and made official, there is a contest, within the meaning of the provisions quoted. Runyon v. Haislet, 90 Iowa, 379, 57 N. W. 902. A publisher is aggrieved when an adverse application, based upon a fraudulent list, is filed, and also when another paper is selected if his should have been chosen. Cory v. Hamilton, 84 Iowa, 597, 51 N. W. 54. But the contest is triable, in the first instance, by the board of supervisors; and, when fraud is relied upon, the charge of fraud should be made and brought to the attention of the board before it determines the contest. It is not allowable to change the issues in the district court. Ashton v. Story (Iowa) 64 N. W. 804. In this case, fraud had not been charged when the board of supervisors acted upon the applications; and, so far as is shown, the papers submitted to it fully authorized, and even required, the decision which was made. The attempt of the plaintiff to charge fraud the day after the decision was rendered was not sanctioned by the statute, and is contrary to the rules which must govern in such cases. It was said in Cory v. Hamilton, supra, that no construction of the statute which would allow a charge of fraud for the first time after the selection was made is permissible. We do not say that a board might not, for good cause, set aside its decision, and grant opportunity for new objections to be made and additional evidence to be offered. Whether such a course of procedure should be permitted in any case we do not decide, but, if ever allowed, it should be for satisfactory reasons only. In this case, no excuse for the failure of the plaintiff to appear before the time fixed for the final consideration of the applications, and make objections, or ask for time in which to do so, is shown. If it be within the discretion of the board to grant or refuse a rehearing in such cases, no abuse of that discretion is shown in this case. Hence there was no ground for reversing the action of the board on appeal to the district court, and, as no issue of fraud was raised before the board, no issue of that character could be tried by the district court. It is only in case charges of fraud are made that the board is required to seek evidence of circulation other than that presented in the statements of the applicants. The district court should have confined its examination to the questions presented by the applications and statements which were before the board. If they were false or erroneous in any respect, the defect should have been presented to the board before it made the selection. The action of the board appears to have been fully warranted by the evidence submitted to it, and the judgment of the district court is erroneous, for reasons stated. It is therefore reversed.

RIDDLE v. DOW et al. (DICKEY, Intervener).

THOMPSON NAT. BANK v. SAME.

(Supreme Court of Iowa. April 13, 1896.)

CHATTEL MORTGAGE—VALIDITY—LANDLORD'S SHARE OF CROP.

A landlord who is to receive as rent for a farm a share of the crop, to be delivered by the tenant, has such an interest in the crop that he may, before its division, make a valid mortgage thereon, which will attach to his share as soon as segregated, and will take precedence of a garnishment of the tenant by a creditor of the landlord after the execution of the mortgage.

Appeal from district court, Crawford county; Charles D. Goldsmith, Judge.

Proceedings by garnishment to appropriate shares of crops grown on leased premises which were to be paid as rent in satisfaction of judgments against the landlord. A creditor of the landlord intervened, claiming the shares specified under a mortgage executed by his debtor. The two causes were tried together by the court. A judgment was rendered in each in favor of the intervener, and the plaintiffs appeal. Affirmed.

Nash & Phelps, W. R. Green, and Theo. F. Myers, for appellants. J. P. Conner, for intervener, appellees.

ROBINSON, J. The two cases are submitted together. The controlling facts are the same in both, and the district court was authorized to find the facts to be substantially as follows: In the year 1891 the plaintiffs recovered judgments against the defendant S. E. Dow, which are still unpaid. The defendant Dow rented to J. H. Griffin and J. R. Griffin by verbal agreements certain land for the year 1892, and was to receive from them as rent one-third of the crops which should be raised on the leased premises, to be delivered in Dow City, about three miles distant from the land. The tenants occupied the premises, and proceeded to raise crops thereon. On the 2d day of September, 1892, Dow made to the interveners W. C. Dickey & Co. a promissory note for the sum of $400, payable on the 1st day of the next November, and to secure its payment executed a chattel mortgage upon the property, described as follows: "My undivided one-third interest in all the crops of every kind and description grown during the season of 1892" on land which was fully described, and which was that leased to the Griffins as stated. At that time no division of the crops grown had been made. The small grain, consisting of wheat and oats, was in stack, and the corn was in the field, and all were in the possession of the tenants. After the mortgage was given, but on the same day, the tenants were garnished under executions issued on the judgments, and their answers were taken. The answers admitted that the garnishees were under obligations to deliver a share of the crops raised by them, but showed that no division had been made. Subsequently nearly 120 bushels of wheat, 320 of oats, and more than 2,000 bushels of corn were delivered by the tenants to the sheriff under the garnishments. A stipulation was then made under which the grain so delivered was sold, and the proceeds of the sale were paid into the court, to be appropriated by the judgments which should be rendered in the cases. The district court adjudged that the lien of the mortgage was paramount to the rights acquired by the garnishment proceedings, and awarded the proceeds of the grain to the interveners.

1. It may fairly be inferred from the record before us that the lease made by Dow gave to the tenants the sole possession of the leased premises during the terms of the lease, the exclusive right to possess and hold the crops which should be grown until they should be divided, and the right to make the division. The division of the crops actually made by the tenants and the delivery of a share thereof to the sheriff were voluntary on the part of the tenants in fulfillment of the requirements of their lease. No question as to notice of the rights of any party is involved in this case. The question we are required to determine is whether the mortgage given by the landlord to the interveners was effectual to create an interest in the crops grown upon the leased premises superior to the rights acquired by the judgment creditors of the landlord by virtue of the garnishments. It is earnestly contended that the landlord had no interest in the crops until they were divided and his share was delivered; that he could not mortgage a share of them until it was set apart to him; and that, as the tenants were garnished before that was done, the judgment creditors acquired rights which were paramount to those created by the mortgage. It is undoubtedly true that the authorities generally hold that, where a tenant on shares has exclusive possession of the leased premises, the legal title to the entire crop grown thereon and the right to possess it are vested in him until the share which is to be delivered as rent is separated from the remainder of the crop, and some authorities hold that such ownership is exclusive. It will be found, however, that in most cases of that character the landlord or person claiming through him was endeavoring to assert a right of possession as against the tenant before a division of the crops had been made, or that there had been a conveyance of the land before a maturity of the crops, and a claim made that the landlord's share did not pass by the conveyance. But the rules which control in such cases are not applicable to this case. To ascertain the fair scope and intent of a decision, and the force which should be given it, attention must be paid to the very questions which required determination. The case of Rees v. Baker, 4 G. Greene, 461, may properly be regarded as the leading one in

this state for the doctrine that the exclusive ownership of growing crops, of which a share is to be delivered as rent, is in the tenant, but no question of that kind was involved in the case. The landlord had leased to the tenant land on shares. The tenant plowed and cultivated it, and sowed fall wheat upon it. The wheat was frozen out during the winter, and, in the spring following, the landlord, without the permission of the tenant, took possession of the land, and sowed it with spring wheat. The court held that the landlord was a trespasser, and that the tenant could recover the value of his labor in preparing the ground for a crop. What was said in regard to the ownership of a crop, had one been raised by the tenant, was not relevant to any issue in the case. The facts involved in Townsend v. Isenberger, 45 Iowa, 670,—the next case decided by this court,—which is alleged to support the doctrine in question, were substantially as follows: The owner of land leased it to a tenant, who was to deliver for its use one-third of the grain he should raise upon it. Before the crops were planted, a creditor of the landlord levied a writ of attachment upon the land. A judgment in the action was afterwards obtained, and before the crops matured the land was sold without redemption, and a sheriff's deed therefor executed. After the attachment was effected, but before the crops were planted, and before the judgment was rendered, the landlord assigned the lease, and the controversy in the case was in regard to the ownership of the share of the crop which was set apart by the tenant as rent. What was said in regard to the ownership of the tenant was designed to show that the rent had not accrued and was not payable until after the purchaser at the sheriff's sale had acquired title to the land; hence that the case was controlled by the rules that rent reserved by lease, and not accrued, passes by a conveyance of the land, and that a purchaser under execution sale is entitled to the rent accruing or falling due after the execution of the sheriff's deed. It is clear that those rules have no application in this case. The cases of Rees v. Baker and Townsend v. Isenberger were referred to in Atkins v. Womeldorf, 53 Iowa, 150, 4 N. W. 905, where it was said that, although it be true that the right of property in a crop grown on shares was, as between the landlord and tenant, in the latter until it was divided, yet that it was "the property of the tenant in the sense that the landlord may not enter upon the premises and take possession of the crops without consent of the tenant." The case of Howard Co. v. Kyte, 69 Iowa, 307, 28 N. W. 609, merely decided that a writ of attachment against the property of a landlord cannot be levied on growing crops of which he is to have a share as rent, for the reason that the officer has no right to take possession of the crop, and the proper method of reaching the right of the landlord to the rent is by garnishment. It was said that: "The rent reserved being a share of the crop, is the same as when the rent is reserved in money, so far as the rights of the landlord or his creditors to take possession are involved, and the tenant is in no manner in default until he refuses to deliver the share of grain in compliance with his contract." But it was not said that the interest of the landlord in the crops raised was no more than it would have been had the rent been payable in money. In no case which has been called to our attention has a share of the crop to be delivered as rent been treated in all respects as though it were money rent. That it should not be is clear on principle. When rent is to be paid in money, the obligation of the tenant is discharged by the payment of the specified amount of money from whatever source obtained; and if a share of the crop to be grown, or its equivalent, is to be paid as rent, the requirements of the lease will be satisfied by the delivery of the share itself or by delivering an equivalent, as crops of a kind and quality equal to the share designated. But when the rent is to be paid by the delivery of a share of the crop raised on the leased premises, and no option is given to deliver an equivalent, the obligation of the tenant can be satisfied only by a delivery of the specified share of the crops grown on the leased premises. Nor can he be compelled to pay anything but the stipulated share, unless he fails to deliver it according to the terms of his contract. Johnson v. Shank, 67 Iowa, 116, 24 N. W. 749.

In a proper case a specific performance by the tenant of his contract to deliver a share of the crops as rent would be compelled by a court of equity. Whether it would be compelled in all cases we do not decide. The rule in regard to ordinary contracts for the sale of personal property is that specific performance will not be decreed where compensation in damages will afford complete and satisfactory relief. It was intimated, however, in Parker v. Garrison, 61 Ill. 250, that the delivery of a share of grain reserved as rent might be enforced as the execution of a trust. In that case the tenant had agreed to deliver as rent one-half of the crops which he should raise on the leased premises, but it was to be paid in corn. He refused to deliver the stipulated share, and did not separate it from the remainder of the crop, but intended to sell all of it. He was enjoined from selling or otherwise disposing of the grain at the suit of the landlord. The court said that the landlord had an interest in the corn; that "it justly and equitably belongs to him"; that "the defendant Garrison had received from him the entire consideration for it, * * * and it was his plain duty to deliver the corn to the complainant." That case is an authority for the theory that the landlord has an interest in the crop of which he

is to have a share as rent, before a division is made, which is more than a mere right to a landlord's lien, and which the courts will protect. It should be remembered in this connection that the rule that the legal title to crops, a share of which is to be delivered as rent, and the right to their exclusive possession, are in the tenant until a separation and delivery of the rent share is fully recognized by the supreme court of Illinois. Alwood v. Ruckman, 21 Ill. 200; Dixon v. Niccolls, 39 Ill. 384; Sargent v. Courrier, 66 Ill. 245. It is true it was said in Drake v. Railway Co., 70 Iowa, 63, 29 N. W. 804, that a landlord has not such an interest in the growing crops of his tenant as will enable him to maintain an action against a person who injures the crops. But the nature of the landlord's claim to the crops in that case is not shown. The point was decided without discussion by the court, apparently on the authority of Townsend v. Isenberger, supra. The case cannot, therefore, be regarded as in conflict with the views we now express. That a lease may be assigned as security, and the right to recover the rent reserved be thereby given to the assignee, was decided in Watson v. Hunkins, 13 Iowa, 548. This rule was followed in Lufkin v. Preston, 52 Iowa, 235, 3 N. W. 58, and 57 Iowa, 28, 10 N. W. 290. In the opinion filed on the first appeal in the case last cited the cases of Rees v. Baker and Townsend v. Isenberger, supra, were referred to, but the court said: "It has never been held that a landlord may not assign his interest in the lease, and thus invest his assignee with the right to secure the rent when it is in a condition to be set apart." The leases considered in that case provided that the landlord should have one-half of the crop in the field at harvest time. The leases were assigned as collateral security, and afterwards, in March, and again in May, an execution was levied upon an undivided half of the corn growing upon the leased premises as the property of the landlord. A sale thereof was made, and when the corn matured one-half of it was gathered by the purchaser, by permission of the tenants. It was held that the assignments, if not fraudulent, invested the assignee with the right to one-half of the corn at harvest time. In Haywood v. O'Brien, 52 Iowa, 537, 3 N. W. 545, it was held that the assignment of a lease gives to the assignee the right to a landlord's attachment. The case of Stickney v. Stickney, 77 Iowa, 699, 42 N. W. 518, was for the foreclosure of chattel mortgages upon live stock, grain, and hay on certain farms. One of them was occupied by a tenant who had agreed to pay one-half of the products, including all crops and fruits grown upon the farm, and hogs, cattle, and calves raised on it. It did not appear that there had been any division of the property, but the court said of that in which the tenant claimed an interest, "Of course, one-half was the landlord's and one-half the tenant's." That a landlord has an interest in crops of which he is to have a share as rent, before separation and delivery of the share, which he may mortgage or sell, has been affirmed in other states. This was expressly held in Howell v. Pugh, 27 Kan. 702. The particulars of that tenancy do not fully appear in that report, but the statements of the case made on an earlier appeal, which is reported in 25 Kan. 97, with those made on the second appeal, show that the tenant was to pay as rent one-half of the wheat and one-third of the corn and flax raised on the leased premises during the term, the wheat and flax to be delivered in the half bushel and the corn in the crib. On the 8th day of July, 1879, the landlord sold his share of the crops, and three days later suits were commenced against him, and the tenant was garnished. At that time the flax and corn were growing in the field, and the wheat was in stack, but no division had been made, and the question to be determined was whether the sale by the landlord was valid and effectual as against the garnishment. The only material difference between that case and this is that in the Kansas case the sale was absolute, while in this it was conditional. In Potts v. Newell, 22 Minn. 561, it was said that the right of the landlord to a share of the crop which was to be paid him as rent was as clearly assignable as the right to receive a specified rent in money; and a mortgage of such share, made before its separation from the remainder of the crop, was sustained.

The interest of the landlord in the share of crops to be delivered by the tenant, where the latter has the legal title and right of possession until separation and delivery, is similar to that of the tenant in the share he is to receive when possession of the crop is retained by the landlord until division. In Yates v. Kinney (Neb.) 27 N. W. 132, it appeared that the tenant, Kinney, was to deliver to his landlord as rent one-third of the crops to be raised on the leased premises, but the crops were to be considered the property of the landlord until they were divided. The tenant executed mortgages upon two-thirds of the crops before they were divided, and while they were growing. The court said: "It is evident that Kinney had some interest in the crops. The fact that the extent of that interest depended upon his compliance with the terms of his lease would not deprive him of the right to sell or mortgage it." The court also held that, where the tenant had the right to assign his lease or sell his share of the crop raised on the leased premises, it logically followed that the same rights or interests might be mortgaged. In Hammock v. Cheekmoore (Ark.) 3 S. W. 180, it was said that a party who works land for a share of the crops raised thereon, under an agreement by which the landlord owns the entire crops until division, "may sell or mortgage his contingent interest, just as he may assign his

wages to be hereafter earned." The doctrine of these cases was recognized in Meacham v. Herndon (Tenn.) 6 S. W. 741. It was said in Horsley v. Moss (Tex. Civ. App.) 23 S. W. 1115, that a landowner who furnished the land, teams, food for teams, and tools, for which he was to receive one-half the crops raised on the land, had more than a landlord's lien on the crops; that he had a specific interest in the crops themselves. In Ferrall v. Kent, 4 Gill, 209, it was said of a lease which provided that the tenant should give to the landlord one-half of everything made on the leased premises, and carry all the crops to market, and pay the landlord one-half the proceeds after they were sold, that it vested in the parties to it a joint interest in the crops. It is well settled that in this state valid mortgages of personal property, not in existence until after the mortgage is given, are valid. It was said in Lawrence v. McKenzie, 88 Iowa, 440, 55 N. W. 505, that the "general rule is that, in the absence of statutory provisions to the contrary, any personal property which is capable of being sold, and which has an actual or prospective existence, may be mortgaged." That rule is in force in this state. Manufacturing Co. v. Robinson, 83 Iowa, 568, 49 N. W. 1031. In the case last cited it was said that the power to sell an account for money due cannot be questioned; that an interest in such an account less than the unqualified ownership of it may be transferred, and that a valid mortgage may be given on a claim for money not earned. When the mortgage in question was given, the small grain grown upon the leased premises was matured and in stack, and the corn must have been nearly, if not quite, fully grown. The description in the mortgage was sufficient, and when the division was made the mortgage attached to the landlord's share thus ascertained. Johnson v. Rider, 84 Iowa, 53, 50 N. W. 36; Lufkin v. Preston, 52 Iowa, 235, 3 N. W. 58. See, also, Melin v. Reynolds, 32 Minn. 52, 19 N. W. 81; Potts v. Newell, 22 Minn. 562; Zehner v. Aultman, 74 Ind. 24; Sims v. Mead, 29 Kan. 125. In Potts v. Newell, supra, it was held that a mortgage upon "all the right, title, and interest" of the landlord in a crop to be grown, of which he was to have a share as rent, attached the instant the share was set apart, and was superior to the levy of an execution made after the mortgage was executed, but before the share was separated. It is the law in this state that no lien is obtained by the process of garnishment, but only a right to proceed against the garnishee personally. Clark v. Raymond, 86 Iowa, 667, 53 N. W. 354. According to numerous decisions of this court, the mortgage in question must have attached to the landlord's share at the moment it was ascertained and set apart, if it did not attach before; and, since the garnishment did not create a lien, the mortgage became a first lien upon the property in controversy. The case of Orcutt v. Moore, 134 Mass. 48, is relied upon as in conflict with the rule we have announced, but we do not think that it is. The lease involved in that case provided that the tenant, Bailey, should "carry on the farm at the halves," and he was to leave at the end of the term "as much hay as he found there when he took the farm." In commenting on the lease the court said: "It is not stated whether this hay was to be hay raised on the farm, or other hay of equal quality; whether the crops were to be divided in kind, or whether Bailey could sell them, accounting for one-half of the proceeds; and the evidence bearing on that question is not stated." The court said that on the case thus made it could not be said as a matter of law that the parties to the lease were tenants in common. When read in connection with the facts to which the court refers, its conclusion appears to be in harmony with the views we have expressed, for in this case it is not shown that the obligation of the tenant to deliver a share of the crops as rent could be discharged by paying an equivalent in crops grown elsewhere than on the leased premises, or in money. On the contrary, it appears that the lease was designed to give each party a share of the crops actually grown on the leased premises. That the landlord may sell the rent for the land at any time is not to be questioned. If he can sell all, he can sell a part, especially when it is readily ascertainable; and if he can make an absolute sale it follows that he can make a conditional one. The mortgage in controversy was a conditional sale of the landlord's share of the crops which had been grown, and was to be delivered according to the terms of the lease. What right or interest the mortgage would have conveyed had a share of the crops grown not been delivered need not be determined. The conclusions which reason and authority demand are that the landlord had a mortgagable interest in the crops in controversy when the mortgage was given; that the interest was made definite and certain when his share was separated and determined; that the mortgage fully attached to that share when it was thus ascertained if it had not been operative before; that, as the mortgage was given before the garnishment was effected, the latter was subject to the rights conferred by the former. It follows that the judgments of the district court were right, and they are therefore affirmed.

DEEMER, J. (concurring specially). I agree with minority opinion on the question as to the interest of the landlord in a share of the crops grown on the leased premises. I do not think he has such a vested or potential interest in the share to be set apart to him as rent that he may make a mortgage which will presently carry the undivided one-third of the property growing upon

the land. But I do think that he has a lien upon the crops which may finally ripen into a title of an aliquot part thereof, and that, when the third is delivered to or set apart for the landlord in accordance with the terms of the lease, then his title becomes perfect. Now, it is held in this state that one may make a mortgage of property to be acquired in the future which will be valid, and which I think will take precedence of a garnishment of him who holds the property for the mortgagor. In the case of Scharfenburg v. Bishop, 35 Iowa, 60, we said: "By the strict rule of the common law it is doubtless true that a party could not mortgage property not then in esse, so as to vest a title in the mortgagee when the property should come in esse. But at civil law we could. * * * Courts of equity, and under practice courts of law also, will recognize the rights of such mortgagee, and enforce them against all persons having notice of them." If it does not at the common law amount to a technical legal mortgage, it is at least an equitable mortgage. Of course, it is necessary that such future-acquired property shall be capable of identification. See, also, on this same point Brown v. Allen, 35 Iowa, 306; Fejavary v. Broesch, 52 Iowa, 88, 2 N. W. 963; Dunham v. Isett, 15 Iowa, 284; Stephens v. Pence, 56 Iowa, 257, 9 N. W. 215; Phillips v. Both, 58 Iowa, 499, 12 N. W. 481; Hughes v. Wheeler, 66 Iowa, 641, 24 N. W. 251. In the case last cited we held that a mortgage drawn with the intention of covering future-acquired property which was in existence, but not the property of the mortgagor, will be valid as to such property when acquired. And we also held that the mortgagee under such a mortgage was entitled to the possession of the property as against a purchaser from the mortgagor. There is no question but that the description of the property in controversy is sufficient to cover the property. Indeed, the property is specifically described as that growing upon certain land during the year 1892. It could scarcely be more definitely described, and it would be difficult to make a description which would more clearly indicate that the mortgagor intended to convey his interest in that crop, no matter when acquired. It follows, then, that as soon as the property was set apart by the tenant the mortgage attached to it, and that the mortgagee then had a perfect lien upon and was entitled to the property, or to its proceeds when sold, under the stipulation in this case.

The garnishing creditor acquired no greater rights against the mortgagee than the mortgagor would have had had he brought the suit, nor are his rights against the garnishee, the tenant, any different than those held by the garnishee against the mortgagee. In a contest between the garnishee, who was the tenant, and the mortgagee there ought to be no doubt about the outcome. When the property was set apart by the tenant, who was garnished by a judgment creditor of the landlord, who was the mortgagor, the mortgage immediately fastened itself upon it, and the tenant held it as the property of the landlord, subject to the mortgage made to the interveners Dickey & Co. The proceedings by garnishment gave the plaintiffs no lien upon the property. They simply succeeded to the rights of the landlord, Dow, against the tenant, in and to the property raised upon the leased premises, and they have no other or greater rights against the interveners Dickey & Co. than Dow would have had. I desire to say again, in order that my position may not be misunderstood, that no question as to sufficiency of description or notice to the creditors in the garnishment is made. Moreover, no such question could be in the case, because the mortgagor was not in possession when he gave the mortgage. In the case of Jessup v. Bridge, 11 Iowa, 572, we held a mortgage of the future earnings of a railway company was prior and superior to the rights of judgment creditors of the railroad company under garnishment proceedings. In view of these well-settled rules, it seems clear to us that the mortgage of the interveners is superior to the claim of plaintiffs in their garnishment proceedings, and that it is not necessary to determine what interest a landlord has in growing crops of which he is to receive a share as rent for the use of his lands. There is no occasion to determine whether the interveners' rights under their mortgage are equitable or legal, for they pleaded the facts necessary to entitle them to recover, and proved without objection all that is required to give them the relief they prayed. An error as to the choice of form will not, under our reformed procedure, defeat them.

Another rule tends to support the interveners in their claim. The mortgage under which they claim contained the usual covenants of warranty, and correctly described the property intended to be conveyed. Now, it seems to be well settled that if a mortgagor who has no title, or whose title fails, afterwards acquires it, it inures to the mortgagee. Jones, Chat. Mortg. § 101. Now, when the property was set apart by the tenant in accordance with the terms of the lease, the title vested in the landlord, and immediately inured to W. C. Dickey & Co., the mortgagees. Under the doctrine announced in the minority opinion, there was nothing the judgment creditor could get until the property was set aside by the tenant, for the landlord had no interest in it. Neither the mortgagee nor the judgment creditor by virtue of his garnishment had any claim against, right to, or interest in the property until set apart. When set apart, their respective interests in it, if they had any, immediately vested; but, as the mortgage was first in point of time, it should be given priority. This is the most favorable attitude for the judgment creditors, and it seems to me that it gives them no standing in this controversy.

But as it is well settled that a garnishment creates no lien, and that the mortgage does, even when the property is subsequently acquired, it follows as a necessary conclusion that the mortgagee should be protected. On these grounds I vote to affirm, and as the majority reach this conclusion, although by a somewhat different course of reasoning, it follows that the judgment is affirmed.

GRANGER, J. (dissenting). The majority opinion closes with a holding that reason and authority demand a conclusion that the landlord had a mortgageable interest in the crops in controversy when the mortgage was given. Regarding the conclusion as a clear misapprehension of authority, and of at least doubtful support in reason, I dissent from it. The proposition, briefly stated, is: Where a landlord leases land, and is to receive for his rental one-third of the grain raised thereon, to be delivered at another place than on the land, and there is no relationship between the landlord and tenant, as that of tenants in common, has the landlord such an interest in the specific grain he will be entitled to receive that he can mortgage the same, and the mortgage be effective, before the grain is set apart for him? I think the authorities are, in this state, on principle, conclusive of the question. I do not see how language can be more so. In Rees v. Baker, 3 G. Greene, 461, it is true the question is but incidentally involved, but it is there said, speaking of the rental: "This share was in the nature of rent, and until it was delivered the exclusive ownership of the growing crop was in the tenant." I cannot imagine an interest the landlord could have except ownership and a lien. That he has the latter no one doubts. The case puts the ownership exclusively in the tenant until set apart. Townsend v. Isenberger is also cited in the majority opinion. I regard the case as a very conclusive test of the question, and its facts should be well in mind. It presents fairly the question whether or not a landlord has any interest in a growing crop that is assignable. In that case the landlord assigned his lease to the plaintiff, which would convey to the plaintiff every assignable interest he had. After the landlord had made such assignment, his land was sold on execution, and the case settled the question whether anything passed to plaintiff by the assignment of the lease. Speaking of that question, it is said: "The share of the crop reserved by the lease to the landowner is to be regarded as rent. The owner of the land acquired no property in the part of the crop reserved for rent until it was set apart to him by the tenant. The ownership of the tenant continued until that time." If the conclusive language of Rees v. Baker was to be doubted as authority because not applicable directly to the issues, the question was certainly involved in Townsend v. Isenberger, and the same conclusive language is there used, and Rees v. Baker is cited in support of it, as well as other authorities. The majority opinion evades the force and language of that opinion by assuming that what is said was designed to show that the rent had not accrued and was not payable until the purchaser at the sheriff's sale had acquired title to the land. I must and do insist that the point ruled is that, before the rental was set apart, the landlord had no property therein that he could assign. The contention of ownership arose after the grain was set apart in a granary for the legal owner, so that the question was fairly presented whether or not the assignment was of validity to transfer title when made, or became afterwards effective, when the title would pass by the setting apart. It is there held that the assignee took no property by the assignment, not because the rent had not accrued when the purchaser took his title to the land, but for no other reason than that the "owner of the land acquired no property in the part of the crop reserved until it was set apart to him." It is in the same connection said, "The ownership of the tenant continued until that time." If the right of the landlord to assign the crop is not denied in that case for the sole reason that he had no ownership as a basis for it, and that the tenant was the owner, then it is not the province of language to express such a holding. The doctrine of these cases is followed in Atkins v. Womeldorf, 53 Iowa, 150, 4 N. W. 905, also cited in the majority opinion; and in fixing a rule for the protection of a landlord so that his interest may not be lost to him to benefit the creditors of the tenant it distinguishes, but in no way denies, the rule as stated in Townsend v. Isenberger. It gives to the landlord a protection against the seizure by such creditors because of his landlord's lien. The case recognizes the rule of the other cases. Mr. Justice Rothrock wrote the opinion in the case of Atkins v. Womeldorf, and also in Howard Co. v. Kyte, 69 Iowa, 307, 28 N. W. 609. It is there said: "When land is rented on shares, the tenant is the exclusive owner of the crop while growing, and the landlord has no control over it, nor title to the part of the crop reserved as rent, until it is set apart to him." It cites the former cases, and then says: "It is true that the landlord has a lien for the rent reserved, but he has neither title nor right of possession of the crop while growing." It is beyond a peradventure that the cases fix the right of a landlord in a growing crop as a lien merely, and not an ownership. It is true that in some of the cases the language relied on is used by way of illustration or argument, but it is significant in this: that at all times, whether treating of the right of the landlord to assign the crop reserved as rent or of its use in other ways, the same thought or rule is observed, —that his interest is a lien, and not an ownership that he can convey. In Drake v.

Railway Co., 70 Iowa, 63, 29 N. W. 804, crops had been injured by defendant, and the question of the plaintiff's right to recover damages therefor was presented, he being the landlord; and it is said: "A landlord has no such interest in the growing crop of his tenant as to enable him to maintain an action against a person who injures the crop." This holding is based on Townsend v. Isenberger, and the reason for the holding must be that the landlord had no property interest to authorize the action. It is the law of Iowa, in view of the majority opinion, that a landlord has such a property interest in the growing crop that he may assign or mortgage it; but if some person shall destroy that interest he may not recover, for the reason that he has no interest that will permit it. I think ours is the only state in the Union to sustain such a rule. Our own holdings ought to settle this question, I think, independent of reason or other authorities. If they announce a bad rule, we should meet the situation frankly, and overrule them, and not attempt to distinguish on principle where there is no difference.

It is said that a lease may be assigned, and the right to recover the rent reserved be given to the assignee. The rule is not doubted. It is no more than to say that the landlord may assign his right. That he can assign his right to the rent, whether payable in money or other property, is not, to my knowledge, questioned. The assignee can take the place of the assignor. When the rent is payable, he can receive it or enforce payment precisely as the landlord could have done. But that is not the question we are considering. It may further be conceded, for the purposes of the case, that he can mortgage the debt,—that is, the chose in action. But that does not mean that he can pledge the specific property with which the debt is to be paid until it is his. I may also concede that a landlord can pledge the rental in the growing crops, and that, as between himself and his pledgee, if he afterwards acquires the title, the pledge will be valid. But not more so than if one should sell or mortgage property in which he confessedly had no interest. If he should afterwards acquire the title, it would inure to the benefit of the vendee or mortgagee. This is the rule as to real estate. Miller's Code, § 1931; Rice v. Kelso, 57 Iowa, 115, 7 N. W. 3, 10 N. W. 335. As to personal property, see Jones, Chat. Mortg. (4th Ed.) § 101. I submit that this court has held, in the cases cited, that a landlord may not assign his interest in a growing crop; that he has no interest therein that could be made the subject of a levy; and that he has no such interest therein that, if it is destroyed, he can maintain an action for damages; and that all such holdings are, in terms, based on the single fact that he has no ownership in the crop until it is set apart. If this is true, I am led to inquire, what is there to which a mortgage can attach? The majority refer to Parker v. Garrison, 61 Ill. 250. It is, in my judgment, without the slightest bearing on the question. In that case the tenant was insolvent, and, after the rental was due, he was removing it, and refusing to set apart the rental according to the contract. The action was to enforce specific performance of the contract by injunction. It simply held the holding of the property, after the time for delivery, was a trust. That was because the tenant had, after the debt was due, refused to deliver the crop in payment as he had agreed to do. It is said in the opinion that the rental share justly and equitably belonged to the landlord, and that is true; and the suit was to compel a specific performance, so that he might have the legal title. The majority omit to quote from the same case the significant remark as a basis for equitable cognizance, as indicating the thought of the court as to the legal title, that "the remedy by replevin, at least, would have been doubtful and uncertain from the difficulty of showing a legal title in the specific property, there having been no delivery"; and the corn was at the time undivided. In Woodruff v. Adams, 5 Blackf. 317, in considering the question of trespass to the real estate, it is held that the landlord's right was to receive a portion of the crop after severance, and other land,—which is precisely this case,—as he was not jointly interested with the producer in the crop while it was growing. It is there said: "His share was in the nature of a rent, and until that was delivered the exclusive ownership of the crop was in the raiser of it." In Howard Co. v. Kyte, supra, this court said: "The rent reserved, being a share of the crop, is the same as when the rent is reserved in money, so far as the rights of the landlord or his creditors to take possession are involved." The words, because of the nature of the case, are used with a limitation as to persons, but they strengthen the oft-repeated holding that the landlord has no ownership. It means that the landlord's right in the growing crop is the same as his right to money to be paid as rent, so far as concerns his right to sell or pledge it. This exact question has received consideration by the supreme court of Massachusetts in Orcutt v. Moore, 134 Mass. 48. I think that here also the majority have perverted the reasoning and conclusion of the case. After a careful discussion of this and kindred questions, speaking of the interest of the landlord in the crop, it is said: "Whether he has any potential interest depends on the contract, which may be ascertained by the jury. If the contract is that the specific property is to belong to the parties jointly, and is to be divided, he has such potential interest. If the contract is that the lessee is to pay as rent a share of the crops, or its equivalent, he would have no interest in any specific property so that he could sell it, though he has a claim for rent payable at a stipulated time." It seems to me that the language is not susceptible of misconstruction. Its conclusiveness is strengthened by

the facts and reasoning. In that state, if the contract is such that the landlord and tenant are tenants in common, the rule is different. No such relationship is claimed in the case at bar. It is held in Sunol v. Molloy, 63 Cal. 369, that the landlord and tenant were tenants in common, and that a mortgagee of the tenant could not hold the entire crop. Such a rule is not to be disputed. The fact of the tenancy in common brings the case in line with the Massachusetts case.

The only conflict of authority that I have discovered is because of holdings in Kansas and Minnesota. In Howell v. Pugh, 27 Kan. 702, some language, used rather argumentatively than otherwise, in considering the principal question in the case, recognizes the right of a landlord to sell his rental share of the crop. The case is somewhat in doubt as to the precise nature of the contract, but what is said is without a citation of authorities, and gives to the landlord a property in the growing crop, which is certainly against the express holdings in this state, and the great weight of authority. In the Minnesota case (Potts v. Newell, 22 Minn. 561), what is said as to the right to mortgage the rental share of the crop is without reference to authorities on the subject. It seems to be the thought of the opinion that the legal title would not pass until the share was separated, which is the recognized rule; and that the landlord would have the right to receive the share in the future when separated, which is also the rule. It is also said that the right of the landlord "was as clearly assignable as the right to receive a specified rent in money, and in case of assignment the title to the third of the wheat would, upon its being set apart, vest at once in the assignee, precisely as it would vest in the assignor if no assignment were made." These rules are nowhere disputed, and they constitute the reasoning for the conclusion. The opinion leaves to inference what the interest was to be mortgaged before the title or ownership passed. The case as clearly holds that the money to be paid as rent could as well be mortgaged as the grain, for the conclusion seems to rest on the right to assign the chose in action. The opinion is, in its reasoning, in accord with general authority to the effect that the landlord has no ownership of growing crops before there is a separation. The case of Hammock v. Cheekmoore (Ark.) 3 S. W. 180, is cited by the majority. The case expressly holds that the relation of landlord and tenant did not exist, and the rule of the case is undoubtedly correct. However, the majority have omitted to notice this conclusive language of the case against their theory of the law: "If the terms of the contract had been such as to indicate an intention to create the relationship of landlord and tenant, * * * the title to the crop would have been in Stewart, the tenant, subject to the landlord's lien for rent, and the landlord could have maintained no action against Stewart at law for converting any part of it." The case holds that Stewart was a laborer for wages, and not a tenant, and it fully supports the holdings in this state as to their being no ownership of the crop in the landlord. It fixes his right in the crop before separation as that of a lien for rent, as I maintain this court has done. The case fully supports my view in this: that the landlord was to furnish the team, utensils, etc., to raise the crop, and Stewart was to do the work, and receive a share of the crop for his labor. Stewart sold a part of the crop, and the holding is that the title to the crop was in the landowner, and Stewart could not sell a part of it. The case places Stewart, under his contract to take a share of the crops for his wages, precisely as that case does, and other cases do, the landowner when he agrees to take a share of the crop for his rent. In one case the rent is to be paid by the tenant, and in the other the wages by the landowner. In either case it is a debt. The person who is to pay owns the money or property with which the debt is to be paid until payment. The mere fact that a debt is payable in a specific article, either of money or of other property, does not invest the creditor with ownership in the specific property until his contract gives him the right to demand payment, if even then. I am not disposed to pursue the discussion further. I am confident of the conclusion that our holdings are conclusive against the rule announced by the majority, and these holdings are aided by the great weight of authority. It is said, in substance, in the majority opinion, that the attachment by garnishment did not effect a lien on the grain before it was set apart, and that, when so set apart, if not before, the lien of the mortgage attached, and gave it priority. I am understanding this to mean, as a legal proposition, that if A. is attached as garnishee in a suit by B. against C., and he has property belonging to C. in his possession, C. may afterwards mortgage it, and the mortgage would be a prior lien. I am much disposed to doubt the rule, but desire to reserve my opinion on that question and that stated in the concurring opinion. In view of the conclusion of the majority, the case must stand affirmed, and I need not now take time to examine the latter question.

ROTHROCK, C. J., concurs in this dissent.

TANDERUP v. HANSEN.

(Supreme Court of South Dakota. April 7, 1896.)

JUDGMENT — RES JUDICATA — TRIAL — MOTION TO DIRECT THE VERDICT — OBJECTIONS TO EVIDENCE — SUFFICIENCY.

1. On a second appeal the supreme court will not review a question decided on the former appeal.

2. A motion to direct a verdict must state

specifically the ground on which the motion is based.

3. A motion to direct a verdict because "no cause of action has been made against the defendant under the pleadings," and "under the evidence in this case the plaintiff is not entitled to recover," does not raise the question whether there was "evidence showing or tending to show that the plaintiff, before commencing this action, notified the defendant of any damage done by his cattle, or the probable amount thereof."

4. On a second trial a witness for plaintiff testified that a witness on the former trial was dead, that deceased testified on such trial, and that defendant was present. He was then asked to state what such witness testified to with reference to certain facts, to which defendant objected, on the ground that the evidence was incompetent, irrelevant, and immaterial, and that no proper foundation had been laid. *Held*, that the objection was too general to raise the question that no proper foundation was laid for such evidence by showing that the deceased witness was duly sworn, and that the witness could give the substance of the testimony of such deceased witness, both on direct and cross examination.

Appeal from circuit court, Turner county; E. G. Smith, Judge.

Action in assumpsit by Jens P. N. Tanderup against Hans P. Hansen. There was a judgment for plaintiff, and defendant appeals. Affirmed.

French & Orvis, for appellant. R. B. Tripp, for respondent.

CORSON, P. J. This is the second appeal taken in this action. The opinion of the court on the former appeal is reported in 58 N. W. 578. The questions of law decided on that appeal have become the law of the case, and must control in all subsequent proceedings. Bank v. Gilman, 3 S. D. 170, 52 N. W. 869; Lumber Co. v. Mitchell (S. D.) 57 N. W. 236; Elliott, App. Proc. § 578. On the former appeal the question of the sufficiency of the complaint was involved, and this court held that the facts stated in the first cause of action were sufficient to constitute a good cause of action, and that the evidence offered to support that cause of action should have been admitted by the court, and for the error of the court in excluding such evidence the case was reversed. On the second trial in the circuit court that court very properly followed the decision of this court, and admitted the evidence offered tending to prove that cause of action. So far, therefore, as objections were made to this evidence on the ground that a sufficient cause of action was not stated, they must be disregarded by this court on this appeal. This disposes of the first point made by counsel, namely, that the court below erred in admitting the evidence tending to sustain the first cause of action.

The second point made by counsel for appellant is as follows: "The court erred in overruling defendant's motion to direct a verdict in favor of the defendant at the close of all the evidence, for the reason that there was no evidence showing or tending to show that the plaintiff, before commencing this action, notified the defendant of any damage done by his cattle, or the probable amount thereof." Whatever merit there might have been in this point had it been stated in the motion to direct a verdict in the court below, it is not available in this court, for the reason that no such ground was stated in the motion in the trial court. Where such a motion is made, the specific ground upon which the motion is made must be stated. It is due to the court and the opposing counsel that their attention should be called to the precise defect in the evidence or the omission of evidence that the party claims entitles him to the direction of the verdict. It is due to the court to enable it to pass understandingly upon the motion, and it is due to counsel that he may, if possible, supply the defective or omitted evidence, if permitted to do so by the court. The only grounds stated in the motion in this case were: (1) "That no cause of action had been made against the defendant, under the pleadings;" (3) "that under the evidence in this case the plaintiff is not entitled to recover." The second specified ground in no way relates to the ground now relied upon. It will be observed, therefore, that the attention of neither the court nor counsel was directed to the defect in the proof now claimed to have existed. Mr. Hayne, in his work on New Trial and Appeal, in section 116, quotes with approval from the opinion of the supreme court of California in Coffey v. Greenfield, 9 Pac. Coast Law J. 38, the following: "It is settled law in this state that a party moving for a nonsuit should state in his motion precisely the grounds on which he relies, so that the attention of the court and the opposite counsel may be particularly directed to the supposed defect in the plaintiff's case. The general ground above stated [that plaintiffs had not introduced any testimony tending to sustain the action] did not comply with the rule, and therefore the court did not err in denying the motion." In Baker v. Joseph, 16 Cal. 173, the court says: "It is next assigned that the court refused to nonsuit the plaintiff, because no demand was proven before suit. But this point, if it could have been well taken below, is not available here; this ground not having been taken before the district court." The motion for a nonsuit in that case "was made on the ground that the evidence did not support or prove a right to recover on either count" in the complaint.

Appellant's third point is as follows: "The court erred in permitting the witness Tanderup to testify, over defendant's objection, with reference to what Jens Christiansen testified to on a former trial of this case, on the ground that no sufficient foundation was laid therefor." On the trial, when the plaintiff was upon the stand as a witness, he testified: "I know a man by the name of Jens Christiansen. He is dead. He testified in this case before Justice Allen, at Hurley. * * * Q. At the time of that testimony the defendant, Mr. Hansen, was in court? A. Yes, sir. Q. You may state what he tes-

tified to with reference to the defendant's stock going upon your land." The defendant's counsel objected to the question as incompetent, immaterial, and irrelevant, and for the further reason that no proper foundation had been laid for the question. The court overruled the objection, stating at the time that his ruling was pro forma only. The witness then proceeded to give the testimony of the deceased witness, Jens Christiansen. The defendant's counsel, neither before the witness testified as to the evidence of the deceased witness in the former trial nor on cross-examination, asked the witness any question, and they made no motion to strike out the evidence. Appellant now contends that this evidence was inadmissible, for the reason that the proper foundation was not laid for its introduction, by showing that the deceased witness was duly sworn, and that the witness could give the substance of the testimony of the deceased witness, both upon direct and cross-examination. Respondent's counsel contend that there is nothing before this court to show that the witness could not give, not only the substance, but the testimony of the witness verbatim, and that, unless this court presumes error, which is not shown by the record, it cannot reverse the case upon this ground of error. It is a cardinal rule of appellate courts that one who alleges error must affirmatively establish the existence of the error by the record. Kent v. Insurance Co., 2 S. D. 300, 50 N. W. 85. The appellant's counsel having failed to examine the witness as to his ability to give the substance of all the testimony of the deceased witness, both on his direct and cross-examination, and having made no motion to strike out the evidence of the witness, there seems to be much force in the position of the respondent, and we are inclined to the view that error is not affirmatively shown by the record in this case. But we do not decide this question at this time, as we are of the opinion that the objection taken was not sufficiently specific to entitle the appellants to a review of that objection on this appeal. The objection "that the proper foundation had not been laid" was too general to be available to the appellant in this court. The specific objection that it had not been shown that the witness could give the substance of all the testimony of the deceased witness, both on the direct and cross-examination, should have been made, in order to have called the attention of the court and opposing counsel to the particular point of the objection. Had the specific objection been made, and the attention of the court and counsel been called to the alleged defect in the proof, it might have been obviated at the trial. This question was fully discussed and considered in Mining Co. v. Noonan, 3 Dak. 189, 14 N. W. 426, and in Agricultural Works v. Young (S. D.) 62 N. W. 432. In Kiler v. Kimbal, 10 Cal. 268, the supreme court of California, speaking by Mr. Justice Field, says: "To entitle an objection to notice, it must not only be on a material matter affecting the substantial rights of the parties, but its point must be particularly stated. * * * The party, as the authorities say, must lay his finger on the point of the objection to the admission or exclusion of evidence." See, also, Rice, Ev. §§ 362-364, and cases above cited. We again quote the statement of Mr. Wait in 3 Wait, Prac. 206, quoted in Mining Co. v. Noonan, supra: "It is well established that the courts do not favor any unfair or secret mode of raising an objection, and therefore any objection which might have been fairly answered if seasonably made will be disregarded on appeal, unless specifically taken below." A party who makes objection to the admission of evidence is presumed to have in his mind the precise point upon which his objection is made, and he must therefore disclose to the court and opposing counsel the precise ground upon which he bases his objection; and, failing to do so, he cannot complain if his objection is overruled, unless his objection could not have been obviated by other evidence, or otherwise met at the trial. We may reasonably presume in this case that, had the opposing counsel's attention been called to the specific objection to the question now presented to this court, an effort, at least, would have been made to supply the proof that would have qualified the witness to give the testimony of the deceased witness. He had proven that the witness was dead; that he testified on the former trial; that the defendant was present, and was proceeding to prove the substance of the testimony. The objection, therefore, that the evidence was incompetent, irrelevant, and immaterial, and that "the proper foundation had not been laid," was not calculated to call the attention of the counsel or the court to the point now made. Whether the objection, if properly made, was a valid one, which ought to have been sustained, we do not now decide. Neither do we decide that the admission of the evidence, if the objection had been properly taken, would have constituted reversible error. Substantially the same rules govern as to the particular character of objections to evidence and ground of motions for the direction of verdicts in order to secure the review of the rulings made by the trial courts by this court. Unless the court below and the opposing counsel have been fairly advised of the point of objection to evidence, or the ground relied upon for the direction of a verdict, the exceptions to the rulings thereon will be disregarded by this court. The judgment of the circuit court is affirmed.

STATE v. HUGHES.

(Supreme Court of South Dakota. April 7, 1896.)

WITNESS—IMPEACHMENT—APPEAL—HARMLESS ERROR—CONSTITUTIONAL LAW—EX POST FACTO LAW—COUNTY COURT'S JURISDICTION.

1. Where the testimony of a witness not a party to the action is sought to be impeached by inconsistent statements out of court, it is necessary that the witness' attention should be called to the time, place, and person to whom the alleged statements were made, and to the specific statements

2. In bastardy proceedings, it is harmless error to strike out testimony of the complaining witness, admitted without objection, that she was a cousin of defendant.

3. Error in sustaining an objection to a question is harmless where the witness subsequently answers the question.

4. Laws 1893, c. 24, changing the method of enforcing the liability of the father of a bastard, is not an ex post facto law as applied to a defendant whose intercourse with the complaining witness was had before the passage of the act. State v. Bunker (S. D.) 65 N. W. 33, followed.

5. Laws 1893, c. 24, conferring on the county courts jurisdiction in bastardy proceedings, is constitutional. State v. Scott (S. D.) 65 N. W. 31, followed.

Appeal from Davison county court; E. S. Johnston, Judge.

Bastardy proceedings by the state against Newton Hughes. From a judgment against defendant, he appeals. Affirmed.

Preston & Hannett, for appellant. H. J. Mohr, for the State.

CORSON, P. J. This was a bastardy proceeding, in which a verdict and judgment were rendered for the state, and the defendant appeals.

At the opening of the trial, the defendant objected to the introduction of any evidence, upon the ground that the act of 1893, being chapter 24, Sess. Laws 1893, was unconstitutional, in that it purported to confer jurisdiction upon county courts in cases where the debt, damage, or claim involved exceeded $1,000. The constitutionality of that law was fully considered by this court in State v. Scott, 65 N. W. 31, and the conclusion reached that it was not in conflict with the state constitution. The same question was presented in State v. Bunker, Id. 33, in which the ruling of this court was the same. Appellant's objection was therefore properly overruled.

The appellant, in his ninth instruction requested, raises the further point that, the law having been passed subsequent to his intercourse with Kate Earl, the mother of the child, the law of 1893 was ex post facto as to him. This same question was raised and decided in State v. Bunker, supra. Ruled by that decision, the court below committed no error in refusing the instruction requested.

It is further contended by appellant that the court erred in instructing the jury that the state was only required to establish the fact that the appellant was the father of the child by a preponderance of the evidence. This precise question was also decided in State v. Bunker, supra, adversely to the contention of the appellant. Under the ruling in that case, the court below committed no error in giving that instruction.

On the trial, Kate Earl, the mother of the illegitimate child, was examined as a witness on the part of the plaintiff, and on cross-examination she was asked the following question: "Do you remember of having a conversation with Mrs. Hughes, the stepmother of appellant, at her home, about the 24th day of July, 1893, regarding this matter?" The abstract shows that the question was objected to, the objection sustained, and exception taken. But it also shows that the witness proceeded to detail the conversation that she had with Mrs. Hughes at about that time, without further objection. The objection was properly sustained, as the question was not in cross-examination of any matter to which the witness had testified in her examination in chief. But if there was any error in excluding the question, which seems to have been a preliminary one, it was cured by the subsequent admission of the evidence.

The appellant further contends that the court erred in striking out the answer to the following question, propounded to the witness Kate Earl: "Q. He is your cousin, is he not?"—referring to the defendant and appellant. The answer was, "Yes, sir." Ordinarily, it is not the proper practice to strike out an answer responsive to the question when the question has not been objected to. Wendt v. Railway Co., 4 S. D. 476, 57 N. W. 226. The objection in such case should be made to the question, if improper, and a motion to strike out the answer is not permissible. But in this case we do not deem the question or answer material, and therefore striking out the answer was not reversible error.

It is further contended by appellant that the court erred in excluding the following question propounded to Mrs. Isaac Hughes, after she had stated that she had a conversation with Kate Earl, about July 24th: "Q. I wish you would detail to the jury in your own language the conversation that took place between you and Katie at the time you have mentioned, regarding this child and its parentage." To this question the state's attorney interposed the following objection: "Objected to, for the reason that no foundation has been laid for impeaching testimony." The objection was sustained, and exception taken. This court will presume that the trial court ruled correctly, unless it affirmatively appears from the record that its ruling was erroneous. This the record fails to show. While the witness Kate Earl was asked the general question, in effect, as to what conversation she had with Mrs. Hughes on or about July 24th, her attention was not specifically called to the statements claimed to have been made by her to Mrs. Hughes, inconsistent

with those testified to by her on the stand. The rule is well established that this must be done before any evidence of such contradictory statements or declarations can be given. 1 Greenl. Ev. § 462; Whart. Ev. § 555; 1 Rice, Ev. pp. 617, 618. In a note to section 462, 1 Greenl. Ev., the learned author says: In Queen's Case [2 Brod. & B. 313] this subject was very much discussed, and the unanimous opinion of the learned judges was delivered by Abbott, C. J., in these terms: "The legitimate object of the proposed proof is to discredit the witness. Now, the usual practice of the courts below, and a practice to which we are not aware of any exception, is this: If it be intended to bring the credit of a witness into question by the proof of anything that he may have said or declared touching the cause, the witness is first asked, upon cross-examination, whether or not he has said or declared that which is intended to be proved. If the witness admits the words or declaration imputed to him, the proof on the other side becomes unnecessary, and the witness has an opportunity of giving such reason, explanation, or exculpation of his conduct, if any there may be, as the particular circumstances of the transaction may happen to furnish; and thus the whole matter is brought before the court at once, which, in our opinion, is the most convenient course. If the witness denies the words or declarations imputed to him, the adverse party has an opportunity afterwards of contending that the matter of the speech or declaration is such that he is not to be bound by the answer of the witness, but may contradict and falsify it; and, if it be found to be such, his proof in contradiction will be received at the proper season." In the case at bar the attention of the witness was called to the time, place, and person, but not to the specific declarations or statements which were claimed to be inconsistent with her testimony upon the stand. Her statements or declarations to Mrs. Hughes were not in the nature of admissions by the party, as she was not a party to the action. The record also fails to show what the statements or declarations of the witness made to Mrs. Hughes, proposed to be proven by Mrs. Hughes, were. It is essential, when the objection to a question is sustained which is claimed to be error, to bring before this court, by an offer made in the court below, the evidence proposed to be elicited by the answer to the question, in order that this court may be advised of its relevancy and materiality. It not affirmatively appearing, therefore, from the record, that the court erred in sustaining the objection to the question, its ruling must be regarded as correct.

We have considered all the assignments of error discussed by the appellant's counsel in their brief, and those not discussed will be considered waived. Finding no error in the record, the judgment of the county court is affirmed. For the reasons stated in the case of State v. Bunker, supra, the record in this case is ordered to be remitted to the circuit court of Davison county, for further proceedings according to law.

SHERMAN et al. v. PORT HURON ENGINE & THRESHER CO.

(Supreme Court of South Dakota. April 7, 1896.)

CONTRACTS—CONSTRUCTION—SALES ON COMMISSION—PRINCIPAL AND AGENT—AUTHORITY TO EMPLOY SUBAGENT.

1. A contract between principal and agents provided that the principal should furnish the agents with machinery to fill orders which the agents agreed to take, that the agents would deliver no machinery until the orders therefor were accepted by the principal, and that the agents should receive a certain commission on machinery actually sold and delivered. The agents forwarded an order which the principal refused to accept, and the former then sued for their commissions, as for a completed sale of the machinery embraced in the order. *Held* that, assuming that the principal did not have an absolute right to reject any order, it could properly refuse to accept one for cause, and the burden was on the agents to show that the order was one with which the principal should have been satisfied, and, the evidence on that point being conflicting, the agents were not entitled to the direction of a verdict.

2. A bank at which a note is payable, and to which it is sent for collection, has no implied authority to employ a bank in another city as its subagent to collect the note, so as to make a payment to such subagent a payment to the owner of the note.

Appeal from Minnehaha county court; E. Parliman, Judge.

Action by P. F. Sherman and others against the Port Huron Engine & Thresher Company. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Reversed.

Bailey & Voorhees, for appellant. Joe Kirby, for respondents.

HANEY, J. It is alleged in the complaint that plaintiffs, as co-partners, were employed by defendant, a corporation, to procure purchasers of threshing machines for it, to be sold in this state; that, pursuant to the contract of employment, plaintiffs, as agents of defendant, did procure a purchaser, and did sell for defendant one threshing outfit, complete, to one Frank Bates, for which service defendant did agree to pay plaintiffs $470; that no part of such sum has been paid; that, pursuant to such contract, plaintiffs did procure a purchaser, and did sell for defendant, to one Tyler, a threshing engine, for which service defendant promised and agreed to pay plaintiffs $318; that no part of such sum has been paid. Defendant, answering, admits the employment; alleges it was under a written contract, pleaded totidem verbis; denies any sale was made to Bates pursuant to such contract; alleges that, if any agreement for the sale of machinery was made, it was made in violation of the contract of employ-

ment, that defendant never accepted the order for such machinery, and that no sale was ever completed. Defendant admits the sale to Tyler, admits plaintiffs' commission thereon is $318, but alleges that notes were taken for the engine, the proceeds of which have not been received by the defendant in cash. There was a trial by jury, verdict and judgment for plaintiffs, motion for new trial denied, and defendant appeals.

Plaintiffs were located at Sioux Falls, in this state; defendant, at Port Huron, Mich. In the written contract defendant agrees to furnish plaintiffs with certain machinery to fill orders in conformity with such contract, so long as it has goods on hand not engaged, to be sold on commission, subject to the terms and conditions of the contract. Plaintiffs agree they will take orders for machines on blanks furnished by defendant, promptly sending original to defendant, keeping a copy and delivering a copy to purchaser, and thereby guaranty the payment of notes taken for goods, at maturity, or at any time thereafter, waiving demand, notice of protest, and nonpayment (this agreement to be sufficient evidence of said guaranty), unless plaintiffs have received, in writing, defendant's acceptance of order before delivery of goods. Plaintiffs agree not to deliver any machinery until the same is fully settled for by purchaser as required in order and in the contract, and until acceptance by defendant. In case of nonfulfillment of last clause, plaintiffs to pay for machinery in cash, on demand, the full list price thereof, with interest from day of delivery; defendant to pay for services rendered, or costs and expenses incurred on account of such delivery. In consideration of the faithful performance by plaintiffs of the contract, defendant agrees to pay them on goods sold, settled for, and delivered by them only, certain commissions; no commission to be paid on any order not filled, or on any machine returned or taken back, for any cause whatever. An order for one of the machines described in the foregoing contract, signed by Bates, presumably on a blank furnished by defendant, was taken by plaintiffs at Sioux Falls, and promptly forwarded to defendant. On the day it was taken, plaintiffs wired defendant for separator, without stating for whom it was intended. The engine ordered was then at Sioux Falls. Without knowing to whom it would be sold, the officers of defendant, at Port Huron, shipped the separator. Upon receipt of the Bates order, they directed one Farnsworth to forbid a delivery to Bates unless plaintiffs would indorse the notes which he had agreed to give for the machinery. This they refused to do, and it was never delivered. The Bates order contained this clause: "This order is taken subject to approval of the Port Huron Engine & Thresher Company." Testimony was adduced by plaintiffs, evidently for the purpose of showing that Farnsworth was authorized to approve the order on behalf of defendant, and that he did so at Sioux Falls, when it was taken. Testimony tending to disprove this was adduced by defendant. It seems to have been the theory of counsel for plaintiffs that if Farnsworth was authorized to approve the contract, and did so, defendant had no right to require plaintiffs to indorse the notes as a condition precedent to delivery of machinery, and plaintiffs should recover on this cause of action. If such were the issues of fact involved, the court clearly erred in its charge, as neither question was submitted to the jury. On this subject the charge is substantially as follows: "Farnsworth seems to have assumed or arrogated to himself the right to say that the sale should be made, or not be made, possibly under the direction of the company. That is for you to determine. You are to determine his character in this matter. If you find that he was defendant's agent; that the sale was made by plaintiffs, on behalf of defendant; that the representations made in the sale by Bates were true; that plaintiffs were, in all matters connected with the sale, controlled by the provisions of that contract which has been shown you; and that the sale was not completed by defendant because of some reason of defendant which was trivial or unreasonable,—the plaintiffs are entitled to recover amount claimed on this sale. On the other hand, if you find the sale was rejected by reason of some act or conclusion reached by defendant within their power under this contract, then plaintiffs are not entitled to recover. You are not to allow any person to avoid his liabilities under the terms of a written contract because of the hardness of its provisions, nor are you to permit the parties to avoid their liabilities because of sympathy, but there must be a reason good and substantial, and within the provisions of the contract, to excuse any of its violations; and, in this connection, I instruct you that defendant cannot avoid this sale upon the grounds of plaintiffs' refusal to indorse Bates' notes, if you find such were the facts, for this contract is an absolute guaranty of this claim, unless plaintiffs have defendant's acceptance in writing, which, under this contract, would discharge plaintiffs' liability as guarantor, but it would not avoid defendant's liability to pay these commissions." Under this charge the jury was not required to decide whether Farnsworth had approved the order,—a fact concerning which there was a direct conflict in the evidence. They were given no rule of law by which to determine the extent of his authority. In effect, they were told to take all the evidence, in connection with the written contract, and find whether plaintiffs had made a sale for defendant according to its terms. They were required to construe a written contract, and determine the law of the case,—in view of the undisputed facts, practically directed to return a verdict for plaintiffs.

Unless plaintiffs were entitled to have a verdict directed in their favor, the charge

was clearly erroneous. We think they were not. They allege a sale. It is undisputed that none was made. Under the contract, they were not entitled to commissions on an order not filled. The making of the sale was denied. On this issue, plaintiffs wholly failed to sustain their first cause of action. This case forcibly illustrates the wisdom of making a plain and concise statement of the facts constituting the cause of action. Comp. Laws, § 4907. Had plaintiffs alleged the procurement of an order, and defendant's refusal to fill it, the question of defendant's right to refuse—the only vital question in dispute—would have been more carefully considered. Plaintiffs' contention that they have shown the procurement of a purchaser ready and willing to buy, and are entitled to commissions, whether sale was made or not, is untenable, because such a cause of action was neither alleged nor submitted to the jury. Even upon that theory the charge of the court cannot be sustained. It wholly fails to instruct the jury as to what would, under the contract, warrant defendant in refusing to fill an order. The indorsing of notes by plaintiffs is not contemplated by the contract. Defendant could not require them to do so, but it could, under certain circumstances, refuse to fill orders. This is, in effect, what was done in this case, its right to do so being the real controversy between the parties. Whether Farnsworth was authorized to approve, or whether he did approve, the order, is immaterial. Defendant could approve, and, for good cause, subsequently refuse to fill an order. Whether, under this contract, defendant did not have an absolute right to reject any order, is a question we do not decide; but, taking the view most favorable to plaintiffs, it was a question of fact whether they were justified in doing so in this case. It will be presumed that defendant acted in good faith. Evidently, it was not satisfied with the security offered. The burden was on plaintiffs to show that this order was one with which defendant should have been satisfied. We cannot say the evidence was conclusive on this point, and therefore plaintiffs were not entitled to a direction of verdict, upon any theory whatever.

As to the Tyler sale, the facts are undisputed. Notes were taken in settlement for the machine sold. But one had been paid when this action was commenced. It is conceded that no commission was due plaintiffs, unless the proceeds of this note had been received by defendant in cash. It was, by its terms, payable at Sioux Falls National Bank of Sioux Falls, to which it was sent by defendant without special instructions; indorsed for collection and remittance. That bank sent it to a bank at Hartford, in this state, indorsed for collection account of Sioux Falls Bank. There it was paid, but, before its proceeds were remitted to Sioux Falls, they were attached by plaintiffs in this action. If the Hartford bank was an agent of defendant, defendant had received such proceeds, and plaintiffs' claim for commission thereon was due; otherwise, it was not due when this action was commenced. The jury was, in effect, instructed to find for plaintiffs. This was correct, if the Sioux Falls Bank could delegate its powers to the bank at Hartford. Comp. Laws, §§ 4004, 4005. Numerous authorities cited in Exchange Nat. Bank of Pittsburgh v. Third Nat. Bank of New York, 112 U. S. 276, 5 Sup. Ct. 141, hold that where a claim is sent for collection to one bank, which forwards it to another for the same purpose, the latter is the agent of the owner, and not of the former bank. These authorities are said to rest on the proposition that, since what is to be done by a bank employed to collect a draft payable at another place cannot be done by any of its ordinary officers and servants, but must be intrusted to a subagent, the risk of the neglect of the subagent is upon the party employing the bank, on the view that he has impliedly authorized the employment of the subagent. Exchange Nat. Bank of Pittsburgh v. Third Nat. Bank of New York, supra. This doctrine is in harmony with the statute in this state. Comp. Laws, § 4003. However, a contrary conclusion has been reached by courts of the highest respectability. Reeves v. Bank, 8 Ohio St. 466; St. Nicholas Bank of New York v. State Nat. Bank, 128 N. Y. 26, 27 N. E. 849; Exchange Nat. Bank of Pittsburgh v. Third Nat. Bank of New York, supra. Where the note is, as in this case, payable at the bank to which it is sent, without any express authority to employ a subagent, we think, under our statute and the authorities, such bank cannot delegate its powers; and, if the collection is intrusted to another bank, the latter is the agent of the former bank, and has no connection with the owner. For the reasons herein expressed the judgment below must be reversed, and a new trial ordered. All the judges concur.

DEWELL et al. v. BOARD OF COM'RS OF HUGHES COUNTY.

(Supreme Court of South Dakota. April 18, 1896.)

COUNTY OFFICERS — PUBLICATION OF TAX-SALE NOTICES—SELECTION OF NEWSPAPER.

Comp. Laws, §§ 607–609, authorize the county board to erect and repair county buildings, and make contracts therefor. Laws 1889, c. 49, amending section 609, provides that the provisions of such section shall apply to all contracts for fuel, stationery, and all other articles for the use of the county, or labor to be performed therefor, when the amount to be paid therefor during any year exceeds $100. Laws 1891, c. 14, § 104, provides that the treasurer shall give notice of sale of real property by publication in a newspaper in his county, if there be one, and, if there be none, by written or printed notices posted, etc. *Held*, that it is the duty of

the county treasurer, and not of the county board, to designate the paper in which to publish the tax-sale notices.

Appeal from circuit court, Hughes county.

Action by S. G. Dewell and Charles A. Wheelon against the board of county commissioners of Hughes county to compel defendant to accept plaintiffs' bid for printing the notice of sale of real property for taxes for the year 1894, and to award them the contract therefor. From a judgment for defendant, plaintiffs appeal. Affirmed.

Albert Gunderson and W. L. Shunk, for appellants. John A. Holmes, for respondent.

HANEY, J. The only question presented by this appeal is whether it was the duty of the board of county commissioners to award the contract for printing the notice of sale of real property for taxes of 1894 to the lowest responsible bidder. Plaintiffs were such bidders, and brought this action to compel the board to accept their bid and award them the contract. The learned circuit judge decided that the publication of the notice was under the control of the county treasurer, and refused to issue a mandate requiring the board to act. Plaintiffs appeal.

Prior to 1889 the board had authority to provide for the erection and repairing of courthouses, jails, and other necessary buildings within and for the county, and to make contracts on behalf of the county for the building and repairing of the same. It was required to advertise for bids for the erection of such buildings, and to accept the lowest responsible bids offered. Comp. Laws, §§ 607–609. In 1889, section 609 was amended by adding thereto the following: "The provisions of this section shall apply to all contracts for fuel, stationery and all other articles for the use of said county, or labor to be performed therefor when the amount to be paid for the same during any year exceeds the sum of one hundred dollars; provided, that in all such cases advertisement for bids therefor need not be for more than three consecutive weeks in some weekly newspaper published in said county and provided also that all contracts for the furnishing of stationery, blank books and supplies generally for all county officers shall be made at the first session of the regular meeting in April to run for the period of one year. That all acts and parts of acts in conflict herewith be and the same are hereby repealed." Laws 1889, c. 49, § 104. Laws 1891, c. 14, provides: "The treasurer shall give notice of the sale of real propery by publication thereof once a week for three consecutive weeks, commencing the first week in October preceding the sale, in a newspaper in his county, if there be one; and if there be no newspaper published in his county he shall give notice by written or printed notice, posted at the door of the court house or building in which courts are commonly held, or the usual place of meeting of the county commissioners, for three weeks previous to the sale. Such notice shall contain a notification that all lands on which the taxes of the preceding year or years remain unpaid will be sold and the time and place of the sale; and said notice must contain a list of the lands to be sold and the amount of taxes both real and personal, due. The county treasurer shall charge and collect in addition to the taxes and interest and penalty the sum of ten cents on each tract of real property and on each town lot advertised for sale, which sum shall be paid into the county treasury and the county shall pay the costs of publication, but in no case shall the county be liable for more than the amount charged to the delinquent lands for advertising."

We discover no difficulty in construing these legislative enactments so that effect may be given to each. In the first place, the printing of the tax list is not included in the act of 1889. The original section required contracts for building and repairing certain county buildings to be let to the lowest bidder. By the amendment there was added to this class of contracts all contracts for fuel, stationery, and all articles for the use of the county, or labor to be performed therefor, when the amount to be paid for same during any one year exceeds the sum of $100. Certainly, printing legal notices cannot be covered by the terms "fuel, stationery or other articles for the use of the county," nor by the words "blank books and supplies for all county officers." The word "supplies," as here used, clearly signifies pencils, paper, rubber bands, blanks, ink, and articles of that description required and constantly used by county officers. Its meaning must be measured and controlled by the connection in which the word is employed, the evident purpose of the act, and the subject to which it relates, namely, "stationery and other articles for the use of the county"; it being required that contracts for such articles shall be made at the regular meeting in April, to run for one year. Then the printing of the tax list is not embraced by the section as amended, unless included in the term "labor to be performed for the county." Labor is "manual exertion of a toilsome nature." This is its meaning in statutes, unless plainly used in another sense. And. Law Dict. 591. When the section was originally adopted, and when it was amended, new counties were being organized; courthouses, jails, and other county buildings were being erected; the counties were needing and employing manual labor. They need and employ that kind of labor at all times. The amendment merely made the original section include such labor. We find nothing in the statute demanding, or even suggesting, that a more extended meaning should be given the word than is ordinarily attached to it. Had the legislature intended to include the printing of legal notices,—in itself an item of considerable expense and importance,—it would

certainly have made use of more definite and appropriate language than is employed in this amendment. The correctness of this conclusion is confirmed by a consideration of the act of 1891, above quoted, wherein it is expressly declared to be the duty of the treasurer to give the notice by publication in a newspaper in his county, if there be one. If it was understood that the publication was to be in a paper selected by the county board, or in the paper whose publisher should make the lowest bid for the printing, certainly the legislature would have so provided; and, if such was the intention of the lawmakers, they would not have used the concluding clause of the section, which is entirely inconsistent with the contention that the price to be paid shall be fixed by the commissioners. Construing both acts together, as it is our duty to do, we think that upon the treasurer, and not the board, is imposed the duty of designating the paper in which to publish the tax-sale notice. The authorities cited by counsel for appellant from California and Kansas are not applicable, because the statutes in those states are entirely different from the statutes in this state. The judgment of the circuit court is affirmed.

AULTMAN CO. v. FERGUSON.

(Supreme Court of South Dakota. April 18, 1896.)

ACTIONS—CONSOLIDATION—DISCRETION OF COURT—BREACH OF WARRANTY—EVIDENCE AS TO DAMAGES—COMPETENCY OF WITNESS.

1. A mortgagee of chattels brought claim and delivery to recover possession of certain property described in the mortgage, which was given to secure the price of an engine sold by plaintiff to defendant, and afterwards commenced another action to foreclose such mortgage. Defendant, in its answer in each action, set up a breach of warranty of the engine, and in the second also claimed damages for a breach of a subsequent agreement relating to the engine. The parties then stipulated that "said foreclosure action shall stand for trial in said court before a trial of fact in said action in claim and delivery." *Held*, that it was within the discretion of the court to order such actions consolidated, notwithstanding the stipulation.

2. In an action to foreclose a mortgage given to secure the price of an engine, and to recover possession of property covered by the mortgage, defendant pleaded a breach of warranty. *Held*, that it was error not to exclude evidence by defendant that two years after such sale the engine, "in its present condition," was of no value to him, but would have been worth to him $1,050 had it fulfilled the warranty.

3. A witness who had never seen the engine in dispute, but had heard the other witnesses testify, was not competent to state what the engine was worth in its condition as described by such witnesses.

4. A certain witness and defendant testified that the engine in question was worth nothing; but on cross-examination the former testified that the whole trouble with the engine might have been due to the slipping of an eccentric, or the failure of the pumps to work properly, which might have been caused simply by the lack of a little packing, and, if these two things had been fixed, it might have worked all right. *Held*, that it was error not to permit such witness to be asked how much time or expense it would take to make such repair.

Appeal from circuit court, Brookings county.

Two actions by the Aultman Company against Ezra Ferguson,—one in claim and delivery, to recover the possession of property described in a chattel mortgage, and in aid of a foreclosure of such mortgage by advertisement, and the other to foreclose such mortgage,—consolidated and tried together. From a judgment for defendant, and from an order denying a motion for a new trial, plaintiff appeals. Reversed.

Cheever & Hall and John C. Jenkins, for appellant. Mathews & Murphy and Alexander & Hooker, for respondent.

FULLER, J. In aid of a foreclosure proceeding by advertisement, plaintiff brought an action in claim and delivery to recover the possession of certain property described in a chattel mortgage, which it is admitted the defendant executed to secure the payment of certain promissory notes given to plaintiff as part consideration for a steam engine. In his answer the defendant denied that plaintiff was entitled to the possession of the property, and, for a full and complete defense, relied upon a breach of a written contract executed by plaintiff, in which said engine was expressly warranted in every material particular. While this action was pending, and before the cause was reached for trial, plaintiff commenced an action to foreclose the chattel mortgage above mentioned; and the defendant, in resistance of the action to foreclose, again set up in his answer a breach of the contract of warranty, together with a certain claim for damages arising thereon, and growing out of a subsequent agreement between the parties in relation thereto. Later, counsel for the respective parties entered into a stipulation in which it was agreed in writing that "said foreclosure action shall stand for trial in said court before a trial of fact in said action in claim and delivery." Before the trial, counsel for defendant, upon the ground that both causes involved the same issues and subject-matter, moved the court—and, over the objection of counsel for plaintiff, obtained an order—that said actions be consolidated and tried together, leave to file an amended complaint being granted. The amended complaint in the action as consolidated, and the answer thereto, presented all the facts at issue prior to the order requiring the two cases to be tried together. The jury found for the defendant upon all the issues, and returned a verdict upon his counterclaim against plaintiff for $100. This appeal is from a judgment accordingly entered, and from an order overruling a motion for a new trial. Upon sufficient cause shown to this

court the Aultman Company, by substitution, has been made the party appellant.

To avoid unnecessary costs, promote the convenience of litigants, and subserve the ends of justice, courts are authorized, in the exercise of a sound legal discretion, to consolidate two or more actions pending at the same time between the same parties. It being obvious that a trial of either of the actions consolidated would virtually settle every material question involved in the other, the laudable object to accomplish which the order was made is clearly apparent; and, as no specific objection was entered to the ruling of the court upon the motion to consolidate, its action ought not to be reviewed and reversed, in the absence of a claim that appellant was prejudiced thereby. If, by the stipulation that the foreclosure suit should stand for trial before the action in claim and delivery, it was intended to have the latter abide the result of the former, a quasi consolidation was thereby effected, and appellant has nothing of which to complain. Confessedly, according to the terms of the notes and mortgage, a default existed, and appellant's right to the immediate possession of the mortgaged chattels, for the purpose of foreclosure, was the controlling question in each of the actions, both of which stood upon the calendar for trial at the same term. Presumptively, the stipulation as to the order of trial was made subject to the approval of the court, although it does not affirmatively appear that its attention was ever called thereto. Whether, in any event, a court would be bound by an express stipulation of the parties not to consolidate two or more causes, is a question which the record does not present. Independently of statutes, it would seem that courts ought not, by stipulation of counsel, to be deprived of their inherent power "to make orders which will expedite business, and prevent costs and a multiplicity of suits, when one action will answer the purposes of justice." 4 Enc. Pl. & Prac. p. 676, and cases collated under the title, "Consolidation of Actions." As the order consolidating the cases was clearly within the exercise of judicial discretion, the same will not be disturbed. Wilkinson v. Black, 80 Ala. 329; Lewis v. Daniel, 45 Ga. 124; Lindsay v. Wayland, 17 Ark. 385; Den v. Fen, 9 N. J. Law, 335. Counsel's contention that, under section 5342 of the Compiled Laws, the court was without power to order the two cases pending to be tried together, is not sustainable. The sale of the engine evidenced by the notes and mortgage was the transaction out of which both actions arose, and the mortgaged property was the subject-matter, to some extent, involved in each case. Furthermore, the ultimate object sought to be attained in each instance was a foreclosure of said mortgage by a sale of the property described in the amended and in the original complaints. Under such circumstances, a cause of action sounding in tort may be joined with one arising upon contract. Comp. Laws, § 4932; Bishop v. Railway Co., 67 Wis. 610, 31 N. W. 219.

On direct examination, and in his own behalf, respondent was interrogated and testified as follows: "Q. Now, Mr. Ferguson, you may tell the jury what the value of this engine in controversy, which you purchased from C. Aultman & Co., was to you, in its condition as it was at the time Mr. Bain left your farm, or the farm where he was attempting to repair it, and when you hauled it back to Elkton. (Objected to by plaintiff's counsel as incompetent, irrelevant, and immaterial, and not the proper basis of damages, under the pleadings. Objection overruled. Exception taken by the plaintiff.) A. It had no value. Q. Mr. Ferguson, what would this engine have been worth to you, if it had done the work of a good, ten horse power engine, that had been worked same amount that you had prior to that? (Same objection by the plaintiff as last above. Objection overruled. Exception taken by the plaintiff.) A. It would have been worth $1,050." E. P. Wolff, who appears never to have seen the engine, was called in respondent's behalf, and, after stating that he had heard the testimony of other witnesses as to the working of the engine and its value, was asked the following question: "You may state what that engine, in the condition as it then was, as described by the witnesses of this action, is worth." Over an objection, valid and sufficiently specific, under any theory of the case, the witness was allowed to answer that the engine was entirely worthless. On cross-examination, after testifying, in effect, that the whole trouble with the engine might have been due to the slipping of an eccentric, or the failure of the pumps to work properly, "which might have been caused simply by the lack of a little packing, and, if these two things had been fixed, it might have worked all right," he was asked the following question, to which an objection was, by the court, sustained: "Now, how much time or expense would it take to make these repairs?" As a complete defense to appellant's cause of action, respondent pleaded and relied upon a rescission of the contract of purchase; and the undisputed evidence shows that he did actually return the engine, and demand of appellant the money advanced, together with a surrender of his notes and mortgage given as consideration therefor. Were we to assume, under the pleadings and theory upon which the case was tried, the true measure of damages to be the difference between the actual value of the engine and what it would have been worth had it fully complied with the terms of the warranty, the evidence of value offered and received would still be clearly inadmissible. The sale and contract of warranty were made and entered into on the 8th day of October, 1890; and respondent was allowed to state to the jury, as a measure by which to compute his damages, that

on the 13th day of September, 1892, the engine, in its present condition, was of no value to him, but that it would have been worth to him $1,050, had it fulfilled the warranty. The court erred in overruling the objection to the question, and in declining to sustain appellant's motion to strike out the answer. The question of value, when material, is not usually established by the opinion of a witness as to what an article is worth to him; and section 4593 of the Compiled Laws provides that "the detriment caused by a breach of warranty of the quality of personal property, is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time." The question as to the value of the engine, propounded to the witness Wolff, who was testifying as an expert, was clearly incompetent, and invaded the province of the jury, because it required him to consider, weigh, characterize, and draw a conclusion of fact as to the effect of, the testimony of other witnesses. Dexter v. Hall, 15 Wall. 9; Kerr v. Lunsford (W. Va.) 8 S. E. 493. "The object of all questions to experts [says Mr. Rice] should be to obtain their opinion as to the matter of skill or science which is in controversy, and at the same time to exclude their opinion as to the effect of the evidence. * * * If they require the witness to draw a conclusion of fact, they should be excluded." 1 Rice, Ev. 351; Hunt v. Gaslight Co., 8 Allen, 169. If, under any circumstances, it was competent for the witness Wolff to testify as to the condition or value of the engine, he ought to have been allowed to respond to the question propounded on cross-examination by counsel for appellant.

Other questions presented by the assignments of error require no special attention. The judgment is reversed, and a new trial is ordered.

BRADY v. KREUGER et al.

(Supreme Court of South Dakota. April 18, 1896.)

EJECTMENT—SUFFICIENCY OF COMPLAINT—RIGHT OF PARTNER TO MAINTAIN—APPEAL—PRACTICE—ASSIGNMENT OF ERROR—HOMESTEAD—CANNOT BE ACQUIRED IN PARTNERSHIP PROPERTY—DIVORCED WIFE NOT ENTITLED.

1. A complaint alleging that plaintiff was the owner and seised in fee of certain premises; that, while such owner and seised and possessed of the premises, defendant unlawfully entered upon the second story thereof, and ousted and ejected plaintiff therefrom, and has ever since withheld possession from plaintiff, to his damage; concluding with demand for judgment for possession and damages,—is sufficient as a complaint for the recovery of possession of real property.

2. A partner, being a tenant in common with his co-partner, may recover possession of the whole of the firm real estate, as against one holding the same without title.

3. Where there has been a motion to direct a verdict, the court is required, on appeal, to review the evidence, in order to determine whether, as a matter of law, the verdict was properly directed, or the motion denied; and in such case it is not necessary that the bill of exceptions should specify the particulars in which the evidence is insufficient.

4. Under Comp. Laws 1887, § 4034, providing that each member of a partnership may require the firm property to be applied to the discharge of its debts, and has a lien on the shares of the other partners for this purpose, a partner cannot, by obtaining possession of, and using as a residence, firm real estate, acquire a homestead right therein.

5. Where real estate has been occupied as a homestead by husband and wife, the wife, upon being divorced from her husband, retains no right to a homestead in the premises, in the absence of a decree to that effect.

Appeal from circuit court, Campbell county.

Action brought by James G. Brady against H. J. Kreuger and Minnie Nidrow to recover possession of certain real estate. There was judgment for plaintiff, and defendants appealed. Affirmed.

H. J. Kreuger, C. H. Barron, and Albert Gunderson, for appellants. John H. Perry (Horner & Stewart, of counsel), for respondent.

CORSON, P. J. This was an action to recover the possession of real property, and damages for its detention. The action was originally commenced against Kreuger alone, but subsequently Minnie Nidrow (formerly Minnie Kipp) was made a party defendant by an amendment to the answer. Kreuger, in his answer, denies the ownership of the plaintiff, and alleges, in substance, that Minnie Kipp was at all times mentioned in the complaint in the lawful and peaceable possession of the second story of the building on said premises, by virtue of a homestead right thereto as the wife of John Kipp, and that defendant was in the possession of the same as her agent. The facts, as disclosed by the evidence, briefly stated, are as follows: John H. Kipp and Samuel O. Overby, prior to April 11, 1893, were partners in a general retail mercantile business, under the firm name of Kipp & Overby. The second story of the building in which this mercantile business was carried on was occupied by Kipp and family and said Overby as a residence. On the last-mentioned day, Overby conveyed his interest in the real and personal property of the partnership to plaintiff, Brady, and the business was continued under the firm name of Kipp & Brady until November, 1893, when Brady purchased Kipp's interest in the partnership. The lots and building thereon used as the store and dwelling house were partnership property. At the time Kipp sold his interest to Brady, Kipp and his family still occupied the said second story of the store building, but the deed to the real property was not signed by Mrs. Kipp. In December, 1893, a decree of divorce was granted, dissolving the marriage between Mr. and Mrs. Kipp; but she con-

tinued to occupy the second story of the store until March, 1894, when she, desiring to visit friends in the East, requested Kreuger to occupy the rooms for her in her absence, and he was so occupying them when this action was commenced. At the close of all the evidence the court, on motion of plaintiff, directed a verdict in his favor, and from the judgment entered therein the defendants appeal.

At the commencement of the trial, counsel for the defendants objected to any evidence being given under the complaint, upon the grounds (1) that the court had no jurisdiction; (2) because the complaint did not state facts sufficient to constitute a cause of action. This objection was overruled, and the defendants duly excepted. This ruling was clearly correct, as the action is one to recover the possession of real property, and damages for withholding the same, and contains all the averments essential to a good complaint in such an action. The plaintiff alleges that on November 9, 1893, he was the owner, and was seised in fee, of the premises, describing them fully; that on March 1, 1894, and while the plaintiff was such owner and seised and possessed of the said premises, the defendants unlawfully entered upon the second story of said premises, and ousted and ejected the plaintiff therefrom, and ever since have withheld the possession of the same from the plaintiff, to his damage in the sum of $200. It alleges that the value of the rents and profits of said premises so unlawfully withheld from March 1, 1894, is $200, and plaintiff demands judgment for the possession, and $200 damages. The appellants contend that the action was one in forcible entry and detainer, of which the circuit court has not original jurisdiction, but only appellate jurisdiction. But in this contention the counsel are clearly in error. The complaint is sufficient as a complaint for the recovery of the possession of real property, but fails to allege several essential facts necessary to constitute an action for forcible entry and detainer. Payne v. Treadwell, 16 Cal. 246; section 6073, Comp. Laws.

At the close of the evidence on the part of the plaintiff, the defendants moved the court to direct a verdict for the defendants. This was denied, and exception taken; but as the defendants proceeded to introduce evidence on the part of the defense, and subsequently moved for a direction of a verdict at the close of all the evidence, this exception will not be further considered.

At the close of all the evidence the plaintiff and defendants moved for a direction of the verdict. The motion of the plaintiff will be considered first in order, as its disposition will determine the motion of the defendants. The counsel for the respondent raises a preliminary question, and that is that this court cannot review the evidence, for the reason that the bill of exceptions does not contain any specification of the particulars in which the evidence is alleged to be insufficient to support the verdict. The respondent has filed an additional abstract, in which he asserts that the bill of exceptions contains no statement of the particulars in which the evidence is alleged to be insufficient, and as this is not denied by the appellants, it will be taken to be true. But the counsel is clearly in error in his contention. The statement or bill of exceptions is only required to specify the particulars in which the evidence is alleged to be insufficient to justify the verdict or other decision when one of the grounds of a motion for a new trial is the insufficiency of the evidence to justify the verdict or decision. Section 5090, Comp. Laws. A motion to direct a verdict presents a question of law, which requires the court to review the evidence in order to determine whether or not, as matter of law, the verdict was properly directed, or the motion denied.

It is contended by the appellants: First, that the husband and wife have a homestead interest in partnership real property, and that no conveyance of such homestead can be made by the husband alone. Second, that after a divorce the wife retains her interest in the homestead, and that, under the facts proven in this case, she was entitled to retain possession of the premises occupied by herself and husband at the time the divorce was granted. Third, that the conveyance made by Kipp of his half interest in the partnership property was absolutely void. All of these propositions are controverted by the respondent.

The real property in controversy being partnership property, no homestead rights therein could be acquired by Mr. and Mrs. Kipp, as against the co-partner. Section 4034, Comp. Laws, provides that "each member of a partnership may require its property to be applied to the discharge of its debts, and has a lien upon the shares of the other partners for this purpose and for the payment of the general balance, if any, due to him." Real estate belonging to a co-partnership is subject to the same rules as the personal property of such co-partnership. Betts v. Letcher, 1 S. D. 197, 46 N. W. 193. In the case at bar the plaintiff, as part of the consideration for the sale to him by Kipp of his interest in the co-partnership property, agreed to pay the partnership debts and save Kipp harmless therefrom. To hold that a partner, by obtaining possession of, and using as a residence, partnership real estate, could acquire a homestead right therein, as against his co-partner, would lead to great injustice and wrong by one partner to his co-partner. We think both the spirit and policy of the law are clearly against such a claim. If Kipp could not have claimed this property as homestead property, as against the plaintiff, his wife would occupy no better position than her husband.

There is, however, another—and perhaps more satisfactory—ground upon which the ruling of the court can be sustained, and that is that the defendant Minnie Nidrow (formerly Minnie Kipp), having been divorced from her husband in the fall of 1893, ceased to have any right to the occupancy of the homestead property (admitting that there could have been such a right in co-partnership property) after she ceased to be the wife of Kipp, who had the legal title to the property at the time he transferred the same to the plaintiff. The only evidence of the divorce was the admission of Minnie Nidrow when on the witness stand as a witness. She stated that in December, 1893, there were divorce proceedings between her and her husband, and that a divorce was granted, and that her name was then Minnie Nidrow, but was formerly Minnie Kipp. This evidence was admitted without objection, and prima facie established the divorce; and, as her evidence was not controverted or disputed, we must assume that a divorce was properly granted. Appellants contend that this court will presume, in the absence of evidence to the contrary, that the decree gave her the right to retain possession of the homestead. But this we cannot do. Courts will sometimes indulge in presumptions to support a judgment of a court, but never to reverse it. In the absence, therefore, of any proof as to the contents of the decree of divorce, we cannot presume it contained anything favorable to the defendants. The relation of husband and wife having terminated, the wife ceased to have any claim upon or right in the husband's property, whether homestead or otherwise, unless such rights were preserved by the decree of the court. If the decree of the court preserved her rights to the homestead, or conferred upon her any other privileges in, or interests in or to, the property of the husband, the burden was upon her to establish such rights by the decree, as she clearly would have no right to the possession of the homestead after a decree of divorce had been granted, unless saved by the decree. There being in this state no right of dower, or other absolute claim of the wife upon the property of the husband, except under the law of succession, as his widow, or under a homestead claim which exists in favor of a wife or widow, and which depends solely upon the fact that she is such wife or widow, she can only avail herself of these claims by showing that she occupies either one or the other of these relations named, to the husband. As the wife, upon a dissolution of the marriage, ceases to be the wife, and can never be the widow, of her divorced husband, her claims upon his property, necessarily, also cease and terminate upon the divorce. Rosholt v. Mehus (N. D.) 57 N. W. 783. It was undoubtedly for these reasons that the legislature of this state has conferred upon the courts in which a decree of divorce may be obtained such comprehensive powers for regulating and settling the rights of the wife in the property of the husband. Sections 2581-2585, Comp. Laws. The rights of the wife, therefore, in her husband's estate, after a divorce is granted, are regulated and determined exclusively by the provisions of the decree of divorce, unless there is some valid contract between the husband and wife. When a wife, after the divorce, seeks to assert any claim to any part of the husband's property,—homestead or otherwise,—she must establish that right by the decree, or by a valid contract between herself and husband. In the case at bar the defendants failed to show any such right. Neither Mrs. Kipp nor Kreuger presented any valid defense to plaintiff's claim for the possession of the property, and hence the plaintiff was entitled to a verdict, as matter of law.

Appellants further contend that, as the deed from Kipp to Brady was executed prior to the granting of the divorce, it was void, and plaintiff was not entitled to recover the possession of the premises from the defendants, as a plaintiff must recover, if at all, upon the strength of his own title. A conveyance of the homestead, not executed by both husband and wife, the statute declares, "shall be of no validity." Section 2451, Comp. Laws, amended by chapters 76, 77, Laws 1891. Whether such a deed is absolutely void for all purposes, or only invalid as against the party having a homestead right, it is not necessary now to determine, as the plaintiff was the owner of an undivided one-half interest in the property by reason of his purchase from Overby, and was therefore at least a tenant in common with Kipp; and, as against one without title, he could recover the possession of the whole property, as such tenant in common. Granting, therefore, that the deed from Kipp to him was void, the direction of a verdict was proper, as against parties showing no right to the possession of the property. Collier v. Corbett, 15 Cal. 183; Treat v. Reilly, 35 Cal. 129. Finding no error in the record, the judgment of the circuit court is affirmed.

LOVELL et al. v. McCAUGHEY et al.

(Supreme Court of South Dakota. April 18, 1896.)

CONTRACT — RESCISSION FOR FRAUD — RETURN OF CONSIDERATION.

An action will not lie to rescind for fraud a contract under which part of the consideration has been received, unless the plaintiff has restored or offers to restore the consideration he has received, as required by Comp. Laws, § 3591.

Appeal from circuit court, Beadle county.

Action by Albert Lovell and others against E. S. McCaughey and another for rescission of a contract. From a judgment for plaintiffs, defendants appeal. Reversed.

J. M. Davis and R. H. Brown, for appellants. T. H. Null, for respondents.

FULLER, J. This action, based upon alleged fraudulent representations, was to rescind a contract for the sale or exchange of Huron real property for certain suburban lots in Sioux City, Iowa. The court before whom the case was tried without a jury found upon all the issues for plaintiffs against the defendants, and from a judgment directing the defendants to reconvey said Huron property to plaintiffs, and to account for the rents and profits thereof, the defendants appeal. Respondent Albert Lovell exchanged a house and lot in Huron for 20 unimproved lots situated in Lynn, a suburb of Sioux City. His claim is that he was by appellants induced to convey and deliver up the possession of his property by means of the following false and fraudulent representations and pretensions: That the Sioux City property belonged to appellants, and was reasonably worth $400 per lot; that by paying an incumbrance of $225 per lot, or $4,500, according to the terms of his agreement, he could and would receive a perfect title to said property; and that the same was not subject to overflow from the Floyd river. It appears from the evidence that the respondent solicited the exchange of property after having frequently visited and carefully examined the Lynn property claimed by appellants, and consisting of a list of 90 lots, from which he selected, as being the most desirable, the 20 described in his contract or bond for a deed. Upon several occasions immediately prior to the transaction complained of he had talked with numerous disinterested persons concerning the value of the lots, the desirability of the location, and the ensuing prospects of the city, so that he was fully advised of the location, character, and current price of the property before he called upon appellants, and entered into negotiations therefor. Pursuant to the contract entered into on the 24th day of January, 1891, respondents conveyed to appellants their Huron property, free from incumbrance, and took in exchange therefor the 20 lots above mentioned, upon the following conditions: "Subject to an indebtedness of $225 upon each and every lot, which indebtedness said Albert Lovell hereby agrees to and does assume as part of consideration of this agreement, and hereby agrees to pay one-third of said indebtedness on each of said lots to said McCaughey and Brown, in cash, on or before (at option of said Lovell) August 1, 1891, one-third in cash by August 1, 1892, balance by August 1, 1893, with 8 per cent. interest on deferred payments until fully paid. That on payments of $225 and interest due thereon, as above, first parties will make warranty deed to any of said lots as second party may require to be deeded." Immediately appellants under their deed and respondents under their contract went into peaceable, continuous, and actual possession of their respective properties, and have so remained without interruption. At the date of the contract between the parties to this suit appellants were in possession of the list of the lots from which respondents made their selection, under a contract of purchase bearing date July 29, 1890, executed and delivered to them by the Sioux City Valley Land Company, in which said company agreed, upon payment of $225 per lot, to convey by warranty deed, free from incumbrance, any or all of said lots to appellants, their heirs or assigns, when called upon so to do at any time prior to August 1, 1891. Concerning lots for which payment had not been made as above specified on the 1st day of August, 1891, appellants, at their election, on said day had the right, under this contract, to pay in cash one-fifth of the aggregate amount of the purchase price at $225 per lot, and to execute in settlement for the balance their promissory notes secured by a mortgage upon the premises, payable in three equal annual installments, with interest at 7 per cent. per annum, and at any time, and as often as $225 was paid upon said indebtedness, the mortgage was to be released from said lot or lots, as appellants might designate; and a warranty deed therefor, conveying a title free from reasonable doubt, was to be executed by the grantor to appellants, their heirs or assigns. This contract contains other conditions optional to appellants, with reference to the 90 lots, which it will not be necessary to notice. While respondents never made nor attempted to make the one-third, or $1,500, payment falling due August 1, 1891, they did, during the life of the contract, pay $225, for which appellants caused to be executed and delivered to respondents, according to the terms of their contract and at respondents' request, a warranty deed to one of the lots, by which they obtained a title absolutely clear and free from reasonable doubt. Mr. Lovell testified that Mr. McCaughey told him that the valley in which the lots are situated was never known to overflow. Mr. McCaughey, who denies this specifically, and swears that the subject was never mentioned, is fully corroborated by Mr. Brown, who was present at the time, and heard all that was said. Moreover, it appears from the undisputed testimony of disinterested witnesses, based upon actual observation and personal knowledge, that the valley had never been known to overflow prior to the execution of the contract sought to be rescinded. The undisputed evidence shows that the lots at the time of the transfer were each reasonably worth from four to five hundred dollars. Although appellants' contract with the land company was of record, and they both specifically stated upon the witness stand that they exhibited and fully explained the terms and conditions thereof to respondent Lovell, and entered into the contract in suit with reference thereto, Mr. Lovell testified that they claimed to be the owners of all the property described therein. Whether the court's findings of fact are sufficiently sustained by the evidence, it

is not, under the view we shall take, necessary to determine

During the month of August, 1891, and after the expiration of both contracts, Mr. Lovell, while in default, applied for additional time within which to perform, and through appellant Brown, acting as the attorney for the land company, obtained from said company, without consideration, an extension of his contract for a term of one year. Prior to that time he had erected residences upon two of the lots, in which he still had an equity, and had built and was in actual possession of a dwelling house situated upon the lot, for which he had obtained, under the contract sought to be rescinded, a perfect title; and counsel for appellants contend that, after years have elapsed since discovering the alleged fraud, respondents cannot maintain an action to rescind the contract without offering to restore the consideration therefor. Under the statute of this state, rescission of a contract not effected by consent is allowable only when the party rescinding has with reasonable diligence complied with the following rules: "(1) He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and (2) he must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable, or positively refuses to do so." Comp. Laws, § 3591. No claim is made that respondents ever restored or offered to restore to appellants either the equity in the property transferred by the contract or the title to the unincumbered lot which appellants, in compliance with their obligation, caused to be conveyed to respondents by warranty deed. Assuming, but not conceding, the existence of fraud in the transaction, and that respondents proceeded with reasonable promptness, after the discovery thereof, to rescind the contract, they are not entitled to a restoration of the Huron property, and at the same time to withhold the right, title, and interest in and to the Sioux City lots received by them from and through the partial performance of the contract upon the part of appellants. Independently of the statutory provision above cited, the rule that a party who has derived an advantage or thing of value from a partial performance cannot usually rescind a contract without placing or offering to place the other party in statu quo by restoring or offering to restore the consideration received, is too well established to justify the citation of supporting authority. Under the circumstances disclosed by the record, respondents cannot retain the property acquired by the contract, and by rescission obtain a reconveyance of all the property transferred in part consideration therefor. The judgment appealed from is reversed.

SCHLEGEL v. SISSON et al.

(Supreme Court of South Dakota. April 18, 1896.)

APPEAL—PARTY AGGRIEVED—PRACTICE.

1. The executor, who is protected from the claims of creditors by a decree directing the payment to the widow of insurance upon his decedent's life, is not aggrieved by the decree, so as to entitle him to appeal therefrom.

2. To authorize an affirmance of a decree on the ground that appellant is not a party aggrieved thereby, a motion to dismiss is not necessary.

Appeal from circuit court, Minnehaha county.

Petition by Lillian Schlegel against George W. Sisson and another, executors of John C. C. Schlegel, and others. From a decree for petitioner the executors appeal. Affirmed.

Henry Robertson and Palmer & Rogde, for appellants. John E. Carland, for respondent.

HANEY, J. Plaintiff petitioned the county court for an order requiring defendants, the executors of her deceased husband's estate, to pay her the proceeds of certain life insurance. Defendants, the creditors, and all parties interested in the estate were cited to show cause why such order should not be made. Defendants and one of the creditors answered. The county court having decided in favor of the plaintiff, defendants alone, as executors, appealed to the circuit court, wherein a judgment was rendered in favor of plaintiff. A motion for a new trial having been denied, defendants alone, as executors, appealed to this court.

It is contended by counsel for plaintiff that defendants, as executors, are not entitled to have this judgment reviewed, for the reason they are not aggrieved thereby. We consider this position well taken. A judgment can be reviewed upon appeal only by the party aggrieved. Comp. Laws, § 5214. Defendants cannot complain of error which is not prejudicial to themselves. Shoe Co. v. Stebbins, 2 S. D. 74, 48 N. W. 833. Creditors and other parties interested in and affected by the decision of the county court, having failed to appeal, are precluded from objecting to the distribution decreed by such court. The decree of the circuit court is ample protection to the executors, and they have neither reason nor right to continue the litigation for the purpose of settling disputed questions of law, or for the purpose of retaining possession of funds, which should be distributed as speedily as possible. They are not aggrieved, within the meaning of the statute. Bates v. Ryberg, 40 Cal. 463; Estate of Merrifield (Cal.) 4 Pac. 1176; Goldtree v. Thompson, 83 Cal. 420, 23 Pac. 383; In re Dewar's Estate (Mont.) 25 Pac. 1025; Ratliff v. Patten (W. Va.) 16 S. E. 464. Plaintiff moved to dismiss this appeal upon the ground we have considered. Defendants filed certain objections thereto. These ob-

jections need not be discussed, because a motion to dismiss was not required, nor was it proper. Whether appellants are aggrieved by the judgment is a question which involves the merits of the appeal. Williams' Estate (Cal.) 36 Pac. 6. The judgment of the circuit court is affirmed.

BELATTI v. PIERCE, Police Justice.

(Supreme Court of South Dakota. April 18, 1896.)

CONSTITUTIONAL LAW—JURY TRIAL—STATUTES VIOLATING.

The charter of the city of Watertown (sections 25, 27), authorizing a police justice to try certain cases for violation of ordinance without a jury, and allowing an appeal in such cases only when imprisonment exceeding 10 days or a fine exceeding $20 is imposed, violates Const. art. 6, § 6, declaring and extending the right of trial by jury to all cases at law irrespective of the amount in controversy, and section 7, declaring the right to trial by an impartial jury in all criminal prosecutions.

Appeal from circuit court, Codington county.

Certiorari by Sveri Belatti against W. M. Pierce, police justice, to review the proceeding by which plaintiff was found guilty of violation of a city ordinance, and fined. From a judgment declaring the proceedings regular, plaintiff appeals. Reversed.

Bennett & Sheldon, for appellant. E. A. Gove, City Atty., for respondent.

HANEY, J. Plaintiff was arrested and brought before defendant, police justice in and for the city of Watertown, charged with unlawfully keeping and having in his possession at his place of business in said city a certain gambling device. He appeared with counsel, entered a plea of not guilty, and before the commencement of the trial demanded, in writing, a jury trial. This demand was denied, defendant excepted, and objected to any further proceedings, upon the ground that the court had no authority to proceed without a jury. Testimony was submitted on behalf of the city, and none was offered by defendant. The court found him guilty as charged in the complaint, and imposed a fine of $17.35. Subsequently a writ of certiorari was issued by the circuit court, and the record of the police justice was duly certified to such court, wherein it was adjudged that the proceedings in the police court were regular under the city charter, and should be in all respects affirmed. From this decision the plaintiff appeals to this court.

Watertown is governed by a special charter, granted in 1885. Sections 25 and 27 provide, respectively, that in cases arising under the ordinances of the city no change of venue shall be allowed, and the same shall be tried by the police justice without a jury, except in cases in which imprisonment exceeding 10 days is by ordinance a part of the punishment, and the defendant demands a trial by jury before the commencement of the trial; and in all ordinance cases tried by the justice without a jury where the judgment is for imprisonment exceeding 10 days, or a fine exceeding $20, an appeal may be taken by the defendant to the circuit court of the county at any time within 10 days after the rendition of the judgment, by giving oral or written notice thereof to the justice, and by filing a bond conditioned as provided by the said act. The ordinance appellant is charged with having violated provides that any one convicted of its violation shall be fined in any sum not exceeding $50, to which may be added imprisonment for any period not exceeding 5 days. Such being the ordinance and amount of fine imposed, plaintiff could, under the express terms of the charter, neither appeal nor have trial by jury. But one question is presented, namely, does the charter conflict with the constitution in that the accused is deprived in any event of a jury trial? The constitution of this state provides as follows:

"Art. 6, § 6. The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy, but the legislature may provide for a jury of less than twelve in any court not a court of record, and for the decision of civil cases by three-fourths of the jury in any court.

"Sec. 7. In all criminal prosecutions the accused shall have the right to defend in person and by counsel; to demand the nature and cause of the accusation against him; to have a copy thereof; to meet the witnesses against him face to face; and to have compulsory process served for obtaining witnesses in his behalf, and to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

In the view we take of these sections, it becomes unnecessary to decide whether the action is civil or criminal. If criminal, plaintiff was certainly entitled to a public trial by an impartial jury; if civil, it is a case at law to which the right of trial by jury is extended by the express language of the constitution. The doctrine declared in states where the right of trial by jury is merely preserved, as it existed when the constitution was adopted, has no application in this state, because here it is not only to remain inviolate, but is expressly extended to all cases at law, without regard to the amount in controversy. Authorities cited by counsel for respondent have been examined, but are not applicable, for the reason they are supported by constitutional provisions entirely different from those in this state. Under these provisions the law cannot compel a litigant, even in a civil action, to accept less than a constitutional jury. City of Huron v. Carter, 5 S. D. 4, 57 N. W. 947. So far as

the charter in question operates to deprive persons of the right to a jury trial in cases of violation of city ordinances, it is in conflict with the state constitution, and void. The judgment of the circuit court is reversed, and the case remanded for such further proceedings as may be proper, and consistent with this opinion.

MOORE v. CITY OF KALAMAZOO.

(Supreme Court of Michigan. April 28, 1896.)

MUNICIPAL CORPORATIONS—INJURIES DUE TO DEFECTIVE SIDEWALKS—NOTICE—EXTENT OF LIABILITY—DAMAGES—CONTRIBUTORY NEGLIGENCE.

1. In an action against a city for injuries due to a defective sidewalk, evidence of other defects in the immediate vicinity is admissible to show notice to the defendant.

2. Evidence that others slipped into the same or other holes in the sidewalk in the vicinity was admissible as bearing on the question of notice.

3. An instruction that testimony as to other defects in the sidewalk near the place where plaintiff was injured was admitted for the purpose of showing notice to the city, is a substantial compliance with a request to charge that the consideration of such testimony should be limited to the subject of notice.

4. In an action against a city for injuries due to a defective sidewalk it was not error to refuse to charge that a city with 300 miles of sidewalk would not be held to as great diligence in caring for its walks as a small village would be.

5. In an action for injuries due to defective sidewalks, where the declaration alleged that the injury prevented plaintiff from attending to her necessary household affairs and business, whereby she lost all the profits therefrom; that the injury is permanent; that prior thereto plaintiff was a strong, healthy woman, but is now lame, and crippled for life,—it was proper to allow plaintiff to show what her earnings were, and to instruct the jury that her earnings, and her ability to earn anything in the future, should be taken into account on the question of damages.

6. Where plaintiff did not call in a surgeon at once, but attempted to go on with her duties, and the court, in response to defendant's request, instructed the jury that it was plaintiff's duty to use proper care and proper treatment, and, if she aggravated the injury by her own acts, defendant would not be liable for any injury caused thereby, it was proper to add to such instructions that if plaintiff did what a reasonably prudent person would do under the circumstances she was not negligent, and that she cannot be charged with knowledge of what might subsequently develop in the way of additional injury.

Error to circuit court, Kalamazoo county; George M. Buck, Judge.

Action by Abbie Moore against the City of Kalamazoo to recover damages for injury alleged to have been sustained by reason of a defective sidewalk. There was judgment for plaintiff, and defendant appealed. Affirmed.

George P. Hopkins, for appellant. D. O. French (N. H. Stewart, of counsel), for appellee.

HOOKER, J. The defendant appeals from a judgment for $4,500 in favor of the plaintiff, who complained of an injury to her knee, crippling her permanently, suffered by reason of the defendant's sidewalk. The brief filed by counsel for the defendant does not discuss the assignments of error seriatim, and we shall therefore deal with the questions discussed, rather than specific assignments. Evidence tending to show that there were other defects in the immediate vicinity, has so often been held admissible as bearing upon the question of notice that we think it unnecessary to cite authorities, especially as counsel framed a request to charge in which he asked the court to limit the use of that testimony to the subject of notice, and alleges error upon the failure of the court to give it. We think the request was given, in effect, and the omission of a part not being prejudicial, does not call for a reversal of the case. Evidence that others stepped into the same hole in the walk is admissible under the case of Lombar v. Village of East Tawas, 86 Mich. 14, 48 N. W. 947. It is unimportant whether they received injury or not, as was said in Corcoran v. City of Detroit, 95 Mich. 86, 54 N. W. 692. Two witnesses testified to stepping in holes in that vicinity, which was substantially the same as saying that they saw the holes. It was said that one fell, but this testimony was stricken out. The evidence allowed to remain was admissible upon the question of notice.

The court committed no error in declining to instruct the jury, as requested, to the effect that the defendant, with 300 miles of sidewalk, would not be held to as great diligence in caring for its walks as a small village would be. The law requires that reasonable care shall be given to walks, and makes no distinction between localities, except as circumstances affect the question of what is reasonable. We should not care to lay down the rule that sparsely settled or small communities must have better or more carefully guarded walks and ways than large cities. The cases cited do not, in our opinion, state any such proposition, or support it.

The remaining questions relate to the subject of damages. It is said that the court erred in admitting proof relative to plaintiff's earnings, and also in stating to the jury that they "should take into account her past earnings during the time that she has already been injured, and the time that you find, from the evidence, that she will remain incapable of earning anything in the future," for the reason that the "declaration contains no allegation which would permit her to recover upon any such theory." The declaration states that she was "prevented from attending to her necessary household and lawful affairs, duties, and business during all of this time performed, and thereby was deprived of and wholly lost all the advantages and profits to be derived therefrom and thereby;" and, "the injury so received being per-

manent and incurable, she is an invalid for life; and plaintiff avers that prior thereto she had been and was a strong, healthy, and able-bodied woman, but that she is now injured permanently, and must remain in such lame and crippled condition the balance of her life, wherefore the said plaintiff has been injured and sustained damages to the amount of five thousand dollars." We think these sufficient allegations to warrant the admission of such testimony and the charge given.

It is contended that plaintiff's conduct in neglecting to care for her injury, and in failing for several weeks to call a surgeon, and in keeping about the house, in an effort to perform her ordinary work, aggravated her injury, and that much of the injury would have been avoided by proper care and treatment. Counsel for the defendant offered the following request, viz.: Defendant's sixteenth request: "It was the duty of the plaintiff in this case, after receiving her injury, if she received any, to use proper care and precaution, and the proper treatment looking toward a recovery; and if she aggravated the alleged injury in any manner by her own acts, whether by being upon her feet and walking around or otherwise, the defendant would not be in any way responsible for that part or portion of the injury or suffering or loss of time caused by reason of the conduct of the plaintiff herself." The court gave this, and added: "You will understand this instruction, gentlemen, the same as the other,—that if she did what a reasonably prudent person would have done under the same circumstances, then it would not be negligence on her part. If she did what a reasonably prudent person would not have done, then it was negligence." He also gave the following requests: "You are instructed that the plaintiff was bound to use such care and caution, after her injury had taken place, that an ordinarily prudent, cautious person would have used under like circumstances; and that, if the injury was such as not to entirely disable her at the time received, but one that would develop later on, the plaintiff cannot be charged with knowledge of what might subsequently develop, but would only be required to act as an ordinarily prudent person would, under the circumstances." "If, on the contrary, you find that the plaintiff was keeping about her work after the injury, did what a reasonably prudent and careful person would not have done, and that thereby the injury was greatly aggravated, the defendant would not be liable for the injury, pain, and suffering brought about by that want of care and prudence on the part of the plaintiff herself. In that case the city would still be liable for the injury, so far as it was the natural result of the sprain by stepping into the hole in the walk, if you find that she was so injured." To these he added: "But the city would not be liable for any injury not the result of the sprain, but of her own negligence, if you should find that she was negligent." Counsel's request (numbered 16, quoted above) would relieve the defendant from liability for all aggravations which could be ascribed to the conduct of the plaintiff, whether imprudent or not, when viewed from the standpoint of ordinary prudence. This is going too far, and we think that the instructions of the circuit judge were in accord with the correct rule. The subject was discussed in the recent case of Reed v. City of Detroit (Mich.) 65 N. W. 967. We are asked to direct a new trial upon the ground that the jury awarded excessive damages, but we cannot say that this is conclusively shown. The judgment is therefore affirmed.

LONG, C. J., did not sit. The other justices concurred.

HYNES v. HICKEY.

(Supreme Court of Michigan. April 28, 1896.)

APPEAL—OBJECTION TO EVIDENCE—INSTRUCTION—BURDEN OF PROOF.

1. An objection to a question as "incompetent" is too general to raise any question for review unless the real objection is apparent.

2. In an action to recover for a failure to properly feed and care for horses, evidence of their being in bad condition when taken from defendant, through lack of food, cast on defendant the burden of proving other cause for their condition.

Error to circuit court, Saginaw county; Eugene Wilber, Judge.

Action by Thomas Hynes against James Hickey. Judgment for plaintiff, and defendant brings error. Affirmed.

W. A. Burritt, for appellant. James H. Davitt, for appellee.

GRANT, J. The defendant agreed with the plaintiff to feed and properly care for a mare and colt for a certain length of time. Defendant received and kept them. Plaintiff paid the consideration agreed upon, and afterwards brought this suit to recover damages for the alleged failure to feed and care for them as the contract provided. Plaintiff received verdict and judgment for $25.

Two errors are assigned:

1. Plaintiff was asked the breed of the mare. To this defendant's counsel said, "Objected to as incompetent." The objection was not sufficiently specific, and cannot be considered, since the ground of the objection was not apparent. Stevens v. Hope, 52 Mich. 65, 17 N. W. 698; Rivard v. Rivard (Mich.) 66 N. W. 686, and authorities there cited.

2. Plaintiff introduced evidence tending legitimately to show that the animals were returned in bad condition, and that this was due to want of proper care and food. It was not error to instruct the jury that the burden of proof was then cast upon the de-

fendant to show other cause, if there were any, for their bad condition. Collins v. Bennett, 46 N. Y. 490.

Judgment affirmed.

LONG, C. J., did not sit. The other justices concurred.

LEWIS v. BELL.

(Supreme Court of Michigan. April 28, 1896.)

WITNESS—COMPETENCY OF EXPERT—INSTRUCTIONS.

1. The testimony of a witness that he had been employed in a stable, containing 40 horses, for two years and a half, and had "watched the symptoms of horses," did not qualify him to give an opinion as an expert as to the cause of the death of a horse.

2. An instruction is not erroneous because it states to the jury a matter of common knowledge.

Error to circuit court, Wayne county; Willard M. Lillibridge, Judge.

Action by Oscar H. Lewis against John N. Bell. Judgment for defendant, and plaintiff brings error. Affirmed.

Turner & Crawford (James M. Goodell, of counsel), for appellant. Fraser & Gates, for appellee.

GRANT, J. Defendant hired from the plaintiff, a livery stable keeper in Detroit, a team of horses, to drive around the city. He used them three hours, and, when returned, they were in a very weak condition. One died the same day, and the other the next. Plaintiff instituted this suit, claiming that the defendant had failed to properly drive and to take due and proper care of the horses, and that their death resulted in consequence. The evidence on the part of the defense tended to show that the horses were properly driven, and that they died from an overdose of medicine administered a day or two before, namely, a ball containing 3 drams of aloes, 1½ drams of calomel, and some gentian. The defendant had verdict and judgment.

Two errors are assigned:

1. A witness for the plaintiff was asked his opinion as to what caused their death. Objection was made to this that the witness had not shown sufficient experience or knowledge to justify his opinion. The ruling was correct. The witness was not shown to have had any skill or experience in the diseases of animals. He had been employed in a stable for 2½ years, where he had the superintendence of 40 horses, and said he had "watched the symptoms of horses." This expression, whatever it may mean, did not show sufficient knowledge to render his opinion of any value.

2. Complaint was made because the court, in its instruction, used the following language: "Now, we all know that we have driven horses that have given evidence of scouring, and have driven them to the journey's end, and come back safely." The judge stated a matter of common knowledge, and immediately followed it by instructing the jury that if they should find that the "scouring was such that an ordinary man, with ordinary sense and judgment, would know that it was unsafe to proceed, then it was the duty of the defendant to have turned around, and placed the horses somewhere." The instruction was correct.

Judgment affirmed.

LONG, C. J., did not sit. The other justices concurred.

BALDWIN v. SCHIAPPACASSE.

(Supreme Court of Michigan. April 28, 1896.)

STATUTE OF FRAUDS—SALE OF LANDS—CONTRACT BY AGENT—PAROL AUTHORITY—RATIFICATION.

1. A paper purporting to express the terms of sale of real property is within the statute of frauds when signed by the vendor's agent, whose sole authority to make the sale rests in parol.

2. After the withdrawal of the intending purchaser under an unauthorized contract of an agent, the vendor cannot bind him by a ratification of the contract.

Appeal from circuit court, Wayne county, in chancery; Robert E. Frazer, Judge.

Bill by Stephen Baldwin against Louis Schiappacasse on an agreement for sale of lands. From a decree in favor of defendant, plaintiff appeals. Affirmed.

Griffin & Warner (F. A. Baker, of counsel), for appellant. Bowen, Douglas & Whiting (William H. Wells, of counsel), for appellee.

GRANT, J. The bill of complaint in this case is based upon the following instrument:

"Detroit, Michigan, February 25th, 1893. Received of Louis Schiappacasse $1,000, part of the purchase of the following described property, to wit: Lots 1, 2, 3, 4, 5, 10, 11, 12, and 13, part of Youngblood's subdivision of part of the southeast quarter of section eleven of town 1 south, of range eleven east, excepting lots 1 and 328 to 350, inclusive, of plats known as 'Palmer Park Subdivision'; said exception fronting 18.85 feet on Woodward avenue, extending along the Six Mile road to the Kelly road, and fronting on the Kelly road 120 feet, which I have sold him for Stephen Baldwin, Esq., subject to said plat, on the following terms: Price $100,000; $24,000 more cash to be paid on examination of abstract on, say, March 10, 1893; balance to be paid as follows: $500 in one year, and $70,000 in five years, from date of deed, to be secured by purchase-money mortgage, and to bear interest at six per cent. per annum, payable half-yearly. J. W. Simcock.

"I agree to buy the foregoing property, on the terms named. L. Schiappacasse."

The bill alleges that, by this document, a sale was made, and that complainant has a vendor's lien for the purchase price; prays

for a sale of the property, and a personal decree against the defendant for the residue. The answer denies that any valid contract was made with Mr. Simcock as the agent of complainant, or that complainant ratified the act of Simcock in making such alleged contract. The sole authority which Mr. Simcock had, if he had any, rested in parol. The complainant, some days prior to February 25th, met Mr. Cameron Curry, a real-estate broker, in the street, and told Mr. Curry that his land was for sale, and wanted to know if he could find a purchaser. Mr. Simcock was interested with Mr. Curry at that time in other property matters, and he spoke to Mr. Simcock about selling the complainant's land. The price fixed was $100,000. The contract was not signed by the complainant, nor by an agent authorized by writing. The authority, whatever it was, rested entirely in parol. It needs no citation of authorities to show that this contract was void under the statute of frauds, and did not bind either complainant or defendant, until the complainant had ratified the act in some manner which would take it out of the statute. In fact, Simcock had not even verbal authority to fix the terms provided in this contract. The check was handed to complainant on the evening of February 25th, but this was not sufficient compliance with the statute. He, in fact, did not then accept the contract or ratify the act of his alleged agent. On the contrary, he insisted upon other terms; and, on the 27th day of February, Mr. Simcock went to the defendant with a written statement of terms, which were insisted upon by Mr. Baldwin, different from those in the contract. The defendant and those interested with him refused to accept these terms. Shortly after, an interview was had between complainant and defendant and other parties interested. At that interview, after considerable talk about the terms, complainant declared that, if the deal was not fixed up by 5 o'clock of that day, he should call the deal off. To this the defendant replied, "If that is so, all right," and the parties separated. After this, complainant tendered a deed, and signed a paper ratifying the act of Mr. Simcock, and handed it to the latter. This latter document, however, was never shown to the defendant, and, of course, was not binding upon him. Dickinson v. Wright, 56 Mich. 42, 22 N. W. 312.

Until complainant had placed himself in such a position that defendant could enforce the contract against him, he was not in position to enforce it against the defendant. Until that was done, there was in fact no contract binding upon either party, and the defendant was at liberty to withdraw. Pom. Cont. § 166; Duvall v. Myers, 2 Md. Ch. 405; Bodine v. Glading, 21 Pa. St. 50. After such withdrawal, the complainant could not bind the defendant by any act of ratification. The paper executed by Simcock and the defendant was not a continuing offer to purchase, which might at any time be accepted by the complainant. It purported to express the terms of an agreement of sale, void because there was no written authority to make it, and incapable of being ratified after the refusal of the defendant to be bound by it. It is evident from the testimony of Simcock, the defendant, and the other parties present when it was executed, that it was not intended to express all the terms of the sale, but was only a preliminary contract. It was contemplated and understood that provisions were to be made for the release of lots as they should be sold by the defendant and those interested with him. These and other provisions were to be inserted in the final papers which were to be between complainant and all these parties, and not with defendant alone. If the instrument had been signed by the complainant, or if Simcock had been authorized in writing to sign it, other important questions would arise, which, in the view we take of the case, it is unnecessary to discuss. The decree is affirmed, with costs.

LONG, C. J., did not sit. The other justices concurred.

MILLER v. BROOKS.

(Supreme Court of Michigan. April 28, 1896.)

ASSIGNMENT OF CONTRACT—MISTAKE—RECOVERY OF CONSIDERATION.

Plaintiff averred that defendant stated that he had been advised by attorneys that a contract with third persons, assigned to plaintiff for a valuable consideration, was a lien on certain property, "practically a chattel mortgage," and that, in taking the assignment in this belief, "a mistake was made, through which she was injured." *Held* that, in absence of averments of fraud, plaintiff could not recover from defendant the consideration for the assignment.

Error to circuit court, Berrien county; Orville W. Coolidge, Judge.

Action by Ionia Miller against Perry Brooks to recover the consideration for an assignment of a contract. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Potter & Potter and Charles N. Sears, for appellant. Hammond & Hammond, for appellee.

HOOKER, J. Brooks was the owner of a livery barn, and a lease of the ground upon which it stood. He made a written contract with Vincent and Lawrence to sell them the barn for $650, the rent of the ground being paid to May, 1894, Vincent and Lawrence to pay rent falling due thereafter to McCord, the owner of the land. $184.50 was paid on delivery of the contract. The remainder of the consideration was to be paid in monthly installments. Some weeks after the contract was made, Brooks made an exchange of property with the plaintiff, receiving a small

farm, for which he gave a house and lot, and assigned the contract made with Vincent and Lawrence. The contract was valued at $465, in the trade, that sum being paid upon it. The plaintiff also took from Brooks an assignment in writing of the lease. The exchange of property was negotiated by the plaintiff's husband, who was her agent. The defendant told him that an attorney at Niles advised him that the contract with Vincent and Lawrence constituted a lien upon the barn, and he also told him that, if Vincent and Lawrence did not pay up, he could take possession of the barn The plaintiff's husband took the writing to an attorney, the defendant permitting him to take it, for the purpose of getting counsel. He stated that his attorney advised him that the contract was perfectly good for $465, and that he believed and acted upon this advice. It is asserted, however, that Vincent and Lawrence had sold the barn to one Cribbs, who had promised to pay Brooks. The plaintiff's husband put a lock on the barn, but other parties, claiming to own the barn, took it off. He was subsequently advised by other counsel that he could not hold the barn, and it was finally torn down and removed. Thereupon this action was brought to recover the sum of $465, and the plaintiff recovered. The case seems to have been based on the representation alleged to have been made by the defendant, viz. that the writing constituted a lien upon the barn. Counsel for the plaintiff disavows a claim of fraud, and the declaration does not allege fraud; but the plaintiff asserts that a "mistake was made, through which she was injured," viz. that it was stated by the defendant to the plaintiff's husband that he had been advised, by Col. Bacon and other lawyers, that the writing constituted a lien on the barn, and was "practically a chattel mortgage." It does not appear that he was not so advised, or that he did not believe it. The plaintiff seems to have misunderstood the legal effect of the writing, which her agent saw, and upon which advice of counsel was taken and acted upon, on her behalf. No fraud was alleged, and we see no ground upon which her judgment can be sustained. The court should have directed a verdict for the defendant, as requested. The judgment is reversed, and a new trial ordered.

LONG, C. J., did not sit. The other justices concurred.

CODDE v. MAHIAT.

(Supreme Court of Michigan. April 28, 1896.)

EQUITY—NEW TRIAL—RES JUDICATA.

A bill in equity to obtain a new trial and for relief against a judgment will not be entertained after motion for new trial has been denied by the court which rendered the judgment, and its denial affirmed by the court of last resort. Gray v. Barton, 28 N. W. 813, 62 Mich. 186, followed.

Appeal from circuit court, Wayne county, in chancery; Willard M. Lillibridge, Judge.

Bill by August Codde against Mary Mahiat to set aside a sale and judgment, and to obtain a new trial. From a decree sustaining a demurrer to the bill, complainant appeals. Affirmed.

The defendant, Mahiat, obtained judgment against the complainant for breach of promise of marriage, which was affirmed in this court. Mahiat v. Codde, 64 N. W. 194. Upon appeal to this court, complainant gave no bond to stay execution. Execution was issued; some real estate of the complainant levied upon, and sold. After the affirmance by this court, complainant filed this bill in equity to set aside the sale and judgment, and to obtain a new trial. The basis upon which he seeks relief is that the verdict was obtained by perjury on the part of the defendant. He now claims to have discovered new evidence, to the effect that the defendant stated to other parties that she was not engaged to complainant, had no love or affection for him, and would not marry him. Attached to the bill are two affidavits, in which the affiants make oath that they heard her make such statements. A demurrer was interposed, sustained, and the bill dismissed.

Oscar M. Springer (H. H. Hatch, of counsel), for appellant. William Stacey, for appellee.

GRANT, J. Gray v. Barton, 62 Mich. 186, 28 N. W. 813, rules this case. It is so nearly identical in its facts and circumstances with this that we deem any further statement or discussion unnecessary. The decree is affirmed, with costs.

LONG, C. J., did not sit. The other justices concurred.

BEEKMAN v. SYLVESTER et al.

(Supreme Court of Michigan. April 28, 1896.)

JOINT DEBTORS—JUDGMENT—DISCHARGE—ACTION ON JUDGMENT.

1. Under statutory provisions for the discharge of one of the joint debtors without releasing the others from their ratable proportions of the debt, 2 How. Ann. St. § 7784, permits the clerk of the court to discharge a judgment, as to the released debtor, upon filing the proper evidence. *Held*, that such filing and discharge are not a prerequisite to a release, and that a release may be shown on the trial of an action brought to enforce the judgment.

2. Where plaintiff's action is against three joint defendants, two of whom show a valid discharge, and no discontinuance is taken as to them, a judgment in favor of plaintiff cannot be sustained against the third defendant.

Error to circuit court, Alpena county; Robert J. Kelley, Judge.

Assumpsit by John G. Beekman against Lyman J. Sylvester and others to recover the amount due on a judgment. From a judgment in favor of plaintiff, defendants bring error. Reversed.

J. D. Turnbull, for appellants. Joseph Cavanagh, for appellee.

HOOKER, J. On February 13, 1885, a circuit court judgment was recovered by the plaintiff and one Bishop against the defendants Lyman J. and Rose Sylvester and William J. Carney. Action was commenced against all of the defendants by declaration filed February 11, 1895. The return shows the service to have been made upon each defendant on February 13, 1895. The defendants moved for a correction of the sheriff's return, claiming that the declaration was not served until February 14th, and pleaded the general issue, with notice of the statute of limitations. The parties stipulated to leave the question of the date of service to the jury, and, if they should find that the declaration was served on February 14th, the return was to be amended. They do not appear to have so found, but rendered a verdict for the plaintiff. As there was evidence on both sides of the question, we cannot disturb the verdict upon this ground.

The defendants offered in evidence a release reading as follows: "State of Michigan, County of Alpena. The Circuit Court for the County of Alpena. Jesse P. Bishop & John G. Beekman, Assignees, etc., vs. Rose Sylvester, Lyman J. Sylvester, & William J. Carney. For valuable consideration to me in hand paid, I hereby release the above-named Lyman J. Sylvester and Rose Sylvester, two of the defendants herein, from any and all liability in and to and under the judgment heretofore rendered against said defendants in this case; and I hereby agree to and with said Lyman J. Sylvester and Rose Sylvester that at no time in the future shall they, said Lyman J. Sylvester and said Rose Sylvester, become liable to pay said judgment, but to hold said other defendant for the amount due on said judgment. John G. Beekman, Assignee Alpena Lumber Co." The plaintiff contends that this release is not admissible as a defense, because not duly filed with the clerk of the circuit court of the county of Alpena, under 2 How. Ann. St. § 7784. On the other hand, counsel for the defendants contend that the release was valid between the plaintiff and the Sylvesters, and that, while the statute does not apply, it released Carney, under the common-law rule, inasmuch (it is said) as, under our rule, a release is good, though not under seal. See opinion of Morse, J., in Seligman v. Pinet, 78 Mich. 57, 43 N. W. 1091. We disagree with counsel for the plaintiff in his construction of section 7784, above quoted. The preceding section provides for the discharge of one partner after dissolution, by settlement, without discharging the remaining partner from his ratable proportion of the debt, and the provision is made applicable to joint debtors by section 7787. Section 7784 permits the clerk to discharge a judgment, as to the released debtor, upon filing the proper evidence; but we think such filing and discharge are not a prerequisite to release, which may be shown upon the trial of an action brought to enforce the judgment. Counsel for the defendant asserts a willingness to agree with counsel for the plaintiff that this is not a good statutory release, though he says that he does not base it upon the reasons given. As none are given by him, and we think of none why this statute does not cover the case, we feel constrained to hold that the Sylvesters were released from liability, and that Carney was released in part, and that, at most, he could have been held liable for one-third of the face of the judgment, and interest. But as the plaintiff's action was planted against three defendants and he did not discontinue, under rule 71, as to the Sylvesters, he is not in a position to sustain his judgment, even against Carney, as he was entitled to no judgment, if not against all. Mace v. Page, 33 Mich. 35; Winslow v. Herrick, 9 Mich. 380; Ballow v. Hill, 23 Mich. 60; Larkin v. Butterfield, 2[illegible] Mich. 254; Anderson v. White, 39 Mich. 13[illegible]; Detroit v. Houghton, 42 Mich. 459, 4 N. W. 171, 287; Munn v. Haynes, 46 Mich. 140, [illegible] N. W. 136; Post v. Shafer, 63 Mich. 85, 29 N. W. 519; Seligman v. Gray, 66 Mich. 341, 3[illegible] N. W. 510. The judgment is reversed, and a new trial ordered.

LONG, C. J., did not sit. The other justices concurred.

MICHIGAN TRUST CO. v. ADAMS.

(Supreme Court of Michigan. April 28, 189[illegible])

FRAUDULENT CONVEYANCE—WHAT CONSTITUTES—UNRECORDED DEED.

Where a deed conveying certain real estate to grantor's wife was duly executed and delivered, grantor being at the time perfectly solvent, and it appeared that grantor, though he collected the rents from the property, accounted for them to his wife, the fact that the deed was inadvertently left unrecorded for a number of years does not tend to show fraudulent intent.

Appeal from circuit court, Kent county, in chancery; Allen C. Adsit, Judge.

Action brought by the Michigan Trust Company, as administrator of the estate of Elisha M. Adams, against Edward M. Adams, to set aside a deed on the ground of fraud. There was judgment for plaintiff, and defendant appeals. Reversed.

Taggart, Wolcott & Ganson, for appellant. More & Wilson, for appellee.

HOOKER, J. In 1871 Elisha M. Adams united with Francis D. Boardman in the execution of a bond to secure payment to the Michigan Asylum for the Insane, at Kalamazoo, for care and maintenance to be afforded to one George P. Boardman, an insane patient, and son of Francis D. Boardman. Both Francis D. Boardman and Adams were possessed of considerable property. In 1875 Adams conveyed the premises in co-

troversy to his wife, who neglected to have her deed recorded until after his death, which occurred in 1884. Boardman died in 1882. Subsequently the land in controversy was conveyed to the defendant, her son, through several voluntary conveyances. Boardman is claimed to have been insolvent at the time of his death, in 1882. In 1893 the treasurer of the asylum caused the appointment of the complainant as administrator of the estate of Adams, and filed a claim in probate court for services rendered in the care and maintenance of George P. Boardman before Adams' death, upon the allowance of which the bill in this case was filed, attacking defendant's title, and seeking to have the property applied upon the claim, and the circuit court granted the relief prayed. In our opinion, the testimony shows an absence of fraudulent design, when the deed was made, notwithstanding the failure to record the deed. It appears that Adams had ample property with which to pay his debts, and a gift, under such circumstances, will not be set aside, in the absence of evidence of a fraudulent intent. We think the case should not be ruled by that of Fetters v. Duvernois, 73 Mich. 481, 41 N. W. 514, upon which counsel for complainant relies. It is radically different, in essential features. In that case the conveyance was a quitclaim deed, which the parties intended to operate as a will, which was probably never delivered, and, upon its face, was but the quitclaim of a future interest. It was voluntary, and not to be used in case of the grantor's recovery. In this case the instrument was a warranty deed of a present interest. Its execution was accompanied by delivery, and it was withheld from record through inadvertence. It does not appear that the possession was retained by the grantor to the exclusion of his wife, and, although he collected rents, he is shown to have accounted to her for them. The following cases cited by counsel seem to us to cover the points involved: Cutter v. Griswold, Walk. Ch. 437 (see cases cited in note to annotated edition); Page v. Kendrick, 10 Mich. 299; Gale v. Gould, 40 Mich. 515; Fraser v. Passage, 63 Mich. 556, 30 N. W. 334; Wooden v. Wooden, 72 Mich. 353, 40 N. W. 460; Hinde's Lessee v. Longworth, 11 Wheat. 200, 210; Lloyd v. Fulton, 91 U. S. 479; Ware v. Purdy (Iowa) 60 N. W. 526. The decree is reversed, and bill dismissed, with costs of both courts.

LONG, C. J., did not sit. The other justices concurred.

MUTUAL FIRE INS. CO. v. PHOENIX FURNITURE CO.

(Supreme Court of Michigan. Dec. 31, 1895.)

FOREIGN JUDGMENTS—CONCLUSIVENESS.

Under Const. U. S. art. 4, § 1, declaring that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," a decree of a court of Illinois, ascertaining the assets and liabilities of a corporation, and decreeing the assessments against the members, who were not parties to the suit, required to pay its liabilities, the decree being, in Illinois, conclusive against the members, is also conclusive against the members in an action in Michigan to recover such assessment from a member. McGrath, C. J., and Long, J., dissenting.

Error to circuit court, Kent county; William E. Grove, Judge.

Action by the Mutual Fire Insurance Company against the Phœnix Furniture Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Fletcher & Wanty for appellant. D. J. Schuyler and Mark Norris, for appellee.

GRANT, J. After a full argument upon the rehearing of this cause, we are satisfied that we were in error in reversing the judgment.[1] The testimony was not returned, and the case is before us on findings of fact and law, to which no exceptions were taken. The sole question, therefore, is, do the facts found support the judgment? We held, in Insurance Co. v. Merrill, 101 Mich. 393, 59 N. W. 661, that the defendants, under such a note, were not liable to an assessment for unearned or return premiums. That case would, of course, control this, unless the decree of the Illinois court is conclusive upon the courts of this state. The constitution of the United States declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." Article 4, § 1. In the early case of Mills v. Duryee, 7 Cranch, 481, it was held that the decrees and judgments of the courts of one state were conclusive in the courts of sister states. This case has since been uniformly followed. Where a court has jurisdiction of the cause and of the parties, its judgment is conclusive in other courts, and the only remedy is by direct proceeding in the original cause. Hanley v. Donoghue, 116 U. S. 4, 6 Sup. Ct. 242; Cole v. Cunningham, 133 U. S. 111, 10 Sup. Ct. 269; Bonesteel v. Todd, 9 Mich. 371. It is conceded that as against the corporation itself, and the directors and officers thereof, the rule applies. It is, however, contended that it does not apply to a stockholder of such corporation who is not made a direct party to the original suit. That is the question in this case. We are not dealing with a case where a stockholder is interposing the defense of payment, or any other defense which was not passed upon in the original suit against the corporation. In such a case there is no judgment or decree of the court of a sister state which other courts must recognize. But the very point now urged as a defense was involved and determined by the Illinois court. This was an Illinois contract. These notes were choses in action,

[1] No opinion filed on original hearing.

were first in possession of the company in Illinois, were turned over by it to the receiver, and were under the direct control of the Illinois courts. That court entered a decree, upon evidence placed before it, determining the amount of assets and debts, and the amount of the assessment necessary to liquidate its liabilities. If every stockholder may now contest this decree, the difficulty thus thrown in the way of an orderly and practical settlement of the affairs of the insolvent corporation is apparent. Different courts might adopt different rulings upon the amount of the assessment. We think the better doctrine is that each stockholder or member of the corporation is an integral part thereof, and is represented in such suit through the corporation itself, and that such decree is binding and conclusive upon him. Two courts have so held in regard to the case now under consideration. Rand, McNally & Co. v. Mutual Fire Ins. Co., 58 Ill. App. 528; Parker v. Mill Co. (Wis.) 64 N. W. 751. In the latter case two points were raised: First, that the receiver in Illinois could not sue in the courts of Wisconsin; and, second, that the assessment was inequitable and unjust, and hence should not be enforced. The distinction beween the rights of property situated in other states, and those of choses in action, is there very clearly pointed out. Upon the first point the court say: "There is no question here of transfer of property in this state. No such transfer was attempted. The property in question—that is, the defendant's note and its liability to pay assessments—was in Illinois, at the office of the company. They were choses in action, and their situs was at the residence of the company." Upon the second point the court say: "If a judgment is conclusive in the state where rendered, it is conclusive here. The decree by which the assessment in question was made was undoubtedly conclusive on the members or policy holders of the defunct company, unless attacked in a direct proceeding, notwithstanding they were not present when it was rendered. We can come to no other conclusion than that we are bound, under the constitutional requirement of 'full faith and credit,' to hold that the decree making the assessment in question, being conclusive in Illinois upon all members and policy holders, unless attacked by direct proceeding, is conclusive here, and not open to collateral attack."

The point appears to be expressly decided in Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739. The proceedings in that case were substantially the same as in this. The defense was that the stockholder was not a party to the suit, that the cause of action was barred by the statute of limitations, that he was not responsible on 150 shares, and that interest should not have been allowed. The stockholder was sued in North Carolina. A decree had been rendered in a court of chancery in Virginia, which had ascertained the extent of the liabilities and assets of the corporation, and decreed the assessment required to pay its liabilities. The court held the decree conclusive, and, in deciding it, speaking through Chief Justice Fuller, say: "A stockholder is so far an integral part of the corporation that, in view of the law, he is privy to the proceedings touching the body of which he is a member,"—citing Sanger v. Upton, 91 U. S. 56. The same question was again before the court in Glenn v. Liggett, 135 U. S. 533, 10 Sup. Ct. 867, and the same conclusion reached, quoting from Hawkins v. Glenn. The same was held in Insurance Co. v. Langley, 62 Md. 211. The learned counsel for the defendant cite Chandler v. Brown, 77 Ill. 338, and Insurance Co. v. Gulick, 102 Ill. 41. These cases are distinguished from a case like the present in Telegraph Co. v. Gray, 122 Ill. 630, 14 N. E. 214. The two former cases were based upon a statute which provided that stockholders should be made parties to the suit. Rev. St. Ill. 1889, c. 32, §§ 1–40. The decree of the Illinois court in this case was based upon an act in regard to the dissolution of insurance companies. Rev. St. Ill. 1889, c. 73, §§ 103–111. This does not provide for any service upon or notice to the stockholders or members, but confers the entire jurisdiction in such cases upon the courts. Upon the question of notice to stockholders, see Wardle v. Cummings, 86 Mich. 400, 49 N. W. 212, 538. Mr. May, in his work on Insurance (vol. 2, § 557), says "the receiver of an insolvent corporation stands upon no better footing" than would the directors in making an assessment, and cites Jackson v. Roberts, 31 N. Y. 304; Embree v. Shideler, 36 Ind. 423.

If these decisions sustain the rule contended for, we could not follow them, as we think they are opposed to the clear weight of authority. The New York statute is clearly different from that in the present case. It reads as follows: "In case the corporation, in regard to which a receiver has been or shall hereafter be appointed, is or shall be a mutual insurance company, such receiver shall have full power under the authority and sanction of the court appointing him, to make all such assessments on the premium notes belonging to such corporation, as may be necessary to pay the debts of such corporation, as by the charter thereof the directors of such corporation have authority to make; and the notice of such assessment may be given in the same manner as is provided in the charter of said company for the directors of said company to give; and the said receiver shall have the like rights and remedies upon and in consequence of the non-payment of such assessments, as are given to the corporation or the directors thereof by the charter of said corporation." Laws 1852, c. 71. It thus appears that the power of the receiver was expressly limited to the power of the board of directors, and to the modus operandi of collecting the assessments. In Embree v. Shideler, it ap-

peared, upon the face of the complaint, that neither the receiver, nor the court to which he had reported his action, had examined and determined upon the validity of the claims against the company. This was expressly required by the charter of the company. It was therefore said that "the assessment is the act of the receiver, and in and with him is the authority to act in the premises." The decree in the present case was erroneous only in that it included some items which, under Insurance Co. v. Merrill, this court would have excluded. Judgments and decrees cannot be attacked collaterally because they include items which courts, other than those by whom they were rendered, might hold to be illegal. See Mor. Priv. Corp. § 822. The judgment must be affirmed.

MONTGOMERY and HOOKER, JJ., concurred with GRANT, J.

McGRATH, C. J. (dissenting). After reargument of this cause, I see no good reason for a change of opinion upon the main issue involved. The case presents two questions: First, whether the decree of the Illinois court is res adjudicata as to the amount of the assessment directed; and, second, whether we are bound, under the constitutional requirement of "full faith and credit," to regard that decree as conclusive.

1. There are a number of authorities which hold that, in a proceeding against a stockholder, under a statute which makes him liable to creditors, and based upon a judgment against the corporation, such judgment is prima facie evidence of the indebtedness of the corporation. Bank v. Warren, 52 Mich. 557, 18 N. W. 356; Hoagland v. Bell, 36 Barb. 57; Hastings v. Drew, 76 N. Y. 9; Schaeffer v. Insurance Co., 46 Mo. 248. Other authorities hold that the judgment is conclusive, and cannot be attacked, except for fraud. Corse v. Sanford, 14 Iowa, 235; Grund v. Tucker, 5 Kan. 70; Coalfield Co. v. Peck, 98 Ill. 139; Conklin v. Furman, 8 Abb. Prac. (N. S.) 161; Milliken v. Whitehouse, 49 Me. 527; Henry v. Railroad Co., 17 Ohio, 187; Wilson v. Coal Co., 43 Pa. St. 424; Bank v. Chandler, 19 Wis. 457; Marsh v. Burroughs, 1 Woods, 463, Fed. Cas. No. 9,112; Stephens v. Fox, 83 N. Y. 313. There is still another class of cases which holds that a stockholder, in the absence of a statute requiring it, is not a necessary party to proceedings to wind up the affairs of the corporation, determine its insolvency, and appoint a receiver; that a decree of court determining such matters, declaring the necessity for an assessment upon stockholders or for the collection of unpaid subscriptions to the capital stock, and directing the collection thereof, is not open to attack in a suit brought to enforce the collection of the assets of the corporation, the unpaid subscriptions to the capital stock, or assessments so ordered. Glenn v. Williams, 60 Md. 93; Insurance Co. v. Langley, 62 Md. 196; Sanger v. Upton, 91 U. S. 56; Glenn v. Springs, 26 Fed. 494; Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739; Lehman, Durr & Co. v. Glenn, 87 Ala. 618, 6 South. 44; Gilchrist v. Land Co., 21 W. Va. 115. The cases, with many others, recognize the rule, but some of them carry the rule to an extent which is not warranted by the principle which underlies the rule, and others use language which is inapplicable to the facts of the particular case before the court. A judgment against a corporation is decisive, as against a stockholder of that corporation, because the proceeding in which it was obtained was one between the contracting parties,—the parties who had the legal right to determine that question.

The only question, then, open, is the amount due from the stockholder to the corporation, or, if he is liable by reason of a statute, the extent of his liability under the statute. If he is exempted from certain classes of claims against the corporation, such exemption may be shown. If the statute imposes a liability as for labor claims, the character of the claim must be established. In Wilson v. Coal Co., supra, the stockholders were made personally liable for all debts except loans, and the court held that defendant might show either that he was not a stockholder, or that the debt was a loan. In other words, the judgment is conclusive as to the amount due from the corporation to the creditor, but is only conclusive as to the stockholder when his liability is established.

As is said in Union Bank v. Wando Min. & Manuf'g Co., 17 S. C. 339, 359: "There can be no doubt of the rights of the stockholders in this action to set up any available defense that goes to the question of their liability upon the note upon which judgment has been obtained against the company. The defendants in this action were not, as individuals, parties to the action in which judgment was recovered. That suit was against the corporation, which, in law, is a distinct person from the individual members which compose it. The ground of the liability of the company may not prevail against the stockholders. For it is only when a judgment is obtained against the company upon debts of a certain description, and upon which suits have been brought within a specified time, that the stockholders are liable. In this action it is, therefore, necessary to establish that the conditions of the liability of the stockholders exist. To do this necessarily involves an inquiry in this action into the grounds of the stockholders' liability. Of course, then, it is competent for these defendants to interpose any defense that goes to the question of their liability upon the notes upon which the judgments were obtained."

In Marsh v. Burroughs, supra, it was contended that the unpaid subscriptions of capital stock were not assets for the payment of debts, either legal or equitable; that they existed merely as possibilities; that they were not a debt due, having never been called in;

that no one could call them in but the directors, and in them it was a mere discretionary power, which could not be exercised either by the assignee, the receiver, or the court itself, and could not be assigned; that said unpaid subscriptions were no part of the capital stock of the bank; and that the real capital stock was what had been called in. The court held, however, that the amount subscribed, and not the sums actually paid in, was the capital stock; that the authority to make calls was not a mere power vested in the bank, to be exercised or not, in its discretion, but that it was a right; that the mode of calling it in prescribed by the charter was a mere form of remedy given to the bank to enforce the subscription, and that unpaid subscriptions were corporate property, constituting a trust fund which could be reached by creditors.

In Sanger v. Upton, supra, it was held that the order of the bankruptcy court as to the right of the assignee to bring suit was conclusive. The court refers to the application of the rule to an order made by the comptroller of the currency, citing Kennedy v. Gibson, 8 Wall. 505, wherein the court say: "It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or any part, and, if a part, how much, should be collected. These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it. Its validity is not to be questioned in the litigation that may ensue. He may make it at such time as he may deem proper, and upon such data as shall be satisfactory to him." The court then says: "It was competent for the court to order payment of the stock, as the directors, under the instructions of a majority of the stockholders, might, before the decree in bankruptcy, have done. The former is as effectual as the latter would have been." Other questions affecting the liability of the stockholders were raised, and the court determined them.

In Hall v. Insurance Co., 5 Gill, 484, the question arose upon the admissibility in evidence of the equity proceeding in which the order directing the call had been made, and the court held that the order for the institution of the suit was conclusive.

In Glenn v. Williams, supra, it was held that the chancery court of Richmond had power and jurisdiction to make assessments upon the unpaid subscriptions to the capital stock to raise funds with which to pay its debts, and that the decree of the court determining and making an assessment upon the capital stock for such purpose was binding and effective upon stockholders not parties to that cause.

In Parker v. Mill Co. (Wis.) 64 N. W. 751, a demurrer was interposed to the complaint, on the ground of want of capacity in the plaintiff to sue. The court below sustained the demurrer, and the supreme court reversed that holding. There is no doubt of the correctness of that decision. That question is res adjudicata.

In Hawkins v. Glenn, supra, Mr. Chief Justice Fuller thus states the issues involved: Counsel for plaintiff in error contend that the decree of the Richmond chancery court making the call and assessment was void as against him, because he was not a party to the suit; that the cause of action was barred by the statute of limitations; that he was not responsible upon 150 shares of the stock; and that interest should not have been allowed from the date of the call, but only from the time of the filing of the complaint. While the learned chief justice does say, as to the determination of the Richmond chancery court, that the court may have erred in its conclusions, but its decree cannot be attacked collaterally, the court does not rest its decision upon the adjudication referred to, but proceeds to discuss the question at length, holding that, as between creditor and stockholder, the latter could not protect themselves from paying what they owe by setting up the default of their own agents.

It must be borne in mind that that case was one for an unpaid subscription to stock. It was a sum which was a part of the capital stock of the company,—a trust fund, held for the benefit of creditors, and the obligation to pay which could not be discharged, as against creditors, by the corporation itself. The contract to pay the sum sought to be recovered was one arising under the charter at the outset. It could not be affected, as to creditors, by the acts or laches of the corporation. In the present case the limit of the liability of the defendant member is not only expressed in the note upon which suit is brought, but in the charter of the corporation as well. No act of the corporation could extend that liability. Defendant pleads no release from his undertaking, nor does he seek to escape by reason of the laches of the corporation in their failure to enforce the contract, nor have creditors any demands upon defendant except such as arise from his undertaking. The receiver, on behalf of the creditors, is simply subrogated to the claim of the corporation against defendant. No assessment made by the corporation in excess of his liability would have been binding upon him. This is a proceeding against the stockholder as an adversary party. He has the same right to insist that the class of debts for which he has been assessed are not such as he contracted to pay as a stockholder would have, under our own statute, in respect to labor claims, if sued upon a judgment against the corporation.

2. In view of the conclusion reached, it is unnecessary to discuss the question as to whether the finding of facts supports plaintiff's contention that the note in question is an Illinois contract. No attempt was made to show that the charter and by-laws of the plaintiff corporation enlarged the defendant's liability. The adjudication which it is in-

sisted, is binding upon us, was not one involving the validity of a contract, or the validity or construction of a local charter, statute, or constitution; nor was it a question of construction, depending upon the intent of the parties, as affected, at the inception of the contract, by any fixed local rules of law; nor did it involve a rule of property. The federal judiciary act provides that the laws of the several states, except in given cases, shall be regarded as rules of decision in trials at common law in the courts of the United States; yet, at an early day, the supreme court of the United States held that this provision did not apply to the decisions of the state courts in the construction of ordinary contracts or on questions of general commercial law. Swift v. Tyson, 16 Pet. 1. And it has been held that the federal courts were not bound by decisions of the state courts construing and determining the legal effect of insurance contracts (Carpenter v. Insurance Co., 16 Pet. 495); nor by decisions of state courts as to rights of the parties to negotiable paper, such rights depending on the law of negotiable paper (Oates v. Bank, 100 U. S. 239; Railroad Co. v. National Bank, 102 U. S. 14); nor by a decision on the construction of a contract of carriage (Myrick v. Railroad Co., 107 U. S. 102, 1 Sup. Ct. 425); nor by a decision construing a deed by the rules of the common law (Foxcroft v. Mallett, 4 How. 353). See also, as to the application of this doctrine, cases cited in 23 Am. & Eng. Enc. Law, 40, 41. The question here presented is whether the determination of the Illinois court, made after the insolvency of the corporation, as to the legal effect of defendant's promise, is conclusive upon the defendant, and binding upon us. I think not. There was no law of place that attached to and formed a part of the contract at its inception. The judgment should have been for defendant, with costs of both courts.

LONG, J., concurred with McGRATH, C. J.

OYLER v. ROSS.

(Supreme Court of Nebraska. April 21, 1896.)

HIGHWAYS—ESTABLISHMENT—PROCEDURE—DEDICATION.

1. A petition is not essential to confer jurisdiction upon a county board to open section-line roads, under section 46, c. 78, Comp. St. The only limitation upon the discretion of the board in that respect is the fundamental one of compensation for private property taken or damaged. Rose v. Washington Co., 60 N. W. 352, 42 Neb. 1, followed.

2. An order of a board of supervisors instructing the county clerk to cause a section-line road to be surveyed, and enter such survey, when made, of record, is not an order for the opening of such section-line road, within the meaning of said section 46.

3. The evidence examined, and *held* to sustain the finding of the district court that the defendant in error had not dedicated certain real estate to the public for use as a highway.

(Syllabus by the Court.)

Error to district court, Saline county; Hastings, Judge.

Action by George H. Ross against Grant Oyler. There was a judgment for plaintiff, and defendant brings error. Affirmed.

J. H. Grimm and E. W. Metcalfe, for plaintiff in error. Hastings & McGintie, for defendant in error.

RAGAN, C. George H. Ross owned the S. W. ¼ of section 27, in township 6 N., and range 4 E. of the sixth P. M., in Saline county. He built a post and wire fence along the west side of said quarter section of land. The fence stood less than 33 feet east of the north and south section line dividing sections 27 and 28, in said township. Grant Oyler, without Ross' permission, tore down this fence, and drove over the cultivated grounds and crops of Ross. For tearing down the fence, and driving over his ground and crops, Ross sued Oyler for damages in the district court of Saline county. Ross had a verdict and judgment, to reverse which Oyler prosecutes to this court a petition in error. Oyler admitted the tearing down of the fence, and driving over the lands of Ross, but pleaded as a defense to the action that the land on which the fence stood, and over which he drove, was at that time a part of "a public road duly laid out and established by continuous use by the public long prior" to the date he tore down the fence.

1. On the 25th day of August, 1884, a number of gentlemen petitioned the board of supervisors of Saline county to establish a road extending north and south on the section line between sections 27 and 28 above mentioned. Thereupon the county clerk of said county appointed a commissioner to examine into the expediency of the proposed road and to report accordingly. The commissioner accepted the appointment, viewed the line of the proposed road, and made report to the supervisors that, in his judgment, it was expedient to establish the road petitioned for. Notice was duly given of all these proceedings, and a day fixed for the filing of claims for damages by reason of the proposed establishment of said road. Prior to the date fixed for parties to file their claims for damages, a large number of claims were filed with the county clerk of said county. A remonstrance was also filed against the establishment of the road prayed for in the petition. Appraisers were appointed to assess the damages sustained by adjoining proprietors in case the road should be established. These appraisers acted and filed their reports, and, upon a hearing of the petition and remonstrance, the board of supervisors made an order rejecting the petition. On the trial in the district court, Oyler offered in evidence a certified copy of the records of the board of supervisors of Saline county, showing the matters just above stated. This evidence the court excluded, and this action of the court is the

first assignment of error argued here. The certified copy of the records offered shows that all the proceedings were in due form, but the court did not err in refusing to admit this evidence, for two reasons: (1) The evidence was not relevant under the pleadings. The averment of the answer is that the land on which Ross' fence stood was a part of the public road, which the public had acquired by user. The plea was not that a public road had been laid out over the land of Ross by the authorities of Saline county, in pursuance of a petition and other proceedings provided for by chapter 78, Comp. St. And, (2) if such had been the plea, the evidence offered did not tend to prove it, as that evidence showed that the authorities of Saline county rejected the petition; and, so far as the record shows, they never did anything further in the premises.

2. After the rejection by the authorities of Saline county of the petition aforementioned, the board of supervisors of said county made the following order: "The clerk is instructed to cause the following described road, * * * running south on the section line between sections * * * 27 and 28, * * * * to be resurveyed; enter such survey, when made, in the proper record; and plat the same on the road plat book of the county." Oyler, on the trial of the case at bar, offered in evidence a certified copy of this order. The court excluded the evidence offered, and this action of the court is the second assignment of error argued here. Section 46, c. 78, Comp. St., so far as material here, provides, "The section lines are hereby declared to be public roads in each county in this state, and county boards of such county may, whenever the public good requires it, open such roads without any preliminary survey and cause them to be worked in the same manner as other public roads. * * *" The contention of counsel for plaintiff in error seems to be that since the north and south section line between sections 27 and 28 was, by statute, made a public highway, the order of the board of supervisors offered in evidence amounted to an order on the part of the board to open and work the road along said section line. We do not agree with this contention. The language of the statute is, "The county board of such county may, whenever the public good requires it, open such roads without any preliminary survey, and cause them to be worked in the same manner as other public roads." But the order offered in evidence is not an order of the board to any one to open and work the road along the section line between sections 27 and 28. The order, then, was irrelevant, under the pleadings, for the reason already stated, and it did not tend to prove that a public road had been ordered opened and worked between sections 27 and 28. We are not discussing the authority of the county board to make an order opening roads on section lines. There is no doubt but that the county boards have the authority, whenever, in their judgment, the public good requires it, to open and lay out public highways along the various section lines, and a petition is not essential to confer jurisdiction upon them for that purpose. The only limitation upon their discretion in the matter is the fundamental one of compensation for private property taken or damaged. Rose v. Washington Co., 42 Neb. 1, 60 N. W. 352. But the evidence offered by the plaintiff in error and excluded by the court, did not show, or tend to show, that a public road had ever been established on the north and south line between sections 27 and 28 by the board of supervisors, in pursuance of a petition filed with them for that purpose, nor that the board of supervisors of that county had ever ordered the road located along said section line by virtue of the statute to be opened and worked.

3. The final assignment of error argued is that the judgment rendered is contrary to the evidence and the law of the case. This argument is based on the contention that the evidence shows that, at the time Oyler tore down the fence of Ross, the public had acquired, by user, a public road over the lands on which the fence stood. The evidence shows that for some 15 or 20 years the public has traveled north and south along the section line between said sections 27 and 28; that this travel way is from 8 to 12 feet wide; that road overseers have sometimes done some work along this travel way, but no part of the fence torn down by Oyler was on this travel way; that Ross had been in possession of his land for some 8 years; that he and his grantors had always cultivated the land up to the line where the fence stood; that, at the time Oyler tore down the fence, the land east of it was planted to crops. Now, it may be that Ross and his grantors, by their conduct in permitting the public to pass and repass along the section line on this travel way, of the width of 8 or 12 feet, and by not exercising, or attempting to exercise, any control or dominion over such travel way, may be estopped from claiming that such travel way is not a public road. But there is no evidence whatever in the record before us which shows, or tends to show, that Ross had ever dedicated, or intended to dedicate, to the public, any part of the land on which his fence stood, or the land east thereof; and, had the jury found that he had dedicated such lands to the public for the purpose of a highway, the finding would have lacked support in the evidence. In Rube v. Sullivan, 23 Neb. 779, 37 N. W. 636, a party owning land, in fencing same, left a strip along the section line a rod or more in width, apparently for the use of a public road, and it was traveled as such, but there was no proof of dedication, or an intention to dedicate, any of the land within the inclosure; and the court held that "without such proof the jury would not be justified in

finding that any of the land within the inclosure had been dedicated to public use, and therefore a road overseer who removed the fence, as an obstruction to the highway, would be liable for the trespass." The judgment of the district court is affirmed. Affirmed.

NEBRASKA MOLINE PLOW CO. v. KLINGMAN et al.

(Supreme Court of Nebraska. April 21, 1896.)

ATTACHMENT—DISSOLUTION—REVIEW ON APPEAL—FRAUDULENT CONVEYANCE—EVIDENCE.

1. Where a motion to discharge an attachment on the ground that the facts stated in the affidavit are untrue is heard on conflicting evidence, the decision of the trial court on the motion will not be disturbed unless it is clearly against the weight of the evidence. Whipple v. Hill, 55 N. W. 227, 36 Neb. 720, followed.

2. The fact that a co-partnership, largely indebted, sells most of its property and its business to one of small means, in consideration of a small amount of cash and the purchaser's promissory notes, is a circumstance tending to show that the transaction was fraudulent, but not conclusive, nor, alone, sufficient, evidence that it was fraudulent.

(Syllabus by the Court.)

Error to district court, Webster county; Beall, Judge.

Action by Nebraska Moline Plow Company against O. C. Klingman and another, partners as Klingman & Co. An attachment issued and was levied, and from an order discharging the same plaintiff brings error. Affirmed.

Switzler & McIntosh, for plaintiff in error. M. A. Hartigan, for defendants in error.

RAGAN, C. In the district court of Webster county the Nebraska Moline Plow Company sued O. C. Klingman and A. D. McNear, a partnership doing business as Klingman & Co., at law, to recover $1,918, which the plow company alleged was owing to it from Klingman & Co. At the time of bringing this suit the plow company caused an attachment to be issued and levied upon a stock of goods consisting of buggies, wagons, and farming implements which the plow company alleged was the property of Klingman & Co. At the time the attachment was issued and the property seized, $275 only of the debt sued for, and for which the property was attached, was due. The district court, on motion of Klingman & Co., discharged this attachment, and to reverse that order the plow company prosecutes here a petition in error.

The plow company alleged in the affidavit made to procure the attachment that "said defendants have sold, conveyed, and otherwise disposed of their property with a fraudulent intent to cheat and defraud their creditors, and to hinder and delay them in the collection of their debts." The affidavit alleged that Klingman & Co. had done three things which amounted to a fraudulent disposition of their property with intent to defraud and delay their creditors: (1) That Klingman & Co. had executed a chattel mortgage for $900 on a portion of their stock of goods to a brother of one of the partners. (2) That Klingman & Co. had turned over to a bank in Webster county bills receivable, belonging to them, of the par value of $4,100. An examination of the evidence preserved in the bill of exceptions shows that these two averments of the affidavit are entirely without foundation. Klingman & Co. at no time, so far as the record shows, ever mortgaged any of their property to a brother of one of the firm, and the disposition made of the bills receivable of Klingman & Co. to the bank in Webster county was made to secure debts owing by Klingman & Co. to the bank. The third act—and the one relied on in the argument here—done by Klingman & Co. which the affidavit alleges was done for the fraudulent purpose of defrauding and delaying their creditors was that on the 24th day of July, 1893, they sold their stock of merchandise to one McClure. The sale of the stock of goods at that time to McClure is admitted, and we are thus brought to the consideration of the only question in the case, namely, does the evidence sustain the finding of the district court that this sale to McClure was not fraudulent, neither made nor accepted by the parties thereto with intent to defraud or delay the creditors of Klingman & Co.? Section 20, c. 32, Comp. St., provides: "The question of fraudulent intent in all cases arising under the provisions of this chapter shall be deemed a question of fact and not of law and no conveyance or charge shall be adjudged fraudulent as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration." This statute made the issue considered by the district court and the issue presented here only one of fact, namely, what was the motive—the intention—which actuated Klingman & Co. and McClure in making the sale? The evidence on behalf of the plow company tends to show that at the time the sale was made by Klingman & Co. to McClure the former were insolvent; that a check of theirs, given to the Moline Plow Company, had gone to protest, and that some of their notes had been dishonored; that McClure had very little property subject to execution; that Klingman & Co. were doing business in Blue Hill, in Webster county; that on Sunday night prior to the sale McClure, Klingman, and McNear met in the city of Hastings; that the trade was there talked over; that a lawyer was consulted about the trade; that on Monday morning, at Blue Hill, McClure and Klingman made an invoice of the goods; that McClure then paid Klingman & Co. $200 in cash, and executed his notes for the remainder of the purchase price of the stock, the total price agreed to be paid being about $4,000, the fair value of the goods; that no

bill of sale of these goods was made by Klingman & Co. to McClure; that Klingman remained in the place of business of Klingman & Co. after the sale the same as before it; that McClure expected and intended to pay Klingman & Co. the notes he had given them for the implement stock out of the proceeds of the sale of such implements, and that Klingman & Co. had turned over the notes received from McClure to a brother of one of the firm, to put them beyond the reach of the firm's creditors. The evidence on behalf of Klingman & Co. tended to show that McNear's interest in the business was about three times as much as that of Klingman; that McNear lived in the city of Blue Hill; that he was in the habit of spending his Sundays in the city of Hastings; that Klingman had the active management of the co-partnership; that McNear was in the employment of a manufacturing company; that he was traveling for that company at a salary of $1,200 a year and expenses; that he had been so traveling for some years prior to the date of the sale to McClure; that in the spring of that year some one had reported to the manufacturing company that he (McNear) was neglecting its business, and devoting too much of his attention to the co-partnership affairs of Klingman & Co.; that the manufacturing company called McNear's attention to this; that McNear then talked to McClure about buying out Klingman & Co.; that on the Sunday preceding the sale McNear was stopping at Hastings, as usual on Sundays; that McClure came to Hastings on that Sunday, not knowing that either McNear or Klingman was there; that he was then, and had been for some time, in the employment of a mowing or reaping machine company, and traveling over the country setting up their machines; that the time of his employment with the machine company had about expired; that on this Sunday, after reaching Hastings, he met Klingman on the street; that afterwards he and Klingman and McNear met, and the proposition to sell to McClure was again discussed; that they all went to a lawyer's office, and counseled with him as to whether a bill of sale was necessary, and were advised that it was not; that on Monday morning McClure and Klingman returned to Blue Hill, invoiced the goods, McClure paid the $200 in cash, executed his notes for the remainder of the purchase money, and took possession of the stock; that Klingman & Co., at the time they made the sale, were not insolvent; that the check of $50 made to the plow company which had been protested was subsequently, before the bringing of the attachment suit, paid; that the assets of Klingman & Co., at a fair valuation, exceeded by several thousand dollars their total liabilities; that the real object and motive of the sale was that McNear might remain in the employ of the manufacturing company for whom he was working; that McClure was worth in the neighborhood of $3,000 at the time he purchased the stock; that he was well acquainted with the character of the business conducted by Klingman & Co., and that he possessed in the banks of Blue Hill an excellent credit; that the notes given by McClure to Klingman & Co. had never been indorsed or transferred; that they were produced on the taking of the evidence to discharge the attachment, and were still owned by Klingman & Co. The evidence further shows without contradiction that only $275 of the debt for which the property was attached was due at the time of the attachment, and that this $275 was secured by bills receivable owned by Klingman & Co.; that Klingman, after the sale, remained in the old business house of Klingman & Co.; that he did so for the purpose of disposing of commission goods which the firm of Klingman & Co. were carrying, and which were not included in the sale to McClure, and for the further purpose of collecting the book accounts and debts due to the firm of Klingman & Co. Under this evidence we cannot say that the finding of the district court is not supported by sufficient evidence, nor that it is clearly against the weight of the evidence. In Whipple v. Hill, 36 Neb. 720, 55 N. W. 227, it was held that: "Where a motion to discharge an attachment on the ground that the facts stated in the affidavit are untrue is heard upon conflicting affidavits, the decision of the trial court on the motion will not be disturbed, unless it is clearly against the weight of the evidence." As already stated, the cardinal inquiry was, what was the motive—what was the intention—which actuated Klingman & Co. and McClure? If the court had found that their motive and their intentions were fraudulent, we think the evidence would have sustained the finding. But the district court, after looking at all the circumstances in evidence, has reached the conclusion that the motive and intentions of the parties were honest, and we cannot say that he is wrong. Counsel for the plow company insist, however, that as the evidence shows that the consideration for the sale was $200 in money, and the remainder of the purchase price was the notes of the purchaser, the court should therefore say that the transaction was fraudulent; and counsel insists that Beels v. Flynn, 28 Neb. 575, 44 N. W. 732, supports his contention that, where a sale is made by a debtor of all his property for a part cash and the remainder in the promissory notes of the purchaser, such transaction is conclusive evidence of a fraudulent intent. In the case cited a debtor had sold all his property to Beels in consideration of some cash and the promissory notes of Beels. Flynn, as sheriff, seized the property under attachment process, and sold it, and Beels sued the sheriff for conversion. The sheriff justified the seizure by virtue of his attachment writs, and defended on the ground that

the sale to Beels was fraudulently made by the debtor with the intention on the part of the debtor and Beels to defraud the latter's creditors. The jury found on this issue for the sheriff, and this court affirmed the judgment. The only issue presented to the jury was whether the sale made by the creditor to Beels was made in good faith. The jury found that it was not, and the only question presented to this court on proceedings in error was the sufficiency of the evidence to sustain the finding of the jury.

It is said in the syllabus that Beels was not a bona fide purchaser, and not entitled to protection. But this was no more than saying that the evidence sustained the finding of the jury that Beels was not a bona fide purchaser. Whether Beels was a bona fide purchaser or not was not a question of law, but of fact. The jury found that he was not a good-faith purchaser, and this court affirmed the judgment, and the opinion meant and means no more than that the evidence before the jury was sufficient to sustain its finding. It is doubtless true that the sale by one of all his property for some cash and the promissory notes of the purchaser, the seller at the time being in debt, and the purchaser being a man of small means, is evidence of a fraudulent intent, but this court has never consciously held that such facts alone were conclusive evidence of fraud. To so hold would be to repeal the statute which has wisely or unwisely declared that intention to be a question for the determination of the jury or trial court from all the facts and circumstances surrounding the transaction put in evidence in the particular case. The judgment of the district court is affirmed. Affirmed.

HOUCK v. LINN et al.

(Supreme Court of Nebraska. April 21, 1896.)

SALE — WHAT CONSTITUTES — APPEAL — ERRORS CURED—REPLEVIN AGAINST LEVYING OFFICER—JUSTIFICATION—CHATTEL MORTGAGE—AVOIDANCE—ASSIGNEE OF DEBT.

1. An arrangement whereby chattels are conveyed at a price certain, with a provision that the vendee may, if he fails to resell them, return them to the vendor, is a contract of sale, with an option to rescind, and not a contract of brokerage.

2. Where an instrument is received in evidence without sufficient proof of its execution, the error is cured, if such proof be subsequently, during the trial, made.

3. Error, if any, in sustaining objections to questions as leading, is cured if the evidence sought to be elicited is afterwards adduced from the same witness in response to other questions.

4. In an action of replevin against a constable who held the property under a writ of attachment, his rights depend upon the attachment, and he cannot justify on the ground that the attachment plaintiff had an independent lien upon the property prior to the attachment.

5. A chattel mortgage is not avoided by the fact that subsequent to its execution the mortgagee consented to a sale of the property by the mortgagor for the benefit of both parties; no other liens existing, and the sale not having been consummated.

6. A chattel mortgage is not avoided by the failure of the mortgagee to foreclose immediately upon default.

7. The indorsement of notes secured by chattel mortgage, as collateral security for a debt of the mortgagee, passes the mortgage security to the indorsee of the notes; and such indorsee is, as against both mortgagor and mortgagee, entitled, on breach of condition, to the possession of the mortgaged property.

(Syllabus by the Court.)

Error to district court, Douglas county; Hopewell, Judge.

Replevin by Sylvester Linn and Alexander Barrie against Dorsey B. Houck. There was a judgment for plaintiffs, and defendant brings error. Reversed as to Linn, and affirmed as to Barrie.

John T. Cathers, for plaintiff in error. Gregory, Day & Day, for defendants in error.

IRVINE, C. This was an action of replevin for three stallions, by the defendants in error, Linn and Barrie, against Houck, a constable. At the close of the evidence the court directed a verdict in favor of both plaintiffs. The essential facts are undisputed. The stallions formerly belonged to one Watson, in Scotland. They were shipped to Iowa, and there sold by Watson's agent, Barrie, to Linn. Linn seems to have bought, in all, 14 horses, and the arrangement between him and Barrie was that on reselling the horses he should pay Barrie a certain price for each, but in case he made no sale he had the privilege of returning the horses. The defendant contends that this arrangement merely constituted Linn an agent or broker for the sale of the horses. But we think it did more. It vested in him the title to the horses, and granted to him an option of rescinding the sale. Linn sold the three horses in controversy to one Jillson, who, to secure the purchase price, executed to Linn his three promissory notes, secured by chattel mortgage on the horses. Jillson brought the horses to Omaha, and put them up at the livery stable of one Doherty. They were placed there May 14, 1891. Linn's mortgage was filed for record May 16th. Jillson not paying for the care of the horses, and apparently having left the country, Doherty, in December, 1891, brought an action in the county court to recover for their keeping, and caused them to be attached. Houck, as constable, levied the attachment. In the meantime Linn and Barrie had had a settlement of their affairs, by virtue whereof Linn gave to Barrie two notes for the amount found due, and indorsed to him the Jillson notes as collateral security. The attachment case proceeded to judgment, and the constable was about to sell the horses, when Linn and Barrie replevied them in this action.

Several assignments of error relate to rulings on the evidence. It is contended that

the court erred in admitting the chattel mortgage, for the reason that it was not sufficiently proved. This objection, we think, was well taken when the mortgage was admitted, but immediately thereafter its execution and identity were amply proved, and the proof on that subject remained uncontradicted. The order in which evidence is introduced rests largely in the discretion of the trial court, and the subsequent proof cured any error in the original admission of the mortgage. Objections were made to two questions put to Linn in regard to his assignment of the Jillson notes to Barrie. It is contended that this proof was irrelevant. We think not. The petition specially pleaded the facts in regard to the interests of the two plaintiffs, and this proof tended to establish the interest of Barrie. Objection was made to certain other questions because they were leading, and these objections were sustained. This is assigned as error, but, if there was any error, it was immediately cured by permitting the same evidence to be adduced in response to similar questions put in a different form. There are certain other assignments relating to rulings on the evidence, but counsel, in the briefs, merely say that the rulings were erroneous, and state no reason therefor, and we are unable to see that any such reason exists.

The other assignments raise the question of the propriety of the court's peremptory instruction to find for the plaintiffs. On this question the greater part of defendant's argument is directed to the question of priority between the mortgagee and Doherty, under his statutory lien for caring for the horses. We cannot regard this question as material. Nor is it even material to this action whether Doherty waived his lien by instituting the attachment suit, and causing the horses to be levied upon. Conceding that Doherty had a lien prior to the mortgage, under the statute, and that he did not waive it by the attachment, this does not affect the right of Houck. Houck was certainly not in possession as Doherty's agent, but was in possession as an officer of the law, justifying merely under the writ of attachment. The lien obtained by virtue of the attachment, which is the sole justification of Houck, does not relate back to the time when Doherty's agister's lien accrued. There are some states where, by statute, it is provided that certain liens may be enforced by attachment, and authorities which carry the lien back are under statutes of this character. Here an attachment is not a method of foreclosing an existing lien, but is the creation of a new lien, the validity of which, as well as its priority, depends upon the attachment proceedings themselves. The attachment was not levied until long after the Linn mortgage was filed, and the mortgage has therefore priority, unless it was void as to the creditors of the mortgagor. It was presumptively void, as the mortgagee was not in possession. But the proof shows clearly, and without contradiction, that the mortgage was executed in good faith, for the purpose of securing a bona fide debt.

It is urged, however, that the mortgage was void because a power of sale remained in the mortgagor. The evidence establishes no such power. The mortgage does not contain it, and the parol evidence shows that the horses were sold to Jillson for breeding purposes, and not for resale. It is true that it appears that, after Jillson got into difficulties, Linn undertook to assist in giving him an opportunity to sell the horses, and thereby discharge both debts. But this did not render the mortgage fraudulent. The mortgages which have been held void, because containing a power of sale, have been those where, by the mortgage itself, or by contemporaneous understanding, the mortgagor was permitted to remain in possession and sell the goods in the ordinary course of trade. In Gregory v. Whedon, 8 Neb. 373, the reason of this rule was stated to be that the object of a mortgage is to create a specific lien on the mortgaged property, which cannot be had if the mortgagor is permitted to dispose of the goods for his own benefit. We can conceive of no principle of law whereby a mortgagor and mortgagee may not, by joint arrangement in good faith, dispose of the property for the benefit of both parties, where no other liens exist.

It is also contended that the mortgage was avoided by the failure of the mortgagee to take possession for the purpose of foreclosure immediately upon default. Certain Illinois cases are cited in support of this argument, but they are based on a statute whereby a chattel mortgage is valid only until the maturity of the debt secured. Rev. St. Ill. c. 95, § 4. Under our statute a chattel mortgage is valid against creditors for five years after it is filed for record. Comp. St. c. 32, § 16. We think, therefore, that the plaintiffs established the validity of the mortgage. But was there evidence justifying the direction of a verdict in favor of both plaintiffs? By the indorsement of Jillson's notes to Barrie, the mortgage security passed to him. The theory of the petition was that only a portion of the notes had been so transferred. But the evidence shows that they were all transferred, and, when the action was commenced, Barrie still retained them, Linn's debt to him not having been paid. Barrie was therefore, at the commencement of the action, the owner of the mortgage, and the proper plaintiff. He could have sued upon the notes, and, they being good as between the original parties, his recovery would have been for their whole amount, and not merely the amount of the debt for which they were pledged. Barmby v. Wolfe, 44 Neb. 77, 62 N. W. 318; Haas v. Bank, 41 Neb. 754, 60 N. W. 85. So he had a right to foreclose the chattel mortgage for the whole debt secured thereby, and had a right, both as against

the mortgagor and the original mortgagee, to the possession of the mortgaged property after condition broken. We think, therefore, no right of possession was established in Linn. The judgment in favor of Barrie is affirmed. That in favor of Linn is reversed, and the cause, as to him, remanded. Judgment accordingly.

MISSOURI PAC. RY. CO. v. HANSEN.

(Supreme Court of Nebraska. April 21, 1896.)

RAILROADS—RATE OF SPEED—EVIDENCE OF NEGLIGENCE.

That a passenger train was run at the rate of 25 miles per hour outside the limits of a city or town, even in a thickly settled neighborhood, and at a point where some persons were accustomed to walk upon the tracks, is not, in itself and alone, sufficient evidence of negligence. In a case where it is sought to hold the railroad liable because of such rate of speed, the jury, on proper request, should be so instructed.

(Syllabus by the Court.)

Error to district court, Douglas county; Scott, Judge.

Action by Mamie Hansen, by her next friend, Henry P. Hansen, against the Missouri Pacific Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

R. S. Hall, A. R. Talbot, J. W. Orr, B. P. Waggener, and Talbot, Bryan & Allen, for plaintiff in error. George W. Cooper, John W. Johnston, and Ricketts & Wilson, for defendant in error.

IRVINE, C. Mamie Hansen, an infant, brought this action by her next friend against the Missouri Pacific Railway Company to recover for personal injuries. She had a judgment for $11,000, which the railway company by these proceedings seeks to reverse. The petition alleges that the plaintiff was, at the date of the injury complained of, 12 years of age; that the defendant was the owner of and operating a line of railroad from Omaha to Kansas City. Then comes the following: "That on the line of defendant's said railroad, and within a thickly settled neighborhood adjoining the corporate limits of the said city of Omaha, immediately northeast of a public crossing on the line of said railway aforesaid, called 'Ruser's Crossing,' defendant, without objection, notice, or warning on its part, at said date, and a long time prior thereto, allowed its said railroad track at said point to be habitually and constantly used by men, women, and children going back and forth, as a footpath and public thoroughfare, the distance of one-half mile northeast of said Ruser's crossing to a point on the line of said railroad where the same intersects with another public crossing, and said defendant had full knowledge that said track aforesaid was so used; that on said date, and while plaintiff was walking in the center of the track of said railroad, along that portion of the line of defendant's said railroad used by pedestrians as aforesaid, going northeast from said Ruser's crossing, and at a point some 600 feet from said Ruser's crossing, that at said time, which was about the hour of 5 o'clock p. m. on said date aforesaid, defendant's agents, servants, and employés were running a locomotive and passenger train attached thereto over and upon said railroad at said time and place, which was coming from the southwest; that while plaintiff was so walking upon said track at said time and place, traveling northeast, with her back to said approaching train, she (plaintiff) could have been and was plainly seen and distinguished, as an infant walking on said railroad track, by the said agents, servants, and employés of defendant then running and managing said locomotive and train of cars at said time and place for the distance of one-half mile, within which distance said locomotive and cars could have been easily stopped, but said defendant's agents, servants, and employés, disregarding the life and safety of this (infant) plaintiff, ran said train, at said time and place, at the unlawful rate of speed of 25 miles per hour, without attempting to stop said train as the same approached plaintiff, without her knowledge, and while said (child) plaintiff might have been and was seen by the said agents, servants, and employés of defendant, as aforesaid, then so negligently and carelessly running said locomotive and train of cars, at said time and place, carelessly and negligently ran said locomotive and train of cars over and upon said plaintiff, whereby and by reason thereof plaintiff's right foot and leg were so badly crushed and mangled that the same had to be and was amputated just below the knee." It will be observed that the only negligence alleged is in running the train at the rate of 25 miles per hour, and in failing to stop it in time to avoid the injury. It is very doubtful whether the petition pleads sufficient facts to impose upon the company the duty of stopping the train. Ordinarily, an engineer has a right to presume that persons walking along the track are in possession of their senses, and will appreciate the danger, and act with discretion; and he is under no obligation to stop the train, or even lessen the speed thereof, before discovering that such person is heedless of warnings given of the approach of the train, or otherwise in imminent peril. Railway Co. v. Cook, 42 Neb. 905, 62 N. W. 235. A mere failure to stop a train when a trespasser is seen, or should be seen, upon the track, can therefore create no presumption of negligence. There must be other facts to create the duty of stopping; and it is doubtful whether the facts that the trespasser is but 12 years old, and the place one where pedestrians are permitted to walk upon the track, create such duty. In this case the evidence was such that some other facts might have been plead-

ed; but we need not now determine what is necessary in that regard, because in the decision of the case the consideration of this feature is only necessary, and has only been entered into, for the purpose of indicating that under such general allegations the specific allegation that the train was running at an unlawful speed of 25 miles per hour, became a salient feature of the pleading. It has been held that outside the limits of cities and towns no rate of speed is in itself unlawful or negligent. Railroad Co. v. Wendt, 12 Neb. 76, 10 N. W. 456; Railroad Co. v. Grablin, 38 Neb. 90, 56 N. W. 796, and 57 N. W. 522. It does not appear that this portion of defendant's railroad was within a city or town. On the other hand it is alleged that it is in a thickly settled neighborhood adjoining the city of Omaha. The evidence is conflicting as to the actual speed; one witness placing it at 25 miles per hour, others as low as 12 miles per hour. There is no evidence that the region was unusually thickly settled. There is evidence that a number of persons were accustomed to walk for a certain distance along the track. How many, and how frequently, does not appear. But there was no highway, and no permission by the railway company to so use its tracks, unless a license might be inferred from its knowledge that they were so used without any measures being taken to prevent. We do not think that any jury should be permitted to find that a railway company was negligent from the mere fact that it ran its passenger trains 12, or even 25, miles per hour along a suburban route, outside of the city limits; even though it knew that trespassers might be on the right of way. Such knowledge would affect its duty in keeping a lookout, and giving warnings, and in exercising other precautions to avoid injuring trespassers. But such a situation certainly would not require trains to be run at a less speed than 25 miles per hour. Under this state of the evidence the defendant requested the following instruction: "The jury are instructed that no rate of speed is of itself negligence except where the rate of speed is prescribed or specified by some law or ordinance; and you are further instructed that the defendant company, in the operation of its trains over its tracks outside of any city, or in the absence of any express law to the contrary, has the right to operate its trains at any rate of speed consistent for the safe and proper conduct of its business; and in this case, unless you find the defendant guilty of some negligence alleged in the petition other than the operation of its train at the rate of 25 miles per hour, your verdict must be for the defendant." The court refused to give this instruction, and in no place gave the jury any similar caution. We think that the railway company was, under the evidence, entitled to have the jury so directed, and that the refusal to so charge was prejudicial error. Many other questions are raised, but most of them have been decided in other cases since the trial of this in the district court, and they will therefore not be considered. Reversed and remanded.

STATE INS. CO. v. NEW HAMPSHIRE TRUST CO.

(Supreme Court of Nebraska. April 21, 1896.)

On rehearing. Denied.

For former opinion, see 66 N. W. 9.

PER CURIAM. Upon consideration of a motion for a rehearing, there was found in the brief submitted by the plaintiff in error such weight of argument that, without receding from the views expressed in the opinion as to the analogy afforded by the case of Phenix Ins. Co. of Brooklyn v. Omaha Loan & Trust Co., 41 Neb. 834, 60 N. W. 133, it is by the court deemed advisable to say that this question will be determined as an original one whenever its consideration becomes necessary. The motion for rehearing is overruled, however, because, from what has been noted in the opinion, it is evident that the application for insurance in no degree influenced the issue of the policy, and hence the representation as to the nonexistence of a mortgage on the insured property was immaterial. Rehearing denied.

VAN ETTEN et al. v. KOSTERS.

(Supreme Court of Nebraska. April 21, 1896.)

JUDGMENT ON PLEADINGS—VARIANCE—PROCEDURE—SET-OFF—PLEADING.

1. It is error to render a judgment for the plaintiff upon the pleadings, without evidence, for a larger sum than is by the answer admitted to be due him

2. When a cause is decided by the court on the petition and answer, without evidence, such matters of defense in the answer as are well pleaded, in the absence of a reply, are to be considered as established.

3. In an action upon a supersedeas bond, against the principal and sureties thereon, a legal claim from the plaintiff to such principal may be pleaded as a set-off.

4. In such an action a judgment for the plaintiff should, under section 511 of the Code of Civil Procedure, state which defendant is the principal debtor, and which are sureties.

5. Flannagan v. Cleveland, 62 N. W. 297, 44 Neb. 58, distinguished.

(Syllabus by the Court.)

Error to district court, Douglas county; Ferguson, Judge.

Action by Henry A. Kosters against Emma L. Van Etten and others. There was a judgment for plaintiff, and defendants bring error. Reversed.

D. Van Etten, for plaintiffs in error. F. A. Brogan, for defendant in error.

NORVAL, J. The court below rendered a judgment on the 24th day of September, 1892,

against the defendants below, upon the pleadings, without any proofs or evidence, for the sum of $359.40. The only question for determination is whether the plaintiff was entitled, upon the pleadings, to judgment for the amount rendered. The action is upon a supersedeas bond executed by Emma L. Van Etten as principal, and the other defendants as sureties, to stay the execution of a judgment obtained in the district court of Douglas county by Henry A. Kosters against said Van Etten during the pendency of proceedings in error instituted by her in this court for the purpose of reviewing said judgment. The petition alleges the recovery of a judgment by Kosters against Van Etten on February 11, 1889, in the sum of $286.30 and costs; the execution and delivery of the supersedeas bond attached to and made a part of the pleadings; the prosecution of a petition in error by said Van Etten to this court; the affirmance of the judgment, and subsequently the modification thereof, by requiring of the plaintiff, as a condition of affirmance, that he file a remittitur for the sum of $28, as of the date of the original judgment, which he accordingly did; the issuing and filing of the mandate of this court directing the district court to proceed with the enforcement of the original judgment to the extent of $258.30, with interest thereon from February 11, 1889, and the costs in the district court, amounting to $35.73; the issuing of an execution upon said judgment, and the return thereof by the sheriff unsatisfied; and that said judgment is wholly unpaid. It will be observed that the recovery in the case at bar is for the precise amount claimed in the petition, including the item of $35.73 for costs; and we take it that the judgment was thus rendered on the theory that the answer of the defendants presented no defense to plaintiff's cause of action. In this we think the court below erred. The defendants, in their answer, deny the amount of costs which the petition alleges was recovered against Mrs. Van Etten by the judgment superseded, and they also expressly aver that such costs did not exceed the sum of $20.93. There was no reply filed, and this averment as to costs in the answer must be taken as true. Upon this defense alone the judgment was excessive in the sum of $14.80. The answer pleaded as a set-off the amount of costs Mrs. Van Etten recovered against the plaintiff in this court on the proceedings to review the original judgment. The answer alleges that such costs were taxed and specified in the mandate issued to the district court at the sum of $24, when in fact Mrs. Van Etten was entitled to recover a much larger sum as taxable costs, to wit, $59.05. The items of cost making this sum are set out in the answer, and it is averred that plaintiff is liable to Mrs. Van Etten therefor, excepting the sum of $6, which belongs to the clerk of this court, as his costs in the case. The unpaid costs which Mrs. Van Etten recovered against the plaintiff she is entitled to set off in this action. Raymond Bros. v. Green, 12 Neb. 215, 10 N. W. 709. There are some other averments in the answer which need not be referred to, as they were insufficient to constitute a defense.

It is finally insisted that this judgment should be reversed because it was rendered against all the defendants as principals, instead of against Mrs. Van Etten as principal, and the others as sureties, in accordance with section 511 of the Code of Civil Procedure, which provides that: "In all cases where judgment is rendered in any court of record within the state, upon any other instrument of writing, in which two or more persons are jointly and severally bound, and it shall be made to appear to the court, by parol or other testimony, that one or more of said persons so bound signed the same as surety or bail for his or their co-defendant, it shall be the duty of the clerk of said court in recording the judgment thereon to certify which of the defendants is principal debtor, and which are sureties or bail. And the clerk of the court aforesaid shall issue execution in such judgment, commanding the sheriff or other officer to cause the money to be made of the goods and chattels, lands and tenements, of the principal debtor, but for want of sufficient property of the principal debtor to make the same, that he cause the same to be made of the goods and chattels, lands and tenements, of the surety or bail. In all cases the property, both personal and real, of the principal debtor, within the jurisdiction of the court, shall be exhausted before any of the property of the surety or bail shall be taken in execution." The petition alleges, and the answer admits, that Emma L. Van Etten was the principal obligor, and that the remaining defendants signed the bond as sureties merely. Under the section quoted, the judgment should have specified who was the principal debtor, and who were the sureties. This was of importance to the sureties, inasmuch as they were entitled to have the property of their principal within the jurisdiction of the court exhausted for the satisfaction of the joint judgment before theirs was seized. The case of Flannagan v. Cleveland, 44 Neb. 58, 62 N. W. 297, is distinguishable. That was an action on an appeal undertaking given in a justice court, and it was ruled that said section 511 was not applicable to a judgment rendered against the signers of such an undertaking, since, by the provision of section 1014 of the Code of Civil Procedure, the liability of such signers, as between themselves and the judgment creditor, is that of principal debtors. It is not necessary for the party appealing from a judgment rendered by a justice of the peace to sign the appeal undertaking, while the plaintiff in error is, by section 588 of the Code, required to execute the supersedeas bond, with

one or more sufficient sureties, in order to stay the execution of the judgment sought to be reviewed. On such a bond the plaintiff in error is the principal debtor, and the other signers are his sureties. The decision cited above was based upon said section 1014, the provisions of which apply alone to sureties on appeal undertakings, and cannot be extended to a case like this. For the errors indicated the judgment must be reversed and the cause remanded, with directions to the district court to render judgment for plaintiff below in accordance with this opinion. Reversed.

LEDWICH v. CONNELL.

(Supreme Court of Nebraska. April 21, 1896.)

INVALID TAX DEED — RIGHTS OF HOLDER — FORECLOSURE OF LIEN.

While the holder of a certificate of purchase at a tax sale may foreclose his lien when the tax deed issued pursuant thereto is invalid by reason of an irregularity in the proceedings leading up to such sale, this rule cannot be invoked when, in his petition, such purchaser alleges that the treasurer made the sale to him without authority of law, and without any jurisdiction in the premises.

(Syllabus by the Court.)

Appeal from district court, Douglas county; Hopewell, Judge.

Action by John Ledwich against William J. Connell. Judgment for plaintiff, and defendant appeals. Reversed.

Connell & Ives, for appellant. A. S. Churchill, for appellee.

RYAN, C. On the 23d day of April, 1892, the appellee began this action in the district court of Douglas county for the foreclosure of an alleged tax lien, which he held, as he averred, upon certain real property owned by the appellant, and a decree was afterwards entered as prayed. There was in the answer a denial of the averments of the petition that the real property above referred to was subject to taxation for the year 1887; that taxes were duly and regularly assessed for said year; that said taxes became due and payable from the defendant without demand therefor; that on May 1, 1888, the said taxes had not, and never since have been, paid, but are still delinquent; and that by reason of the aforesaid assessment and taxation the said taxes became and continued to be a lien upon said land. By the answer it was admitted that of the allegations of the petition the truth was stated in such as alleged that, the taxes being delinquent and unpaid, the same were offered for sale on the 1st day of November, 1888, and not sold for want of bidders, and that on January 26, 1889, the same were sold at private sale for the delinquent taxes for the year 1887 to the appellee, who paid to the treasurer of Douglas county the sum of $446.84, which said sum was received by said county treasurer for said tax so assessed as aforesaid upon said land; that said treasurer has ever since retained said sum, and passed the same to the various accounts of the state and county, and that upon receipt of said money said county treasurer, on January 26, 1889, issued to the appellee a certificate of sale therefor. It was alleged in the answer, and not denied, that upon this certificate of sale no notice has ever been served or attempted to be served of the purchase of the real property in the certificate described, or of any other matter required by section 123 of chapter 77, Comp. St. The answer admitted the correctness of the following allegations of the petition: "(6) That in making said sale the said treasurer of Douglas county, Nebraska, made the same without authority of law, and without jurisdiction in the premises; that by mistake and neglect of said Henry Bolln, who was then treasurer of said county of Douglas, in said state of Nebraska, said land was not advertised for sale as required by law; that in fact no advertisement whatever was made of the sale of said land for delinquent taxes, and that the sale was void by reason thereof." It was alleged in the petition that by reason of the mistake on the part of the county treasurer, and his neglect to advertise the land for delinquent taxes, the certificate issued was at the time the petition was filed, and at all times had been, illegal and void, but this admission was coupled with a denial that such certificate was illegal and void solely by reason of the mistake of the treasurer or his neglect to properly advertise the land for sale for delinquent taxes and in this connection it was by the answer asserted that certificate was void for good and sufficient reasons other than those enumerated in the petition. By the petition there was asserted the right of the plaintiff to be subrogated to the rights of the county with reference to the taxes paid to its treasurer upon the purchase of the land bought by the plaintiff, and this right was denied by the defendant in his answer. From this analysis of the pleadings we find that the parties have left but few disputed questions, and to these we shall now direct our attention.

In that portion of the sixth paragraph of the petition above quoted there is the broad averment that "in making said sale the said treasurer made the same without authority of law, and without any jurisdiction in the premises." While other similar averments in the petition are qualified by the statement of some reason why the sale was without authority of law and without jurisdiction, in this particular instance there was no qualification whatever. This general statement being admitted by the answer, we are bound to assume that the sale was without authority of law, and without any jurisdiction. On the trial the certificate of purchase was introduced in evidence, notwithstanding the admitted fact that the sale was without authority of law, and without any jurisdic-

tion. This certificate was evidence proper for consideration with reference to a sale having been made, if, under the issues, that question had been open for determination. But there was no such issue. The plaintiff had alleged and the defendant had admitted that the sale made by the treasurer was without authority of law, and without any jurisdiction. For all purposes this was an established fact, and the certificate could not in the least unsettle it. For this reason the certificate cannot be considered for the purpose of determining whether or not in fact there was a sale to the appellee. If the certificate cannot be considered for the reason stated, it is manifest that evidence allunde of the same fact is incompetent, and hence we are left without proof of any kind that plaintiff purchased the land with reference to which this controversy exists. The appellee in the district court predicated his right to a foreclosure of the lien of the county upon the principle that by the sale he had been subrogated to the rights of such county, and that, therefore, in equity, without the sanction of a statute, he was entitled to the relief prayed. The insuperable objection to this proposition is that by his own averments the appellee showed that the sale was without authority of law and without any jurisdiction. This being true, the sale was void absolutely, and not merely invalid by reason of defective compliance with some requirements of the statute, or a failure to perform some precedent condition, as was the case in Pettit v. Black, 8 Neb. 52; Wilhelm v. Russel, Id. 120; O'Donohue v. Hendrix, 13 Neb. 257, 13 N. W. 281; Merriam v. Hemple, 17 Neb. 345, 22 N. W. 775; Otoe Co. v. Mathews, 18 Neb. 466, 25 N. W. 618; Merriam v. Dovey, 25 Neb. 618, 41 N. W. 550; Stegeman v. Faulkner, 42 Neb. 53, 60 N. W. 319; Adams v. Osgood, 42 Neb. 450, 60 N. W. 869. In each of these cases cited there was a mere irregularity in the exercise of the authority and in the jurisdiction to sell conferred by law. There was not, as in this case, an entire lack of both authority and jurisdiction. What might be the rights of appellee arising from subrogation cannot in this action be determined, for the county treasurer having conducted the sale upon which the rights of the appellee depend "without authority of law, and without any jurisdiction," there was no subrogation possible.

It has already been shown that the certificate of purchase under the admitted averments of the petition was inadmissible in evidence. It is therefore not necessary, indeed, it would be improper, to express an opinion as to the necessity of compliance with the provisions of section 123 of chapter 77, Comp. St., to entitle the holder of a certificate of purchase at a tax sale to maintain a foreclosure action thereon. The judgment of the district court is reversed, and this cause is remanded for further proceedings. Reversed and remanded.

BUILDING & LOAN ASS'N OF DAKOTA v. CAMERON.

(Supreme Court of Nebraska. April 21, 1896.)

PLEADING — PRACTICE — CONTRACTS — RESCISSION — TENDER OF CONSIDERATION.

1. Where a petition contains several causes of action, the trial court should, on motion of the defendant, require them to be separately stated and numbered. Bank v. Bollong, 40 N. W. 411, 24 Neb. 821.

2. One who seeks to rescind a contract on the ground of fraud must, within a reasonable time, offer to return the property or consideration therefor received by him, provided it be of any value.

3. Property, the loss of which would in any way result in disadvantage or inconvenience to the adverse party, must in such case be returned, although it possesses no intrinsic or market value.

4. The plaintiff, a subscriber to the stock of a foreign building and loan association, sued to recover money paid for such stock, alleging a rescission of his contract of subscription on account of the false and fraudulent representations of the defendant's agent. *Held*, in the absence of evidence to the contrary, that said stock is presumed to be of some value, and its surrender is a condition precedent to the right to rescind.

(Syllabus by the Court.)

Error to district court, Lancaster county; Tuttle, Judge.

Action by James E. Cameron against the Building & Loan Association of Dakota. There was a judgment for plaintiff, and defendant brings error. Reversed.

Leese & Starling and Stewart & Munger, for plaintiff in error. Field & Holmes, for defendant in error.

POST, C. J. This was an action by the defendant in error, who claims on his own account and as assignee of L. R. Kinnan, Olaf Matteson, John P. Yates, James M. Hamilton, William T. Marsh, W. T. Stretch, and F. P. Storey, against the plaintiff in error, the Building & Loan Association of Dakota, hereafter called the "Association." In the petition it is, in substance, alleged that in the month of July, 1889, one Misner, a representative of the defendant below, visited the village of Ceresco, the home of the plaintiff therein and his assignors, and represented to said parties that the said defendant was prepared to make loans upon real estate at 6 per cent. interest without the payment of any commission, provided the proposed borrowers would subscribe for the stock of the defendant association, and organize what is known as a local board in in said village, and that all amounts paid for such stock would be credited upon the notes given by subscribers for money so borrowed; that, relying upon said promises and representations, the plaintiff and his assignors advanced to the said association the sum of $224 in payment for stock by them severally subscribed for, and for the sole purpose of procuring loans in accordance with the terms and conditions mentioned in their agreements with the said Misner, but

that the said association refused to make the said loans, or any of them, upon the stipulated terms, and, on the contrary, imposed other and different conditions so unreasonable in character that they could not be complied with by said subscribers, or any of them; that said representations were false, and made by said Misner for the purpose of cheating and defrauding the parties named; and that, upon the refusal of the association to make such loans in accordance with the agreement of its agent, and upon learning of the fraud practiced upon them, the several subscribers elected to rescind their contracts of subscription, and demanded a return of the money paid and advanced by them. There is a second cause of action for the sum of $214 as compensation earned by the plaintiff in procuring application for loans under an agreement with the said Misner acting in behalf of the defendant. There was a trial before the district court for Lancaster county, resulting in a verdict and judgment for the plaintiff therein in the sum of $224, which has been removed into this court for review by means of the petition in error of the defendant association.

The first proposition to which we will give attention is that the several causes of action should have been separately stated and numbered. Objection upon that ground was made at every stage of the proceedings before the district court, including the answer, to which reference will be made hereafter. That the wrong, if any, to each of the parties named is a separate cause of action, for which each might have recovered in his own name, cannot be doubted. The Code of Civil Procedure (section 93) provides that, "where the petition contains more than one cause of action, each shall be separately stated and numbered." And this provision applies to all wrongs for which separate actions will lie. Maxw. Code Pl. 342; Kinkead, Code Pl. p. 18; Bank v. Bollong, 24 Neb. 821, 40 N. W. 411. It follows that the district court should have required the plaintiff to separately state and number his cause of action, and its ruling in that behalf is error calling for a reversal of the judgment. Another fatal objection to the judgment complained of is that the plaintiff below has at no time tendered or offered to return the stock issued to the several subscribers therefor. The first cause of action is not the failure to make the promised loans, nor the difference between the actual worth of the stock and its value as represented by Misner, the defendant's agent, but to recover the money paid on the theory of a rescission of the contract. It has been often held, and may be regarded as elementary law, that one who seeks to rescind a contract on the ground of fraud must offer to return the property or consideration received therefor by him, provided it be of any value, within a reasonable time. Clark v. Tennant, 5 Neb. 549; Brown v. Waters, 7 Neb. 424; Babcock v. Purcupile, 36 Neb. 417, 54 N. W. 675; Gould v. Bank, 86 N. Y. 75; Graham v. Meyer, 99 N. Y. 615, 1 N. E. 143. In Snow v. Alley, 144 Mass. 555, 11 N. E. 764, it is said: "The right to rescind or avoid a contract proceeds upon the ground that a party has been fraudulently betrayed into making it, and, having thus been induced to part with his own property, may resume possession of it on returning that which he has himself received, and thus placing the other party in the same position that he was before the contract was made. * * * Where property is entirely worthless, it need not, indeed, be returned; but so strictly has this rule been held that articles which are of the slightest value, or the loss of which may be a disadvantage in any way, must be returned, even if they have no intrinsic or market value,—as casks containing worthless lime, or sacks which have been on bales of wool." —citing Conner v. Henderson, 15 Mass. 319; Morse v. Brackett, 98 Mass. 205; Bassett v. Brown, 105 Mass. 551; Estabrook v. Swett, 116 Mass. 203. The stock issued to the plaintiff and his fellow subscribers is personal property (2 Beach, Priv. Corp. § 612), presumably of some value, and the surrender thereof or an offer to surrender it to the defendant association is an essential condition to the right to rescind. The judgment is therefore reversed, and the cause remanded for further proceedings in the district court. Reversed and remanded.

BARR v. LAMASTER.

(Supreme Court of Nebraska. April 21, 1896.)

ADJOINING HOUSE OWNERS—RIGHT TO PARTITION.

1. The right of partition, whether in equity or under the provisions of the Code, is confined to joint tenants and tenants in common of an estate in land. Hurste v. Hotaling, 29 N. W. 299, 20 Neb. 178

2. Adjoining lot owners in a city may by grant impose mutual and corresponding restrictions and conditions upon the land owned by each, the mutuality of the covenants in such case being a sufficient consideration for the respective grants.

3. Mutual covenants imposing such rights or restrictions will be construed as the grant of reciprocal easements, which may, when the remedy at law is insufficient, be enforced and protected by a court of equity.

4. The plaintiff and defendant, owners in severalty of adjoining lots, pursuant to a mutual agreement, erected thereon buildings corresponding in size, having the stairs, hallways, skylight, and heating apparatus in common. *Held* a grant to each of an easement in so much of the stairs, halls, and skylight as is situated upon the lot of the other; that the easement of each in the property of the other is owned in severalty, and the mere existence of such cross easements does not authorize the partition of said lots at the suit of either party.

(Syllabus by the Court.)

Appeal from district court, Lancaster county; Hall, Judge.

Action by William Barr against Milton F. Lamaster. Defendant filed a cross petition, and plaintiff thereafter dismissed his peti-

tion. From a judgment for defendant on his cross petition, plaintiff appeals. Reversed and dismissed.

Pound & Burr and Roscoe Pound, for appellant. R. D. Stearns, J. H. Broady, E. H. Wooley, Cobb & Harvey, and E. J. Murfin, for appellee.

POST, C. J. In the month of May, 1887, the plaintiff and defendant being the owners in severalty of adjoining inside lots in the city of Lincoln, and being desirous of improving the same, mutually agreed to so build thereon as to have the entrance, hallways, and skylight in common, thus saving valuable space to each. It was further agreed that the two buildings should be heated as one, and by means of a single furnace. Pursuant to such agreement, three-story brick buildings were erected on the lots mentioned, separated by a partition wall one story in height, the upper halls or courts being reached by a common stairway, and receiving light and ventilation from a common skylight, and each party paying one-half of the cost of the heating plant subsequently owned and used by them in common. This controversy was instituted by the plaintiff, Barr, in the month of January, 1892, who alleged, in the petition filed by him, in addition to the facts above stated, that the defendant, taking advantage of the common hallway, was destroying the value of his (plaintiff's) property by maintaining a nuisance therein, and by encouraging and permitting his (defendant's) tenants to harbor therein lewd and disreputable characters, etc. The prayer of the petition was for the appointment of a receiver to take charge of and lease the premises and to manage the heating apparatus therein; also, for a decree permitting the plaintiff to erect a partition wall upon his own premises, from the cellar to the roof of his said building, and to set aside and cancel the written agreements, three in number, under and by virtue of which the said buildings were constructed. An answer was in due time filed, in which, after setting out one of the several agreements relating to the buildings in controversy, it is alleged that said agreement remains in full force and effect, and expressly denying the plaintiff's right to erect a wall as prayed by him, and denying the jurisdiction of the court to award the relief sought. Accompanying the answer is a cross petition in the following language: "The defendant consents to the erection of a brick wall between the said lot of this defendant and the said lot of said plaintiff and that the heating fixtures, including the smokestack, furnace, boiler, pipes, and utensils, owned jointly by and between plaintiff and defendant be sold. Defendant insists that the court shall sell said joint property above mentioned and erect said brick wall, on the true line between the said lots, through the medium of a receiver or master commissioner or the proper officer appointed by the court for that purpose, and that such officer, by the aid of the county surveyor or other proper person, locate the true line between the said two lots prior to putting the said partition wall thereon; and defendant asks that said partition wall be built, through the entire length and height of said building. Defendant therefore prays for the sale of said joint heating fixtures, and the erection of said partition wall as aforesaid, and for judgment for damages as aforesaid, and for costs." The agreement to which reference is made in the answer is as follows: "This agreement, made and entered into this 7th day of November, 1890, by and between William Barr and Milton F. Lamaster, witnesseth: That whereas, Milton F. Lamaster is owner of lot six (6), block fifty-eight (58), city of Lincoln, and William Barr is the owner of lot five (5), block fifty-eight (58), city of Lincoln; and whereas, said parties have erected a three-story building upon each of said lots; and whereas, the stairway and hall of the second and third floors are joined for the purpose of use and occupancy: It is therefore stipulated and agreed that the said hall and stairway shall always, during the existence of said buildings, be used and occupied by said parties jointly and severally. And it is further stipulated and agreed that the title to each party's lot shall not in any way or manner be affected by the use of said joint occupancy by the said parties hereto, and that said halls and stairways, being located equally upon said lots, are to be used jointly by the said parties, for the convenience of both of them, to the end that they may get a wider and more commodious hallway and stairway in said buildings; it being stipulated and agreed that the occupancy by one party of a portion of the other's lot shall not in any way affect or becloud the title of the other party. And it is further stipulated and agreed that said buildings shall be heated jointly, and each of the parties to this agreement to pay one-half of the expense for the same, whether the buildings or any portion of them are occupied or vacant; also, that each party is to pay one-half of all expense for repairs to heating apparatus. It is further stipulated that all the heating apparatus in the halls of said building, and boiler and all heating apparatus in the boiler room, is owned jointly by the parties hereto. It is further stipulated that the halls and stairway of said building shall be lighted jointly, and that each of the parties to this agreement pay one-half of the expense of lighting the same. Neither of said parties shall have the right to remove or appropriate to his own use any of the heating or lighting apparatus belonging to said building, or any other property or thing to said building belonging, or owned in common by the parties to this agreement. It

is further stipulated that this agreement shall be and remain in force for the period of twenty years unless sooner canceled by the mutual consent of the parties hereto. Witness our hands this 7th day of November, A. D. 1890. [Signed] Wm. Barr. M. F. Lamaster. Witness, A. D. Burr." In an amended and supplemental reply to the defendant's answer and cross bill, it is alleged that to erect a wall on the line between said buildings is wholly impracticable, since it would necessitate the remodeling of the interior of said building at great expense; that it would destroy the hallways, reduce the size of the rooms, and otherwise irreparably injure the plaintiff's property, to his damage, etc. Subsequently the plaintiff, by leave of court, dismissed his petition, and the cause proceeded to final decree upon the defendant's cross bill and reply thereto.

The decree mentioned, and from which the plaintiff has prosecuted an appeal to this court, is as follows: "And now, on this 1st day of July, 1893, the court, being well and fully advised in the premises, doth find, from the testimony, that the plaintiff, William Barr, is the owner of lot five (5), and the defendant, Milton F. Lamaster, is the owner of lot six (6), in block fifty-eight (58), in the city of Lincoln; that upon said lots a three-story brick building is erected, and that said buildings contain a joint stairway and hallway on the second and third stories, said stairway and hallways being one-half upon each of said lots; that each of the said parties own the building upon their respective lots, but that, in the construction of said building, it was intended to be lighted and heated jointly, and that the boiler pipes and chimney, etc., were paid for by the plaintiff and defendant jointly, and that the boiler was placed upon the lot line between the said lots, and that the other portion of the joint property was placed upon lot five, except heating pipes and radiators, which the court finds were placed equally in each of the said buildings. The court further finds that it is impossible for the plaintiff and defendant to continue the joint use of said stairway and hallways, and that a partition wall should be erected between said buildings the entire length of said buildings, the center of said wall to be on the true lot line between said lots, and that the erection of said wall shall be commenced on the 15th day of August, 1893, or as soon thereafter as possible. The court further finds that a partition wall has been erected between the said buildings extending to the second story thereof, except where the stairways are, in front, and the boiler now stands. It is therefore ordered, adjudged, and decreed that a partition wall be built through said stairway, and extend through the hallways on the second and third stories, and from the basement in front for the entire length of the building, including the space where the boiler now stands, to the skylight in said building, on the lot line, and that each of said parties pay for one-half of the expense of the same, and that James Tyler, architect, be and is hereby appointed special commissioner to erect said wall,—said special commissioner to advertise for bids for having said wall built for at least ten days in a newspaper of general circulation in Lincoln, and said work to be let to the lowest responsible bidder, with power reserved to reject any and all bids, and readvertise. It is therefore ordered, adjudged, and decreed that said James Tyler shall appraise the property owned in common by said plaintiff and defendant, and may call to his assistance, at his option, any persons acquainted with the value thereof, and notify each of said parties of said appraisement; and if either of said parties desire to take said property at said appraisement to pay James Tyler the one-half of said appraised value, and shall have the privilege so to do, each party having first choice of taking joint property at appraised value situate on his lot; otherwise, said James Tyler shall advertise and sell said property as upon execution, except the chimney, which shall be taken down and used in the erection of said partition wall, if neither of said parties will pay the appraised value thereof, and except also the sewer, which was erected on lot five at the joint expense of the plaintiff and the defendant, which shall be taken at the appraised value of the same by the owner of lot five (5), William Barr, at his option, and also other permanent water pipes and other fixtures that are the joint property of said Barr and Lamaster, and located upon said lot five (5), and said Lamaster shall take, at its appraised value, any such property located on lot six (6), at his option. Either party to have the right to appeal from the appraisement of property on his lot solely situated to the district court on giving bond in double the amount to prosecute the appeal and to pay the appraisement determined at the end of the litigation. It is further ordered, adjudged, and decreed that the said plaintiff, William Barr, and the said defendant, Milton F. Lamaster, each pay one-half of the costs of this action; the costs of the plaintiff being taxed at $——, and the costs of the defendant being taxed at $——, and for all of which execution is hereby awarded."

The proceeding, as submitted to the district court, appears to have been regarded as an equitable partition, between the parties to the decree, of the property thereby affected, and in that light it must be viewed for the purpose of this appeal. It is first argued by the appellant that the cross bill failed to state a cause of action, since there can be no partition of property owned in severalty. It may be stated, as a general proposition, that, where the parties are neither joint tenants, tenants in common, nor co-partners, but each owning distinct and several parts of the property described, an action for partition

thereof will not lie. Freem. Coten. §§ 87, 431, et seq.; Russell v. Beasley, 72 Ala. 190; McConnel v. Kibbe, 43 Ill. 12; Johnson v. Moser, 72 Iowa, 528, 34 N. W. 314; Anderson School Tp. v. Milroy Lodge Free & Accepted Masons No. 139, 130 Ind. 108, 29 N. E. 411. The foregoing general rule is in strict accord with the provisions of our Code for the partition of real property, viz.: "When the object of the action is to effect the partition of real property among several joint owners, the petition must describe the property and the respective interests, and the estates of the several owners thereof if known. All tenants in common or joint tenants of any estate in land may be compelled to make or suffer partition of such estate or estates in the manner hereinafter prescribed." Code Civ. Proc. § 802. In Hurste v. Hotaling, 20 Neb. 178, 29 N. W. 299, the court, by Maxwell, C. J., after quoting the foregoing section, say: "The controlling principle in partition thereof, without regard to the extent or quality of the interest, is that the parties shall be joint tenants in common of an estate in land. * * * Only joint tenants or tenants in common of an estate in land, however, can institute the proceeding." In Johnson v. Moser, supra, the plaintiff had, by purchase at sheriff's sale, acquired title to the first and fourth stories of a certain brick building; also, the cellar thereunder, except that portion used by the execution defendant for the storage of vegetables and provisions for the use of his family. It was held that an action for the partition of the cellar by metes and bounds could not be maintained, the parties being neither joint tenants nor tenants in common, but owners in severalty of distinct and separate portions thereof. In Anderson School Tp. v. Milroy Lodge Free & Accepted Masons No. 139, supra, the parties had erected a building under an agreement whereby the plaintiff was to own and control the ground and first story, subject to the defendant's right of entrance to the third story, to be owned and occupied by it. Elliott, C. J., speaking for the court, after holding that partition should be denied on the ground that it would destroy the defendant's right of access to its lodge room, adds: "But this is not the only reason why appellant is not entitled to partition, for there is this additional reason, namely, each party owns its part of the building in severalty. As each party owns its part of the property in severalty, it is legally impossible that partition can be awarded, for there is no community of interest."

By virtue of the agreements under which the buildings were erected, each party to this controversy has an easement in so much of the halls and skylight as is situated upon the lot of the other, and, in the language of plaintiff's counsel, such easements "are in no way inconsistent with entire several ownership of the two buildings, and the mere existence of cross easements does not authorize the court to make partition, because each party owns his easement in the property of the other in severalty." The defendant, it is shown, granted to the plaintiff the easement in the hallways and skylight voluntarily, and for a valuable consideration, viz.: the grant to him of a cross easement therein. Such easement is real property, an incorporeal hereditament, and as much a part of the plaintiff's estate as the building itself. The defendant is not merely prohibited from interfering with the access of the plaintiff and his tenants to the building of the latter by means of the common hallways, and their free enjoyment of the common skylight, but equity would interfere to prevent the tearing down or destroying by him of his own building during the existence of such easement. 2 Story, Eq. Jur. (12th Ed.) § 927; Trustees v. Lynch, 70 N. Y. 440; Henry v. Koch, 80 N. Y. 391. And, should he suffer his building to decay, the plaintiff would have the right to enter for the purpose of repairing, in order to preserve his easement therein. 2 Washb. Real Prop. p. 79; Washb. Easem. 654; Prescott v. White, 21 Pick. 341; McMillan v. Cronin, 75 N. Y. 474.

But the decree is defended upon the ground that the plaintiff, by the petition to which reference has been made, and by which he sought permission to erect a partition wall on his own premises, abandoned whatever easement he enjoyed in the defendant's property, and that he is accordingly now estopped to call in question the power of the court to grant the relief awarded. But to that contention there are two sufficient answers: First, the allegations of the petition, in so far as they relate to rights of the parties under the agreements mentioned, are in substantial accord with the statements of the answer, and the alleged estoppel is predicated, not upon any statement of fact, but upon the pleader's conclusion from the facts stated by him; second, the plaintiff, for reasons not disclosed, but presumably because he was not entitled to the relief prayed, dismissed his petition previous to the hearing of the cause in the district court. A party will not, it is true, be permitted to shift his position during the trial by pleading one cause of action or defense and recovering upon another. But that doctrine can have no application to the case before us, where the alleged variance consists in the mere assertion of a legal proposition in a proceeding previously dismissed on the plaintiff's own motion. The decree is reversed, and the action dismissed. Reversed and dismissed.

FRANK v. SCOVILLE et al.

(Supreme Court of Nebraska. April 21, 1896.)

TAXATION—DEED BY COUNTY TREASURER—INVALIDITY—RIGHTS OF PURCHASER.

1. No ground of complaint is presented by the refusal of the court to make a finding in

support of which there has been offered no sufficient evidence.

2. A county treasurer's tax deed, under the present condition of the statutes of this state, is invalid either with or without a seal.

3. When a tax deed of the treasurer is invalid because no seal of the treasurer is attached thereto, or because the statute authorizes no such seal, the holder thereof is entitled to reimbursement for the amount of such taxes as he has paid upon his purchase, and subsequent taxes properly paid, and in respect thereto to be subrogated to the rights of the public as to the liens of such taxes and interest.

(Syllabus by the Court.)

Appeal from district court, Hall county; Thompson, Judge.

Petition by William Frank against Libbie C. Scoville and others. From a judgment for plaintiff, defendant Scoville appeals. Affirmed.

Abbott & Caldwell, for appellant. R. C. Glanville, for appellee.

RYAN, C. In his petition filed in the district court of Hall county the plaintiff alleged that by purchase from two heirs of Leonard Burge, deceased, he had become, and still continued to be, the owner of an undivided two-thirds of certain lots, which he described. Libbie C. Scoville, it was alleged, was the holder of a certain invalid tax deed, which created a cloud upon plaintiff's title, and it was prayed that the amount necessary to enable plaintiff to redeem should be ascertained by the court, that plaintiff might be adjudged entitled to redeem therefrom, and that, upon such redemption being made, plaintiff's title might be quieted. By her answer, Libbie C. Scoville admitted that there had been made to her by the treasurer of Hall county a tax deed, which, as she alleged, was valid, and gave her full title to the lots described in plaintiff's petition. This defendant, in her answer, also alleged that, as the widow of Leonard Burge, she was entitled to dower in the lots in controversy, which dower she prayed might be set apart for her. She furthermore answered that she had paid the taxes from the year 1874 to 1890, inclusive, which, with the interest thereon, amounted to $225, and had on July 12, 1876, paid off a mortgage made on said lots by Leonard Burge and herself, for which purpose she had been required to pay, and had paid on or about December 24, 1884, the sum of $144, which sum, with interest to January 1, 1892, amounting to $244 80, with the aforesaid taxes, this defendant prayed to be decreed a lien on the aforesaid lots paramount to every other claim. These averments were denied in the reply, and the statute of limitations was pleaded as to payment of the mortgage described. There was a decree which allowed Libbie C. Scoville $250.61 for and on account of taxes, and created this the first lien upon the lots in controversy. In the brief submitted on behalf of the appellant, Mrs. Scoville, there was a complaint that the court allowed nothing on account of the mortgage. There was no sufficient proof pointed out by the brief of appellant as to why such mortgage should have been reinstated in favor of Mrs. Scoville, and we have been unable to find any evidence that she paid it, for the release was silent as to who had paid, and upon this point there was no other evidence. So, too, as to the alleged dower interest of Mrs. Scoville, there was proof that at the time of the death of Leonard Burge she was his wife, while there was some testimony tending to show that he had obtained a divorce from her. After this cause had been tried, and on April 15, 1893, contemporaneously with the entry of the decree, the attorneys for Mrs. Scoville notified the court and desired that she might have leave to file an amended and supplemental answer thereafter to be prepared. This was filed June 19, 1893, although the record shows that the motion for leave to file the same was denied on that day, except for the correction of a mistake disclosed by the decree itself. The matter which the court refused to allow to be pleaded was the payment of an alleged sidewalk tax of $41.55, made during the pendency of the action. There had been introduced no evidence requiring this proposed amendment of the answer, and it was no abuse of discretion for the court to refuse this new cause of action to be stated more than two months after the judgment which settled all matters as to which issue had been joined, and which had not, by the decree itself, been expressly excepted from its operation. In the discussion of the only question presented, to wit, the rights of Mrs. Scoville with respect to the taxes paid by her, there was between counsel charges and counter charges of improper conduct with reference to the tax deed made to Mrs. Scoville. Whether or not there was on it a seal originally, and whether or not there was sharp practice in obtaining an inspection of such deed to obtain evidence of the nonexistence of such seal, and whether or not a seal was surreptitiously placed upon the deed after this action was begun, are matters of no real importance in view of the holding of this court in Thomsen v. Dickey, 42 Neb. 314, 60 N. W. 558, and Larson v. Dickey, 39 Neb. 471, 58 N. W. 167, for, under the rule announced in those cases, a seal, in any event, could effect nothing. There is no claim that the court erred in the amount of the assessment on account of taxes paid, and it was proper to establish this as a lien upon the interest of plaintiff in the aforesaid lots, and Mrs. Scoville was entitled to nothing more than was by the decree awarded her. See Adams v. Osgood, 42 Neb. 450, 60 N. W. 869. The judgment of the district court is therefore affirmed.

HARRISON, J., not sitting.

FULLER et al. v. PAULEY et al.

(Supreme Court of Nebraska. April 21, 1896.)

MECHANIC'S LIEN—LAND OF THIRD PERSON—PRIORITIES.

1. A person who furnishes materials for use in the erection of buildings on land to one in possession thereof, under contract of sale, may acquire a mechanic's lien on the premises for any unpaid amount of the price of the materials; but, if there is no agreement between the vendor and vendee of the land that the improvements shall be made, the lien can only attach to the interest of the vendee, and will be subsequent and inferior to the lien of the vendor for any balance of the purchase price for the land remaining unpaid.

2. A finding of a trial court on a point in respect to which the evidence is conflicting, but which there is sufficient evidence to sustain, will not be disturbed.

(Syllabus by the Court.)

Appeal from district court, Madison county; Jackson, Judge.

Action by Fuller, Smith & Fuller against William T. Searles, J. M. Pauley, and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Phelps & Sabin and Wigton & Whitham, for appellants. Allen, Robinson & Reed and W. E. Reed, for appellees.

HARRISON, J. It appears from the pleadings and evidence in this case that W. T. Searles had contracted to purchase from the state a section of what is generally known as "school land," or "school section," and had such written evidences or contracts as are issued in transactions of this character between the state and a purchaser of school lands. On October 1, 1887, he sold the land to one J. M. Pauley, the price agreed upon being $12.50 per acre, or $8,000 for the entire tract. Pauley was to pay the amount then unpaid to the state, $4,320, and to pay in cash to Searles $3,680. Of this last-mentioned sum, he paid but $80. In December of the same year, or the following January, pursuant to an agreement then entered into by the parties, Pauley gave his notes, payable six months after date, to Searles for the unpaid balance of the amount of what was to have been the cash payment of the purchase consideration. After this arrangement, Pauley took possession of the land, and remained in possession until about the 1st of November, 1888; and, during the time just indicated, erected a house and barn, and made some other improvements thereon, and, for the lumber and other materials used in so doing, became indebted to the appellants, and also to S. K. Painter, for some material. These bills not being paid, a lien was prepared and filed by each party, in accordance with the provisions of our statute in relation to mechanics' liens, and this action by appellants to enforce their lien, in which S. K. Painter, the other lienholder, and W. T. Searles, were made defendants, was commenced. A decree was rendered foreclosing the lien of appellants, also that of Painter, but subordinating them to the rights or demand of Searles, Pauley's vendor, for the unpaid balance of the purchase price of the land.

The question of the priority as between the liens for material and the vendor's claim for unpaid purchase money is the main one presented by the appeal. Collateral to this, but quite important in a final determination of the case, is the inquiry of whether Pauley, as a part consideration for the sale of the land to him by Searles, agreed to build the dwelling and barn, the furnishing of materials for which, by the lienholders, respectively, is the basis of the lien of appellants and of S. K. Painter. The evidence on this point in the case is conflicting, and the judge before whom it was tried made a general finding on the issues involved, in favor of Searles, which comprised and included a finding that it was no part of the consideration for the purchase of the land that Pauley should build the house and barn, and this conclusion was amply supported by the evidence, and will not be disturbed. The evidence discloses that Searles did not assign to Pauley the contracts of purchase issued by the state, but retained them in his possession, and intended to do so until the whole sum which he would realize from the transaction should be paid to him. With these conditions shown to exist,—a contract of sale from vendor to vendee, a portion of the purchase money unpaid, no part of the consideration between the vendor and vendee being an agreement by the vendee to erect the improvements, there being in fact no such an agreement, while the right to a lien for materials furnished to make the improvements might arise and attach,—it could, in any event, be only to the interest of the vendee in the property, and as a lien subject and inferior to the right of the vendor for any unpaid balance of purchase money. Mentzer v. Peters (Wash.) 33 Pac. 1078; Thomas v. Ellison (Ark.) 22 S. W. 95; Wilkins v. Litchfield (Iowa) 29 N. W. 447; Smith v. Huckaby (Tex. Civ. App.) 23 S. W. 397; Phil. Mech. Liens, § 72. The judgment of the district court is affirmed.

HAY v. MILLER et al.

(Supreme Court of Nebraska. April 21, 1896.)

EQUITY — PRACTICE — DEED — CANCELLATION — INSANITY—WHAT CONSTITUTES—OPINION EVIDENCE.

1. Error as to the form in which an issue of fact in an equity cause is submitted to the jury for decision is not available in this court, where no exception was taken thereto in the trial court, and the judgment is not assailed on that ground in the petition in error.

2. A nonprofessional witness may give his opinion as to sanity as the result of his personal observation of the person whose sanity or mental condition is questioned, after first stating the facts which he observed.

3. While mere imbecility or weakness of

mind in a grantor will not, in the absence of fraud, avoid his deed, insanity will do so if of such a character as to induce the conveyance, although such insanity may not amount to a complete dethronement of reason and understanding upon all subjects. Dewey v. Allgire, 55 N. W. 276, 37 Neb. 6, followed.

4. Where there was sufficient evidence properly admitted to sustain the findings, they will not be disturbed.

(Syllabus by the Court.)

Error to district court, Douglas county; Walton, Judge.

Action by Mary E. Miller and others against Mary Hay to cancel a deed. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

Kennedy, Gilbert & Anderson, for plaintiff in error. Cowin & McHugh and G. W. Ambrose, for defendants in error.

NORVAL, J. On the 25th day of October, 1890, Joseph Manning made, executed and delivered to Mary Hay a warranty deed purporting to convey to the latter, his niece, all his real estate and personal property and effects. His property consisted of a large number of lots in the city of Florence, in the county of Douglas, and about $1,200 in money. The consideration for making the conveyance, as expressed in the deed, is "that the said Mary Hay has undertaken and agrees to furnish to the grantor a good, comfortable home in her family, and suitable support, during the remainder of his natural life, and at his death a suitable burial; all at her own expense." On the 6th day of November—12 days after the delivery of the deed—Manning died, intestate, at the home of Mrs. Hay, in the county of Douglas, and subsequently William Colburn was duly appointed administrator de bonis non of the estate of said Manning, and qualified as such officer. On the 18th day of January, 1891, Mary E. Miller, Lizzie Rogerson, John Morisey, and Maggie Stangelan, the grandchildren and sole heirs at law of the said Joseph Manning, deceased, the said administrator joining with them, brought this action in the court below against the said Mary Hay and William Hay, her husband, to annul and cancel said deed on the ground that the grantor at the date of the execution of the instrument was of unsound mind, and incapable of understanding the nature or effect of his acts; and, further, that the grantee obtained the conveyance through fraud and undue influence. No testimony was offered on the trial in support of the allegations in the petition of fraud and undue influence. On application of the plaintiffs the court made an order directing that there be tried by a jury the issue whether or not the said Joseph Manning, at the time of the making and executing of the deed in question, was of unsound mind. Upon the hearing the jury returned a verdict finding the said issue in favor of the plaintiffs, and that said Manning, by reason of his mental condition, was incapable of making a disposition of his property, or to realize the purport and effect of his acts when he executed the deed. A motion to set aside the verdict and for a new trial was overruled, and thereupon the remaining issues in the case presented by the pleadings were tried to the court. Findings in favor of the plaintiff were made, and a decree was entered setting aside and canceling the deed, and adjudging the grandchildren of the deceased to be the owners of the property described in the conveyance. Mrs. Hay has prosecuted a petition in error.

Complaint is made in the brief of the form in which the issue was submitted to the jury, counsel claiming that the question propounded to the jury represented a question of law, instead of one of fact from which the conclusions of law could be drawn by the court. No exception was taken by the defendants to the form in which the question was submitted at the time the order was entered, nor was any objection made upon that ground either in the motion for a new trial or in the petition in error; hence, if there was any error in the decision, it is not available in this court. Moreover, the question was not objectionable on the ground on which it is assailed. It submitted to the jury for their determination purely an issue of fact, namely, whether Joseph Manning, on the 25th day of October, 1890, and at the time he executed the deed, was of "unsound mind, and mentally incapable of understanding the nature and effect of said instrument."

It is urged that the court committed error in permitting nonexpert witnesses for the plaintiffs to state their opinions as to the mental condition of said Joseph Manning. Counsel take the ground that the opinion of a witness not an expert is not competent to prove the sanity or insanity of another, save and except in the case of a subscribing witness to a will. Whatever may be the rule elsewhere, it is not the law in this state. As early as Schlencker v. State, 9 Neb. 241, 1 N. W. 857, it was held that the opinion of a nonprofessional witness is competent evidence upon the sanity or mental condition of the accused, where such opinion is based upon facts within his personal knowledge, and which he has previously detailed before the jury. The doctrine announced in the above case has been followed with approval in Polin v. State, 14 Neb. 540, 16 N. W. 898; Burgo v. State, 26 Neb. 643, 42 N. W. 701; Shults v. State, 37 Neb. 481, 55 N. W. 1080; Dewey v. Allgire, 37 Neb. 6, 55 N. W. 276; Pflueger v. State, 46 Neb. 493, 64 N. W. 1094. In the case at bar it was disclosed that each of the nonexpert witnesses called by the plaintiff was well acquainted with Manning in his lifetime, and had sufficient opportunities of observing him, and that the witness did not give his opinion as to Manning's sanity or mental condition until after he had stated the facts to the jury upon which such opinion was based. We discover no error in the admission of the

nonexpert testimony prejudicial to the rights of the party now complaining.

It is finally insisted that there is no proof of mental weakness of said Joseph Manning at the time of making the deed to Mrs. Hay, sufficient to invalidate the conveyance. Numerous witnesses were examined upon this branch of the case,—about an equal number on either side,—their testimony making nearly 450 typewritten pages. We have read it all, and, without entering upon a detailed consideration of the evidence, it may be said that that introduced upon behalf of the defendants tends to show that Manning, when he made the deed, was perfectly sane, and was capable to contract with reference to his property. The testimony on the other side is fully as convincing, and tends to establish that Manning, when he executed the deed, was more than 90 years old; that for some time prior thereto, by reason of sickness and advanced age, he had been greatly enfeebled in mind and body, and when the conveyance was executed his mind was so impaired that he was wholly incapable of understanding the nature and effect of his acts. The testimony adduced, although conflicting, when tested by the rule laid down in Dewey v. Allgire, 37 Neb. 6, 55 N. W. 276, was ample to warrant a finding that Manning was incompetent to execute the deed. It was in that case said (we quote from the syllabus): "While mere imbecility or weakness of mind in a grantor will not, in the absence of fraud, avoid his deed, insanity will do so if of such a character as to induce the conveyance, although such insanity may not amount to a complete dethronement of reason and understanding upon all subjects." The facts bring the case at bar within the above decision. The finding upon the controverted issue in the case being supported by sufficient competent evidence, the decree setting aside the deed must be affirmed. Affirmed.

HOOVER v. STATE.

(Supreme Court of Nebraska. April 21, 1896.)

HOMICIDE — CONTINUANCE — CONDUCT OF TRIAL — APPEAL — HARMLESS ERROR — PRESUMPTIONS — INFORMATION — INTERLINEATIONS — INSANITY — EXPERT TESTIMONY.

1. There must, to show prejudicial error, be made to appear something more than that, within three weeks after a homicide had been committed, there was a conviction of the accused, in respect to such homicide, of the crime of murder. Irvine and Ragan, CC., dissenting.

2. There is necessarily vested in the district court a considerable discretion as to overruling an application for a continuance in a criminal case, and, to a reversal of the ruling in denial of such an application, such application must contain something more than the affidavits of the prisoner and his counsel, in general terms, that there exists, in the county wherein the trial must take place, a great deal of excitement.

3. From the mere fact that the word "purposely" was interlined with a pen in a typewritten information upon which a preliminary examination was had, it is not a necessary inference that the interlineation was made after or during the preliminary examination, and a plea in abatement sustained only by such assumption was properly overruled in the district court.

4. Nonexpert witnesses can be permitted to express an opinion as to the sanity or insanity of a person, only when they have shown other sufficient qualifications, and have stated the facts and circumstances upon which their opinion of such mental condition is based.

5. There is no presumption that the district judge, without sufficient justification, required witnesses, though relations of the prisoner, to leave the immediate vicinity of the accused during the progress of the trial; neither does the mere fact that this was done in an unusual manner justify the assumption that thereby prejudice resulted.

6. Where a prosecuting attorney referred to facts not in evidence, and, upon objection that the statements were unwarranted by the evidence, the district court instructed the jury to disregard such statements, there was left no ground for complaint, for the reason that the court, when appealed to, granted all the relief prayed for.

7. The verdict is sustained by ample evidence, which was uncontradicted, and the judgment of the district court thereon is affirmed.

(Syllabus by the Court.)

Error to district court, Douglas county; Scott, Judge.

Claude H. Hoover was convicted of murder, and brings error. Affirmed.

James A. Powers and M. C. Acheson, for plaintiff in error. A. S. Churchill, Atty. Gen., and George A. Day, Dep. Atty. Gen., for the State.

RYAN, C. Plaintiff in error was convicted of murder in the first degree in the district court of Douglas county. The information was filed December 24, 1895, and charged, in appropriate language, that the plaintiff in error, on December 13, 1895, had murdered Samuel Du Bois in said county. A plea in abatement was overruled on December 26, 1895, and on the same day there was an arraignment, and a plea of not guilty. On the day following, the trial began, was continued on the 28th, and on the 29th there was a verdict, as above indicated. A motion for a new trial was overruled on December 30th, and on January 3, 1896, sentence was pronounced that Claude H. Hoover, on April 17, 1896, suffer death by hanging.

Just before his death, the business of Samuel Du Bois was repairing elevators. In his employ were Kate Brophy, and Claude H. Hoover. In her testimony, Miss Brophy describes herself as a half-sister of Hoover and a half-sister of the widow of Samuel Du Bois. In the record the relationship of the parties is not stated with more fullness, and, indeed, no more definite information is necessary, for this enables us to understand why Hoover should feel authorized to talk as he did to Miss Brophy. Between the hours of 1 and 2 o'clock on the afternoon of December 13, 1895, Miss Brophy was in the office of Mr. Du Bois. Plaintiff in error came in, and said to Miss Brophy: "I don't want

you to go with that girl any more, because she ain't the kind of girl you ought to go with." In the discussion of this suggestion there seems to have arisen considerable feeling, so much so that when, very soon afterwards, Mr. Du Bois came into the office, he observed there was something wrong. When the nature of the trouble had been explained to him, Mr. Du Bois said he knew Miss Brophy would not go with any one who wasn't right, for she had always done right. To Mr. Hoover, Mr. Du Bois said that he should go out of the office, and at the same time he seems to have taken hold of Hoover, and led him towards the door. While this was being done Hoover suggested that he would go out if Du Bois would pay him the wages due him. This was agreed to, and very soon done, and Mr. Hoover, upon receiving his pay, said to Mr. Du Bois that he was obliged to him, and was told by Mr. Du Bois that he was welcome. The deceased and the accused seem not to have met again until just before the commission of the homicide hereinafter described. About 15 minutes before 2 o'clock Hoover, by telephone, arranged with Miss Brophy to meet him, and soon afterwards, from across the street, beckoned her to come to him. Upon compliance he asked her the address of Mr. Colby at Kansas City, saying that he was that night going to that city. In this interview he spoke of Du Bois and said that Du Bois had no business striking him, and that if he (Hoover) would do right, he would shoot Du Bois. He was probably considerably intoxicated at this time, shed tears, and sent his farewells to other members of the family. It is not clear, from the evidence, whether this interview was before or after the purchase of the pistol with which he afterwards killed Du Bois. It was, at any rate, about the same time in the afternoon; that is to say, about 2 or 3 o'clock. About half past 5 o'clock, Mr. Hoover went to the shop of Mr. Saalfield, a shoemaker. There were then in the shop some other parties, and Mr. Hoover sat down and talked with them, and, among other things, remarked that he would give a quarter if Sam Du Bois would show up. His companions did not notice that he was much intoxicated, if, indeed, he was at all, at this time. Within 15 minutes after Hoover had become an inmate of the shop Samuel Du Bois entered, saying, "Good evening, gentlemen," and was instantly confronted by Hoover, who said, "I've got you where I want you, you son of a bitch." The persons in the shop at the time were able to state, in their testimony, nothing that immediately followed this remark, except that they saw two flashes of a pistol in Hoover's hand, and heard Du Bois say: "I am shot." It seems, however, that Du Bois must instantly have closed with his assailant; for the earliest resumption of the narrative of any eyewitness begins with the description of the manner in which Du Bois was holding Hoover powerless to do him further harm. Finally, Du Bois, unassisted, wrenched the pistol from Hoover's grasp, and, having turned from Hoover, said: "Somebody take this gun. He shot me, but I don't want to shoot him." Mr. Fenton took the pistol from Mr. Du Bois, who immediately took off his coat, and as soon as some garments could be spread upon the floor lay down. Before Du Bois had lain down, Hoover said to him, "I always told you I would shoot you." Afterwards, however, he seemed sorry for what he had done. Du Bois, within 15 hours, died of the wounds inflicted by Hoover. We are able thus confidently to state the above facts, for there was, in respect to them, no conflict in the evidence. The matters upon which the plaintiff in error relies for a reversal of the judgment of the district court will now be considered in their order of presentation in the brief of his counsel.

It is first urged that the application for a continuance should have been sustained, in view of the showing thereby of the excited condition of the people of Douglas county, and that there was prejudicial error in hastening the trial, as was done in this case. A considerable discretion is necessarily lodged with the district courts with reference to applications for continuance in criminal cases. If the rule was otherwise, it would be almost impossible to bring to trial persons accused of grave crimes. The court in this case was certainly very expeditious, having performed the last of its duties on January 3, 1896, just 10 days after the filing of the information, and three weeks after the commission of the homicide. There is no showing that there was sacrificed any right of the accused; neither does it appear that, if more time had been given him to prepare for trial, he would have been able to procure evidence of any kind to his advantage; and, so far as the existence of excitement was concerned, it was only shown by affidavits of the accused and his counsel, couched in very general terms. While haste, if it was shown to have attended the various proceedings, might predispose a reviewing court to a favorable consideration of the proofs indicating that thereby the accused had actually suffered prejudice, this predisposition should not entirely excuse the absence of such proof.

By the information upon preliminary examination it was charged that Claude H. Hoover did unlawfully, feloniously, purposely, and "of his deliberate and premeditated malice, kill and murder," etc. This information was typewritten, except that the word "purposely" was interlined with a pen. In the district court the information upon which the trial was had contained the word "purposely." It is not shown that the word "purposely" was not in the information before the preliminary examination was had, except by an affidavit, submitted in this court.

to procure an order requiring that such original information should be certified to this court for inspection. Upon this unsatisfactory showing, in this court made for the first time, we would not be justified in assuming that, at an improper time, an amendment of the information before the examining magistrate had been made; and this was the sole question presented by the plea in abatement. Whether or not this information would have been sufficient, without the word "purposely," we do not consider, much less decide.

The next criticism of the action of the court is because there was excluded evidence which, it is claimed, would have shown that the accused was insane when he killed Du Bois. Miss Brophy testified that Hoover had been drinking, but was not drunk while he was in the office; that, at the interview across the street from the office, he was drunk, she thought. At times, she said, he didn't talk right; he talked strange, she always thought. In her cross-examination, Miss Brophy said she was 17 years old, and had lived in the family with the accused for two years, and had seen him every day during this time, and that, on the 13th of December, 1895, he was acting very strangely. The following proceedings during the cross-examination of Miss Brophy are shown, by the bill of exceptions, to have taken place: "Q. You have seen him act queer on other occasions? A. Yes, sir. (Motion by the state to strike the answer as incompetent, irrelevant, immaterial, and not proper cross-examination. Sustained. Defendant excepts.) Q. From all that you saw of Claude this day, and all that you know of him, and the manner in which he acted on that day, what was said and done, did you consider him at the time sane or insane? (Objection by the state as incompetent, immateral, irrelevant, and not proper cross-examination. Sustained. Defendant excepts.)" It must be conceded that this was proper cross-examination, and yet, aside from this, there is left this undetermined,—the competency, materiality, and relevancy of the evidence excluded, and of that offered on this branch of the case. The interrogative sentence, "You have seen him act queer on other occasions?" called simply for a conclusion of the witness. The inquiry should have been with reference to the facts and circumstances themselves, and not merely, in effect, whether the witness regarded the conduct of the accused on other occasions as queer. There was therefore no error in excluding this evidence. The next question, as to whether the witness, from what she saw of the accused on the day of the homicide, and from what she knew of him, regarded him as sane or insane, was premature. The rule is that, before a nonexpert can give his opinion as to the sanity or insanity of a person, he must state the facts and circumstances upon which he bases his conclusion. In Schlencker v. State, 9 Neb. 241, 1 N. W. 857, it was held that the opinion of a witness not an expert is competent evidence upon the question of the prisoner's sanity, where such opinion is formed upon facts within the personal knowledge of the witness, and sworn to by him before the jury. In the later cases in this court there has been no direct statement of the requirement that a nonexpert witness, before giving his opinion as to the mental condition of a person at a certain time, must state the facts and circumstances upon which that opinion rests; yet the case above cited has been repeatedly approved in a general way. Polin v. State, 14 Neb. 540, 16 N. W. 898; Shults v. State, 37 Neb. 481, 55 N. W. 1080. We are indebted to the brief of the attorney general for citations of the holdings of 21 different states in support of this rule, and the cases cited in behalf of the plaintiff in error are not in conflict with it. Since the argument in this case, this principle has been enforced in Hay v. Miller, 47 Neb. —, 66 N. W. 1115. We cannot examine the errors alleged with reference to the exclusion of the evidence of Mrs. Du Bois as to the sanity of Hoover for a reason additional to that given above, which is, that there was no statement as to what the proffered testimony would disclose, if admitted.

By affidavit it was shown, without contradiction, that, while one of the attorneys for the prisoner was addressing the jury, there were seated near the accused Mrs. Du Bois and Miss Brophy; that the presiding judge, Hon. Cunningham R. Scott, came directly from his private room to them, and, in the presence and the hearing of the jury, said: "Go right away from here. You cannot sit there." Counsel for the prisoner then said: "Your honor, these are our witnesses." To which the reply was, simply: "Yes, sir." It is insisted that this was prejudicial to the rights of the accused, and must have had an influence upon the jury. It is possible that too much display was made in obtaining the removal of these ladies, and probably it would have been much better if the presiding judge had conveyed his wish to them through the medium of a bailiff or some other person. It was a strange situation, however, and there may have been such misconduct that the presiding judge was justifiable in putting a stop to it in a very summary manner. The fact that the ladies were witnesses on behalf of the accused conferred upon them no right in a special manner to manifest to the jury their wish for his acquittal; and, if anything of this kind was transpiring, it was certainly the duty of the court to see that it ceased. It is true there is no evidence in the record of any misconduct, and yet this conduct of the judge, while not altogether dignified, cannot be assumed to have been without justification.

The fifth and last point urged in the brief is that there was misconduct on the part of the county attorney in making use of the

following language in his argument to the jury, to wit: "Samuel Du Bois was a man who rose by his own merit from humble walks of life, and was a man of large, generous heart. He was called upon to make the laws of this city, and these facts, with other circumstances, make this one of the most heinous crimes ever committed in this community." In the affidavit by which was shown the use of the above language, it was disclosed that the county attorney further said to the jury: "For 14 hours he suffered all the tortures of the damned." Following this quotation the affidavit contained these words: "That said Powers [an attorney for the prisoner] called the attention of the court to this language, and insisted that it was unwarranted by the evidence, and thereupon the court instructed the jury not to consider it in arriving at their verdict. And further affiant saith not." It appears, clearly, from these quotations, that the sole objection made to the language of the county attorney was that it was unwarranted by the evidence, and that thereupon the court, by an instruction, directed the jury not to consider it. This was all that counsel by his objection seems to have required. Prosecuting attorneys cannot be too careful to confine themselves strictly within the evidence. It is not required of them that, in asserting the majesty of the law, they shall resort to questionable means. They are the representatives of the state, and should never forget to maintain its authority by fair, open methods. In this case whatever lapse occurred was instantly counteracted by the court, as far as required by counsel for the prisoner, and therefore he has no ground for complaint. This record has been very carefully examined with a view to ascertaining whether or not any prejudicial error was committed, and we can find none. The statement of the facts established by uncontradicted evidence which has hereinbefore been given leaves no room for doubt that the defendant was properly convicted of the crime with which he was charged. The judgment of the district court is affirmed.

Sentence is to be executed August 7, 1896.

IRVINE, C. (dissenting). I think this judgment should be reversed for the sole reason that the accused was put on trial, over his objections, within so brief a period after the offense with which he was charged was committed that he had no reasonable time to prepare his defense, and was not permitted the assistance of counsel within the proper meaning of the term. The offense was charged to have been committed December 13th. The defendant was held to answer December 18th. The information was filed December 24th. He was arraigned December 26th. He was put on trial December 27th, less than two weeks after the offense was committed. It is true that there was no showing, by evidence preserved in the record, of public excitement, or prejudice, preventing a fair trial. It is also true that a motion for a continuance for the purpose of properly preparing for trial must be supported by proof of the occasion therefor. But there is a difference between the continuance of a cause and its mere postponement to a future day. The same strictness is not required in order to procure a temporary postponement that is required for a continuance over the term; and especially in a criminal case, although the application be for a continuance, if the proof be insufficient, the court should postpone the trial, if it would be unjust for any reason to proceed at once. This was a capital case. The life of the accused was at stake. We cannot shut our eyes to well-known truths. Counsel, no matter how learned, no matter how experienced, require in all cases some time for preparation. Where his client's life is at stake, any lawyer with a proper sense of the responsibility resting upon him requires a considerable time for the examination of the case, for reflection, and for preparation for trial. His client is, in such a case, usually much less able to assist him than in civil cases, or than in criminal cases of minor import. It is not always possible for counsel to even sufficiently inform himself of the facts of the case and of available evidence to at once present the formal proof requisite to procure a continuance; and when a man is charged with murder, especially where, as it in this case turned out, insanity is a feature of the defense, a reasonable opportunity should be given counsel, not only to procure the attendance of witnesses, but to examine into the facts of the case and deliberate upon his course of conduct. As said by the supreme court of Louisiana, in State v. Ferris, 16 La. Ann. 425: "The law, in securing to them [persons accused of crime] the assistance of counsel, did not intend to extend a barren right; for of what avail would be the privilege of counsel * * * if, on the spur of the moment, without an opportunity of studying the case, the former should be compelled to enter into an investigation of the cause?" I am aware that convictions have been sustained where less time intervened between the commission of the offense and the commencement of the trial than in the case at bar. But, so far as I know, there has not been any recent instance of a sentence of death sustained under such circumstances of expedition against the protest of the accused. But the case, to my mind, should not be controlled by precedent. A reasonably speedy enforcement of the criminal law is necessary. But the court should not permit the clamor of newspapers or of the public to so far hasten prosecutions as to substantially deprive the accused of their constitutional privilege of a fair and impartial, as well as a speedy, trial, and to the real assistance of counsel,—that is, the assistance of counsel who have had a reasonable opportunity to investigate the case and prepare a

defense. I think, in this case, there was an abuse of discretion in not granting the accused a postponement of the trial, and that the judgment should be for that reason reversed.

RAGAN, C., concurs in the foregoing dissenting opinion.

PADDOCK et al. v. SAM GOSNEY LIVE-STOCK COMMISSION CO.

(Supreme Court of Nebraska. April 21, 1896.)

FACTS—PROVINCE OF JURY.

When there is involved merely a question of fact, its determination rests with the jury; and the district court is therefore *held* properly to have admitted evidence to establish such fact, and properly to have refused to instruct, upon request, that, from certain evidence stated, a certain presumption arose, and that certain other evidence stated established other facts.

(Syllabus by the Court.)

Error to district court, Douglas county; Ogden, Judge.

Replevin by the Sam Gosney Live-Stock Commission Company against Orin K. Paddock and others. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Gregory, Day & Day, for plaintiffs in error. Mahoney, Minahan & Smyth and Ben S. Adams, for defendant in error

RYAN, C. The subject-matter of this replevin suit, as to which there was a verdict, upon which a judgment was rendered by the district court of Douglas county, was a car load of steers, shipped by E. W. Banks, from Thurman, Iowa, to South Omaha. As these cattle were shipped in the name of said Banks, it was assumed by Paddock & Co., a firm at South Omaha, that these cattle were owned by Banks, and could be subjected to the payment of a debt by him owing to said firm, and accordingly an attachment was by said firm sued out, and thereunder the said cattle were attached as the property of Banks. The Sam Gosney Live-Stock Commission Company, a corporation doing business at South Omaha, replevied the cattle from the sheriff, joining the members of the firm of Paddock & Co. as defendants; and from the judgment in favor of the plaintiff in the district court aforesaid, the defendants have prosecuted error proceedings to this court.

As might be inferred from the above statement of facts, the chief contested question was one of fact; that is to say, whether the cattle were in reality those of the Gosney Live-Stock Commission Company, or were owned by, and therefore were subject to seizure for satisfaction of the debts of, Banks. There is no room for doubt that Mr. Gosney, acting for the Sam Gosney Live-Stock Commission Company, visited Thurman, Iowa, July 6, 1891, saw the cattle afterwards shipped to South Omaha, and endeavored to buy them; but, finding the price asked was greater that he was willing to pay, he did not then purchase. He, however, told Paul Bros., bankers at Thurman aforesaid, that he wished to purchase these cattle if the market should become more to his liking within a short time, and in that event he would want to make arrangements through said bank. Mr. Gosney, on July 8th, telephoned Mr. Banks to buy the cattle at the price at which they had been offered, and also telephoned Paul Bros. to honor a draft on the Sam Gosney Live-Stock Commission Company, drawn by Banks, for the purchase price of the cattle. This was accordingly done, and the cattle were purchased; but Banks, without the knowledge of the aforesaid commission firm, shipped the cattle to South Omaha in his own name. It is complained that there was admitted evidence of the transactions in Iowa, but we can see no good reason for excluding this testimony; for the question was whether, in reality, Banks was the owner of the cattle upon which the levy had been made. It was therefore necessary to show such facts as served to show whether or not Banks was the owner of the cattle, and certainly the arrangement previously made for furnishing the necessary money was material, as was also the proof that, in pursuance of such arrangement, the required money was actually supplied through Paul Bros.

It is urged that the court should have given instruction numbered 3, asked by the plaintiff in error. This instruction was to the effect that the purchase of the cattle by Banks in his own name, and payment by checks drawn on Paul Bros., raised a presumption that Banks was the owner of the cattle at the time they were purchased and shipped. The court, upon its motion, had instructed that the burden of the proof was upon the defendant in error to establish, by the preponderance of the proof, every material disputed allegation of its petition. This was as much as the court was bound to do, for what presumption was to be entertained from proof of certain facts was a question for the jury alone to determine. Dobson v. State, 46 Neb. 250, 64 N. W. 956, and authorities cited; Metz v. State, 46 Neb. 547, 65 N. W. 190. The fifth instruction asked by plaintiff in error was properly refused, for it required the jury to pass upon the effect of a mere guaranty of the Gosney Live-Stock Commission Company to Paul Bros. The evidence did not tend, even remotely, in any fair view of it, to establish such a relation between the parties concerned. Hence, this instruction was properly refused. There was an attempt, in the sixth instruction, by the plaintiff in error, to state what facts would be sufficient to constitute Banks the owner or not the owner of the cattle in dispute. This matter of ownership was a question of fact, to be determined by the jury upon its

own estimate of the weight of the evidence as a whole; and an instruction which sought to perform this duty for the jury was properly refused. These are all the questions discussed, and the judgment of the district court is affirmed.

HANNA v. BUCKLEY.

(Supreme Court of Nebraska. April 21, 1896.)

SALE OF PERSONALTY—CLAIM OF THIRD PERSON—SURRENDER BY PURCHASER.

1. The buyer of personal property may peaceably surrender possession to a third person, claimant thereof; but, if he does so, in an action between him and the seller, in order to sustain a claim on his part for damages for the loss of the property, he must prove that the third person had a title thereto, valid and paramount to that acquired by the buyer from the seller.

2. Evidence *held* insufficient to sustain the verdict.

(Syllabus by the Court.)

Error to district court, Dawson county; Church, Judge.

Action by Robert Hanna against L. S. Buckley. Judgment for defendant, and plaintiff brings error. Reversed.

G. W. Fox, for plaintiff in error. C. W. McNamar, for defendant in error.

HARRISON, J. The plaintiff commenced this action in the district court of Dawson county on a promissory note, to recover the sum of $49.50 and interest. Defendant admitted the execution and delivery of the note in suit, but alleged that it was for the purchase price of a horse sold to him by plaintiff, and that plaintiff represented that he possessed a good title to the horse, and that it was not mortgaged or incumbered in any manner; that this was untrue, there being, at the time of the sale to defendant, to plaintiff's knowledge, an existing mortgage on the horse; that, subsequent to defendant's purchase, the animal was taken from him by or for the party owner and holder of the mortgage lien, of which fact he immediately notified the plaintiff, who did not and had not taken any action in the premises,—all of which damaged the defendant in the amount of the note and $25 in excess thereof. The plaintiff, in reply to the answer of defendant, admitted that the note evidenced the agreed price of a horse sold by him to defendant, but denied each and every allegation of the answer. The issues were tried before the judge and a jury, and the result was a verdict for the defendant; and, after motion for a new trial heard and overruled, judgment was rendered on the verdict. The plaintiff presents the case here by error proceedings.

One assignment of error is that the verdict was not sustained by sufficient evidence, and under this assignment it is claimed that it was for the defendant to show, before he should have been allowed any damages, not only that the horse had been taken from him, but that it was done by or for some person having a superior title or right to the property. The evidence discloses that the plaintiff had a lien by mortgage on the horse, and took possession of it, foreclosed the mortgage, and sold the horse, which, at such sale, was purchased by the defendant herein; and, at the time of the sale, the defendant inquired of plaintiff whether there was any other lien on the property existing, other than the one to enforce which it was being sold, and was assured by plaintiff that there was not, and that, in making the purchase, the defendant relied on such statement as being true. We will quote a portion of the defendant's testimony: "Q. State what the note in this action was given for. A. It was given for a horse that I bought of Mr. Robert Hanna. Q. State if there was anything said by Mr. Robert Hanna in regard to the title of the horse. A. The horse was sold on a mortgage, and I asked Mr. Robert Hanna, at the time of the sale, if the horse was free and clear of all incumbrance, and he said it was. Q. State if the horse was ever taken away from you. If, so, state the circumstances. A. After I had the horse about a month or six weeks, the deputy sheriff of Custer county came with a mortgage on the horse, and took the horse away from me; at least, he went into the corral where the horse was, and got the horse, and took him away. Q. State if you said anything to Mr. Hanna about it. A. I notified Mr. Robert Hanna just as quick as I possibly could go to where he was. Q. How long did it take you to go there? A. The same day, not over an hour."

In regard to the mortgage or lien under which it was claimed the horse was taken from the possession of defendant, it was further testified that plaintiff had knowledge that some person claimed to hold a mortgage on the property, but there was no evidence in respect to its validity or date, whether it had been filed, or whether it covered the horse sold by plaintiff to defendant. The mortgage was not proved or offered in evidence. To give the evidence in regard to the defendant's being deprived of the horse its full effect, it may be said to establish that some person, claiming to be deputy sheriff from Custer county, went to the place where defendant had the horse, and took it away, asserting his right to do so was derived from a lien created by a mortgage then in his possession, and that the defendant offered no resistance, but allowed the horse to be taken, and immediately notified the plaintiff of what had occurred. This was not sufficient. It further devolved upon defendant to prove that the lien under which the horse was taken from his possession was a valid one, and superior to the title which had been conveyed to him by plaintiff. This he did not do. Where, as in this case, personal property is sold, and

there is a warranty of the title by the vendor, if some third person claims the property, either as an owner, or by virtue of a mortgage or other lien thereon, the buyer may peaceably surrender possession to such third person, and, in an action against the buyer, for the unpaid purchase price, or any portion thereof, by the seller, the damages sustained by the buyer by reason of the failure of the title to the property is good matter of defense; but, to maintain such defense, the party alleging it, under the circumstances hereinbefore detailed, must establish that the title to which he yielded was valid, superior, and paramount to the title acquired from the seller. By a voluntary surrender of the property to a third party, the buyer, in an action between him and the seller, in order to sustain a claim for damages arising from the loss of the property, assumes the onus of showing that the third person had a valid and paramount title or claim to the property. McGiffin v. Baird, 62 N. Y. 329; Bordwell v. Collie, 45 N. Y. 494; Benj. Sales, § 830, note; Hall v. Aitkin, 25 Neb. 360, 41 N. W. 192; Cheney v. Straube, 35 Neb. 521, 53 N. W. 479.

In the case at bar the defendant did not prove the validity of the title of the party to whom or to whose agent he voluntarily surrendered the possession of the horse, and the superiority of such title to that of the party of whom he purchased, and of whom he was seeking to recover damages for the failure of the title. Consequently, the evidence was insufficient to sustain the verdict, and the judgment and verdict must be set aside.

There are some other alleged errors argued in the brief; but, as there must be a new trial, we do not deem a discussion of them necessary. The judgment of the district court is reversed, and the case remanded for further proceedings. Reversed and remanded.

McCLELLAND v. SCROGGIN.

(Supreme Court of Nebraska. April 21, 1896.)

CONTINUANCE—NEGLIGENCE—QUESTION FOR JURY.

1. A motion and the affidavit filed in support thereof, which did not show that if a continuance was granted the evidence of the absent witness or his personal attendance could or would be obtained, *held* insufficient.

2. The care which may be termed ordinary is such a degree of care as a prudent and reasonable man would exercise under the existing circumstances and conditions. Where the known risks are enhanced, the degree of care should correspondingly increase.

3. The facts and circumstances in evidence in this case with reference to the management and operation of the engine of a steam thresher, more particularly in respect to the manner of dumping or throwing ashes and cinders and live coals therefrom in the stack yard near to the straw and stacks of grain, and the condition in which such ashes, cinders, and coals were there left, *held* to present questions of negligence which should have been submitted to the jury.

(Syllabus by the Court.)

Error to district court, Nuckolls county; Hastings, Judge.

Action by Benjamin F. Scroggin against Susan A. McClelland. There was a judgment for plaintiff, and defendant brings error. Reversed.

Cole & Brown and S. W. Christy, for plaintiff in error. Searle & Coleman, for defendant in error.

HARRISON, J. During the fall of 1891 the defendant in error was operating what is generally designated a "steam thresher," and with it threshed grain for plaintiff in error, in such quantity that the bill for services amounted to $103. This the plaintiff in error did not pay and this suit was instituted for its recovery. Plaintiff in error, in her pleading, admitted the account, both as to its origin and amount, but alleged that while engaged in threshing for her the defendant in error and his employés carelessly and negligently dumped or deposited ashes, cinders, and live coals from the engine, a part of the thresher, on the ground, so that fire was communicated to the loose straw on the premises around the thresher and to the unthreshed wheat and stacks, and there was thereby destroyed wheat belonging to plaintiff in error of the value of $182.60; all of which affirmative matter pleaded by plaintiff in error the defendant in error denied. When the case was called for trial it was agreed that, as the issues were joined, the plaintiff in error was charged with the burden, and should first produce proof. At the close of the testimony introduced in her behalf the judge instructed the jury as follows: "Defendant admits the claim of plaintiff for $103 and interest from November 20, 1891, and seeks to avoid the same by a claim for damages for negligence on the part of plaintiff in the handling and care of plaintiff's traction engine, whereby defendant's wheat and straw is alleged to have been burned. In the view of the court the defendant has failed to produce any sufficient evidence to substantiate this claim. You will therefore find your verdict in this cause for plaintiff in the amount of his claim." The jury followed the directions contained in the instruction, and returned a verdict in favor of defendant in error for $112, for which amount, after motion for new trial heard and overruled, judgment was rendered. Prior to the trial, an application was made on behalf of the plaintiff in error for a continuance of the case. This was in the usual form of a motion supported by affidavit. The application was made on March 7 1893, and it was stated in the affidavit accompanying the motion that one Frank Ribley was a material witness for the affiant; that he was, in the forepart of February, 1893, at Maryville, Kan., where affiant wrote him with reference to his being present to testify in the cause on behalf of affiant, and on or about the 13th day of Feb-

ruary, 1893, received a letter from Frank Ribley, stating that he would be back to Oak, Nuckolls county, Neb., about March, 1893, and not later than March 5, 1893; and it was further stated that the witness had not returned according to his promise, to the knowledge of affiant, nor had she heard anything more from him; that, placing reliance in the promise of the witness to be present and give testimony, affiant had taken no steps to procure his deposition. The affidavit filed in support of the motion for a continuance failed to show that the evidence of the absent witness or his personal attendance would probably be obtained if a continuance was allowed, hence it was insufficient, and the judge did not err in overruling the motion. Polin v. State, 14 Neb. 540, 16 N. W. 898; Barton v. McKay, 36 Neb. 632, 54 N. W. 968.

The only further question is, did the trial court err in directing a verdict in favor of defendant in error, or in effect deciding and stating that the plaintiff in error had not produced any sufficient testimony to show that defendant in error or his employés had been guilty of any negligence in operating the engine and thresher, which had been the cause of the fire; or was there sufficient evidence on this point to require its submission to the jury as a question of fact for their determination? The evidence disclosed that the threshing was commenced either Wednesday or Thursday of the week, and that it was in progress on Friday until about 5 o'clock p. m., and again on Saturday. During all the time the work was done in one stack yard, in which there were, in all, eight stacks of grain. The position of the engine was changed two or three times, and at each place in the stack yard or field where it had stood there had been dumped or thrown out ashes and cinders, and in at least two of them live coals. On Saturday the wind was quite strong, and carried with it loose straw, which it strewed around and over the stack yard, and the prevalence of the high wind, and the consequent inconvenience caused in the threshing with the engine and separator in the positions they occupied when work was begun in the morning, necessitated that they be changed during the day. Work was stopped on Saturday evening, and the machine left in position for further operation. Between 10 and 11 o'clock on Saturday night the straw and some of the grain stacks were discovered to be burning. The steam thresher is but one of the advanced type of implements used by man in his labors, and has been, with others of a similar kind, supplied by inventive genius and ingenuity as their want has become apparent in the progress, development, and advancement of the people in the various pursuits of life; and its use is proper and necessary, and any new conditions or relations arising from the use of this or any of the new devices or implements are to be adjusted as they present themselves. In the use of the steam thresher the agency of fire must be employed, and in the near presence of straw and other combustible material; but we have no doubt that the established rule that such care should be exercised in its use as a prudent and reasonable man would take under the existing circumstances should apply and govern. Where the known risks are enhanced, the degrees of care and diligence should increase correspondingly. City of Beatrice v. Reid, 41 Neb. 214, 59 N. W. 770. Viewed in the light of this rule, the evidence in the case at bar presented subject-matter for the examination and determination of the jury, and the judge should have submitted it to them, and it was therefore error to direct a verdict. The judgment of the district court is reversed, and the case remanded. Reversed and remanded.

RAWLINGS v. YOUNG MEN'S CHRISTIAN ASS'N OF LINCOLN.

(Supreme Court of Nebraska. April 21, 1898.)

ASSOCIATIONS—ACTION ON SUBSCRIPTION—GENERAL DENIAL—SECONDARY EVIDENCE—AGENCY.

1. When suit is brought upon a contract, a general denial puts the making of the contract in issue, and the burden devolves upon the plaintiff of establishing it substantially as alleged.

2. Suit was brought on a subscription contract, alleging an absolute subscription. The answer contained a general denial. The evidence tended to show that the defendant had authorized the plaintiff's solicitor to enter his name for a certain amount, subject to certain conditions, and that the solicitor had subscribed defendant's name without embodying such conditions in the contract. *Held*: (a) That the issue presented was not whether there had been a breach of the conditions which would constitute a defense, but was whether the defendant had authorized the contract which the solicitor had undertaken to make for him; (b) that the defendant was not bound by the acts of plaintiff's solicitor beyond the actual authority conferred upon him; (c) that the defendant was entitled to have this theory of the case submitted to the jury.

3. The book in which the subscription was entered was proved to have been lost. *Held*, that the plaintiff might prove its contents by parol evidence, although there were in existence similar books, also used for subscription purposes substantially like the one in question, and not offered in evidence.

(Syllabus by the Court.)

Error to district court, Lancaster county: Hall, Judge.

Action by the Young Men's Christian Association of Lincoln against Frank Rawlings. There was a judgment for plaintiff, and defendant brings error. Reversed.

Davis & Hibner, for plaintiff in error. Ricketts & Wilson, for defendant in error.

IRVINE, C. The Young Men's Christian Association of Lincoln brought this suit against Rawlings, alleging, in its petition, that it was a corporation, and that, in the year 1888, desiring to erect a building, it solicited subscriptions for that purpose; that Rawlings subscribed to the erection of the

said building the sum of $500, to be paid on demand; that the association, on the faith of that and other like subscriptions, proceeded to erect a building for the use of the association, and contracted extensive liabilities which remain unpaid; that thereby Rawlings became indebted to the association in said sum of $500. Rawlings answered, admitting that the plaintiff was a corporation, and that, in 1888, desiring to erect a building, it solicited subscriptions for that purpose. Further answering, Rawlings denied that he subscribed $500, or any sum whatever, for said purpose; denied that he was indebted to the association in the sum of $500, or in any sum whatever; and denied every allegation of the petition not specifically admitted. The trial resulted in a verdict and judgment for the association for the amount claimed, with interest. Rawlings brings the case here by petition in error.

The evidence discloses that one Ensign had been employed by the association to solicit subscriptions; that for this purpose there was placed in his hands a book containing a certain preliminary statement or caption, in the nature of a subscription contract. This was followed by blank spaces for signatures, and the entry of the amounts subscribed. There were several of these books, which were turned in by the solicitors to the officers of the association. In one of the books turned in by Ensign appeared the name of Rawlings, and opposite it, in figures, "$500.00." This book was not forthcoming on the trial, and, after quite satisfactory proof that diligent search for it had proved unavailing, the plaintiff was permitted to prove its contents by parol evidence. None of the witnesses undertook to give the language of the so-called "caption." None of the other books were produced or offered in evidence. There was evidence tending to show that some of these captions were printed, some written, and some typewritten; that they were not in all respects alike, although substantially the same in terms. The parol evidence admitted tended to show that, following Rawlings' name, appeared the words, "To be used on building." Mr. Ensign testified that, when he called on Rawlings, Rawlings authorized him to enter his name for the amount of $500 on this condition, and on the further condition that the building should cost $50,000. Mr. Rawlings' testimony was to the effect that he had positively refused to himself subscribe, or to permit his name to be subscribed, for any sum whatever, but that he had said that, if he gave anything, it would be on condition that the building should be commenced the following spring and completed during the year. Witnesses on behalf of the association testified to conversations with Rawlings after the time of his alleged subscription. One of these witnesses says that, when confronted with the book, Rawlings said that there was a condition to the subscription,—that the association was to begin the building within a given time. Another witness said that Rawlings' statement to him was that the subscription was to be applied upon the building, and not on the lots, and that the building was to be completed at once. The remaining witness for the plaintiff, testifying as to this last conversation, said that Rawlings said that the building was to be completed within a year. Reviewing this testimony, it will be observed that it is conceded that Rawlings did not himself subscribe; that, according to his own testimony, he never subscribed, but merely said that, if he did, it would be upon certain conditions. According to the other witnesses, he had authorized Ensign to subscribe for him, but, according to each of them, there was a condition to be attached to his subscription although the witnesses differ as to what this condition was.

In this state of the evidence, the court instructed the jury as follows: "Plaintiff contends, in its evidence, that defendant authorized the witness Ensign to sign his name to its subscription list for $500 in the year 1888, to be used in the erection of its building. Whether or not such authority was given is a question for you to determine from the evidence. If you find, from the evidence, that defendant, in the year 1888, authorized the witness Ensign to sign defendant's name to plaintiff's subscription list for $500, to be used by plaintiff in the erection of its building, then you are instructed that defendant's name, if so signed by his direction and authority, binds defendant, and is as legal as though signed by himself personally." The following instructions, requested by defendant, were refused: "If you find, from the evidence, that the defendant refused to sign the subscription contract described in the petition and testimony of plaintiff, but instead thereof authorized his name to be attached to another and different contract, then your verdict should be for the defendant. You are instructed that, if you find that the defendant authorized the witness Ensign to sign his name to a subscription with certain conditions annexed, and the witness Ensign signed his name to such subscription without those conditions annexed, such act of signing would not be the act of the defendant, and he would not be bound thereby. If you find, from the evidence, that the defendant authorized his name to be signed to a subscription for $500 upon condition that plaintiff would agree to complete its building within one year, then such condition was necessary, and without it the defendant could not be bound; and if you find, from the evidence, that such condition was required by him at the time, your verdict should be for defendant." The propriety of the giving and refusing of these instructions is presented for review.

The plaintiff contends that, under the

pleadings, there was no question presented as to a condition attached to the subscription, or a breach thereof; that therefore the court properly submitted the case to the jury, on the sole question of the authority given by Rawlings generally to subscribe his name, and therefore properly refused instructions involving a consideration of the conditions attached to the subscription. We quite agree with the plaintiff that the special denials of a subscription put in issue only the question as to whether there had been any subscription of whatever character. But the answer contained a general denial, and it therefore devolved upon the plaintiff to prove the contract as he alleged it. McEvoy v. Swayze, 34 Neb. 315, 51 N. W. 824. In that case the plaintiff sued on a contract which he set forth. The defendant, by answer, averred a different contract, and denied the contract pleaded by plaintiff, by a general denial of the petition. The court held that the burden devolved upon the plaintiff of establishing the contract he alleged, saying: "The answer, therefore, put in issue the making of the contract, and the breach thereof, as set up in the petition. The affirmative matter averred in the answer is nothing more than an argumentative denial. Such allegations were entirely unnecessary, as the facts could have been proven under the general denial." If the defendant in this case had pleaded specially, the answer would necessarily have been reducible to this form: "The defendant says that he did make a certain contract of subscription as follows, etc., but denies that he made the contract alleged in the petition." To any one familiar with common-law pleading, it is at once apparent that this would have been analogous to the special traverse of the common law, where the inducement was not itself traversable, and the absque hoc was the gist of the plea. Tyler, Steph. Pl. 199. It would not be a plea in confession and avoidance, but a direct traverse, putting in issue the declaration, with the affirmative matter merely pleaded as an inducement, but not itself tendering an issue. If the defendant were here relying upon a conditional subscription, and a breach thereof, it might be questionable, under the Code, whether the common-law rule would prevail, and whether it would not be necessary for the defendant to plead the condition and the breach; and in such a case the plaintiff's further argument might be pertinent that the conditions here proved were conditions subsequent and not precedent, and that therefore the subscription was collectible, without proof of a prior compliance with the condition. But the question presented by the instructions is a different one. Rawlings did not himself subscribe. The utmost that the plaintiff's evidence discloses is a subscription for him by an agent. This agent was also the agent of the association, so that the association was charged with the agent's knowledge of any limitations placed upon his authority by the defendant. Therefore, there is no question in the case of an implied authority, or authority by estoppel. If it is true that Rawlings did authorize Ensign to subscribe $500 for him, but required that certain conditions should be attached to this subscription, then the subscription by Ensign of Rawlings' name to a contract not embodying those conditions was without authority. It was not the act of Rawlings, and he is not bound thereby. The instructions given by the court may be in themselves correct, but, under the evidence, they should have been accompanied by specific instructions bearing on this question of the authority given to Ensign; and while, perhaps, those requested by the defendant were not so specific as might be desired, the first and second, at least, were free from legal objections, and the defendant was entitled to have them given.

The defendant contends that the court erred in admitting parol evidence of the contents of the subscription book, in view of the fact that the evidence disclosed that other books of like character were in existence. It is insisted that these other books were better evidence than parol testimony of the contents of the particular book as to the nature of the contract, at least so far as the caption is concerned. This question should be disposed of, as there must be a new trial of the case. We do not think that, in this respect, the court erred. In the first place, it was not shown that the other books in existence were copies of that particularly in question. The proof was, merely, that they were in substance alike, and that they differed in details. In the second place, we think it is the general rule that there are no degrees of secondary evidence. When the primary is not obtainable, a party may resort to any evidence otherwise competent; and his choice of one class of secondary evidence instead of another goes to the weight of the evidence, and not to its admissibility. Goodrich v. Weston, 102 Mass. 362; 1 Greenl. Ev. (14th Ed.) § 84, note. Reversed and remanded.

FRY v. KAESSNER.

(Supreme Court of Nebraska. April 21, 1899.)

INTOXICATING LIQUORS—LICENSE—PAYMENT—MALICIOUS PROSECUTION—PROBABLE CAUSE.

1. There exists no authority in this state to grant license to sell intoxicating liquors without payment in full of the fee prescribed by law, and a license issued without such payment of the fee is invalid.

2. A person may institute a criminal prosecution when the apparent facts are sufficient to induce a discreet and prudent person to believe that the party to be accused has committed the crime with which he is to be charged; and, although the accused may be adjudged innocent, the complainant will not be liable in an action for malicious prosecution.

3. "Every sheriff, deputy sheriff, constable, marshal, or deputy marshal, watchman, or police officer, shall arrest and detain any person found

violating any law of this state, or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained." See Cr. Code, § 283.

4. Evidence examined, and *held* insufficient to support the verdict.

(Syllabus by the Court.)

Error to district court, Douglas county; Ferguson, Judge.

Action by Gustave Kaessner against Jonas Fry and others. There was a nonsuit as to all defendants except Fry, as against whom plaintiff recovered judgment, and said defendant brings error. Reversed.

W. S. Poppleton, for plaintiff in error. Jas. W. Carr, for defendant in error.

HARRISON, J. In this action Gustave Kaessner sought to recover damages in the sum of $20,000, alleged to have been suffered by him as the consequences of his malicious prosecution by Jonas Fry, the marshal of the village of Elkhorn, and a number of others who were made defendants, but as to whom no more specific reference need be made, as during the trial a nonsuit of plaintiff's cause of action was entered as to all of them. A trial of the issues was had, and the plaintiff, in the district court, was accorded a verdict and judgment against Jonas Fry in the sum of $350. Error proceedings have been prosecuted to this court on behalf of Fry.

During a portion of the year 1890, one August C. Uhtof was running a saloon, or was engaged in the business of selling liquor, in a building or room which belonged to Gustave Kaessner, situated in the village of Elkhorn. As authority to engage in the business there, Uhtof had obtained from the village board what was issued as, and purported to be, a license for his conducting such business one year, commencing January 20, 1890, and terminating January 20, 1891, for which he was to pay quarterly in advance. He had paid on January 19, 1890, $125; April 19, 1890, $125; and no more. Differences and trouble arose beween Uhtof and the village board, probably more especially in regard to an occupation tax which the board demanded of him and he refused. The board took counsel, and were advised by an attorney, after he had been fully informed upon and fully investigated the subject, that Uhtof's supposed license to sell liquors was void, and that he was liable to arrest, or that his place could be closed; that the latter was the proper and the better course to pursue, and the one favored by counsel. Of all this, Fry, the marshal, was informed by the board, or some of its members; and, furthermore, he had an interview with the attorney, in which he was told the same, in substance. The board, at one of its meetings, made an order by which it purported to revoke Uhtof's license; and, in the endeavor to have him stop selling liquors, there were some suits at law commenced and prosecuted. But to come to the occurrences with which we are more particularly concerned, because from them sprung the case at bar: On the 7th of September, 1890, in the evening, Uhtof was arrested. And we will say here that, at the date just alluded to, his license was of no force or effect,—was void, if it ever had been of any validity,—for the reason, if none other, that he had never paid the license fee in full. He had not even paid the installments. The license is void if the fee is not paid in full. Zielke v. State, 42 Neb. 750, 60 N. W. 1010. It appears that after Uhtof's arrest he was taken to the village jail, and kept there during the night. Kaessner, whose place of business was near Uhtof's saloon, when on his way to business on the morning of the 18th of September, 1890, noticed that Uhtof's saloon was not open, and went into some other room or rooms of the same building, where it appears Uhtof and his family lived, and questioned some members of the family in regard to the whereabouts of Uhtof. While he was there, Uhtof came in, and, during a conversation they had, Uhtof asked Kaessner to tend bar during the day, as he (Uhtof) could not be there to do so, but must attend his trial or hearing to be held then. To this Kaessner assented, and was given the key to the saloon, and opened it, and prepared for customers; and it was in the testimony that it was not long until customers came, and he served them, selling them some beer. Jonas Fry testified on this point as follows: "Q. You may state what the facts were, as known to you, regarding the actual selling of liquor by Gustave Kaessner here on the morning of his arrest, September 18th? A. He was. Q. How do you know he was selling liquor? A. I saw him." The marshal, between 10 and 11 o'clock of that morning, went to the saloon, without a warrant, and after some resistance from Kaessner, and also from Uhtof, who was then in the saloon, and after calling in help, finally arrested Kaessner as he stood behind the bar, and took him to the jail, and put him in, and left him there until he (the officer) went to the residence of a justice of the peace, about three-quarters of a mile distant, and, with the justice, returned to the village. A complaint was prepared and verified by the marshal, charging Kaessner with selling intoxicating liquors without first having obtained a license authorizing such selling by him, and a warrant was issued. At about 1 o'clock in the afternoon, Kaessner was taken before the justice of the peace, David Smith, to have his hearing, and applied for a change of venue; and the case was transferred to be heard before Ed. A. Shaw, a justice of the peace in the city of Omaha. Fry took Kaessner to Omaha, and kept him in an hotel over night, and the next morning took him to the county jail, and left him therein, where he was kept something more than a day, when he furnished bond and was released. On October 15,

1890, Kaessner had a hearing, and was discharged.

One proposition raised by the assignments of error, and mainly depended upon by counsel for plaintiff in error, is that the verdict was not sustained by sufficient evidence. The testimony disclosed that Uhtof was conducting the saloon business in the village of Elkhorn without any valid license or authority so to do; also, that Kaessner, on the morning of the 18th of September, 1890, was "tending bar or running the saloon for Uhtof, and sold intoxicating liquor at that time and place; and, further, that Jonas Fry was the marshal of the village; that he knew all the facts in regard to Uhtof's carrying on the business without legal right so to do; that Fry saw Kaessner in the saloon, selling liquors, on the morning the arrest was made, and he was also informed by other persons of sales of intoxicants made there by Kaessner on that morning." It has been said, "Probable cause [for a criminal prosecution] is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the accused was guilty" of the offense named. Railroad Co. v. Kriski, 30 Neb. 215, 46 N. W. 520; Diers v. Mallon, 46 Neb. 121, 64 N. W. 722. The prosecution may act upon appearances. If the apparent facts are such that a discreet and prudent person would be led to the belief that the accused had committed a crime, he will not be liable in this action, although it may turn out that the accused was innocent. Such a case must be presented as would induce a sober, sensible, and discreet person to act upon it. Cooley, Torts, note 2, p. 182. Unquestionably, on the facts and circumstances as developed in the testimony in this case with reference to the illegal sales of intoxicating liquors by Kaessner the morning of his arrest for such acts, Fry, having knowledge of them, was warranted in making the complaint and instituting the prosecution. Railroad Co. v. Kriski, supra. In this connection the question of the arrest of Kaessner without a warrant, and his detention until one could be obtained, arises. It is provided in section 283 of the Criminal Code: "Every sheriff, deputy sheriff, constable, marshal or deputy marshal, watchman or police officer shall arrest and detain any person found violating any law of this state or any legal ordinance of any city or incorporated village, until a legal warrant can be obtained." The officer in this case had been informed that Kaessner was selling liquor in Uhtof's saloon, for the running of which the officer knew there was no valid license. He saw the accused sell liquor that morning and in that place, and, when he went to make the arrest, Kaessner was behind the bar, with the liquors at hand and ready for business, although the evidence did not show that he was, just at the immediate instant of the arrest, dealing out or passing liquor over the bar. Doubtless, the officer was justified in making the arrest as he did without a warrant, and detaining Kaessner until it could be obtained; but the better and the proper course would have been to have filed a complaint and obtained a warrant before making the arrest. Kaessner was a business man and citizen of the village, and it was reasonable to suppose that he would not flee, to avoid the arrest, before a warrant could be issued. There was no necessity for his immediate apprehension. It was not claimed that he was committing a breach of the peace, or creating disorder. "But, when the offense committed is a misdemeanor only, then even an officer should not ordinarily arrest without a warrant, unless the offender is found by the officer himself in the act. The reason is obvious. In cases of misdemeanor, there is not that probability that the offender will abscond * * * as in cases of felony." War. Cr. Law, 48. The verdict rendered was not supported by the evidence; hence the judgment of the district court must be reversed, and the cause remanded for further proceedings. Reversed and remanded.

TECUMSEH NAT. BANK v. HARMON.

(Supreme Court of Nebraska. April 21, 1896.)

PRACTICE IN CIVIL CASES—STIPULATIONS FOR FUTURE AMENDMENT.

1. H. sued the T. bank on a deposit. The bank answered by a general denial. During the trial it undertook to prove payment. Objection being made to the relevancy of the proof, an agreement was made in open court, whereby the bank was allowed 20 days to amend its answer "in any manner" with the same effect as if presently filed, and the trial proceeded. The instructions given excluded from the jury the consideration of the issue of payment which was finally tendered by the amended answer, filed after trial, but within the stipulated time. *Held*, that the plaintiff was bound by the terms of his stipulation, and that the judgment must be reversed for failure to submit the issues finally framed to the jury.

2. The practice of proceeding with a trial subject to a future amendment of the pleadings criticised.

(Syllabus by the Court.)

Error to district court, Johnson county; Babcock, Judge.

Action by George W. Harmon against the Tecumseh National Bank. There was a judgment for plaintiff, and defendant brings error. Reversed.

J. H. Ames and S. P. Davidson, for plaintiff in error. T. Appelget and J. H. Broady, for defendant in error.

IRVINE, C. This case has been elaborately argued, orally and on briefs, with relation to questions of substantive law, supposed to be involved therein. We think, however, that its decision must depend chiefly upon matters of practice, presented by a state of the record so anomalous that they must be de-

termined principally upon general considerations without the aid of authority. Harmon brought the suit against the Tecumseh National Bank, alleging that on the 6th day of March, 1891, he deposited with the bank $5,000 at the instance and request of the bank, and that the deposit was to draw interest at 6 per cent. per annum; that $1,000, and all interest to March 9, 1892, had been paid, but the remaining $4,000, with interest from said March 9th, remained due. To this petition there was originally filed an answer, admitting the corporate capacity of the defendant, and denying all other allegations. On the issues so framed, the case proceeded to trial, but immediately after the defendant began to introduce its evidence it was confronted by an objection on the ground of irrelevancy. What then occurred is thus recited in the record: "The defendant here asks leave of court to amend his answer, to which the plaintiff objects. On the intimation of the court that he would permit the defendant to withdraw a juror, and consequently continue the case, rather than submit to that the plaintiff consents that the defendants can go on and draw their answer in any manner, and file it, and they will rely on the instructions of the court. It is agreed by the parties that the amended answer so filed will have the same effect as though filed now. Said answer to be filed within twenty days." Thereupon the case proceeded, and the evidence took a wide range. There was a verdict for the plaintiff for $4,000, with interest. Judgment was entered on this, and the defendant prosecutes error.

On the one side it is contended that the verdict is not sustained by the evidence; on the other that, without regard to any error which may have occurred in the course of the trial, the verdict was the only one which could be properly rendered under the evidence, and that the judgment should for that reason be affirmed. As we think the cause must be remanded for a new trial, we forbear any comment upon the evidence beyond what is necessary to solve the questions now presented to us, and simply say that in our opinion it was of such a character as to require the submission of the contested issues to a jury. There had been for a long time, in Tecumseh, a firm of bankers known as Russell & Holmes. Latterly it seems that this concern, whether by incorporation or otherwise does not appear, was styled the Bank of Russell & Holmes. Before the transaction here in controversy the Tecumseh National Bank was organized, and seems to have become a successor to Russell & Holmes, although the evidence tends to show that the former firm remained in existence for the purpose of closing out some incidental business. Mr. Holmes, of the old firm, was president of the national bank. March 6, 1891, there was a conversation between Harmon and Mr. Holmes in the banking house, looking to the withdrawal by Mr. Harmon of money he had on deposit in the Carson National Bank of Auburn, and the loan or deposit of this money on interest either with Russell & Holmes or the Tecumseh National Bank. Whether the party contracting to receive the deposit or loan was Russell & Holmes or the Tecumseh National Bank is the vital question of the case, coupled with another, which we do not pass upon, which is whether, under the circumstances, the bank may be held liable by estoppel, on account of the acts of its president, although it did not in fact receive the benefit of the money. It was agreed between Holmes and Harmon that Harmon should withdraw $5,000 from the Carson Bank and place it with Holmes. He drew his check upon the Carson Bank for $5,000 to the order of the Tecumseh National Bank, and received what is called a deposit slip, headed "Tecumseh National Bank," signed by Holmes as president, and indicating the deposit of the check for $5,000. This check was by the Tecumseh Bank indorsed for collection, and it was collected. March 9th—three days after this transaction—there was issued by Holmes and accepted by Harmon, a pass book, being one of the books which had formerly been used by the bank of Russell & Holmes. This was marked on the cover, "Bank of Russell & Holmes, Tecumseh, Nebraska, in account with George Harmon." Inside was the following: "The Bank of Russell & Holmes. 1891. Dr. Mch. 9. Deposit, $5,000. This deposit to draw interest at six per cent. per an. if left six months. Interest paid to Mch. 9/91." On another page were certain entries indicating the payment of certain sums as interest and principal. There was evidence allunde tending to show that the transaction was a loan to Russell & Holmes at 6 per cent.; that the deposit of March 6th was only preliminary to that transaction; and that on March 9th the transaction was consummated as evidenced by the pass book, the money in fact passing to Russell & Holmes. On the other hand, there was evidence tending to show that Harmon understood that the whole transaction was with the Tecumseh National Bank; that he was unable to read, and therefore was perhaps not bound by the form of the pass book, which might at least have put another man on inquiry. The court gave a number of instructions at the request of the plaintiff, several of which were to the effect that the jury should find for the plaintiff if on March 6th, or about that time, he left with the defendant the money sued for. By one of the instructions the jury was told that the plaintiff's check and the deposit slip of March 6th constituted a complete written contract, the terms of which could not be contradicted by oral evidence, and that the jury should disregard all oral evidence tending to so contradict these papers. By still another, the jury was instructed that the pass book of March 9th could not be received

for the purpose of changing the terms of the contract, as evidenced by the check and deposit slip of March 6th. Here the question of practice is presented for consideration. As the issues stood at this time, the petition was on a deposit. The answer was a general denial, and under this answer the defendant could not prove discharge by payment or otherwise. But under the answer as finally filed, while it was perhaps not very artificially drawn, the issue of payment was presented; and the question was not merely whether a deposit had been made on March 6th, but it was whether the bank had discharged the liability thereby incurred by collecting the check and paying its proceeds to Russell & Holmes, in pursuance of plaintiff's direction. It is at once apparent that the instructions given confined the jury to the sole question as to whether the deposit had been made, and directed them that the transaction of March 9th could not be received to avoid the effect of any evidence as to the transaction of March 6th. They did not submit the issues presented by the amended answer. The real question is, therefore, whether the defendant can now avail itself of its amended answer.

In Grimison v. Russell, 11 Neb. 469, 9 N. W. 647, the original pleadings were lost after trial and before judgment. Copies were not substituted, and the judgment was reversed because the court had no authority to enter judgment without pleadings whereon to found it. The reason of that case is applicable to this, although, perhaps, the defendant, being the party originally at fault, could not avail itself of the error if the plaintiff had been free from fault. But the stipulation of record shows that the plaintiff consented that the defendant might have 20 days to file its answer "in any manner," with the same effect as if then filed. The proceeding was highly irregular, and the court should have insisted that the issues be framed before the trial proceeded. By consenting to this course, however, the plaintiff bound himself to submit to any answer which might be filed within the time stipulated and allowed by court. This answer presented issues which had not been submitted to the jury. We think the plaintiff must be held to his stipulation, and the case must be considered as if the answer finally filed had been already filed when the instructions were given. It is always well to have issues framed before judgment. This case illustrates the danger of trying a case and proceeding to judgment, and pleading it thereafter.

It is argued that there was a special finding which in effect determines the merits of the case, independent of the general verdict. The following is the question propounded to the jury, and its answer: "Was the money in controversy included in the fund of the Tecumseh National Bank, after the amount thereof was entered upon plaintiff's pass book with Russell & Holmes? If so, at what time?" The answer was as follows: "Yes. March 9, 1891." We have been unable, after a careful examination of the evidence, to find any evidence sustaining this finding. Reversed and remanded.

UNLAND v. GARTON et al.

(Supreme Court of Nebraska. April 21, 1896.)

SALE—WARRANTY—WHAT CONSTITUTES—QUESTION FOR JURY.

1. To constitute a warranty, it is not necessary that the word "warrant" should be used; it is sufficient if the language used by the vendor amounts to an undertaking or assertion on his part that the thing sold is as represented.

2. Whether statements made by a vendor as to the condition or quality of property offered for sale were intended by him to be warranties of the condition or quality of such property, or whether, by such statements, the vendor intended merely to give his opinion as to the condition or quality of such property, are questions of fact for the jury. Erskine v. Swanson, 64 N. W. 216, 45 Neb. 767, followed.

(Syllabus by the Court.)

Error to district court, Saline county; Hastings, Judge.

Action by John H. Unland against John G. Garton and another. There was a judgment for defendants, and plaintiff brings error. Affirmed.

J. H. Grimm and E. W. Metcalfe, for plaintiff in error. Hastings & McGintie, for defendants in error.

RAGAN, C. John H. Unland sued John G. Garton at law in the district court of Saline county on a promissory note. Garton had a verdict and judgment, and Unland brings the case here for review.

1. The first assignment of error argued is that the court erred in permitting Garton to introduce any evidence, as the facts stated in his answer constituted no defense to the action. The execution and delivery of the note were admitted, but Garton pleaded as a defense thereto that the only consideration for the note was a cornsheller sold by a copartnership, of which Unland was a member, to him (Garton); that the cornsheller was warranted; and that the warranty had failed. The warranty pleaded was as follows: "That, at the time of said purchase, said Unland & Heller represented and warranted to these defendants that said sheller was as good as new; that it would do as good work as any cornsheller: and that it would do first-class work in every particular." Counsel for plaintiff in error now insists that this language did not amount to a warranty, and that it was merely a recommendation of the machine, or an expression of opinion by the seller as to its merits. In Halliday v. Briggs, 15 Neb. 219, 18 N. W. 55, the warranty relied on was in this language: "All right, sound and free from disease." It was held that a court would not be justified in

holding this language to be a warranty against the finding of a jury to the contrary. It was further held in that case that if the evidence left the matter in doubt as to whether or not the seller intended to make an affirmation, or to express an opinion merely, the matter should be submitted to the jury. In Erskine v. Swanson, 45 Neb. 767, 64 N. W. 216, the warranty was in this language: "You needn't be afraid of that lameness. I guaranty that horse. In a few weeks you won't notice it. Why, the horse will be all right. I guaranty to you it will be all right. He is a good, sure horse." And it was there held: "To constitute a warranty, it is not necessary that the word 'warranty' should be used; it is sufficient if the language used by the vendor amounts to an undertaking or an assertion on his part that the thing sold is as represented." It was further held that "whether statements made by a vendor as to the condition or quality of property offered for sale were intended by him to be warranties of the condition or quality of such property, or whether, by such statements, the vendor intended merely to give his opinion as to the condition or quality of such property, are questions of fact for a jury." The allegation in the answer assailed is that the vendors "represented and warranted the sheller to be as good as new," etc. We think this allegation sufficient as against a demurrer, and that the answer stated a defense.

2. The second assignment of error is "that the court erred in giving paragraphs two and three of instructions on its own motion." No exception was taken by Unland to the giving of either of these instructions. The assignment of error cannot, therefore, be considered.

3. The third assignment of error argued is "that the court erred in refusing to give the instructions asked for by the plaintiff." The plaintiff in error requested the court to give six instructions. The assignment is that it erred in refusing to give all of them. We have examined the instructions so far as to ascertain that the court did not err in refusing to give some of them. This assignment will therefore be overruled.

4. The final assignment is "that the verdict is not sustained by sufficient evidence." We think it is. The judgment of the district court is affirmed. Affirmed.

BURRIS v. COURT.

(Supreme Court of Nebraska. April 21, 1896.)

CONTINUANCE — TRIAL — INSTRUCTIONS — ADMISSION BY ATTORNEY — CONSTRUCTION.

1. An application for a continuance is addressed to the sound discretion of the trial court, and, unless it appears that there has been an abuse of such discretion, its rulings will not be disturbed.

2. An instruction by which the court only professed to describe, and in fact did accurately describe, to the jury, the admissions of fact of a party as the same appeared of record, cannot be assailed as erroneous, on the alleged ground that the adverse party had a right, in the first place, to an admission of greater scope or conclusiveness than that described as a condition upon which a continuance would be denied such adverse party.

3. An admission of plaintiff that proposed witnesses of defendant, if time applied for should be allowed to procure their evidence, would give certain testimony, is not equivalent to an admission that such proposed testimony is absolutely true and indisputable.

(Syllabus by the Court.)

Error to district court, Loup county; Thompson, Judge.

Action by Myrta Court against William Burris. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Clements Bros. and Coffin & Stone, for plaintiff in error. A. M. Robbins, A. S. Moon, and C. I. Bragg, for defendant in error.

RYAN, C. A former judgment in this case was reversed, and the cause was remanded to the district court of Loup county for further proceedings. 34 Neb. 187, 51 N. W. 745. In the opinion reported, as above indicated, there was a statement of such facts as are essential to a fuller understanding of the questions hereinafter discussed. There was, on a second trial, a verdict of guilty, and the judgment was accordingly rendered which the plaintiff in error seeks to have reversed by these proceedings in error.

An application for a continuance was made upon the affidavit of the plaintiff in error, in which were the statements that two material witnesses named were absent from this state, each of whom, if he testified by deposition, would swear that, during the period of gestation preceding the birth of Myrta Court's child, he had had sexual intercourse with the said Myrta Court. The proceedings with reference to this application are described in the record as follows: "Plaintiff, in open court, admits that the witnesses Elbridge Mitchell and Colonel Spencer would testify to the facts set forth in the affidavit for a continuance that are alleged in said affidavit, i. e. Elbridge Mitchell will swear that at several times between the 1st day of August and the 26th day of September, 1889, the period during which the bastard child of plaintiff, alleged to have been begotten by this defendant, might have been conceived, that he, the said Elbridge Mitchell, had sexual intercourse with said plaintiff. And said Colonel Spencer would swear that on or about the 1st day of September, 1889, he, the said Colonel Spencer, had sexual intercourse with plaintiff; and that said affidavit and the facts therein stated may be read in evidence to the jury. Motion for continuance overruled. Plaintiff excepts." On the draft of the bill of exceptions originally submitted to counsel for the plaintiff in the district court, there was no mention whatever of the above affidavit of William Burris. Upon suggestion of such

counsel, however, there were interlined in the certificate of allowance of said bill, following a description of other evidence, the words: "And also introduced in evidence the affidavit of William Burris for a continuance, a certified copy of which affidavit is hereto attached." The above quotations disclose all that is to be found in the record or bill of exceptions with reference to the affidavit of Mr. Burris up to the time of instructing the jury; and, upon this showing, we are urged to hold that the court should have granted a continuance. In Stoppert v. Nierle, 45 Neb. 105, 63 N. W. 382, it was said that motions for continuance are addressed to the sound discretion of the trial court, and, unless it appears that there has been an abuse of such discretion, its rulings thereon will not be disturbed. The same rule was stated and enforced in Stratton v. Dole, 45 Neb. 472, 63 N. W. 875, and in Keens v. Robertson, 46 Neb. 837, 65 N. W. 897. Upon the presentation of the affidavit of Mr. Burris, his adversary offered to admit that the proposed witnesses therein named would swear to the facts which by said affidavit it was alleged they would swear to if an opportunity was given to take their testimony. It is doubtless true that this substitute for the oral testimony of these witnesses would probably lack the convincing force which an oral narrative would lend to the facts stated. But these witnesses were not in this state, and therefore their personal attendance at this trial could not be compelled. At most, their testimony could, by depositions, be reduced to writing, and, preserved in that manner, it could be read to the jury. It is probable that the statements made in the affidavit of Mr. Burris are as direct as would have been made by the witnesses themselves. At least, we are bound to believe this would be the case, for there is no way of testing the probable testimony of these witnesses except as the same is disclosed by the affidavit of Mr. Burris. Without a possibility of this being impaired or destroyed by cross-examination, Mr. Burris stated just what he expected these witnesses would swear to, and his adversary formally admitted that their testimony would be as stated. Having the benefit of these statements as evidence, we cannot see that the court erred in refusing a continuance, in order that, in a more formal manner, this same testimony might be obtained and read to the jury.

It is, however, insisted that, in respect to this matter, the court erred in giving this instruction: "You are instructed that the plaintiff, by admitting the statements contained in the affidavit for a continuance which were read in evidence before you, simply admits that if said witnesses Elbridge Mitchell and Colonel Spencer were present as witnesses, testifying in this case, they would testify as stated in said affidavit, but the plaintiff does not admit that such testimony would be the truth. She has the same right to contradict such admitted testimony as though the witnesses were present, and had so testified to the same matter upon the witness stand." In the first part of this instruction, the court did not attempt to state a rule of law, but rather to describe what, in fact, the defendant in the district court had offered to admit, and that was that the proposed witnesses, if present, would testify to certain facts, and that such facts might be read in evidence to the jury. This was a correct statement of the scope of this admission, as shown by the record, and the court committed no error in so describing it. This being true, it is evident that there existed no reason for assuming that these statements were to be deemed more conclusive in their nature than if they had been stated by the witnesses. If the rule contended for by counsel for plaintiff in error is correct, that these statements in the affidavit of proposed evidence must be accepted as absolutely true, it would have been improper to have allowed the plaintiff in the district court to deny them. It is quite possible, and to the mind of the writer it appears very probable, that an intelligent jury would absolutely discredit the voluntary testimony of the nature of that alleged as likely to be given by Elbridge Mitchell and Colonel Spencer, if they had been given an opportunity to testify. Under the rule contended for by the plaintiff in error, the instruction should have been that these statements of the affidavit must be accepted as absolutely true, notwithstanding any gross improbability in point of fact, and the depravity or self-stultification of each witness, evidenced and illustrated by his own testimony. The jury was not bound to believe these statements merely because embodied in an affidavit; neither thereby did these statements imply absolute verity. They were mere evidence, to be accorded such weight by the jury as, under all the circumstances of the case, they deserved.

The court, in an instruction, briefly described to the jury the provisions of sections 6–8, c. 37, Comp. St., in which it is provided how the defendant may be dealt with by the court in case there is a verdict of guilty. This in no manner concerned the jury, and the instruction should not have been given: yet we fail to see in what respect the plaintiff in error could have been prejudiced by it.

Whether the story of Myrta Court, or its denial by William Burris, was entitled to credence, was a question of fact for the jury, and in support of a finding either way there was sufficient evidence to justify the verdict.

No other question was argued in the brief of the plaintiff in error, and we conclude, upon the whole case presented, that the judgment of the district court must be affirmed. Affirmed.

HARRISON, J., not sitting.

LOUIS v. UNION PAC. RY. CO.

(Supreme Court of Nebraska. April 21, 1896.)

APPEAL—WEIGHT OF EVIDENCE.

A question of fact determined on conflicting evidence will not be reviewed.

(Syllabus by the Court.)

Error to district court, Platte county; Sullivan, Judge.

Action by Jacob Louis against the Union Pacific Railway Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

McAllister & Cornelius, for plaintiff in error. J. M. Thurston, W. R. Kelly, and E. P. Smith, for defendant in error.

NORVAL, J. This action was brought to recover damages against the defendant for the negligent destruction by fire from one of its engines of about 120 tons of hay owned by the plaintiff. At the trial there was a verdict for the railroad company, and from an order refusing a new trial plaintiff prosecutes error to this court. The only contention here is that the verdict is contrary to the evidence. No witness testified to having seen the fire in question start. Several persons were called and examined by plaintiff, who testified that they saw the fire spring up shortly after defendant's locomotive and cars had passed on its track, from which it might be inferred that the fire originated from sparks or cinders thrown or cast out by said engine into the dry grass and combustible material near defendant's right of way. Evidence was also introduced by the plaintiff tending to show that the reputation of this particular engine for setting out fires was bad. On the other hand, evidence was adduced to show that this locomotive was equipped with the latest and most approved appliances for the prevention of the escape of sparks and cinders, and at the time was in good condition, and was operated properly and in a skillful manner; furthermore, that no fire escaped from said engine on said date. There is also testimony tending to show that the fire originated too far from defendant's right of way to have been started by sparks or coals from the engine, had any escaped therefrom. There is ample evidence in the record to sustain a finding for either party, the testimony being so conflicting. The verdict not being unsupported by the evidence, the judgment is affirmed. Affirmed.

HOWLAND v. SHARP.

(Supreme Court of Nebraska. April 21, 1896.)

APPEAL—WEIGHT OF EVIDENCE.

The evidence examined, and *held* insufficient to support the verdict of the jury.

(Syllabus by the Court.)

Error to district court, Douglas county; Ferguson, Judge.

Replevin by Warren A. Howland against John F. Boyd, sheriff. On defendant's death the action was revived against Julius C. Sharp, administrator. There was a judgment for defendant, and plaintiff brings error. Reversed.

E. C. Page, for plaintiff in error. J. W. West, for defendant in error.

HARRISON, J. This, an action of replevin, was commenced to obtain possession of certain personal property held by John F. Boyd, as sheriff of Douglas county, under the levy of a writ of attachment issued in an action by Herman Diess v. The Western Dry-House & Construction Company. The suit in which the attachment was issued was brought July 22, 1890, and the writ was levied on the same day. Judgment was rendered in the last-mentioned cause of date November 26, 1890, and the property was ordered sold, the proceeds to be applied on the judgment. In the case at bar the plaintiff did not furnish the bond required in replevin actions, and the property was not delivered to him, the cause proceeding as one for damages. During the pendency of the suit the sheriff died, and it was revived in favor of his administrator, Julius C. Sharp. There was a trial of the issues, and a verdict and judgment in favor of the defendant. The plaintiff presents the case here for review by error proceedings.

The argument in the brief filed for plaintiff in error is first directed to the question raised by the assignment of error that the verdict is not sustained by sufficient evidence. The controversy in the cause was over "all brick in and about the brickkilns contained in the brickyard situated on Douglas County Poor Farm; said brickyards being bounded on the east by the Belt Line Railway, on the south by Park street, and on the west by Ryan & Walsh's brickyard,—the city of Omaha." A careful consideration and investigation of all the testimony presented in the record convinces us that the view of counsel that the verdict is not supported by the evidence is a correct one. It was shown that one George Hinchliff was, and had been for several months, the owner and in possession of the property in the brickyard, including these bricks in the kilns; that he sold the bricks to one William Redgwick during the month of May, 1890, and about two months prior to the levy of the attachment in favor of Diess; that on October 26, 1890, Redgwick sold the bricks to the plaintiff, neither of them having any knowledge at the time of the sale of the existence of the attachment, its issuance, or levy. There was an effort on behalf of defendant to show that the bricks belonged to the Western Dry-House & Construction Company, and it was shown that Hinchliff and

Redgwick had at one time been members of, or interested in, the company, but there was no evidence which would sustain the verdict returned by the jury.

There are some other assignments of error, in reference to the trial judge giving certain instructions, and also in refusing to give an instruction requested by plaintiff, and a further assignment in regard to the action of the judge in overruling objections to and admitting testimony; but we do not deem it necessary to discuss them now, as a determination of them is not necessary to a decision of the main question in the case, nor would it materially assist in another trial of the case, should there be one. The judgment of the district court is reversed, and the cause remanded for further proceedings. Reversed and remanded.

MAY et al. v. HOOVER et al.

(Supreme Court of Nebraska. April 21, 1896.)

FRAUDULENT CONVEYANCE—SUFFICIENCY OF EVIDENCE.

Evidence examined, and *held*, to sustain the conclusion of the district court that the conveyance assailed in this action as fraudulent was neither made nor accepted with the intent to defraud, hinder, or delay the creditors of the appellee.

(Syllabus by the Court.)

Appeal from district court, Madison county; Jackson, Judge.

Action by May Bros. against John D. Hoover, Jr., and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Albert & Reeder, for appellants. Campbell & Wallis, for appellees.

RAGAN, C. May Bros. brought this suit in equity to the district court of Madison county against John D. Hoover, Jr., and wife, and John D. Hoover, Sr., to have set aside a conveyance of real estate, made in December, 1888, by Hoover, Jr., and wife, to Hoover, Sr. May Bros. alleged that the conveyance was without consideration, and made for the purpose of hindering, delaying, and defrauding them and other creditors of Hoover, Jr. The district court found the issues in favor of the defendants below, and dismissed the case; and from this decree May Bros. have appealed.

1. It appears, from the evidence in the bill of exceptions, that for some years prior to 1881 Hoover, Sr. and Jr., being father and son, were co-partners, owning and operating a store and a mill at Battle Creek, Neb. In January, 1881, the father and son dissolved their co-partnership relations, the father selling out his interest in the co-partnership property to the son. The price agreed to be paid by the son to the father was about $7,000, for which the son executed his promissory notes to his father. The son continued in business alone until December, 1888. At that time he and his wife conveyed to the father the real estate previously owned by the co-partnership, and some other property. This is the conveyance assailed as fraudulent in this action. The principal consideration for this conveyance was the debt, and the interest thereon, owing by the son to the father, contracted in 1881, as already stated; said debt being past due and wholly unpaid. These facts are practically undisputed. The district court was of opinion, and we agree with him, that the appellees made it appear, on the trial, that the conveyance was made in good faith and for a valuable consideration, and not made with intent to defraud, hinder, or delay the creditors of Hoover, Jr. It is insisted by appellant, in his argument here, that the evidence does not show that Hoover, Sr., paid a valuable consideration for the property. We think it does. What that consideration was has already been stated. There is also some evidence in the record which shows that Hoover, Sr., worked for the son in the mill or store after the father and son dissolved co-partnership, and that, when the conveyance assailed by this suit was made, the value of Hoover, Sr.'s, services was taken into consideration in fixing the price to be paid for the property. There is a conflict in the evidence as to the value of the property conveyed by Hoover, Jr., to Hoover, Sr., in December, 1888; but the evidence would sustain a special finding, had one been made, that the property conveyed to Hoover, Sr., was not worth any more than he paid for it.

It also appears, from the record, that, after the son and wife sold and conveyed the real estate in controversy to the son's father, the latter conveyed a part of such real estate to the son's wife. It is insisted by the counsel for the appellant that this shows the transaction to be fraudulent. We think this was, at most, a circumstance to be considered with all the other facts and circumstances in the case, in determining whether or not the transaction between the father and son was made in good faith; but we do not think it was conclusive evidence of a fraudulent intent on the part of any of the parties. If the conveyance made by the son to the father was made and accepted in good faith, for an honest purpose, and without any intent on the part of either of them to defraud, delay, or hinder the creditors of Hoover, Jr.,—and the district court has found that such conveyance was so made and accepted, and the evidence sustains his finding,—then Hoover, Sr., might do what he pleased with the property afterwards. He might keep it, sell it to Hoover, Jr.'s, wife, or to any one else, or give it away; and, except as against his own creditors, no one would have a right to complain.

The appeal presents no disputed question of law, but simply the question whether the district court reached the proper conclusion under the evidence. If the district court had

found that the conveyance was fraudulent, we seriously doubt if the evidence would have sustained such finding. Certainly, we cannot say, under the evidence before us, that the finding of the district court lacks sufficient evidence to support it, and its decree is therefore affirmed. Affirmed.

DOXTATER v. CONNELL et al.

(Supreme Court of Wisconsin. April 14, 1896.)

DEED—RESCISSION—FRAUD—EVIDENCE.

Defendant wrote plaintiff, an Indian, who owned a one-fourth interest in a farm of 58 acres, valued at $986, 56 acres of which was mortgaged for about $600, and 40 acres of which was incumbered with a life estate in a woman 46 years of age, stating that 56 acres of the farm was soon to be sold on foreclosure, and that he would give her $5 for her one-fourth interest in the 3 acres not covered by the mortgage, in response to which plaintiff wrote that she would deed him "everything" for $5 and a new dress, the consideration which defendant had agreed to give her co-tenants for their interest. Defendant sent a quitclaim deed conveying the entire 58 acres, which was executed by plaintiff, as she claimed, without the same being read to her, and with the understanding on her part that only the 3-acre strip was conveyed. The entire farm was purchased by defendant at the foreclosure sale. *Held*, that the rescission of the deed on the ground that it was procured by fraud was unauthorized.

Appeal from circuit court, Outagamie county; John Goodland, Judge.

Action by Matilda Doxtater against Nettie M. Connell and others. There was a judgment for plaintiff, and defendants appeal. Reversed.

This is an action in equity to set aside a conveyance of real estate on the ground of fraud. The facts may be stated briefly as follows: Hira Welsh, a Stockbridge Indian, lived at Stockbridge, Calumet county, Wis., and owned the lands in controversy, which are a part of the Stockbridge reservation, and amount to about 58 acres in all, being composed of three contiguous strips, to wit, a strip of 3 acres of land in lot 5 of the reservation, also 42½ acres in lot 54, and 12½ acres in lot 159. Hira Welsh died August 29, 1887, leaving, surviving him, his widow, Janette Welsh, who was then 41 years of age, and four children, of whom the plaintiff is one. Hira Welsh, in his lifetime, and his wife, executed two mortgages on the lands in question, except the 3-acre strip in lot 55, to one Henry Kersten, each being for $150,—one dated December 2, 1885, and the other dated November 5, 1886, and both bearing 10 per cent. interest. Both mortgages were duly recorded. Neither of these mortgages was paid, and in 1891 the mortgagee, Kersten, foreclosed the second of said mortgages by action against the widow and all the heirs of Hira Welsh, including the plaintiff, and obtained judgment of foreclosure May 13, 1891; the whole amount of the judgment, including costs, then being $369.91. The plaintiff had married and left home prior to the time of her father's death, and, at the time of the commencement of this action, lived with her husband at Ft. Howard, Brown county, on the Oneida reservation. The widow, Janette, continued to live upon the farm after the death of her husband, and lived there at the time of the trial of this action, and is still a widow. Hira Welsh died intestate. The defendant, Nettie M. Connell, lives at Chilton, Wis., and on the 5th day of February, 1892, through her agent, T. E. Connell, sent the following letter to the plaintiff: "As heir to Hira Welsh, deceased, you own an interest in a small strip of land in lot 55, Stockbridge, a couple of acres. Now, as I bought the Ann Fisher farm, in lot 55, I would like this strip. I looked the matter up and find it will be sold for taxes in May, as the tax was unpaid for the past three years. Now, if you wish to get anything out of it, I will give you $5 for your interest, if you quitclaim to me. Let me know, quick, if you are willing to do this. Also, let me know if your husband is there with you, and what his full name is, and I will prepare the quitclaim deed, and send it to you to be signed." In reply to this letter, the plaintiff, on the 5th day of March, 1892, sent the following letter to the defendant: "I now hasten to answer your letter, as it has lain a long time. I had a letter from my sister in Redwood Falls, informing me of the letter she had from you, telling how you had gave her $5 and the promise of a new dress to us all if we would sign off everything to you, and asking me if I had one; but, as you had directed your letter to Oneida, I had not received it, so my husband chanced to pass the office, and he stopped, and inquired there, and got your letter. We live so far from there, we never have any mail come there. We get our mail at Ft. Howard. So now, if you want my right, or my deed, in the same way, send me the deed and the money,—$5,—and I will sign at once, and forward it back to you; and please write my name 'Matilda,' instead of 'Tillie,' for that is not my name. My husband's name is Napoleon Doxtater. Please direct to Ft. Howard if you wish to send the deed. You might as well had it a month ago if you had only sent your letter to Ft. Howard." Thereupon the defendant, through her agent, sent the following letter to the plaintiff: "Your letter reached me this morning. Yes; I paid your sister the $5, and promised a nice new dress in case I get any benefit of the deed. You know the farm will be sold, I think, in May, by the sheriff, to pay the mortgage. The $5 is for your interest in a small strip from the road east that the mortgage does not cover. If I can get a deed from your sister Dora and your mother, I will be able to take the land, and pay off the mortgage, and give you each a new dress, as I agreed. If I cannot, or if I have to pay them too much, I will not be able to do this. I think they will deed, as you and your sister have, because they will lose

it anyway, and it is better to get a little than nothing. I sent a deed to McCartney's Exchange Bank with the $5. So you can go and sign it as quick as you want to, and get the money. Where are the children of your half-sister, Emma Doxtater, and how old are they? Please let me know. Hope you will hurry up with the deed, for, if there is any chance at all to save anything, I will have to do it quick." Upon receipt of the last letter set forth above, the plaintiff sent, to the bank named in the letter, for the $5, and executed the deed, which contained a description of all the lands owned by Hira Welsh in his lifetime, and the deed was forwarded to the defendant. The testimony shows that the land in question was worth from $16 to $17 per acre, and that 40 acres of the land was a homestead. The utmost value of the entire farm, therefore, under the testimony, is $986. At the time of the exchange of letters, and the execution of the deed above set forth, there were incumbrances upon this land, consisting of the mortgages above set forth, together with a small amount of taxes, amounting to more than $600. The premises were advertised for sale upon the foreclosure on the 6th day of July, 1892, at 11 o'clock a. m. Upon that day the defendant, at 10 o'clock in the forenoon, paid these incumbrances, amounting, at that time, to $664.26. The plaintiff claims that she was defrauded in the transaction, in that she was led to believe that she was only deeding the 3-acre strip to the defendant, and that she did not intend to deed any other piece of land. She claims that the deed was not read over to her before signing, and that she did not know its contents, and did not know that the description of the other parcels of land, of which her father died seised, were contained in the deed. All allegations of fraud are denied by the defendant. It appears that, on the 7th of July, 1892, the defendant forwarded to the plaintiff a draft for $8 for the purchase of a dress, which draft the plaintiff received and collected. The plaintiff can read and write English, was 27 years of age at the time of the trial, and lived on the land in suit from the time of her birth until she was 18 years of age.

At the close of the trial the court made findings to the effect that plaintiff was unacquainted with the transactions of business, and not familiar with the property mentioned in the complaint, and did not know the value thereof, or her interest therein; that, in February, 1892, she owned a one-fourth interest in the lands described in the complaint, and that said lands were reasonably worth $1,750, and were subject to the lien of the foreclosure judgment above referred to, and that parts of lots 54 and 159 were subject to tax liens; that the defendant drafted a deed covering the plaintiff's entire interest in said premises, and procured the plaintiff to execute the same under the belief that she was conveying only the 3 acres in lot 55, and no other lands; that the only consideration therefor was $5, which was wholly inadequate; that the plaintiff was induced to execute said deed by reason of statements in the letter of February 5, 1892, said letter being the same letter heretofore set out in full; that the statements contained in said letter were false, but that the plaintiff relied upon them, and believed them true, and was induced to execute the deed on the strength of such belief, and that she would not have conveyed the premises had she known the true condition of her title, and the value thereof, and what was, in fact, covered by the deed; that the defendant, on July 6, 1892, redeemed the premises from the judgment of foreclosure, paying therefor, in all, the sum of $433.57, and the further sum of $11.69 to redeem them from the tax sale of May, 1891. As conclusions of law, the court found that the deed ought to be annulled, canceled, and set aside for fraud; that the defendant ought to be reimbursed by the plaintiff for one-fourth of the amount paid in removing incumbrances or liens from the premises, to wit, one-fourth of $433.57 and one-fourth of $11.69, with interest from July 6, 1892; also, that she should be reimbursed the $5 and the $8 paid by drafts; that plaintiff should also recover her costs, which should be offset in discharge of the amount which the court holds should be reimbursed to the defendant; that the amount directed to be reimbursed to the defendant should be secured by lien upon the premises. Judgment was entered in accordance with these findings, and the defendants appeal.

James Kirwan and Humphrey Pierce, for appellants. J. E. McMullen (J. A. Aylward of counsel), for respondent.

WINSLOW, J. We are unable to agree with the conclusion of the circuit judge to the effect that there was fraud in the transaction under investigation. The material facts are quite free from dispute. The land in dispute was worth, according to the highest estimate, not more than $17 per acre, or, in all, $986 for the 58 acres. In February, 1892, when the negotiations were begun, the whole farm, except the 3-acre strip in lot 55, was incumbered by a foreclosure judgment, rendered May 13, 1891, for $369.91, with accrued interest; also, by another mortgage, on which was due more than $200, and with a small amount of unpaid taxes. Besides these incumbrances, 40 acres of it was a homestead, and subject to the estate, during widowhood, of the widow of Hira Welsh, who was then but 46 years of age, and still unmarried; the balance being subject to the widow's dower interest. Subject to these incumbrances and burdens, the plaintiff owned an undivided one-fourth interest. Neither she nor any of the other heirs appear to have had any thought, ability, or intention of redeeming the land from the foreclosure

sale, which would take place, in the natural order of things, early in July, 1892. The plaintiff knew her father left a farm, though she denies that she knew its value, or the number of acres. She had lived on the farm up to her eighteenth year. This was the situation when the defendant offered her, by letter, $5 for the 3-acre strip. There was no material false statement in this letter. It is true that the taxes were not unpaid for three years on it, but they were unpaid for 1891, and it was sold for taxes in May, 1892. There was no statement of value, nor was there any misstatement of a material fact, nor was the price offered inadequate, in consideration of the situation of the property. To this letter the plaintiff replied, offering to sign off everything for $5 and a new dress. In view of all the facts, and the knowledge which the plaintiff had, this offer can mean nothing less than a proposition to quitclaim her interest in the entire farm. The defendant so understood it, and replied immediately, accepting the new proposal. In this letter he informs plaintiff specifically that the farm will probably be sold in May to pay the mortgage; that the $5 which he sends is to pay for her interest in the small strip which the mortgage does not cover. He then discusses the question whether he can pay off the mortgage, and give each of the heirs a new dress, if all the heirs will deed, as "you and your sister" have done, and informs her that the deed is sent to the bank, where she can execute it. This letter, certainly, if carefully read, reveals the entire facts; and, if misunderstood, it cannot reasonably be considered as the fault of the defendant, but rather due to lack of attention on the part of the plaintiff. From it the plaintiff was informed that she was receiving $5 for the strip, and that the defendant was offering the dress for her interest in the balance of the farm, which was mortgaged, and soon to be sold. In addition to this, the deed disclosed the fact that the whole farm was desired by the defendant, and, in July following, the plaintiff received from the defendant a draft for $8 for her interest in the farm, which she kept. Considering the fact that the plaintiff's interest in the farm was subject to life estates and incumbrances just ready to extinguish the original title, which neither she nor the other heirs had made any preparations to meet, and the further fact that there appear to have been no fraudulent misstatements made by the defendant, the deed must stand. Judgment reversed, and action remanded, with directions to enter judgment dismissing the complaint.

BURKHARDT et al. v. ELGEE.

(Supreme Court of Wisconsin. April 14, 1896.)

APPEAL—JURISDICTIONAL AMOUNT.

Where it appears that under no aspect of the case plaintiff could recover an amount sufficient to give the supreme court jurisdiction on appeal, an appeal will be dismissed, regardless of the amount claimed.

On rehearing. Denied.

For prior report, see 66 N. W. 525.

WINSLOW, J. A motion for rehearing is made in this case on the ground that the "amount involved" is the amount of damages laid in the complaint, viz. $100, and hence that the action is appealable, under chapter 215, Laws 1895. It seems to be considered that the appeal was dismissed because the circuit court found the value of the fish to be but 50 cents, and that we have taken the finding of the circuit court as conclusive upon the question of the "amount involved." Such was not the idea intended to be conveyed by the opinion, but some of the language is perhaps subject to such a construction. We have not intended to lay down any different doctrine from that laid down by the supreme court of the United States in determining what is the "amount in dispute" in a case appealed to that court. The doctrine of that tribunal is well stated in Gorman v. Havird, 141 U. S. 206, 11 Sup. Ct. 943, as follows: "It is true, as a general rule, that where judgment goes for the defendant the amount of the plaintiff's claim is the test of jurisdiction, but this rule is subject to the qualification that the demand shall appear to have been made in good faith for such amount. If it appear clearly from the whole record that under no aspect of the case the plaintiff could recover the full amount of his claim (i. e. the amount necessary to confer jurisdiction), this court will decline to assume jurisdiction of the case." In this case, which is simply an action of trespass, the record shows without dispute that there were no circumstances which would justify a verdict for exemplary damages, and that the actual damages under no aspect of the case could exceed one dollar. Hence, under the rule above quoted, the appeal must be dismissed.

Rehearing denied.

KENNEDY v. LAKE SUPERIOR TERMINAL & TRANSFER RY. CO.

(Supreme Court of Wisconsin. April 14, 1896.)

RAILROADS—INJURIES TO EMPLOYES—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK.

1. Where a railroad company allows ashes to be thrown on its tracks, and an employé, while coupling cars, falls over them, and is injured, it is liable therefor.

2. The yard foreman of a terminal switching company operating over 40 miles of track and 70 switches, whose duty required him to aid in and superintend the switching, seeing none of the crew on the approaching switch train, went between the cars to make a coupling when they were three feet apart, and still in motion, and fell over a pile of ashes on the track. The ashes were partially covered by snow and ice, and the day was dark and sleet was falling. *Held*, that the foreman was not, as a matter of law, guilty of contributory negligence.

3. An employé cannot be deemed, as matter of law, to have assumed the risk of being injured from falling over piles of ashes four to eight inches high on the track in going between cars to make a coupling, where he did not know of their existence, and at the time they were partially covered with ice and snow, and the day was dark and sleety.

Appeal from circuit court, St. Croix county; E. B. Bundy, Judge.

Action by James D. Kennedy against the Lake Superior Terminal and Transfer Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was commenced July 2, 1892, to recover damages sustained by the plaintiff by having his hand and wrist crushed and mangled while in the employ of the defendant, December 22, 1891, and engaged in coupling freight cars on the defendant's tracks in Superior, by reason of the alleged negligence of the defendant. The issue being joined, and at the close of the second trial thereof, the jury returned a special verdict to the effect: (1) That the plaintiff was injured while in the employ of the defendant; (2) that there were piles of ashes on the track of the defendant's railway, between the rails, at the time and place of the accident; (3) that the defendant was guilty of a want of ordinary care in permitting such ashes to be there, and such ashes did make said place not reasonably safe in which to make the coupling which the plaintiff was endeavoring to make; (4) that the defendant had, for some time previous to the accident, permitted persons occupying part of the Paden Building to empty their ashes on the track in question, after the fact that they did so was known to the defendant's agents having charge of the track; (5) that such want of ordinary care was the proximate cause of the injury which the plaintiff received; (6) that such or similar ash piles had been there prior to the accident during the month of November and until December 22, 1891; (7) that the height in inches of such ash piles was from 4 to 8 inches; (8) that such ash piles were not made or placed there by the defendant, or any of its servants while engaged in the service of the defendant; (9) that such ash piles were of such a nature, and had been there for such a length of time, that the defendant or its officers and agents, whose duty it was to remove obstructions from such places in the exercise of ordinary diligence, ought to have discovered them before the accident and injury to the plaintiff, and removed them; (10) that the plaintiff's stumbling over the ash piles while attempting to make the coupling was the proximate cause of his injury; (11) that the plaintiff was not guilty of any want of ordinary care in trying to make the coupling in the way he did, under all the circumstances; (12) that the plaintiff did not, at the time he attempted to make the coupling, know of these ash piles; (13) that the plaintiff would not, by the exercise of ordinary care, have discovered the existence, character, and location of the ash piles, which he claims contributed to his injury, before he undertook to make the coupling; (14) that the fact that the cars were coming in at the speed they were, and that each of the cars to be coupled had upon it double deadwoods, did not make it so unsafe that it was any want of ordinary care and prudence for the plaintiff to attempt to make the coupling, taking into consideration his knowledge of the circumstances; (15) that it will take $5,000 to compensate the plaintiff for the injury he received. From the judgment entered upon such verdict in favor of the plaintiff the defendant brings this appeal.

Butler & Butler, for appellant. Ross, Dwyer & Hanitch, for respondent.

CASSODAY, C. J. (after stating the facts). The main track of the defendant's railway at the place in question runs east and west, and crosses Tower avenue at right angles. The first street east of Tower avenue is Ogden avenue, and the first street east of that is John avenue. From Tower avenue to John avenue the distance is more than 600 feet. Near the west side of John avenue is a switch connecting a spur or stub track with the defendant's main track, and on the south side thereof, and which spur track runs west from the switch, and parallel to and four feet south of the main track to within two feet of the east sidewalk of Tower avenue, where it terminates. On the south side of the spur track is an alley parallel with it, and nine or ten feet wide, connecting with Tower avenue and the other avenues mentioned. Immediately south of the west end of the spur track and the alley is Paden's Building, mentioned in the verdict, extending from Tower avenue east and along the alley for a distance of about 100 feet. By reason of that building the spur track is called "Paden Spur." Certain packing companies had their offices in Paden's Building, and Paden spur was used for storing meat and other freight cars. On the morning in question six or seven freight cars attached to each other were standing on the west end of Paden spur, the car at the west end being a meat car, standing within two or three feet of the end of the rails, with no bumpers or other obstruction to prevent cars from running off the ends of the rails. The evidence in behalf of the plaintiff tends to prove that the morning was dark, wet, and sloppy with rain and sleet falling, and some snow and ice on the ground,—being December 22, 1891; that about 9 o'clock of that morning the plaintiff, who was in the employ of the defendant as foreman of a switching crew, came from the west across Tower avenue on the main track with his crew, engine, and one meat car, intending to set the car he was thus bringing in upon Paden spur, next to the meat car thus standing on the west end of that spur; that, to effect that object, he

directed his men to cut off the meat car on the main track, just before reaching the switch, and then to pass on east with the engine beyond the switch, and then turn the switch and back up on Paden spur with the engine, and take out all the cars standing thereon, except the one meat car standing at the west end thereof, and then, after taking those cars out onto the main track, to back up, and hitch the meat car so standing on the main track to the rear end of the train, and then go east on the main track beyond the switch and back up on Paden spur, so as to bring the two meat cars together; that before such orders of the plaintiff were executed, and just after his engine had so passed east over Tower avenue, the plaintiff jumped off the engine, and went to Paden spur, and pulled the pin which coupled the meat car thereon to the other freight cars; that he then stepped out onto the main track; that, observing that the meat car standing on Paden spur was very near to the end of the rails, and liable to run off, he thought he would try the brake thereon, and for that purpose climbed up the ladder on the north side and at the west end thereof, and then went on the top to the east end of that car and tried to set the brake, but found the chain was too long and would not set, and then climbed down the same ladder and put some blocks of wood under the wheels of the meat car, at the west end thereof, so as to prevent it, when being coupled to the other cars, from running off the rails onto the sidewalk; that he then went out along the main track towards the other meat car standing thereon, to get its number; that about that time his crew coupled onto it, and started with it east; that by reason of the weather he then walked up and down on the main track, waiting for the cars to be set in on the Paden spur; that when he saw them coming he observed that there was no one to make the coupling, and so, with the intention of making the coupling himself, he walked to the side of the coming cars, moving at from three to five miles per hour, and gave the car-length signal, and as they came nearer he repeated the same, and then gave a signal to slow up; that, as the link of the moving car was hanging down pretty low, he tried it to see whether it was loose; that he then gave the stop signal, which was not obeyed, and then gave another, and went in to make the coupling when the cars were two or three feet apart; and while in the act of guiding the link to get it under the deadwoods, he stumbled with his right foot over the piles of ashes mentioned in the verdict, and grabbed hold of the end of the ladder, and raised himself up, and the deadwoods caught his hand and wrist, and crushed and mangled the same so that amputation became necessary.

1. The first 10 findings of the jury mentioned in the foregoing statement appear to be sustained by the evidence. Those findings establish the negligence of the defendant in not furnishing a reasonably safe place to couple such cars, and that such negligence was the proximate cause of the plaintiff's injury. In Bessex v. Railway Co., 45 Wis. 477, it was held to be the duty of the company to keep its tracks free from obstructions which would render the moving of cars along them unnecessarily hazardous to its employés charged with that work; and if, in consequence of its neglect of that duty, such an employé was injured, the company might be held liable for the injury; that in such a case the negligence of the agent of the company having the care and control of one of its yards in permitting obstructions to accumulate along the tracks in such yard was the negligence of the company. Such rules have repeatedly been sanctioned by this court. Hulehan v. Railway Co., 58 Wis. 319, 17 N. W. 17; Id., 68 Wis. 526, 32 N. W. 529; Nadau v. Lumber Co., 76 Wis. 127, 43 N. W. 1135; Johnson v. Bank, 79 Wis. 421, 48 N. W. 712; McClarney v. Railway Co., 80 Wis. 280, 49 N. W. 963; Stackman v. Railway Co., 80 Wis. 432, 50 N. W. 404; Kelleher v. Railroad Co., 80 Wis. 588, 50 N. W. 942; Engstrom v. Steel Co., 87 Wis. 171, 58 N. W. 241; Cadden v. Barge Co., 88 Wis. 409, 60 N. W. 800. This question was not present upon the former appeal, but it was intimated pretty strongly by Orton, C. J., that the only cause of action which had been alleged and proved by the plaintiff was the presence of the heaps of ashes; and that that cause of action had been withdrawn from the jury by the trial court. 87 Wis. 28, 57 N. W. 976.

2. The other important questions in this case are whether the plaintiff assumed the risk, or was guilty of contributory negligence. The eleventh, twelfth, thirteenth, and fourteenth findings of the jury, mentioned in the foregoing statement, are to the effect that he was not guilty of such negligence. The plaintiff had been the foreman of a switching crew from the previous August; at first on a night crew, and then on a day crew. The evidence tends to prove that his duties as such foreman were similar to those of a conductor; that he had a book, and kept track of all transfers of cars, the tracks from which they were taken, and the place at which they were delivered, whether empty or loaded, and made reports of the same, and looked after the engine in general; that he was to keep off tracks upon which trains were liable to be, and to have general charge of the running of the switch engine and the cars attached to it, and to couple and uncouple cars when helpers were not present; that the defendant, as its name imports, is a terminal railway company, organized by the different railway companies entering Superior, and is operated for the benefit and convenience of such companies in reaching the widely scattered docks and other industries doing business at Superior; that the

tracks of the defendant at Superior are extensive, and besides it has the privilege of using, and does use, the tracks and yards of the other companies mentioned, so that the switching crew of which the plaintiff was such foreman used, in the course of this work, some 40 miles of track and 70 switches, besides numerous spur tracks, in yards and upon tracks in different parts of the city, and several miles apart. In view of these things, and the general nature of the plaintiff's duties, and the facts which the plaintiff's evidence tends to prove, as indicated, that the morning was dark, wet, and sloppy, with rain and sleet falling, and some snow and ice on the ground, we cannot say, as a matter of law, that the plaintiff was guilty of contributory negligence. The verdict finds that the ash piles were from four to eight inches high, and, since they were covered with snow and ice, they might very easily be unobserved by one walking over them upon such a morning and under the circumstances mentioned. The case is very different than it would have been if the plaintiff's duties had required him to observe and make safe the condition of the tracks in the yard where Paden spur was situated. We cannot say, under the circumstances mentioned, as a matter of law, that the plaintiff assumed the risk. This court has repeatedly held, in effect, that before an employé can be held to have assumed an unusual or extraordinary risk, he must know, or have reasonable means of knowing of, the precise danger to which he is exposed, and which he thus assumes; and that a mere vague surmise of the possibility of danger is not enough to take the case from the jury. Dorsey v. Construction Co., 42 Wis. 583. In that case Ryan, C. J., said, in effect, that even where those operating trains have actual knowledge of the dangerous proximity of adjacent objects, yet that it would be unreasonable to require them "to retain constantly in their minds an accurate profile of the route of their employment, and of collateral places and things, so as to be always chargeable, as well by night as by day, with notice of the precise relation of the train to adjacent objects." Id. 599. This language is peculiarly applicable here. To the same effect, Nadau v. Lumber Co., 76 Wis. 132, 43 N. W. 1135; Kelleher v. Railroad Co., 80 Wis. 584, 50 N. W. 942; Haley v. Lumber Co., 81 Wis. 426, 51 N. W. 321, 956; Colf v. Railway Co., 87 Wis. 276, 58 N. W. 408. The plaintiff testified positively that he saw the ash piles after the injury, but never saw them before the accident; and his testimony is undisputed as to that fact. The only remaining question upon the point we are now considering is whether the plaintiff was guilty of any want of ordinary care in failing to observe the ash piles before or at the time he attempted to make the coupling. Under the facts and circumstances mentioned, we cannot say, as a matter of law, that the plaintiff was guilty of such want of ordinary care, but must hold that the question was properly submitted to the jury. The finding of the jury in favor of the plaintiff upon that question is, therefore, conclusive. There are numerous exceptions in the case, but what has been said disposes of all questions calling for consideration. The judgment of the circuit court is affirmed.

TRUSTEES OF ST. CLARA FEMALE ACADEMY OF SINSINAWA MOUND v. DELAWARE INS. CO. et al. SAME v. MILWAUKEE MECHANICS' INS. CO et al. SAME v. NORTHWESTERN NAT INS. CO. et al. SAME v. ROCKFORD INS. CO. et al.

(Supreme Court of Wisconsin. April 14, 1896.)

EQUITY — REFORMATION OF INSURANCE POLICY — MISTAKE — EVIDENCE — PRACTICE — ACTIONS INVOLVING EQUITABLE AND LEGAL ISSUES — JUDGMENT.

1. To authorize the reformation of an insurance policy on the ground of mistake, the mistake must have been mutual.

2. An insurance policy was issued on a house, under construction by a contractor, to the owner of the building, who had agreed, in the contract for the construction of the building, to insure the building during construction for the benefit of the contractor, as his interest might appear. The owner of the building, in negotiating for the insurance, did not request that the interest of the contractor be insured, nor was the insurance agent, to whom the owner left the matter as to the form of the policy, aware that the owner desired to have the interest of the contractor insured. *Held*, that a reformation of the policy so as to insure the interest of the contractor was not authorized.

3. Under Rev. St. § 2844, providing that where, in any action, there shall arise issues triable by a jury and by the court, the court shall, in its discretion, order the trial of either to be first had, and, "when both" shall be found, render judgment, it is error in an action on an insurance policy, where a claim is made by the contractor of the building insured against the owner, and the policy is sought by such contractor to be reformed so as to include his interest in the building as builder, to order the reformation of the contract on the trial of such equitable issue, before the other issues have been tried.

Appeal from circuit court, Dane county: Robert G. Siebecker, Judge.

Action by the trustees of St. Clara Female Academy of Sinsinawa Mound, of the state of Wisconsin, against the Delaware Insurance Company and another, and against the Milwaukee Mechanics' Insurance Company and another, and against the Northwestern National Insurance Company and another, and against the Rockford Insurance Company, etc., and another. From judgments for defendant W. J. McAlpine, the defendant insurance companies appeal. Reversed.

These actions were upon four insurance policies, issued November 8, 1893, by the defendant companies, respectively, for $2,500 each, and there was other insurance written at the same date for $5,000, all on the plain-

tiff's "two and one-half story brick shingle-roof schoolhouse, including," etc., "situate," etc., "permission being given to effect other insurance, and also to complete the construction of said building." The complaints contained the usual allegations, and claimed that a total loss of the insured property by fire occurred November 16, 1893, and that, at the time each of the policies was issued, the building was in process of construction by the defendant McAlpine, the contractor, and that the contract required that it should be insured for the benefit of the owner and said contractor as well; that McAlpine claims that such insurance was taken in part for his benefit, and that he has an interest in each policy to the extent of his loss, and therefore he was made a defendant. The respective companies answered, contesting their liability for the loss. The defendant McAlpine answered, setting up two counterclaims: First. That the policies so issued in form to and in the name of the plaintiff covered all the work, labor, and material wrought into the building by him, and that said policies were in fact and in equity taken out and procured for his use and benefit, to the extent of securing to him the payment of all justly due him, which was $26,000 (of which $9,500 had been paid), and were intended by the plaintiff and the several companies for his use and benefit, and of the plaintiff, according to their respective interests; that the plaintiff, in its contract with him, had agreed, and it was its duty, to insure said building in its own and his name, sufficient to cover said work and materials, to be made payable to them as their interests might appear; that the defendant requested the plaintiff, a short time before the policies were issued, to perfect such insurance; that the plaintiff failed to obtain any insurance in defendant's name, and the only policies issued were in form in the name of the plaintiff; and that, at the time of the fire, it was indebted to him for work and material in the sum of $12,500; and he claimed damages against the plaintiff in that sum. Second. That the plaintiff fully informed the several companies of the defendant's said interest, and the plaintiff relied on the superior skill and knowledge of the companies and their agents to prepare said policies, so that the rights of all parties would be fully protected, and they knew the building was in process of erection, and that it was the plaintiff's intention to insure the building against loss by fire in such manner as to protect the rights of all parties interested therein, and that it requested the several companies to prepare said policies accordingly, and that the agent of the several companies undertook and agreed so to do; that, by mistake and inadvertence of the several companies, their agent, and the plaintiff, such insurance was not effected in the name of the defendant, but in the name of the plaintiff only; that, at the time said policies were issued, the several companies knew that the premises had been mortgaged to the Northwestern Mutual Relief Association for $10,000, and that each agreed to insure said property subject to said mortgage, but, through mistake and inadvertence, the parties to said policies failed to insert in them the fact of the existence of the mortgage, and to attach the proper mortgage clause. The defendant prayed that the several policies might be reformed and corrected so as to contain his name in addition to the plaintiff's, and express their rights and interests therein as so intended; that a statement be inserted in each policy that the property is mortgaged for $10,000 as aforesaid, or by attaching thereto the proper mortgage clause. The defendant claimed judgment against the several companies in like manner as if the policies had been written as so intended, and that they be reformed as aforesaid, and for general relief, and, if not reformed, that he recover the damages claimed in the first counterclaim against the plaintiff. The several companies, in reply to said counterclaims, as well as by answer to the several complaints, set up various matters in defense to the claims made under the policies, and contended that the several policies were void and of no effect. The several companies, in further reply, denied, in substance, the allegations relied on to obtain a reformation of the policies; denied that they had any notice or knowledge as to the building contract or its terms or provisions before the fire, or that their agent in behalf of the plaintiff or the defendant McAlpine undertook or agreed to prepare said several policies so as to protect the interest of McAlpine in said property, or any interest therein of any person or corporation other than the plaintiff, or otherwise than as stated in and by the said several policies; and denied that any mistake therein or omission was made in form or substance, or that said insurance was made or intended for the use and benefit of McAlpine to any extent or in any manner whatever; and denied that it was so intended by the plaintiff; and alleged, in substance, that the said policies were issued advisedly, without mistake or inadvertence, and that no other contract was made to or with the plaintiff than is set forth in the policies, and that they were not requested to, and did not, at any time, insure the interest of McAlpine in the property. The cases were heard together on the same proofs; and the court found, among other things, that it was the understanding, intention, and agreement between the plaintiff and each of said companies to insure said building against loss by fire so as to protect all parties having interests therein, including the plaintiff, the Northwestern Mutual Relief Association, as mortgagee, and the defendant McAlpine, as they might appear; that Sister Mary Edmond, who represented the plaintiff, and defendant McAlpine, stated to H. R. Hobbins, the agent of the several companies in making said insurance, that she was ignorant as to how such insurance on an incompleted build-

ing should be taken out in order to insure it, and that she left to said agent the matter of the arrangement of the contract of insurance, and the writing of the policies, in such manner as to insure said property against damage by fire, and protect all parties having interests therein; that said Hobbins, as such agent, in writing such policies, labored under a mistake, believing that, if he issued them in the name of the plaintiff, they would protect all parties in interest, including the interests of the Northwestern Mutual Relief Association and defendant McAlpine, as they might appear, and, in accordance with such intention, arrangement, and agreement, said property was insured against all loss by reason of fire on the part of the plaintiff, of the Northwestern Mutual Relief Association, as such mortgagee, and the defendant McAlpine; that, at the time of the fire, the building was of the value of about $26,000, and there was destroyed of labor and material wrought into the same to the value of $20,000. The court gave judgment in each case, reforming and amending the policy involved in it by inserting therein the name of the defendant McAlpine as one of the assured, so that, when reformed and amended, it should name the plaintiff and McAlpine, as their respective interests should appear, as the parties insured, and also by attaching to said policy the mortgage clause as established by law, describing the premises insured as subject to a mortgage of $10,000 made by the plaintiff, with such stipulations and conditions as are contained in the standard mortgage clause of the state of Wisconsin; and judgment was given against each of the companies in favor of McAlpine for the costs of such equitable counterclaims. The legal causes of action against the several companies have not been tried, nor the counterclaim of McAlpine against the plaintiff. Each of the defendant companies appealed from the judgment so rendered against it, and the cases were argued together.

F. J. & C. F. Lamb and H. W. Chynoweth, for appellants. Bashford, O'Connor, Polleys & Aylward, A. G. Zimmerman, and B. W. Jones, for respondents.

PINNEY, J. (after stating the facts). The conclusion of the circuit court that the several insurance policies in question should be reformed by adding to each of them the usual mortgage clause showing the existence of a mortgage on the insured property, running to the Northwestern Mutual Relief Association, in the amount of $10,000, and containing stipulations and conditions provided for by law and by the standard policy to be inserted in the mortgage clause, is sustained by the evidence, and was not contested. The only contested question is whether the finding that the defendant McAlpine is entitled to recover judgment against the plaintiff and the several insurance companies reforming the several policies in question by inserting his name after the name of the plaintiff as one of the assured, and by inserting thereafter the words "as their respective interests may appear." This is wholly a question of fact, and depends entirely upon the testimony of Sister Mary Edmond, who represented the plaintiff in securing these policies, and the testimony of H. B. Hobbins, the agent of the several companies, who negotiated the insurance and issued the policies in suit on their behalf. There is no conflict or contradiction between these witnesses. On the 8th of November, 1893, Hobbins called on Sister Mary Edmond, in response to a letter from her saying: "As our building is being roofed, we ask you to come to Edgewood at once, to attend to the insurance. * * * We are most anxious to secure ourselves against loss." The plaintiff, by a provision in the building contract with McAlpine, had agreed to effect insurance on the building in its own name, and in the name of McAlpine, against loss by fire, in such sums as might from time to time be agreed upon, "the policies being made to cover work incorporated in the building, and materials for the same in or about the premises, and made payable to the parties to the contract as their interest may appear." McAlpine requested the plaintiff to procure insurance shortly before the date of the policies. Sister Mary Edmond describes the transaction in respect to the insurance, in substance, as follows: "I told Mr. Hobbins I didn't understand how insurance was taken out on a building in course of erection, and that I left entirely into his hands to attend to it." On being asked what was said during the interview with Hobbins in relation to McAlpine and his interest in the building, she answered, "I have no recollection of Mr. McAlpine's name being mentioned," and further testified that she had no recollection—that is, no distinct recollection—in regard to the contractor's name being mentioned; that she thought Hobbins knew that the building was being built by a contractor; that Hobbins asked, she thought, the amount of the contract, and everything connected with the building; that she told him $32,405 was the amount of the contract, but nothing was then said as to the amount that had been paid. Hobbins examined the building, and thought he could only put on $15,000 insurance. The policies were received two days before the fire, and she made no examination of them. Hobbins testified that the sister said she did not know how the insurance should be written, on account of there being a contractor building it; and he insured it in the way he did, supposing they had an insurable interest, having had the other insurance (on the other building) in the name of the Trustees of St. Clara Academy, and that he wrote this up the same way. He testified that the contractor's name was mentioned; that he was told they had paid $9,500 on the contract; that he knew of the

$10,000 mortgage, and that provision was to be made for it; that she said she would leave it to him to write the insurance, because he had written all the other insurance; that he told her the building was far enough along for $15,000, and this was afterwards to be increased to $25,000, and that was virtually all there was of it. On cross-examination, he said he insured the Trustees of St. Clara Academy, and gave them these policies; that no mistake was made in writing the policies that he knew of; that he was not requested by the sisters to insure McAlpine's interest, and did not write his name in the policies for that reason. His risk would be what is called a "builder's risk," as contractor. Being asked if it was his intention when he wrote the policies to protect the interests of all the parties, he said, "I couldn't say that, as I supposed I insured the sisters;" that the thought that was on his mind was that he was insuring the building; that he was not asked to insure specifically the interest of the sisters or any particular interest; that it was stated that McAlpine was the contractor, and that there was a mortgage on the place. There was no evidence to show that Hobbins had any knowledge of the contract between the plaintiff and McAlpine to procure insurance on the building. This is, in substance, all the material evidence on the vital question. It does not present a case for correction or reformation of contracts of insurance, for it wholly fails to show that any such contract or agreement was ever made as between the contractor, McAlpine, or any one in his behalf, and either of the insurance companies, or that, as between them, any such contract was ever contemplated or intended.

The case for correction or reformation of the policies by inserting McAlpine's name in them, as sought, fails at the very threshhold, and is neither more nor less than an application to the court to make, by its judgment, contracts which the parties have wholly failed to make for themselves. This is not a case where there has been a mutual mistake either of fact or of law. It is a case where the minds of the parties to the supposed contracts have never met, either on the terms expressed in the policies or any other terms. Here there were no contracts to express. There had been no agreement for insurance, and there was no privity or contractual connection or relation between the parties. The agent of the companies had no knowledge of the agreement to insure between the plaintiff and McAlpine; did not know that he, or any one in his behalf, desired any insurance on his interest in the property; and the evidence is clear and decisive that the agent, Hobbins, had not been requested by any one to insure McAlpine, or to make him a party to the policies for any purpose whatever. The insurance was made to the plaintiff as owner, and for a period of three years. When it is said that a written agreement may be corrected or reformed so as to express and carry out the intention of the parties, this must be understood as applying to the intention of the parties by reason of some mutual agreement made between them, and upon which their minds have actually mutually met, and not to some real or conjectural intention they may have separately entertained, but which never acquired the character of real contractual intention. As applied to the present case, it was not enough that McAlpine, or the plaintiff, or both of them, intended to have the property insured for them as their interests might appear. It was necessary for them, in order to have the relief demanded, that the defendant companies or their agent so understood the matter, and undertook or agreed to write the insurance accordingly. While it is not material what language the parties used to express their mutual intent, the court will carry it into effect, and reform the instrument accordingly. Still it is only such common intent that the parties have arrived at or expressed that the court will effectuate by means of its extraordinary powers over contracts and written instruments, and in such cases it will act only upon the most clear and positive proof of mistake or fraud. The writing must be taken to contain the real contract until the contrary is established by the clearest and most satisfactory evidence, and a mere preponderance of evidence will not suffice. Lake v. Meacham, 13 Wis. 355, 382; McClellan v. Sanford, 26 Wis. 595, 607; Blake Opera-House Co. v. Home Ins. Co., 73 Wis. 667, 41 N. W. 968; Hearne v. Insurance Co., 20 Wall. 490; Southard v. Curley, 134 N. Y. 154, 31 N. E. 330; Groff v. Rohrer, 35 Md. 327; Tripp v. Hasceig, 20 Mich. 263. The evidence, for the reasons stated, fails to bring this case within the principle of the rule invoked by respondents' counsel, in support of which they have cited many cases, and which is concisely stated by Justice Miller in Williams v. Insurance Co., 24 Fed. 625, that "where an instrument fails to represent what both parties had intended to have it represent, and one party had drawn up the instrument, and the other party merely accepted it, and the fault was on the party drawing up the instrument, it may be reformed." This is clearly stated by Justice Harlan in Snell v. Insurance Co., 98 U. S. 85, where it is said that, "in the attempt to reduce the contract to writing, there has been a mutual mistake, caused chiefly by that party who now seeks to limit the insurance to an interest in the property less than that agreed to be insured. The written agreement did not effect that which the parties intended. * * * He [the assured] trusted the insurance agent with the preparation of a written agreement, which should correctly express the meaning of the contracting parties. He is not chargeable with

negligence because he rested in the belief that the policy would be prepared in conformity with the contract." And it was held that, upon discovery of the mistake, he was entitled to relief. Other cases to the same effect, and also showing under what circumstances relief will be granted for mistake of law, were cited by respondents' counsel. We think the evidence wholly fails to show mistake either of fact or of law, but that it does appear that there was no contract or meeting of minds between McAlpine and the insurance companies, or either of them, or any one acting for them, to insure his interest. The finding of the circuit court upon this branch of the case is clearly erroneous.

2. There has been no trial of the legal causes of action stated in the complaints in these actions, nor has there been any trial of the counterclaims pleaded in them by McAlpine, in form as legal causes of action against the plaintiff. If the insurance companies should succeed in defending against the policies, the trial had in these actions and these appeals will prove to have been an idle waste of time and money. The judgments rendered on the counterclaims of McAlpine against the insurance companies certainly definitely and finally determined all the matters embraced in such counterclaims. Though characterized as orders, they are essentially judgments, and conclusive adjudications of the matters embraced in them, until reversed. They are final adjudications of a part of the merits involved in the cases, leaving other and very important portions not only not adjudicated, but untried. The statute (section 2844) provides that "when, in any action, there shall arise issues triable by a jury, and other issues triable by the court, the court shall, in its discretion, direct the trial of the one or the other to be first had, according to the nature of the issues and the interests of justice, and judgment shall be given upon both the verdict and the finding of the court, when both shall be found. But no issue need be tried the disposition of which is not necessary to enable the court to render the appropriate judgments." There can be but one final judgment in the case, and that must dispose of all the issues and the rights of the parties. Sellers v. Lumbering Co., 36 Wis. 398; Scott v. Reese, 38 Wis. 636; Singer v. Heller, 40 Wis. 544; Treat v. Hiles, 75 Wis. 265, 44 N. W. 1088; Sherman v. Lumber Co., 77 Wis. 23, 45 N. W. 1079; Gage v. Allen, 84 Wis. 330, 54 N. W. 627. Under our practice, there is no such thing as an interlocutory judgment. Sellers v. Lumbering Co., supra; Singer v. Heller, supra. And as was said by Cole, J., in Sellers v. Lumbering Co., supra: "The distinction is broad between an 'order' and 'judgment,' and they are not to be confounded in practice." It follows, therefore, that the judgments here appealed from are erroneous, in that they cannot be maintained either as orders or as interlocutory judgments, but are really judgments determining a part only of the issues and rights of the parties, rendering a further judgment necessary to a final determination of the rights of the parties in the actions. Rev. St. § 2882. In Mowry v. Bank, 54 Wis. 38, 11 N. W. 247, and 66 Wis. 539, 29 N. W. 559, there were two judgments. The first determined the rights of the parties, but provided for a reference to carry out what had been so adjudged. A part of this judgment was reversed, and then the reference proceeded under the corrected judgment; and, for the amount reported, judgment was finally given. In Murray v. Scribner, 70 Wis. 231, 35 N. W. 311, it was held that a mere interlocutory order for judgment is not appealable, although it denies the motion of one party for judgment, and grants that of the other. In Paetz v. Stoppleman, 75 Wis. 510, 44 N. W. 834, as in Mowry v. Bank, supra, the so-called "interlocutory judgment" practically settled and determined all the rights of the parties, leaving certain sums under the judgment to be ascertained and adjusted by a reference. These cases afford no warrant or support to the judgments before us. The merits of the case, in whole or in part, cannot be adjudicated or determined by a mere order. This is the appropriate office of a final judgment. Correct practice, and the avoidance of unnecessary expense and delay incident to the adjudication of the rights of the parties in detached parts or portions, require us to adhere quite strictly in the future to the practice referred to by the earlier cases. As the merits in respect to the findings have been fully argued, and considerable expense has been incurred to that end, we have thought it not improper to pass on them, though we might well have stopped by reversing the judgments on the ground last stated, as the court will feel obliged to do, as a matter of practice in future cases. The judgment of the circuit court in each of the above cases is reversed, and they are remanded for further proceedings according to law.

WUNDERLICH et al. v. CHICAGO & N. W. RY. CO.

(Supreme Court of Wisconsin. April 14, 1896.)

RAILROAD COMPANIES—FIRE FROM ENGINE—PLEADING—SUBROGATION.

1. A question of misjoinder of plaintiffs, or whether the complaint, as to one or more of several plaintiffs, states a cause of action against defendants, cannot be raised by demurrer, under Rev. St. § 2649.

2. Where insured property is destroyed by fire, through the negligence of a third person, an insurer of the property, who has paid the assured the insurance money, becomes subrogated pro tanto to the owner's claim against the wrongdoer, and should join the owner as plaintiff in an action for such negligent burning.

Appeal from circuit court, Langlade county; John Goodland, Judge.

Action by George H. Wunderlich and others against the Chicago & Northwestern Railway Company for the alleged negligent destruction of property by fire allowed to escape from a defective engine. From a judgment overruling a demurrer to the complaint, defendant appeals. Affirmed.

The complaint alleges that the plaintiffs Wunderlich on the 12th of September, 1894, owned and operated a sawmill and general store at Elmhurst, Langlade county, and that on said day their sawmill and store, and a large amount of lumber, valued in all at over $50,000, was destroyed by fire, which fire was caused by sparks negligently allowed to escape from a defective engine operated by the defendant. The complaint further alleges that plaintiffs Palatine Insurance Company and 11 other insurance companies, who are joined as plaintiffs, had, at the time of said fire, policies of insurance, in full force and effect, "upon the said property of the plaintiffs Wunderlich, against loss and damage thereto by fire," to the amounts respectively named in the complaint, and that the plaintiffs Wunderlich have received from the several companies the full amount of their several policies, except that two companies who are named have made partial payments only. Judgment is demanded for the full value of the property destroyed. To this complaint the defendant demurred on the ground (1) that there is a defect of parties plaintiff, in that the complaint states no cause of action in favor of the said insurance companies (naming them); (2) that several causes of action have been improperly united; (3) that the complaint does not state facts sufficient to constitute a cause of action; (4) that the complaint does not state facts sufficient to constitute a cause of action in favor of the said plaintiff insurance companies. The demurrer was overruled, and the defendant appealed.

Fish & Cary, for appellant. John E. Martin and Bouck & Hilton, for respondents.

WINSLOW, J. (after stating the facts). Fairly and reasonably construed, the complaint charges that the property of the plaintiffs Wunderlich was destroyed by a fire negligently kindled by the defendant, and that the plaintiff insurance companies had previously issued to the plaintiffs Wunderlich contracts of insurance against fire upon said property, which were in force at the time of the fire, and that said insurance companies had paid the losses under their policies. The demurrer to the complaint was properly overruled, for two reasons: (1) Because it is settled in this state that "the question of misjoinder of plaintiffs, or whether the complaint, as to one or more of several plaintiffs, states a cause or action against the defendants, cannot be raised by demurrer under any of the grounds allowed by section 2649, Rev. St." Kucera v. Kucera, 86 Wis. 416, 57 N. W. 47. (2) Because it is equally well settled that where insured property is destroyed by fire, through the negligence of another, the insurer of such property, who has paid the insured the insurance moneys, becomes subrogated pro tanto to the plaintiff's claim against the wrongdoer, and should properly join the owner as plaintiff in an action for such negligent burning. Pratt v. Radford, 52 Wis. 114, 8 N. W. 606. Order affirmed.

WEBSTER v. WHITE et al.

(Supreme Court of South Dakota. April 18, 1896.)

BOUNDARIES—COUNTY SURVEYS—OFFICERS—PERSONAL LIABILITY FOR TORT—HARMLESS ERROR—TRIAL BY JURY—WAIVER—DAMAGES—EVIDENCE.

1. The location by the county surveyor of the section lines under Act 1890, c. 35, which makes the survey presumptively correct, only makes such location prima facie evidence against the landowners.

2. Township officers trespassing upon land in the attempt to locate a section-line highway on a line other than its proper location are personally liable for the trespass.

3. That, in a suit to enjoin township officers from opening a highway, they are not sued in their official capacity, does not require a reversal of a decree granting such injunction.

4. A request by defendant for a trial by jury, made after plaintiff has closed his evidence,—the parties having noted the case for trial by the court,—comes too late.

5. In an action for trespass to land, a witness should not be allowed to give his opinion as to the amount of damages, the basis upon which it was made not being shown.

Corson, P. J., dissenting.

Appeal from circuit court, Minnehaha county.

Action by Madison Webster against Samuel White and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Hosmer H. Keith, for appellants. Davis, Lyon & Gates, for respondent.

HANEY, J. This action was brought to enjoin defendants from opening and maintaining a section-line highway through plaintiff's land, and to recover damages resulting from an attempt to do so. The line between sections 25 and 26, Split Rock township, Minnehaha county, is the one in dispute. The highway along what was claimed to be this section line had been worked and traveled for a number of years, when, in April, 1893, the township employed the county surveyor to survey its lines and erect landmarks, under chapter 35, Laws 1890. In making such survey the county surveyor located the line about 18 rods west of the traveled highway, where it passes plaintiff's premises, and, as he contends, that many rods west of where it was originally located by the government surveyors. An attempt by the township officers to open and work a road along the line as located by the new survey gave rise to this action. It was tried by the court, resulting in a judgment

for plaintiff, from which, and an order denying a motion for a new trial, defendants appealed.

Defendants contend that the survey made by the county surveyor was the corporate act of the township, and is binding upon all landowners until set aside in a direct proceeding brought against the township in its corporate name; that it cannot be questioned collaterally. We are unable to view chapter 35, Laws 1890, in any such light. The act itself makes the survey only presumptively correct. Prior to its passage the same presumption prevailed in favor of surveys made in the manner prescribed by the statute. The only substantial effect—apparently, the only purpose—of the act was to authorize civil townships to furnish profitable employment to county surveyors at the expense of the townships. So far as this case is concerned, it may be conceded that the county surveyor's work was presumptively correct; and his report, having been received in evidence, cast upon plaintiff the burden of proving that the line as originally located was not where the county surveyor located it. This is all the effect the statute itself requires shall be given to the survey. Whether it is entitled to even this effect, as against landowners without notice of the survey, is doubtful, and not decided at this time.

It is claimed that defendants were performing their duty as public officers, and can neither be restrained, nor required to respond in damages. If the findings of the court are sustained by the evidence, they were not performing any official duty. It was their duty to maintain and work a highway along the section line as established by the original survey,—not on a line 18 rods west thereof, and through the land of plaintiff. When they left the section line, they left the highway, and whatever they did beyond the limits of the highway was without authority and unlawful.

It is alleged and admitted that defendants Benedict, Lee, and Munson are township supervisors; that defendant White is road overseer; and that each acted in an official capacity. It is contended that they and their successors in office cannot be enjoined, because the title of the action fails to show that they are sued in an official capacity. This is but a defect in form, which involes no substantial right, and, in any view, cannot be regarded as reversible error. Defendants, having exceeded their authority as township officers, might be treated as trespassers, and enjoined as individuals. The decree is effectual to prevent them from acting in any capacity, and it is immaterial to them what effect it may hereafter have upon the corporation, or others not parties to this action. The facts, as found by the court, clearly authorized the issuance of an injunction. 2 High, Inj. § 702, and cases cited.

Defendants make the point that they were entitled to a trial by jury. Upon the issues made by the complaint and answer, both parties noticed the cause for trial by the court. Defendants did not request a jury, nor object to a trial by the court, until after the conclusion of plaintiff's evidence, when they asked the court to rule and decide in their favor upon several propositions; among them, "that defendants are entitled, under the constitution, to a trial by a jury on all questions of trespass, and such as the proof would warrant, given upon the trial of this action." If this was intended as a demand for a jury trial, it came too late. Noting the case for trial by the court, and failing to ask for a jury, or object to the proceedings, until the plaintiff had completed his testimony in chief, were unequivocal acts showing an intention to abandon the right of a trial by jury. Wheelock v. Lee, 74 N. Y. 495; Baird v. Mayor, etc., Id. 382.

The trial court found that the line run by the county surveyor between sections 25 and 26 does not correspond with the line of the United States survey, and the landmarks erected by the county surveyor were not set upon the corresponding section corners and quarter section corners established by the United States survey between said sections, but said new line and landmarks are located about 18 rods west of said United States survey, and upon plaintiff's said premises. It is claimed that this finding is not sustained by the evidence, and numerous errors are assigned, relative to the introduction and rejection of evidence. A large number of witnesses were examined on behalf of both parties, among whom were some of the first settlers in the township. As is usual in this class of cases, the evidence is conflicting. It would serve no useful purpose to attempt a statement of it in this opinion. After a careful examination of the entire record, we have reached the conclusion that, upon the competent evidence before it, the court was justified in finding as it did in respect to the true location of the line in dispute. This court will not reverse the findings of a trial court unless there is a clear preponderance of the evidence against its decision. Randall v. Burk Tp., 4 S. D. 337, 57 N. W. 4.

Plaintiff, as a witness in his own behalf, was asked this question: "What, in your judgment, is the actual damage to the east half of the northeast quarter of the land you own, caused by work that has been done by Mr. White and the other defendants, that you have described?" This was objected to as inadmissible under the complaint; not tending to prove any facts; as calling for a conclusion of the witness; and not the right measure of damages. The objection should have been sustained. His estimate was not limited by any rule. It is impossible to determine upon what basis it was made. As his answer appears to be the only evidence as to the amount of damages sustained, we

think the court should have found only nominal damages. Regarding the question of damages as merely incidental to the principal controversy, we think the judgment should be modified by reducing the amount of damages from $25 to $1; and, so modified, it should be affirmed.

CORSON, P. J. (dissenting). I am unable to concur in the majority opinion of this court, and I shall only attempt a very brief statement of my reasons for dissenting.

I concede, that leaving out of view the official survey made by the county surveyor, and the government official field notes, there is no such preponderance in the evidence as to where the original mounds were placed as to authorize this court to reverse the judgment of the court below. But, in my judgment, the evidence as to the old mounds was so conflicting that the court should have decided the case in favor of the defendants, upon the official survey made by the county surveyor, which was shown to correspond with the original government field notes. It seems to me that the court below, and the majority opinion of this court, give too little effect to the official survey. Of what practical use are the government field notes, unless a controversy like the one before us can be settled by surveys made corresponding with them? The county official survey seems to have been made under the provisions of chapter 35, Laws 1890, section 5 of which reads as follows: "All land marks set under authority of the provisions of the preceding sections shall be presumptively deemed to be at the section and quarter section corners, as originally established by the United States survey, at which they respectively purport to be set." By section 689, Comp. Laws, relating to surveys, it is provided, "his [the county surveyor's] surveys shall be held as presumptively correct." The manner in which such surveys shall be made is provided for by section 694, Comp. Laws, which reads as follows: "In retracing lines or making any survey he shall take care to observe and follow the boundaries and monuments as run and marked by the original survey, but shall not give undue weight to partial and doubtful evidences or appearances of monuments the recognition of which shall require the presumption of marked errors in the original survey, and he shall note an exact description of such apparent monuments." The electors of Split Rock township, by a vote of 42 to 16, authorized this survey to be made. This survey of the township seems to have been made in a most thorough and conscientious manner by the deputy county surveyor, who seems to have carefully examined every point where it was claimed an old mound had been seen. The section line involved in the cases before us was resurveyed in a most careful and painstaking manner by the county surveyor himself, who re-examined all the points at which old mounds were claimed to have existed; and he testified—and it is not disputed—that his survey, as made, corresponds with the original government field notes, in every respect. Can such a survey, so declared to be presumptively correct, be overcome by the mere preponderance of conflicting oral evidence as to the existence of mounds from 20 to 40 rods easterly of the line so established by the county surveyor? Or, in other words, should not the evidence to overcome such a survey be so clear and convincing that different minds could not reasonably draw different conclusions therefrom? While the rule is well settled that mounds established at the time of the original government survey will control courses and distances given in the government field notes, still, in order to control the courses and distances as there given, the existence of such original mounds on the line claimed should be established by clear, unequivocal, and convincing evidence. When the evidence as to the location of such mounds or monuments is substantially conflicting, then it would seem to be the duty of the court to accept the official survey as conclusive. This rule seems to be approved in Pernam v. Wead, 6 Mass. 131. In that case Chief Justice Parsons, speaking for the court, says: "When the boundaries of land are fixed, known, and unquestionable monuments, although neither courses nor distances nor the computed contents correspond, the monuments must govern. With respect to courses, from errors in surveying instruments, variation of the needle, and other causes, different surveyors often disagree. The same observations apply to distances arising from the inaccuracies of measures, or of the party measuring, and computations are often erroneous. But fixed monuments remain. About them there is no dispute or uncertainty; and what may be uncertain must be governed by monuments, about which there is no dispute." It will be observed that the learned chief justice says, "When the boundaries of land are fixed, known, and unquestionable monuments." Again he says: "But fixed monuments remain. About them there is no dispute or uncertainty; and what may be uncertain must be governed by monuments, about which there is no dispute." Such, also, seems to be the view of the supreme court of Iowa in Yocum v. Haskins, 81 Iowa, 436, 46 N. W. 1065, in which that court quotes, and apparently adopts, the language of Mr. Justice Parsons in the case quoted from. That court says, "When the boundary is not fixed and known, but is in dispute, courses, distances, and contents may be considered, in fixing and knowing the true boundary." The rule that fixed monuments will govern and control courses and distances is based upon the theory that such monuments are fixed, certain and undisputed. It is because of the undisputed character and position of such monuments that they are allowed to control courses and distances given

in the field notes, which, as Chief Justice Parsons says, may, from various causes, be inaccurate; but when the location of the monuments themselves is in dispute, and is not certain, fixed, and well known, the government field notes, and surveys made in pursuance of them, should prevail. In my opinion, such a survey, being both official and a record, and made from the official government record, should prevail as against any but the most conclusive, satisfactory, and substantially undisputed oral evidence as to the mounds upon the ground. If such is not the rule, then what rule of law is there by which to determine the boundaries of government lands, and especially for determining the section lines for the purpose of public highways? If the section lines are to be determined in each case by the court or jury, upon a mere preponderance of the oral evidence as to where the original government mounds were placed, as many different section lines might be established as there are sections or quarter sections along the line. In one case the jury might find, from the weight of the oral evidence, that the line claimed by the plaintiff was the line on which the mounds were established. In the next case the court or jury might find, from a preponderance of the oral evidence, that the surveyed line 16 to 40 rods further to the west was the line upon which the mounds were in fact placed. Where, then, are the section-line roads to run? When there is such conflict in the evidence as to where the original mounds were actually placed by the government surveyor, is there no legal method of determining the question? It seems to me that there is, and that is the official survey made by the county surveyor in accordance with the government field notes. Here, in the absence of fixed and undisputed monuments, we have the official field notes, made at the time of the original survey, from which any competent surveyor can locate the points at which the mounds should have been placed, and where, presumptively, they were placed. These field notes should only yield to fixed and undisputed monuments, and never to doubtful and disputed monuments. The doctrine I contend for is no new doctrine, but is only the application of a very old doctrine to the class of cases where the official acts and records of public officers are sought to be overcome by oral evidence. To illustrate: When one who makes an absolute deed claims that it was given and intended as a mortgage, he may have the deed so declared, if he can show, by clear, satisfactory, and practically conclusive evidence, that such was the fact. But no mere preponderance of the evidence will answer. If there is a substantial conflict in the evidence, the absolute character of the deed will be sustained.

Mr. Pomeroy, in his work on Equity Jurisprudence, says: "The presumption, of course, arises, that the instrument is what it purports on its face to be,—an absolute conveyance of the land. To overcome this presumption, and to establish its character as a mortgage, the cases all agree that the evidence must be clear, unequivocal, and convincing, for otherwise the natural presumption will prevail." 3 Pom. Eq. Jur. § 1196. See, also, cases cited. The same rule applies to cases for the reformation of contracts, or other instruments in writing. The presumption arising, that such contracts contain the real agreement of the parties, is so strong that it can only be overcome by the same clear, unequivocal, and convincing evidence as is required to show that an absolute deed is a mortgage. 2 Pom. Eq. Jur. § 859. These cases are referred to only to show that there are a class of cases where rights are given, but yet they must be established by more than a mere preponderance of the evidence. When it is sought to establish a section line, therefore, which does not correspond with the government field notes, or the official survey of the county surveyor, and which, in effect, contradicts a public record and an official survey, certainly something more should be required than a mere preponderance of the evidence. Evidence as clear, unequivocal, and convincing as is required to show an absolute deed to be a mortgage should, at least, be insisted upon, or the presumption awarded to the official survey and the record of the field notes should prevail.

The defendants justified their entrance upon the land in controversy under and by virtue of the official survey of the county surveyor; which, as we have seen, is declared to be presumptively correct. To permit the parties to overcome this presumption by a mere preponderance—conceding there was such a preponderance—of conflicting oral evidence of the existence of earth mounds, claimed to have been placed upon an entirely different line from that shown by the field notes of the government surveyor, but which no witness testifies were so placed by such surveyor, seems to me to be calculated to render very uncertain the boundaries to government land, and holds out to parties too great inducements to swerve from the truth, in their recollection of these old monuments. It may be observed that, in the cases before us, many of the witnesses as to the line claimed by the plaintiffs, if the same can be maintained, secure from 10 to 40 acres of land each, in addition to the land patented to them by the government, while the number of acres of their neighbors are correspondingly that much less than the patent calls for. While undisputed and well-established government mounds, placed by the government surveyor, should be respected, doubtful and uncertain evidence of the existence of such mounds, many years ago, along lines that do not correspond with the government field notes, and which, in effect, impute to the government surveyor great negligence, want of integrity, or ignorance, should be given but little weight, as against

the official field notes and survey. The line contended for by the plaintiffs in the cases before us is similar to the one contended for in Hanson v. Red Rock Tp., 4 S. D. 358, 57 N. W. 11, and my views upon the subject of these earth mounds as monuments are so fully stated in the opinion in that case that a repetition of them here is unnecessary. My conclusion is that the court below should have found in favor of the defendants, and that its judgment in the three cases submitted together should be reversed, and a new trial granted.

BOWMAN v. McGILVRAY.

(Supreme Court of South Dakota. April 18, 1896.)

Appeal from circuit court, Minnehaha county.

Action by Samuel A. Bowman against H. C. McGilvray. From a judgment for plaintiff, defendant appeals. Affirmed.

Hosmer H. Keith, for appellant. Davis, Lyon & Gates, for respondent.

HANEY, J. This cause involves substantially the same issues as Webster v. White (decided at the present term) 66 N. W. 1145; the only difference being that plaintiff and defendant owned adjoining farms, and the defendant claimed the boundary to be as located by the county surveyor while employed by the township in erecting landmarks under the provisions of chapter 35, Laws 1890. He entered upon plaintiff's premises, relying upon such survey, and this action was brought to enjoin him from continuing to use and occupy a portion of plaintiff's land. Following Webster v. White, supra, the judgment is modified by reducing the amount of damages from $10 to $1. So modified, it is affirmed.

CORSON, P. J., dissenting.

OLANDER v. JACOBSON et al.

(Supreme Court of South Dakota. April 18, 1896.)

Appeal from circuit court, Minnehaha county.

Action by Charles Olander against Fred S. Jacobson and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Hosmer H. Keith, for appellants. Davis, Lyon & Gates, for respondent.

HANEY, J. The same questions are involved in this case as in Webster v. White (decided at the present term) 66 N. W. 1145. For the reasons therein announced, the judgment in this case is modified by reducing the amount of damages from $25 to $1. So modified, the judgment is affirmed.

CORSON, P. J., dissenting.

KNOX v. MEEHAN et al.

(Supreme Court of Minnesota. April 29, 1896.)

LIBEL—WHAT CONSTITUTES.

Held, in an action for libel, that the complaint states facts sufficient to constitute a cause of action.

(Syllabus by the Court.)

Appeal from district court, Polk county; Frank Ives, Judge.

Action by Charles J. Knox against James Meehan, Jr., and others. From an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

F. F. Davis and Ira C. Richardson, for appellant. Henry W. Lee and F. A. Grady, for respondents.

COLLINS, J. Plaintiff's appeal is from an order sustaining a general demurrer to his complaint in an action for a libel said to have been contained in an article published in a newspaper of which defendants were the editors and proprietors. According to the complaint, the article was in these words: "One of the B. M. U.'s occupied a pulpit in a local church on Sunday night. Saturday he was engaged in the endeavor to rob his neighbor, and Monday returned to his regular avocation of doing the Meehans up, as well as their friends and sympathizers. This religious hypocrite was the first man to cry 'boycott.'"

The contention of defendants' counsel is that this article was not libelous per se, and that plaintiff has failed to plead extrinsic facts sufficient to connect him with it, or sufficient to make its publication libelous as to him. We cannot agree with counsel on either proposition. Published words which directly tend to the prejudice or injury of a person, in his office, profession, trade, or business, are actionable. Williams v. Davenport, 42 Minn. 393, 44 N. W. 311. Any publication calculated to expose one to public hatred, contempt, or ridicule is libelous per se. Dressel v. Shipman, 57 Minn. 23, 58 N. W. 684. The article in question was extremely well calculated to prejudice and injure the individual so well described therein, and to expose him to public hatred, contempt, or ridicule. If plaintiff was intended, and understood by others to be intended, as the person referred to, and if the article was intended to apply to him, and this was so understood by those who read it, or knew that it was published, his right of action upon it was complete. As it contained matter of description, and alluded to circumstances from which readers and others might easily discover and know who was intended, it was not necessary that the person upon whom it reflected should be mentioned by name.

There is no merit in the claim that the allegations of the complaint are insufficient to show that plaintiff was the person alluded to and intended. It was set forth that plaintiff was a well-known member of an organization in the village in which the defendants' newspaper was published, and in which he resided, well and publicly known as the "Business Men's Union," its purpose and object being to promote and advance the business interests of the village, and that on the Sunday night prior to the publication, in the absence of the officiating clergyman, plaintiff had occupied the pulpit of the Methodist Episcopal Church

in said village, and had then and there read a discourse to the congregation. It was not only alleged that the matter contained in the article was published of and concerning the plaintiff, but coupled with the quoted language in the complaint were full and explicit innuendoes by which it was plainly, positively, and repeatedly asserted that plaintiff was meant and intended by the words "one," and "he," and "his," and "religious hypocrite," and also that by the letters "B. M. U.," in the opening phrase, the Business Men's Union, before mentioned, was meant and intended. The complaint identified the plaintiff as the object of the article, and the actionable quality of the matter published, as respects him, was clearly shown therein. Order reversed.

HISTORICAL PUB. CO. v. LA VAQUE.

(Supreme Court of Minnesota. April 29, 1896.)

GUARANTY—CONSTRUCTION.

A letter of credit, or written guaranty, construed.

(Syllabus by the Court.)

Appeal from municipal court of Duluth; W. D. Edson, Judge.

Action by the Historical Publishing Company against George N. La Vaque. Judgment for defendant, and plaintiff appeals. Affirmed.

Draper, Davis & Hollister, for appellant. N. A. & H. G. Gearhart, for respondent.

COLLINS, J. For the purpose of disposing of this appeal, we assume, without deciding, that defendant became bound by the so-called "letter of credit" signed by him, which, in so far as is here material, was in the following language: "Dec. 9th, 1892. Historical Publishing Co., Philadelphia—Gentlemen: I request that should Jesse L. Jellison, of Duluth P. O., Minn. state, order books from you at any time within two months from the date of this letter of credit, that you ship the same to his order; and I hereby obligate myself to see that they are paid for within thirty days after the books arrive at destination, provided Mr. Jesse L. Jellison should fail to pay, and the amount of the bill does not exceed $100." The subsequent facts were that, relying on this letter, plaintiff sold and delivered to Jellison books of an agreed value of $61.20 on December 12, 1892, and also sold and delivered to him books of an agreed value of $156 a few days prior to the expiration of the two months. Jellison, soon after receiving the books first sold, paid the amount due, $61.20; and he also paid $50 on account of the second bill,—a total payment of $111.60. In other words, he ordered and received books of the value of $217.20 within the specified period, and he paid to plaintiff $11.20 in excess of the sum, $100, for which defendant agreed to become liable should he default. It is the position of counsel for appellant that upon this letter their client was authorized to give credit to Jellison in an unlimited amount, within the designated period of time, and that defendant can be compelled to respond, to the extent of $100, for any delinquency on the part of the debtor, without regard to the amount of credit which may have been given him, or the amount of his payments. We do not think, from the language used, that such was the intention of the parties. The defendant obligated himself to pay, should Jellison fail so to do, provided the amount of the bill did not exceed $100. Construing the writing fairly, it authorized credit to be extended in the sum of $100 and no more, and defendant only guarantied the payment of an indebtedness incurred not in excess of that amount. One can readily understand why a guarantor might be willing to obligate himself to answer for the default of another who proposed to purchase a small bill of books or other goods,—a quantity which could readily be disposed of if bought for sale, or for which the means of the debtor would render payment easy, if purchased for his own use,—and at the same time positively refuse to assume any liability if the proposition was to purchase books or goods in unlimited quantities. In the one case the probability of default by the debtor might seem quite remote, while in the other it might appear almost inevitable. Our conclusion is that the credit given in excess of the amount specified in defendant's obligation was not covered by it, and that the two sales, both made within the specified two months, should be treated as a single transaction, and as one sale, in excess of the authorized amount. As to this excess the defendant incurred no liability, and, as Jellison actually paid more than the sum for which defendant became guarantor, he was discharged and exonerated. Judgment affirmed.

KENDALL v. CITY OF DULUTH.

(Supreme Court of Minnesota. April 29, 1896.)

CONVERSION—PLEADING.

Held, in an action brought to recover the value of a wagon obtained by defendant from plaintiff for a certain specified use or purpose, that the complaint failed to state facts sufficient to constitute a cause of action.

(Syllabus by the Court.)

Appeal from municipal court of Duluth; J. H. Boyle, Judge.

Action by Howard C. Kendall against the city of Duluth. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Mann & Corcoran, for appellant. Ellsworth Benham and W. A. Cant, for respondent.

COLLINS, J. We construe the first paragraph of the third subdivision of the complaint as alleging that plaintiff furnished the undertaker's wagon therein mentioned to de-

fendant city for the purpose of conveying sick persons, afflicted with a contagious disease, to the pesthouse. The original taking for this certain purpose and use was therefore with the plaintiff's consent. Then followed the allegation that the wagon was so used, and, further, that defendant had the wagon remodeled into an ambulance, and converted the same to its own use, and has ever since had and used said wagon. There was no allegation that a return had been demanded, or that defendant had used the wagon for any other or different purpose than that for which it was obtained, or that it was not still using it for the conveyance of sick persons to the pesthouse, or that it had done anything with it, except to remodel it into an ambulance and convert it to its own use. An ambulance is a wheeled vehicle used for the purpose of conveying sick or wounded persons. The wagon was obtained from the plaintiff for the agreed purpose of conveying sick persons, and, on the face of the pleading, it does not appear that the defendant has done anything except what it might lawfully do in order to render it suitable for the use consented to by plaintiff. The averment that defendant has converted the wagon to its own use must be read in connection with the balance of the allegations, from which it clearly appears that nothing has been done except to make the vehicle suitable for the use consented to by plaintiff when he furnished it, and then using it as agreed upon. Order affirmed.

SHANNAHAN v. CHICAGO, ST. P., M. & O. RY. CO.

(Supreme Court of Minnesota. April 30, 1896.)

NEW TRIAL—INSUFFICIENCY OF EVIDENCE—REVIEW.

The rule laid down in Hicks v. Stone, 13 Minn. 434 (Gil. 398), followed.

(Syllabus by the Court.)

Appeal from district court, Blue Earth county; M. J. Severance, Judge.

Action by John Shannahan against the Chicago, St. Paul, Minneapolis & Omaha Railway Company. Verdict for plaintiff for $2,000. From an order granting a new trial for insufficient evidence to support the verdict, he appeals. Affirmed.

Hughes, Rice & Hughes and A. R. Pfau, for appellant. Lorin Cray and S. L. Perrin, for respondent.

BUCK, J. After a careful examination of all the evidence in this case, we conclude that it comes within the rule laid down in Hicks v. Stone, 13 Minn. 434 (Gil. 398), which is followed. Order affirmed.

END OF CASES IN VOL. 66.

INDEX.

Abatement.

Of nuisance, see "Nuisance."

Acceptance.

Of dedication, see "Dedication."
Of goods sold, see "Sale."
Of mortgage, see "Chattel Mortgages."

Accessory.

See "Criminal Law."

Accident.

See "Carriers"; "Negligence"; "Railroad Companies."
At crossing, see "Railroad Companies."

Accident Insurance.

See "Insurance."

Accomplice.

Testimony of, see "Criminal Law."

ACCORD AND SATISFACTION.

See, also, "Payment."

A contract in settlement of all matters in controversy is conclusive between the parties, in the absence of fraud or mutual mistake.—Lauzon v. Belleheumer (Mich.) 345.

Settlement of an action between plaintiff and defendant, by which defendant agreed to build an approach to an embankment, bars an action by plaintiff to recover damages by reason of such approach.—Kelleher v. Chicago, St. P. & K. C. Ry. Co. (Iowa) 94.

Accounting.

By assignee for creditors, see "Assignment for Benefit of Creditors."
Equity jurisdiction, see "Equity."

Account Stated.

Account books as evidence, see "Evidence."

Acknowledgment.

Of forfeiture of homestead, see "Homestead."

Acquiescence.

Estoppel by, see "Estoppel."

ACTION.

See, also, "Appearance"; "Continuance"; "Limitation of Actions"; "Practice in Civil Cases."
Against agent, see "Principal and Agent."
—— voluntary association, see "Associations."
By and against city, see "Municipal Corporations."
By health officer to abate nuisance, see "Health."
For breach of contract to convey, see "Vendor and Purchaser."
For damages for wrongful issuance of injunction, see "Injunction."
For injuries to passengers, see "Carriers."
For malpractice, see "Malpractice."
For removal of ice, see "Waters and Water Courses."
For wrongful attachment, see "Attachment."
—— seizure of mortgaged property, see "Chattel Mortgages."
On appeal bond, see "Appeal."
On bail bond, see "Bail."
On bills and notes, see "Negotiable Instruments."
On bond, see "Bonds."
On contract, see "Contracts."
On judgment, see "Judgment."
On policies, see "Insurance."
On replevin bond, see "Replevin."
On subscription to stock, see "Corporations."
Particular actions, see "Assault and Battery"; "Assumpsit"; "Attachment"; "Composition with Creditors"; "Death by Wrongful Act"; "Deceit"; "Divorce"; "False Imprisonment"; "Forcible Entry and Detainer"; "Garnishment"; "Injunction"; "Libel and Slander"; "Malicious Prosecution"; "Mandamus"; "Partition"; "Replevin"; "Specific Performance"; "Trespass"; "Trover and Conversion."
To cancel contract, see "Equity."
To enforce payment of taxes, see "Taxation."
To foreclose mortgage, see "Mortgages."

Causes of action *held* properly joined under Comp. Laws, § 4932, subd. 1.—Bush v. Froelick (S. D.) 939.

Counts for the use of land and for trespass and for injury by the obstruction of a highway in front thereof may be joined.—Jenks v. Lansing Lumber Co. (Iowa) 231.

Actions for the detention of leased property and for conversion of personalty included in the lease may be united under Sanb. & B. Ann. St. § 2647.—Alliance Elevator Co. v. Wells (Wis.) 796.

An action by a mortgagee of chattels for claim and delivery, and an action to foreclose the mortgage, *held* properly consolidated.—Aultman Co. v. Ferguson (S. D.) 1081.

Actions by the same plaintiff against different insurance companies, growing out of the same loss, may be consolidated on motion.—Gross v. Milwaukee Mechanics Ins. Co. (Wis.) 712; Same v. Western Assur. Co., Id.

Acts.

See "Statutes."

Adjoining Landowners.

Damages for removing lateral support, see "Damages."

Adjournment.

See "Continuance."

Administration.

See "Executors and Administrators."

Admissions.

As evidence, see "Criminal Law"; "Evidence."

Adverse Claims to Land.

See "Quieting Title—Removal of Cloud."

ADVERSE POSSESSION.

See, also, "Limitation of Actions."

That grantee's possession is adverse may be inferred from the exercise of acts of ownership.—Stall v. Jones (Neb.) 653.

Offer by occupant of land, while he is holding adversely, to purchase from the owner, *held* to interrupt the running of the statute.—Litchfield v. Sewell (Iowa) 104.

The possession of a mortgagee *held* adverse to remainder-men.—Hall v. Hooper (Neb.) 33.

Evidence *held* insufficient to show adverse possession.—Litchfield v. Sewell (Iowa) 104.

Affidavit.

For appointment of receiver, see "Receivers."
For continuance, see "Continuance."
For order of arrest, see "Arrest."
In attachment, see "Attachment"; "New Trial."
On application to open default judgment, see "Judgment."
On motion for new trial, see "Criminal Law."
To hold to bail, see "Arrest."

Affirmance.

See "Appeal."

After-Acquired Title.

Estoppel to assert, see "Estoppel."

Agency.

See "Principal and Agent."

Agreed Case.

See "Appeal."

Alcoholic Liquors.

See "Intoxicating Liquors."

Alimony.

See "Divorce."

ALTERATION OF INSTRUMENTS.

Where a note sued on shows a material alteration, the question whether it was altered before or after delivery is for the jury.—Goodin v. Plugge (Neb.) 407.

Amendment.

Of bill of exceptions, see "Appeal."
Of pleading, see "Pleading."
—— in action for divorce, see "Divorce."
Of statutes, see "Statutes."

ANIMALS.

Killed or injured by locomotive, see "Railroad Companies."
Shipment by carrier, see "Carriers."

The question of the reasonableness of notice to the owner of trespassing stock depends on the circumstances of the case.—Sloan v. Bain (Neb.) 1013.

One taking up trespassing stock on cultivated land, to preserve his lien, must comply with Comp. St. c. 2, art. 3.—Sloan v. Bain (Neb.) 1013.

Answer.

See "Pleading."

APPEAL.

See, also, "Certiorari", "Error, Writ of"; "Exceptions, Bill of"; "New Trial."
Costs on appeal, see "Costs."
In criminal cases, see "Criminal Law."
Necessity of exceptions in court below, see "Exceptions, Bill of."

After a case was certified from a justice to the circuit court, it was proper to permit a notice attached to the plea to be amended.—Alton v. Meeuwenberg (Mich.) 571.

Appellate jurisdiction.

An appeal will be dismissed, regardless of the amount claimed, where under no aspect can plaintiff recover the jurisdictional amount.—Burkhardt v. Elgee (Wis.) 1137.

Under Laws 1895, c. 215, no appeal lies from a judgment when the amount involved is less than $100, without a certificate that difficult or constitutional questions are involved.—Burkhardt v. Elgee (Wis.) 525.

Where remittitur is filed before judgment reducing amount below jurisdictional amount, appeal will not lie, though bond had been filed and approved.—Knox v. Nicoli (Iowa) 876.

Only parties to a judgment, or their privies, can prosecute an appeal.—Burlington & M. R. R. Co. in Nebraska v. Martin (Neb.) 15.

A city can appeal from a judgment of the district court canceling an assessment on appeal from the board of equalization.—Farmers' Loan & Trust Co. v. City of Newton (Iowa) 784.

An executor protected by a decree reciting payment to the widow of insurance on his decedent's life has no right of appeal therefrom.—Schlegel v. Sisson (S. D.) 1087.

A judgment will not be reviewed before its formal entry on the journals of the trial court.—Hornick v. Maguire (Neb.) 867.

An appeal from a judgment and decree *held* to include the adjudication on a demurrer to the petition in the action.—Henkle v. Holmes (Iowa) 910.

—— Appealable judgments and orders.

A mere judgment for costs is not appealable.—Little v. Gamble (Neb.) 849.

An order dissolving a temporary restraining order is not appealable.—Manning v. Connel (Neb.) 17.

An appeal lies only from the final judgment of a justice.—Denslow v. Dodendorf (Neb.) 409.

A judgment entered in accordance with a mandate of the supreme court is not appealable.—Patten Paper Co. v. Green Bay & M. Canal Co. (Wis.) 601.

To entitle a party to review, there must have been a final judgment on the merits.—Barnhouse v. Village of Adams (Neb.) 826.

Requisites.

Where a record fails to show the taking of an appeal, the proceeding will be dismissed.—Swigart v. Jackson County (Iowa) 881.

A motion for a new trial is unnecessary to present the question whether the petition pre-

sents a cause of action.—Scarborough v. Myrick (Neb.) 867.

Where exceptions on motion for new trial are relied on for review of instructions, the record must show a motion filed within three days after verdict.—Rowen v. Sommers (Iowa) 897.

Insufficiency of the evidence must be made a ground of motion for new trial.—Gade v. Collins (S. D.) 466.

Document not presented to trial court on motion for new trial not considered on appeal.—Rohde v. Biggs (Mich.) 331.

On failure to mention in a motion for a new trial the ruling on a motion to make more specific, the right to have the ruling reviewed is waived.—Barker v. Davies (Neb.) 11.

A memorandum of judgment made on the trial docket will not authorize a review.—Hornick v. Maguire (Neb.) 867.

The certificate authorized by Code, § 3173, must be made and filed when the case is decided and judgment entered.—Powers v. Illinois Cent. R. Co. (Iowa) 76.

—— Notice.

In an action against a city and its board of equalization, notice of appeal served on the mayor or city clerk is a sufficient service.—Farmers' Loan & Trust Co. v. City of Newton (Iowa) 784.

In an action against a husband and wife, when no judgment is rendered against the wife, notice of an appeal by the husband need not be served on the wife.—Menefee v. Chesley (Iowa) 1038.

—— Bond.

Bond filed before judgment is entered must be regarded as filed after judgment.—Knox v. Nicoli (Iowa) 876.

On appeal from justice's court, appellee may ask a change of sureties on the bond.—Galligher v. Wolf (Neb.) 645.

Assignments of error.

Assignments that the court erred in overruling a motion in arrest and a motion to set aside the verdict are not sufficiently specific.—Moffitt v. Albert (Iowa) 162.

Assignments of error not stating specific errors relied on will not be considered.—Peterson v. Walter A. Wood Mowing & Reaping Mach. Co. (Iowa) 96.

An assignment of error that the trial court erred in sustaining a demurrer or motion, when such demurrer or motion is based on several distinct grounds, is too general.—Guyar v. Minnesota Thresher Manuf'g Co. (Iowa) 83.

When a motion to direct a verdict was based on several grounds, an assignment predicating error merely on the sustaining of the motion is insufficient.—Shakman v. Potter (Iowa) 1045.

An assignment of error *held* not to raise the question of error in assessment of the amount of recovery.—Beavers v. Missouri Pac. R. Co. (Neb.) 821.

An assignment as to the giving or refusing of several instructions will be overruled if any one was correct.—Oltmanns v. Findlay (Neb.) 425.

Assignment of errors cannot be amended after the time for serving without leave.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co. (Minn.) 132.

Record.

On appeal in applications for liquor license the evidence introduced must be reduced to writing and transmitted.—Waugh v. Graham (Neb.) 301.

Instructions not authenticated cannot be considered.—Burlingim v. Bader (Neb.) 288.

A motion for new trial must be certified to in the transcript.—Romberg v. Fokken (Neb.) 282.

Under Code, § 2742, the certificate of evidence in equity proceedings must be made by the judge, though the case was tried on written testimony alone.—Teague v. Fortsch (Iowa) 1056.

Where the record on appeal is incorrect, the remedy is by proceedings to secure correction in the lower court.—Omaha Loan & Trust Co. v. Hogeboom (Neb.) 14.

Under Code, § 2742, a certificate of evidence made by a judge after his retirement, or one made by his successor in office, is insufficient.—Teague v. Fortsch (Iowa) 1056.

When it appears that a deposition introduced is omitted from the record, evidence will not be weighed.—Storz v. Finkelstein (Neb.) 1020.

Order affirmed for failure to show that all the records and proceedings considered on the motion have been returned to the court.—Firth v. Brack (Minn.) 987.

Under Rev. St § 3050, on appeal from an order the clerk should certify that the papers returned are the papers used on the hearing.—Glover v. Wells & Mulrooney Grain Co. (Wis.) 799.

Leave will be granted plaintiff in error to withdraw record for purpose of submitting bill of exceptions to trial judge for amendment.—McFarland v. West Side Imp. Co. (Neb.) 637.

A settled case must control, and cannot be contradicted by statements in an order or affidavit.—Hemstad v. Hall (Minn.) 366.

—— Necessary contents.

Error in excluding evidence will not be reviewed where the record does not show what it would be.—Olwell v. Milwaukee St. Ry. Co. (Wis.) 362.

An appeal from a refusal of mandamus will be dismissed where there is no record showing an appeal from the judgment.—Sanger v. Skidmore (Iowa) 176.

An order reciting that it was made after considering certain evidence cannot be reviewed where the evidence is not in the record.—Glover v. Wells & Mulrooney Grain Co. (Wis.) 799.

Appellee's abstract stating that appellant's abstract does not contain all the evidence will be deemed true if not denied.—Crawford v. Berryhill (Iowa) 876.

Where instructions are not in the record, none will be reviewed.—Callen v. Rose (Neb.) 639.

Where the correctness of appellant's abstract is denied, and appellant files no transcript, the question cannot be determined.—Eldridge v. Stewart (Iowa) 891.

On appeal in equity, where the abstracts do not show that they contain all the evidence, the decree below will be affirmed.—Furenes v. Servertson (Iowa) 918.

Where the question to be determined depends upon an issue of fact, there must be a settled case or bill of exceptions showing that all the evidence is presented.—In re Schmidt's Estate (Minn.) 721; Spriesterbach v. Schmidt, Id.

A party *held* not entitled to file a supplemental abstract to correct an affidavit of publication.—Iowa State Sav. Bank v. Jacobson (S. D.) 453.

—— Objections relating to bill of exceptions.

The allowance by a referee of items of account will not be disturbed where there is no certificate in the bill of exceptions that it contains all the evidence.—Casgrain v. Hamilton (Wis.) 118.

In the absence of a bill of exceptions the only question is whether the findings justify the conclusions.—Brigham v. Paul (Minn.) 203.

A written stipulation of facts filed is no part of the record, unless made so by bill of exceptions.—State Ins. Co. v. Buckstaff Bros. Manuf'g Co. (Neb.) 27.

A stipulation of facts is no part of the record in the case in which it is filed, by a bill of exceptions allowed in another case.—State Ins. Co. v. Buckstaff Bros. Manuf'g Co. (Neb.) 27.

The presumption is, in the absence of a bill of exceptions, that the instructions were proper.—Oltmanns v. Findlay (Neb.) 425.

Assignments which can be reviewed only in connection with a bill of exceptions will be disregarded, where no authenticated bill is filed.—Walter A. Wood Mowing & Reaping Mach. Co. v. Gerhold (Neb.) 538.

Assignments of error relating to the sufficiency of the evidence will be disregarded in the absence of a bill of exceptions.—Andres v. Kridler (Neb.) 649.

A decree cannot be reviewed on a question of fact when the evidence has not been preserved by a bill of exceptions.—White v. Smith (Neb.) 638.

It is presumed that the essential averments were proven in the absence of a bill of exceptions.—Romberg v. Hediger (Neb.) 283.

Review.

Cases will be reviewed upon the theory upon which they were prosecuted or defended in the trial court.—Omaha Brewing Ass'n v. Wuethrich (Neb.) 990.

Appellee cannot complain of a part of a decree from which he has not appealed.—Carbiener v. Montgomery (Iowa) 900.

Where a declaration has been treated on the trial below and on appeal as containing a count for false imprisonment, it is too late on a second appeal to allege that the count is for malicious prosecution.—Moore v. Thompson (Mich.) 51.

Where a verdict has been directed, the court is required on appeal to review the facts.—Brady v. Kreuger (S. D.) 1083.

Where appellee denies the sufficiency of appellant's abstract, which statement is not denied by appellant, questions of fact will not be reviewed.—Kunz v. Young (Iowa) 879.

An appeal from the judgment does not bring up for review an order denying a new trial made after judgment.—Gade v. Collins (S. D.) 466.

An order allowing amendment before trial cannot be reviewed on appeal from an order denying a new trial.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co. (Minn.) 132.

It is within the discretion of the court on appeal from the board of equalization to allow pleadings to be filed.—Farmers' Loan & Trust Co. v. City of Newton (Iowa) 784.

Where a case goes to the supreme court on certificate of questions of law, an abstract of the pleadings need not be filed.—Menefee v. Chesley (Iowa) 1038.

Where the certificate of a question of law on an appeal involving less than $100 fails to settle a disputed question of fact, the case will be dismissed.—Tucker v. Anderson (Iowa) 754.

Where, in an action for conversion, defendant alleges superior title, he cannot on appeal seek to recoup the amount of a lien existing against the damages awarded for conversion.—Omaha Brewing Ass'n v. Wuethrich (Neb.) 990.

Assignments not presented by briefs or argument are waived.—City of Kearney v. Smith (Neb.) 538.

—— Presumptions.

When finding of fact of trial court will be presumed on appeal.—Switzer v. Davis (Iowa) 174.

The court will not presume an adjournment sine die of a district court from the fact that 23 days intervened since a given day thereof.—Hyde v. Kent (Neb.) 39.

A recital in a judgment as to a matter of fact is not conclusive where the record shows that it was erroneous.—Gile v. Colby (Wis.) 802.

In the absence of evidence, it will be presumed, in support of a general verdict against interveners in attachment, that plaintiff acquired the right to attach the property before the interest of interveners was acquired.—Moffitt v. Albert (Iowa) 162.

Where a witness testified as to an account, it will not be presumed that he was testifying from the books.—Iowa City State Bank v. Novak (Iowa) 186.

Where no errors affirmatively appear in the record, it will be presumed that the proceedings were correct.—Union Pac. R. Co. v. Kinney (Neb.) 449.

—— Objections not raised below.

Objections not raised below will not be considered.—Hinkle v. Saddler (Iowa) 765.

Appeal must be taken from ruling of trial court to present it for review.—Findlay v. Carson (Iowa) 759.

Objections not raised below by persons remonstrating against the issuance of a liquor license cannot be urged on appeal.—Waugh v. Graham (Neb.) 301.

A judgment will not be reversed because testimony not the best evidence was admitted without objection.—Martin v. Smith (Mich.) 61.

Where the court was not called upon to decide whether an offer to rescind was made in time a holding that it was so made will not be disturbed.—Hilton v. Advance Thresher Co. (S. D.) 816.

A stipulation not objected to below could not be assailed on appeal.—Warren v. Great Northern Ry. Co. (Minn.) 984.

Misconduct of counsel not excepted to is not ground for reversal.—Bankers' Life Ass'n v. Lisco (Neb.) 412.

—— Weight and sufficiency of evidence.

Findings of fact made by the court on application for a liquor license will not be disturbed.—Waugh v. Graham (Neb.) 301.

An order refusing to set aside a referee's findings will not be reviewed unless they were against the weight of evidence.—Guetzkow Bros. Co. v. Andrews (Wis.) 119.

Where the evidence is sufficient to sustain a verdict, it will not be disturbed.—Martin v. Clark (Neb.) 40

A verdict *held* not the result of passion or prejudice.—Beavers v. Missouri Pac. R. Co. (Neb.) 821.

A decree in partnership accounting which is sustained by the evidence will not be disturbed.—Eames v. Miller (Mich.) 338.

A verdict will be set aside where there is no evidence to sustain it.—Anheuser-Busch Brewing Ass'n v. Murray (Neb.) 635.

An order granting a new trial for insufficiency of the evidence to sustain the verdict will not be reviewed where not manifestly unjust.—Shannahan v. Chicago, St. P., M. & O. Ry. Co. (Minn.) 1151.

—— Conflicting evidence.

A question of fact determined on conflicting evidence will not be reviewed.—Louis v. Union Pac. R. Co. (Neb.) 1133.

A judgment supported by sufficient evidence will not be disturbed.—Allsman v. Daley (Neb.) 867.

A judgment on conflicting evidence will not be disturbed.—Nelson v. Mills (Neb.) 854.

A verdict or finding based on conflicting evidence will not be disturbed.—Farmers' Co-operative Soc. of Geneva v. German Ins. Co. (Iowa) 878; Hughes v. Jones (Mich.) 337; Tredway v. Rickard (Minn.) 974; Wakefield v. Connor (Neb.) 286; State v. Spirk (Neb.) 404; Smith v. Smith (Neb.) 1016; Fuller v. Pauley (Neb.) 1115.

The supreme court will not reverse on conflicting evidence.—Buffalo County Nat. Bank v. Gilcrest (Neb.) 850; Whitcomb v. Thomas (Neb.) 818; Lombard Inv. Co. v. Snowden (Neb.) 839.

When the evidence as to whether an attachment affidavit is true is conflicting, an order discharging the attachment will not be reviewed.—Nebraska Moline Plow Co. v. Klingman (Neb.) 1101.

Where evidence as to the controlling question in a case is conflicting, the verdict of a jury will not be disturbed.—Bennett v. Chicago, M. & St. P. Ry. Co. (S. D.) 934.

—— Harmless error.

Harmless error is not ground for reversal.—Hamilton v. Thoen (Iowa) 166.

A refusal to join a defendant to an action for an injunction *held* harmless where the injunction was denied.—Jenks v. Lansing Lumber Co. (Iowa) 231.

Error in admitting evidence of a fact of which there was ample evidence already admitted without objection is harmless.—Hickman v. Layne (Neb.) 298.

Error in allowing a witness to be cross-examined on matters not gone into on direct examination *held* harmless.—Roach v. Cameron (Iowa) 194.

Error in introduction of copy is cured by the adverse party offering the original instrument.—Emlaw v. Travelers' Ins. Co. (Mich.) 469.

Erroneous reception of evidence to a fact already established by competent evidence is without prejudice.—Sawyer v. Choate (Wis.) 689.

Where a special verdict shows no liability of defendant, conflict in the answers relative to the defense is harmless error.—Deisenrieter v. Kraus-Merkel Malting Co. (Wis.) 112.

A judgment will not be reversed on account of error not prejudicial to the complaining party.—Baum Iron Co. v. Berg (Neb.) 8.

Where the evidence shows that a plaintiff would, at most, be entitled to recover nominal damages only, a judgment for defendant will not be reversed for error not affecting the evidence.—Hathaway v. Burlington, C. R. & N. R. Co. (Iowa) 892.

The exclusion of material evidence requires reversal, though the instructions rendering it material were incorrect, but not objected to.—Eldridge v. Stewart (Iowa) 891.

Admission of incompetent evidence in a trial by the court is not reversible error.—Stover v. Hough (Neb.) 825.

Where there is uncontroverted evidence to sustain the verdict for damages, a judgment will not be reversed because incompetent evidence was admitted on that issue.—Keller v. Town of Gilman (Wis.) 800.

The admission of incompetent evidence as to speculative damages is harmless error, where the verdict for plaintiff is one for nominal damages.—De Goey v. Van Wyk (Iowa) 787.

A judgment will not be reversed for erroneous admission of evidence which is not prejudicial.—Rivard v. Rivard (Mich.) 681; Farmers' Loan & Trust Co. v. Memminger (Neb.) 1014; Bennett v. Chicago, M. & St. P. Ry. Co. (S. D.) 934.

Error in admitting an instrument without proof of its execution was cured by subsequent proof thereof.—Houck v. Linn (Neb.) 1103.

A decree enjoining county officers from opening a highway will not be reversed because they were not sued in their official capacity.—Webster v White (S. D.) 1145.

Error in sustaining objections to questions as leading is cured by the subsequent introduction of the evidence sought to be elicited.—Houck v. Linn (Neb.) 1103.

Decision.

Where the petition in error presents no question for review, the judgment will be affirmed.—State Ins. Co. v. Buckstaff Bros. Manuf'g Co. (Neb.) 27.

A decree may be affirmed on the ground that appellant is not a party aggrieved, without a motion to dismiss.—Schlegel v. Sisson (S. D.) 1087.

When essential to an important legal right, a judgment will be reversed to enable a party to recover nominal damages.—Olson v. Huntimer (S. D.) 313.

Where an appeal from a justice has been properly dismissed, the order will not be reversed because a wrong reason was given therefor.—Denslow v. Dodendorf (Neb.) 409.

Under rule 23 of the supreme court an order to show cause why motion to dismiss should not be granted may issue.—Shickle, Harrison & Howard Iron Co. v. City of Rapid City (S. D.) 499.

A motion to dismiss because the original papers were not transmitted or the abstract served can be made only on the motion day of the circuit.—Shickle, Harrison & Howard Iron Co. v. City of Rapid City (S. D.) 499.

When the recovery is excessive, the court may affirm on remission of the excess.—Regier v. Shreck (Neb.) 618.

An erroneous decision of the supreme court cannot be questioned after the term, but stands as the law of the case.—Everett v. Gores (Wis.) 616.

Where a case is remanded, with directions to enter judgment in accordance with the opinion, no amendment to pleadings will be allowed.—Patten Paper Co. v. Green Bay & M. Canal Co. (Wis.) 601.

Liabilities on appeal bonds.

A judgment creditor can sue on an appeal bond without taking out execution first.—Johnson v. Reed (Neb.) 405.

The continuance of a cause on appeal will not release the surety on the bond.—Johnson v. Reed (Neb.) 405.

Where the bond was to pay any judgment rendered against appellants, the surety is liable, though judgment was rendered against only one of them.—Johnson v. Reed (Neb.) 405.

APPEARANCE.

One not a party who voluntary appears and opposes a motion on the merits, and complies with an order then made making him a party, becomes a party.—Farmers' Nat. Bank of Owatonna v. Backus (Minn.) 5.

An appearance to move to set aside a default judgment *held* a waiver of irregularities in the service in the action.—Scarborough v. Myrick (Neb.) 867.

A judgment, void because of want of jurisdiction of the proper parties, is not aided by an attempted appearance by such parties, after its rendition.—State v. Weinfurther (Wis.) 702.

Where defendant, though the affidavit to hold to bail was insufficient, entered a general appearance, a motion to quash the proceedings because of such insufficiency will be denied.—Graham v. Cass Circuit Judge (Mich.) 348.

Application.

For continuance, see "Criminal Law."
For insurance, see "Insurance."
For license to sell liquors, see "Intoxicating Liquors."
Of payment, see "Payment."

Appointment.

Of agent, see "Principal and Agent."
Of officer, see "States and State Officers."
Of receiver, see "Receivers."

Arbitration and Award.

Stipulation in policy, see "Insurance."

Argument of Counsel.

See "Criminal Law"; "Trial."

Arraignment.

See "Criminal Law."

ARREST.

See, also, "Bail"; "Criminal Law."
Motion in arrest of judgment, see "Judgment."
Power of court commissioner, see "Court Commissioners."

An affidavit to hold to bail in action of slander *held* insufficient.—Graham v. Cass Circuit Judge (Mich.) 348.

When the cause of arrest in a civil action is identical with the cause of action, the complaint must state a cause of action entitling plaintiff to an order.—Hart v. Grant (S. D.) 322.

When an affidavit for an order of arrest is made on information and belief, the facts on which it is based must be set out.—Hart v. Grant (S. D.) 322.

ASSAULT AND BATTERY.

Evidence examined and *held* sufficient to sustain a verdict.—Wells v. State (Neb.) 29.

Assessment.

Of benefits, see "Municipal Corporations."
On mutual benefit insurance, see "Insurance."

Assets.

Of decedent's estate, see "Executors and Administrators."

Assignee.

See "Assignment for Benefit of Creditors."

ASSIGNMENT.

See, also, "Assignment for Benefit of Creditors."
Of dower, see "Dower."
Of errors, see "Appeal."
Of good will, see "Good Will."
Of lease, see "Landlord and Tenant."
Of mortgage, see "Mortgages."

An assignment of vouchers due under a contract partially completed *held* not to include money subsequently earned under the contract.—Ryan v. Douglas County (Neb.) 30.

Consideration for an assignment cannot be recovered because the legal effect of the instrument assigned was misunderstood by the assignee.—Miller v. Brooks (Mich.) 1092.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See, also, "Insolvency."
Right to jury trial in action by assignee to set aside conveyance, see "Jury."

The omission from the deed, in the description of the creditors, of the term "bona fide," did not vitiate it.—Yanish v. Pioneer Fuel Co. (Minn.) 198.

Under Rev. St. § 2832, an order settling an assignee's accounts will be vacated, where a creditor failed to appear because he received no notice.—Commercial Bank v. McAuliffe (Wis.) 110.

Whether certain acts constitute a general assignment is to be determined by the intent of the parties.—Roberts v. Press (Iowa) 756.

Code, § 2115, providing that no general assignment shall be valid unless made for all the creditors, does not affect general transfers of the debtor's property.—Roberts v. Press (Iowa) 756.

A mortgage of a debtor's entire property to secure a particular creditor *held* not a general assignment.—Roberts v. Press (Iowa) 756.

ASSOCIATIONS.

See, also, "Corporations."
Mutual benefit companies, see "Insurance."

Where membership in an association has ceased, the burden is on the corporation to prove it.—Cornfield v. Order of Brith Abraham (Minn.) 970.

Any association of persons transacting business by a common name may be sued by such name.—Cornfield v. Order of Brith Abraham (Minn.) 970.

One who authorized another to subscribe for him on condition in an association *held* not bound by an unconditional subscription.—Rawlings v. Young Men's Christian Ass'n (Neb.) 1124.

An instruction in an action on a subscription *held* erroneous as not submitting to the jury the question whether defendant authorized the subscription.—Rawlings v. Young Men's Christian Ass'n (Neb.) 1124.

ASSUMPSIT.

In assumpsit on an express contract, evidence as to quantum meruit is inadmissible.—Eaton v. Gladwell (Mich.) 598.

Evidence examined, and *held* improper to direct a verdict for defendant.—House v. Bowman (Iowa) 165.

Evidence *held* admissible to show partnership indebtedness and individual interest, in an action to recover on a sale of partnership assets.—Fountain v. Hutchinson (Mich.) 477.

In an action against attorneys for moneys collected, damages resulting from an unauthorized appearance by defendants for plaintiff cannot be recovered.—Scott v. Kirschbaum (Neb.) 443.

Assumption of Risks.

See "Master and Servant."

ATTACHMENT.

See, also, "Execution"; "Exemptions"; "Garnishment."

Lumber is not perishable property, within How. Ann. St. § 8011.—Mosher v. Bay Circuit Judge (Mich.) 478.

To sustain an attachment against joint debtors, plaintiff must show joint action on their part to dispose of their property.—Cottrell v. Hathaway (Mich.) 596.

Evidence *held* not to support a finding that the attachment debtor owned the property levied upon.—Howland v. Sharp (Neb.) 1133.

Judgment in attachment need not direct a sale.—Iowa State Sav. Bank v. Jacobson (S. D.) 453.

A general verdict *held* a finding against plaintiff on all the issues.—De Goey v. Van Wyk (Iowa) 787.

Sheriff may amend return to levy of attachment to conform to facts at time of levy.—Hicks v. Swan (Iowa) 762.

Time for serving on defendant notice of levy as required by Code, § 2967, is at the time of levy.—Hicks v. Swan (Iowa) 762.

A petition for dissolution *held* to sufficiently allege that petitioner had not disposed of, nor attempted to dispose of, property owned jointly with another —Cottrell v. Hathaway (Mich.) 596.

It was not error to fail to make an order under Code, § 3016, protecting interveners, where the summary proceedings for which that section provides were not adopted, and interveners failed to ask for such order.—Moffitt v. Albert (Iowa) 162.

Affidavit.

An affidavit in the language of the statute is sufficient.—Burnham v. Ramge (Neb.) 277.

Where an officer justifies seizure under attachment, the recitals of indebtedness in the affidavit and complaint are prima facie evidence thereof.—Howard v. Dwight (S. D.) 935.

An affidavit for attachment under Pub. Acts 1889, No. 149, on a claim not due, *held* sufficient.—Mosher v. Bay Circuit Judge (Mich.) 384.

An affidavit for attachment, under Pub. Acts 1889, No. 149, for a note not due, *held* to authorize an attachment against an indorser of the note.—Mosher v. Bay Circuit Judge (Mich.) 384.

Wrongful attachment.

The burden *held* on plaintiff in an action on the bond to show that the attachment wrongfully issued.—Storz v. Finkelstein (Neb.) 1020.

In the absence of malice, an action for wrongful attachment can be maintained alone on the attachment bond.—Storz v. Finkelstein (Neb.) 1020.

Damages in an action for wrongful attachment *held* not recoverable as being remote and speculative.—De Goey v. Van Wyk (Iowa) 787.

An instruction in an action for wrongful attachment *held* proper on the evidence.—De Goey v. Van Wyk (Iowa) 787.

ATTORNEY AND CLIENT.

Argument of counsel, see "Criminal Law."
Power of attorney to confess judgment against corporation, see "Corporations."
Service of notice of trial on attorney, see "Practice in Civil Cases"; "Trial."
When attorney guilty of contempt, see "Contempt."

In an action for services as attorney, certain receipts from other attorneys *held* inadmissible.—Howell v. Smith (Mich.) 218.

Evidence examined, and *held*, that whether a receipt for services produced was written by plaintiff was for the jury.—Howell v. Smith (Mich.) 218.

An attorney employed to collect a debt cannot, without special authority, release a debtor, except on payment of the full amount of money.—Smith v. Jones (Neb.) 19.

A client is not chargeable with notice of facts which the attorney learned in such a way that he would not be at liberty to communicate them to his client.—Melms v. Pabst Brewing Co. (Wis.) 518.

The lien of an attorney for fees *held* not divested by an assignment of the claim by the client.—Leighton v. Serveson (S. D.) 938.

A judgment in defendant's favor for costs may be set off against a judgment in plaintiff's favor, without regard to the lien of an attorney.—Lindsay v. Pettigrew (S. D.) 321.

Authentication.

Of bill of exceptions, see "Exceptions, Bill of."

BAIL.

In an action on a bail bond, a demurrer on the ground that the state is not a proper party to sue is frivolous.—State v. Newson (S. D.) 468.

Ballots.

See "Elections and Voters."

Bankruptcy.

See "Assignment for Benefit of Creditors"; "Insolvency."

BANKS AND BANKING.

Instruction as to plaintiff bank's notice through individual transactions of officers *held* properly given.—Continental Nat. Bank v. McGeoch (Wis.) 606.

A bank at which the note is payable, and to which it is sent for collection, is without implied authority to employ a subagent for collection.—Sherman v. Port Huron Engine & Thresher Co. (S. D.) 1077.

Liability of officer of an insolvent bank in a criminal prosecution for receiving deposits knowing of the insolvency under McClain's Code, §§ 1824, 1825, determined.—State v. Yetzer (Iowa) 737.

BASTARDY.

A preponderance of the evidence sustains a conviction.—Davison v. Cruse (Neb.) 823.

Complainant's unchastity *held* not material to the issue.—Davison v. Cruse (Neb.) 823.

Probable duration of period of gestation *held* a question for the jury. — Davison v. Cruse (Neb.) 823.

Battery.

See "Assault and Battery."

Benefits.

From public improvements, see "Municipal Corporations."

Bequest.

See "Wills."

Best and Secondary Evidence.

See "Evidence."

Bill of Exceptions.

See "Appeal"; "Exceptions, Bill of."

Bill of Lading.

See "Carriers."

Bill of Review.

See "Equity."

Bills and Notes.

See "Negotiable Instruments."

Bona Fide Purchasers.

See "Mortgages"; "Negotiable Instruments"; "Sale"; "Vendor and Purchaser."

BONDS.

See, also, "Indemnity"; "Principal and Surety."
Bail bonds, see "Bail."
Cancellation in equity, see "Equity."
Form of judgment against surety, see "Judgment."
Liabilities on appeal bonds, see "Appeal."
Municipal bonds, see "Municipal Corporations."
Of justices, see "Justices of the Peace."
On appeal, see "Appeal."
Replevin bond, see "Replevin."
School bonds, see "Schools and School Districts."
Set-off in action on supersedeas bond, see "Set-Off and Counterclaim."

Allegation in an answer of a surety on an official bond *held* an admission of the delivery of the bond.—State v. Hill (Neb.) 541.

A state treasurer accepting in payment of funds due from his predecessor certificates of deposit is chargeable with the amount of such payment, though the bank fails.—State v. Hill (Neb.) 541.

In an action on a state treasurer's bond, *held*, that it was for the jury to determine how much actual money had been received and paid.—State v. Hill (Neb.) 541.

The acceptance by an incoming state treasurer of certificates of deposit will, to the extent of such payment, relieve the retiring treasurer.—State v. Hill (Neb.) 541.

The bond of a state officer is valid if he writes his name in the body, and subscribes his oath of office, though he inadvertently fails to attach his final signature.—State v. Hill (Neb.) 541.

Where a state treasurer receives certificates of deposit in payment, the state may ratify the act, in which case he and his sureties are chargeable as for money.—State v. Hill (Neb.) 541.

The bond of a building contractor to pay all labor performed and materials furnished under a contract with the state *held* to render the sureties liable to a subcontractor for materials furnished.—Fitzgerald v. McClay (Neb.) 828.

A bond conditioned for the payment to an employer of moneys received *held* discharged by taking the agent's note in full satisfaction.—Smith v. Jackson (Iowa) 80.

Complaint, in an action on the bond of an attorney to a corporation, examined and *held* to state a good cause of action.—Germania Spar & Bau Verein v. Flynn (Wis.) 109.

A counter bond given a fidelity insurance company *held* a continuing obligation.—Fidelity & Casualty Co. of New York v. Lawlor (Minn.) 143.

It is no defense to an action on a bond given by a depositary of county funds that the county auditors never designated the bank as a county depositary or approved the bond.—Board of Com'rs of Hennepin County v. State Bank (Minn.) 143.

Certain evidence, in an action on a bond, *held* admissible for the purpose of establishing the consideration and showing the history of the transaction.—Wheeler v Meyer (Mich.) 46.

Books.

Of account as evidence, see "Evidence."

BRIDGES.

Taxpayers may recover from a bridge company taxes paid in aid of the construction of a bridge, under Laws 21st Gen. Assem. c. 13, and retained by the company on its failing to comply with the conditions.—Smith v. Omaha & C. B. Railway & Bridge Co. (Iowa) 1041.

The village of Petoskey is liable, under Acts 1879, Act No. 280, § 4, for the maintenance of that portion of a bridge which crosses its artificial channel running parallel with Bear creek.—Williams v. Village of Petoskey (Mich.) 55.

The aid authorized to be furnished by cities, under Laws 21st Gen. Assem. c. 13, for the construction of bridges, cannot be given to a foreign corporation.—Smith v. Omaha & C. B. Railway & Bridge Co. (Iowa) 1041.

Bridge constructed under Laws 21st Gen. Assem. c. 13, *held* not to have been constructed by a domestic corporation.—Smith v. Omaha & C. B. Railway & Bridge Co. (Iowa) 1041.

Briefs.

See "Appeal."

Brokers.

See "Factors and Brokers."

Burden of Proof.

See "Evidence."

BURGLARY.

Evidence *held* sufficient to sustain conviction.—Bush v. State (Neb.) 638.

Evidence that the office entered was in possession of a person as president of a corporation, instead of individually, as charged, does not constitute a variance.—State v. Porter (Iowa) 745.

Where the evidence shows that the building entered was a three instead of two story building as charged, the variance is not fatal.—State v. Porter (Iowa) 745.

Information *held* sufficient, though it did not state the degree of the offense charged.—State v. La Croix (S. D.) 944.

Instruction on effect of possession of stolen goods *held* proper.—State v. Ham (Iowa) 1038.

Cancellation.

Of contract, see "Equity."

CARRIERS.

See, also, "Horse and Street Railroads"; "Railroad Companies."
Insurance against loss, see "Insurance."

Of goods.
Where the contract exempts a carrier from loss by fire, it is not liable therefor unless negligence is shown.—Smith v. American Exp. Co. (Mich.) 479.

A provision limiting a carrier's liability if the value of the property is not given is valid.—Smith v. American Exp. Co. (Mich.) 479.

A carrier is not liable for injury to property on a connecting line, where the contract limits its liability to its own line.—Smith v. American Exp. Co. (Mich.) 479.

A bill of lading accepted without objection constitutes the contract of carriage.—Smith v. American Exp. Co. (Mich.) 479.

Directions in a bill of lading to notify a certain person gives no authority to deliver to such person without production of the bill of lading.—Union Stock-Yards Co. v. Westcott (Neb.) 419.

A carrier delivering property for which a bill of lading is issued to any one except the holder thereof is liable.—Union Stock-Yards Co. v. Westcott (Neb.) 419.

The liability of a carrier ceases three days after notice of the arrival of the goods.—Backhaus v. Chicago & N. W. Ry. Co. (Wis.) 400.

A carrier which delivered the goods to the shipper without a surrender of the bill of lading *held* liable to a pledgee of the bill in good faith.—Ratzer v. Burlington, C. R. & N. Ry. Co. (Minn.) 988.

In absence of special contract, a shipper of stock assumes all damages caused by their restiveness and viciousness.—Heller v. Chicago & G. T. Ry. Co. (Mich.) 667.

A carrier is bound to transport stock with ordinary care and reasonable dispatch.—Heller v. Chicago & G. T. Ry. Co. (Mich.) 667.

Of passengers.
If the complaint under Comp. St. c. 72, art. 1, § 3, show that plaintiff was a passenger, and that the injury resulted from operation of the road, a presumption of negligence arises.—Chicago, B. & Q. R. Co. v. Hague (Neb.) 1000.

In an action against a street railway for personal injuries, evidence *held* insufficient to show that the car from which plaintiff fell belonged to and was operated by defendant.—Anderson v. Des Moines St. R. Co. (Iowa) 64.

On the evidence, *held*, that plaintiff ejected from a freight car was not a passenger, but a joint trespasser with the brakeman who let him into the car.—Brevig v. Chicago, St. P., M. & O. R. Co. (Minn.) 401.

A shipper of cattle, traveling with his stock, on a drover's pass, is not entitled to ordinary privileges of a passenger.—Omaha & R. V. Ry. Co. v. Crow (Neb.) 21.

Evidence of the company's negligence and deceased's contributory negligence in an action for the death of a shipper of live stock, *held* for the jury.—Omaha & R. V. Ry. Co. v. Crow (Neb.) 21.

Case Made.

See "Appeal."

Certificate.

To bill of exceptions, see "Exceptions, Bill of."

CERTIORARI.

Certiorari will not lie to review the ruling of the circuit court in overruling objections taken by special appeal, where no final judgment was entered.—Travis v Culver (Mich.) 575.

Certiorari will not lie to review the refusal to quash an indictment.—People v. Thompson (Mich.) 478.

Action of supervisors, in declaring by ordinance a part of a town attached to another town, should be reviewed by certiorari directed to the supervisors.—State v. Weinfurther (Wis.) 702.

Challenge.

To jury, see "Jury."

Chancery.

See "Equity."

Change of Venue.

See "Venue in Civil Cases."

CHARITIES.

Will construed, and *held* inadequate to create a valid trust.—Wheelock v. American Tract Soc. (Mich.) 955.

CHATTEL MORTGAGES.

Authority of agent to discharge, see "Principal and Agent."
Priority between tax lien and mortgage, see "Taxation."
Right of mortgagee to insurance, see "Insurance."

An absolute bill of sale *held* to constitute a chattel mortgage.—Pinch v. Willard (Mich.) 42.

A bill of sale may be shown by parol to have been given as security.—Pinch v. Willard (Mich.) 42.

The indorsee of notes secured by mortgage *held* entitled to possession on default.—Houck v. Linn (Neb.) 1103.

A mortgagee who fails to comply with the statute on foreclosure is liable to the mortgagor for value of the property less the mortgage lien.—Callen v. Rose (Neb.) 639.

A bank *held* to be a mortgagee in good faith, within Comp. St. c. 32, § 14.—State Bank v. O. S. Kelley Co. (Neb.) 619.

A mortgagee in a mortgage given to secure her from liability as surety on a note may, as against creditors of the mortgagor wrongfully seizing the property, recover the amount of her liability.—Louden v. Vinton (Mich.) 222.

The fact that a mortgagee of stock furnishes the mortgagor some feed for its keeping does not bind him for bills for its pasturage afterwards contracted by the mortgagor.—Cleveland v. Koch (Mich.) 376.

A chattel mortgage construed, and *held*, that the giving of a second mortgage was not an attempt to dispose of the property, allowing the first mortgagee thereupon to take possession.—Donovan v. Sell (Minn.) 722.

In an action by a mortgagee for wrongful seizure of mortgaged property, the mortgage may be introduced without the note which it was given to secure first being put in evidence.—Louden v. Vinton (Mich.) 222.

Requisites and validity.
Chattel mortgage *held* not invalidated for uncertainty.—Louden v. Vinton (Mich.) 222.

Description in chattel mortgage *held* sufficient.—Louden v. Vinton (Mich.) 222.

Description of property *held* sufficient to charge a purchaser with notice.—First Nat. Bank v. Koechel (S. D.) 933.

Description *held* sufficient to cover the increase of cows mortgaged.—Cleveland v. Koch (Mich.) 376.

Facts *held* sufficient to show an acceptance of a chattel mortgage.—Louden v. Vinton (Mich.) 222.

A landlord who is to receive a share of the crop from the tenant has a mortgageable interest in the crop before delivery, and a mortgage then made is superior to a garnishment of the tenant after its execution.—Riddle v. Dow (Iowa) 1066; Thompson Nat. Bank v. Same, Id.

A chattel mortgage *held* not avoided by the mortgagee's consent to a sale which never took place.—Houck v. Linn (Neb.) 1103.

A chattel mortgage *held* not avoided by the mortgagee's failure to foreclose upon default.—Houck v. Linn (Neb.) 1103.

Conversion by mortgagee.

A chattel mortgagee authorized to take possession on default and sell, who takes possession and keeps the property as his own, is liable for conversion.—Howery v. Hoover (Iowa) 772.

Where a chattel mortgagee takes possession on default, and holds the property as his own, expenses incurred in the care of the property cannot be allowed.—Howery v. Hoover (Iowa) 772.

A chattel mortgagee taking possession and claiming ownership is liable for the value of the property when converted.—Howery v. Hoover (Iowa) 772.

A mortgagee taking possession of the chattels, and retaining them for an unreasonable time, is bound to pay for their use.—Murray v. Laushman (Neb.) 413.

Child.

See "Guardian and Ward."

City.

See "Municipal Corporations."

Claim and Delivery.

See "Replevin."

Claims.

Against decedent's estate, see "Executors and Administrators."

Class Legislation.

See "Constitutional Law."

CLERK OF COURT.

Duty to authenticate bill of exceptions, see "Exceptions, Bill of."

The term of office of a clerk of the district court is limited, under Const. art. 6, § 13, to four years.—State v. O'Leary (Minn.) 264.

Laws 1891, c. 39, §§ 1, 2, and Gen. St. 1894, §§ 866, 867, create vacancies in the office of clerks of courts in counties affected by that act in January, 1896, which vacancies are to be filled by appointments.—State v. O'Leary (Minn.) 264.

Collateral Attack.

On appointment of receiver, see "Receivers."
On judgment, see "Judgment."
On patents to public lands, see "Public Lands."

Collection.

See "Banks and Banking."
Of taxes, see "Taxation."

Commercial Paper.

See "Negotiable Instruments."

Commission.

Of factor or broker, see "Factors and Brokers."

Common Carrier.

See "Carriers."

Compensation.

For land taken for public use, see "Eminent Domain."
Of agent, see "Principal and Agent."
Of attorney, see "Attorney and Client."
Of factor or broker, see "Factors and Brokers."
Of municipal officer, see "Municipal Corporations."

Competency.

Of evidence, see "Evidence."
Of juror, see "Jury."
Of witness, see "Witness."

Complaint.

See "Pleading."

COMPOSITION WITH CREDITORS.

See, also, "Assignment for Benefit of Creditors."

Composition *held* a valid compromise.—Continental Nat. Bank v. McGeoch (Wis.) 606.

Debtor's giving of collaterals to an indebtedness for which he was personally liable *held* not to invalidate a compromise into which that creditor afterwards entered with others.—Continental Nat. Bank v. McGeoch (Wis.) 606.

Evidence *held* admissible as circumstances tending to show knowledge of a creditor's preference.—Continental Nat. Bank v. McGeoch (Wis.) 606.

Facts *held* to show good consideration for a compromise.—Continental Nat. Bank v. McGeoch (Wis.) 606

Where, before compromise, creditor has disposed of certain collaterals, and applied the proceeds in determining the balance due, debtor is bound by the disposition.—Continental Nat. Bank v. McGeoch (Wis.) 606.

A creditor who has entered a compromise with knowledge of another's preference cannot avoid the settlement on that ground.—Continental Nat. Bank v. McGeoch (Wis.) 606.

COMPROMISE.

One who accepted a check for part of a disputed claim, signing a receipt in full settlement, could not recover the balance claimed by him.—Treat v. Price (Neb.) 834.

A creditor accepting part of a disputed claim *held* to have notice that the payor's agent was without authority to pay except in full settlement.—Treat v. Price (Neb.) 834.

Condemnation Proceedings.

See "Eminent Domain."

Condition.

Of policy, see "Insurance."

Conditional Sales.

See "Sale"

CONFLICT OF LAWS.

Rev. St. § 1692, requiring tender on a plea of usury, does not apply to cases arising under statutes of other states.—Maynard v. Hall (Wis.) 715.

Disposition of real estate in Wisconsin is governed entirely by the laws of Wisconsin.—Shattuck v. Bates (Wis.) 706.

Connecting Lines.

See "Carriers."

Consideration.

Of negotiable instrument, see "Negotiable Instruments."

Consolidation.

Of actions, see "Action."

Conspiracy.

Admissibility of declarations of conspirator, see "Criminal Law."

CONSTITUTIONAL LAW.

The legislature cannot confer upon the supreme court original jurisdiction over subjects not enumerated in the constitution.—State v. Hall (Neb.) 642.

Laws 1893, c. 24, conferring on county courts jurisdiction, is constitutional.—State v. Hughes (S. D.) 1076

Due process of law does not require a hearing before property can be taken or damaged for public use.—Chicago, B. & Q. R. Co. v. State (Neb.) 624.

The preservation of fish is a proper function of government.—West Point Water Power & Land Imp. Co. v. State (Neb.) 6.

Laws 1895, c. 221, providing for the protection of game and fish, though unconstitutional as to acts prior to its passage, is constitutional as regards those after its passage.—Bittenhaus v. Johnston (Wis.) 805.

Laws 1895, c. 221, providing for protection of game and fish, *held* constitutional.—Bittenhaus v. Johnston (Wis.) 805.

Gen. Laws 1893, c. 124, § 9, as amended by Gen. Laws 1895, c. 115, § 5, relating to consignments of game, *held* constitutional.—State v. Chapel (Minn.) 205.

A city charter authorizing the police justice to try violations of ordinances without a jury is unconstitutional.—Belatti v. Pierce (S. D.) 1088.

Code Civ. Proc. § 85, as amended, making a lis pendens constructive notice of the action to prior incumbrancers, *held* unconstitutional.—Sheasley v. Keens (Neb.) 1010.

Laws 1895, c. 302, applicable to Milwaukee, only *held* unconstitutional as special legislation in so far as it included contracts already performed.—Boyd v. City of Milwaukee (Wis.) 603.

Laws 1893, c. 310, applicable to cities with a population of 20,000 inhabitants, is constitutional.—Boyd v. City of Milwaukee (Wis.) 603.

3 How. Ann. St. § 1690z1, regulating the use of emery wheels, is not unconstitutional, as class legislation.—People v. Smith (Mich.) 382.

In determining the necessity of a legislative act for the public welfare, presumptions are in favor of the validity of the act.—People v. Smith (Mich.) 382.

An order requiring the reconstruction by a railroad company of portions of a viaduct erected by it jointly with the city *held* not to impair the obligation of contracts.—Chicago, B. & Q. R. Co. v. State (Neb.) 624.

Pub. Acts 1889, No. 149, authorizing an attachment on a claim not due, does not impair the obligation of contracts.—Mosher v. Bay Circuit Judge (Mich.) 384.

The police power may be delegated to municipal corporations.—Chicago, B. & Q. R. Co. v. State (Neb.) 624.

Comp. St. c. 12a, § 48, authorizing the city of Omaha, by ordinance, to require railroads to construct viaducts, *held* a valid exercise of police power.—Chicago, B. & Q. R. Co. v. State (Neb.) 624.

In the exercise of police power, the state may prescribe regulations for the protection of those willingly performing dangerous service.—People v. Smith (Mich.) 382.

Laws 1893, c. 24, is not an ex post facto law as to a defendant who had committed a crime before the passage of the act.—State v. Hughes (S. D.) 1076.

The legislature may impose a tax on credits in the hands of resident trustees in trust for nonresidents.—City of Detroit v. Lewis (Mich.) 958.

Construction.

Of contract, see "Contracts."
—— of sale, see "Sale."
—— to convey, see "Vendor and Purchaser."
Of policy, see "Insurance."
Of will, see "Wills."

CONTEMPT.

A newspaper article is not per se contemptuous, where it is susceptible of an innocent construction, and requires an innuendo to apply its meaning to the court.—Rosewater v. State (Neb.) 640.

The court, having pronounced sentence in the presence of accused, may file a formal judgment in the absence of accused and their attorney.—Freeman v. City of Huron (S. D.) 928.

One knowing of an order of court who intentionally violates it is guilty of contempt.—Freeman v. City of Huron (S. D.) 928.

An affidavit alleging facts on information does not give jurisdiction in contempt.—Freeman v. City of Huron (S. D.) 928.

A contempt proceeding for violating an order in an action may be entitled as in that action.—Freeman v. City of Huron (S. D.) 928.

Other than the state's attorney may conduct the prosecution of contempt proceedings.—Freeman v. City of Huron (S. D.) 928.

The presenting of an application to have another judge try the case because of prejudice on the part of the one to whom the application is made *held* not a contempt.—Le Hane v. State (Neb.) 1017.

The fact that documentary evidence reflected on the character of the judge *held* not a contempt.—Le Hane v. State (Neb.) 1017.

A conviction of an attorney in a summary proceeding for making an application for a change of judges *held* erroneous.—Le Hane v. State (Neb.) 1017.

Evidence *held* not to show that a receiver was in possession of property which defendants took.—Burdick v. Marshall (S. D.) 462; In re Spaulding, Id.

CONTINUANCE.

In criminal cases, see "Criminal Law."

The denial of a continuance is in the discretion of the trial court.—Burris v. Court (Neb.) 1131.

The denial of a continuance will not be reversed except for abuse of discretion.—Storz v. Finkelstein (Neb.) 1020.

Refusal of a continuance because of professional engagement of attorney *held* not an abuse of discretion.—Adamek v. Plano Manuf'g Co. (Minn.) 981.

An affidavit for continuance for absence of a witness *held* insufficient.—McClelland v. Scroggin (Neb.) 1123.

CONTRACTS.

See, also, "Assignment"; "Assignment for Benefit of Creditors"; "Carriers"; "Chattel Mortgages"; "Factors and Brokers"; "Frauds, Statute of"; "Fraudulent Conveyances"; "Guaranty"; "Master and Servant"; "Mortgages"; "Negotiable Instruments"; "Partnership"; "Payment"; "Pledge"; "Principal and Agent"; "Principal and Surety"; "Sale"; "Specific Performance"; "Vendor and Purchaser."

Consideration of mortgage, see "Fraudulent Conveyances."
Construction of chattel mortgage, see "Chattel Mortgages."
—— of easement, see "Easement."
Costs in actions on, see "Costs."
Creating agency, see "Principal and Agent."
Effect of usury, see "Usury."
For sale of land, see "Vendor and Purchaser."
Laws impairing obligation, see "Constitutional Law."
Measure of damages for breach, see "Damages."
Of municipal corporations, see "Municipal Corporations."
Of sale, see "Sale."
Reformation in equity, see "Equity."
Validity of note executed on Sunday, see "Sunday."

A contract in consideration of a release of a claim is valid though the claim may be one which will prove invalid if litigated.—Carter White-Lead Co. v. Kinlin (Neb.) 536.

One party may obligate himself for a definite or indefinite period, the other party having an option to terminate it at will.—Carter White-Lead Co. v. Kinlin (Neb.) 536.

Where a writing is signed by the parties, the fact that modifications are suggested by one party, and approved by the other, which are never embodied in the writing, does not prevent such writing from constituting a contract.—Farrow v. Bresler (Mich.) 492.

Where a writing is drawn and signed by the parties, the fact that modifications are at the same time suggested by one party, and approved by the other, which are never embodied in the writing, does not prevent such writing from constituting a contract.—Farrow v. Bresler (Mich.) 492.

Contract *held* not void for want of mutuality.—Walsh v. Myers (Wis.) 250.

The price of liquors sold in Nebraska for the purpose of illegal sale therein could not be recovered.—Storz v. Finkelstein (Neb.) 1020.

Interpretation.

Contract for the assignment of certain patents construed.—Murphey v. Weil (Wis.) 532.

Contract for the assignment of certain patents construed, and *held* there was such a failure of consideration as entitled the assignee to a return of a part of the price.—Murphey v. Weil (Wis.) 532.

Where a word used in a contract has a definite meaning, extrinsic evidence is inadmissible, so as to make its meaning a question for the jury, and not for the court.—Murphey v. Weil (Wis.) 532.

A contract *held* not to render defendants absolutely liable for a sum agreed to be paid plaintiff.—Barsby v. Warren (Neb.) 409.

An agreement *held* to bind a judgment creditor to exhaust the property of one judgment debtor before resorting to property of the other.—Gibson v. McClay (Neb.) 851.

Contract for the manufacture of cans *held* to fix the price to be paid therefor with sufficient definiteness.—Walsh v. Myers (Wis.) 250.

Plaintiff's guaranty to furnish a specified quantity of water to defendant's waterworks *held* not to have been controlled by defendant's specifications as to the depth of the wells and the distance and depth of the water-bearing strata.—Eagle Iron Works of Town of Guthrie Center (Iowa) 81.

Contract construed and *held* a lease, with a privilege of purchase during the term, the rent not to apply on the price.—Braun v. Wisconsin Rendering Co. (Wis.) 196.

The word "money" includes any circulating medium in general use in the commercial world as a representative of value.—State v. Hill (Neb.) 541.

Performance.

Contract to do work under the instructions of an architect is performed if the work is done as required by the architect and to his approval, whether it conforms to drawings or not.—Smith v. Farmers' Trust Co. (Iowa) 84.

A contract grounded on conduct opposed to fair dealing will not be enforced.—McDonnell v. Rigney (Mich.) 52.

The owner's failure to object to a building was not to constitute a waiver of latent defects.—Eaton v. Gladwell (Mich.) 598.

Evidence examined, and *held* to show a rescission of a contract.—Hutchinson v. Holmes Sanitarium (Wis.) 700.

A contract cannot be rescinded in part for fraud, and ratified in part.—Baum Iron Co. v. Berg (Neb.) 8.

Actions on.

A general denial in an action on a contract puts the making of the contract in issue.—Rawlings v. Young Men's Christian Ass'n (Neb.) 1124.

That the agents of an insurance company entered into a contract to divide the separate earnings of each equally among themselves is no defense to an action by one against the company to recover for services rendered by him.—Gray v. Farmers' Mut. Live-Stock Ins. Ass'n (Iowa) 98.

Contributory Negligence.

See "Negligence."

Conversion.

See "Trover and Conversion."

Conveyances.

See "Chattel Mortgages"; "Deed"; "Fraudulent Conveyances"; "Mortgages"; "Sale"; "Vendor and Purchaser."

CORPORATIONS.

See, also, "Banks and Banking"; "Carriers"; "Horse and Street Railroads"; "Insurance"; "Municipal Corporations"; "Railroad Companies"; "Telegraph Companies."
Application of insolvency law, see "Insolvency."
Contract for sale of stock, see "Sale."
False representations by promoters, see "Deceit."
Taxation, see "Taxation."

A stockholder *held* liable for debts due laborers, under Rev. St. § 1769, though the services were performed out of the state.—Clokus v. Hollister Min. Co. (Wis.) 398.

The liability imposed by Comp. St. c. 16, § 139, abated with the repeal of said section without a saving clause.—Hogue v. Capital Nat. Bank (Neb.) 1036.

The insolvency of a corporation does not convert its property into a trust fund.—Ford v. Hill (Wis.) 115.

The seal of a corporation is not essential to the validity of a power of attorney to confess judgment.—Ford v. Hill (Wis.) 115.

The president of a corporation *held* to have had power to execute a power of attorney to confess judgment against the corporation, the directors making no objection thereto.—Ford v. Hill (Wis.) 115.

Under Rev. St. § 1776, an attorney of a corporation may be appointed for a longer term than one year.—Germania Spar & Bau Verein v. Flynn (Wis.) 109

The affixing to a document of the corporate seal is presumed to have been authorized.—Yanish v. Pioneer Fuel Co. (Minn.) 198.

Application by attorney general for leave to bring proceedings to forfeit the franchise of a corporation denied on the ground that the right to bring such proceedings had been waived.—State v. Janesville Water-Power Co. (Wis.) 512.

A bank which bought mortgaged realty from one of its officers was not liable to the mortgagee for loss sustained by him because of worthless securities given him by the officer at the time of the transfer to release the mortgage.—Staples v. Huron Nat. Bank (S. D.) 314.

Corporate existence.

Corporate existence cannot be collaterally attacked by persons contracting with the alleged corporation in such capacity.—Hogue v. Capital Nat. Bank (Neb.) 1036.

A creditor dealing with a recognized corporation *held* estopped to attack its corporate existence.—Gow v. Collin & Parker Lumber Co. (Mich.) 676.

One seeking to foreclose a mortgage of a corporation thereby affirms its corporate existence.—Gow v. Collin & Parker Lumber Co. (Mich.) 676.

Stock.

A corporation *held* estopped, as against a pledgee, from denying the validity of a transfer of stock.—Des Moines Loan & Trust Co. v. Des Moines Nat. Bank (Iowa) 914.

A corporation *held* estopped from claiming a lien on stock as against a pledgee.—Des Moines Loan & Trust Co. v. Des Moines Nat. Bank (Iowa) 914.

In an action to recover on unpaid subscriptions by the receiver of an insolvent corporation certain alleged equitable defenses *held* not available.—Basting v. Ankeny (Minn.) 266.

A receiver of an insolvent corporation may maintain an action to collect a call on unpaid subscriptions made prior to his appointment.—Basting v. Ankeny (Minn.) 266.

One to whom stock is transferred without notice of any by-law making it liable for debts of the holder to the corporation *held* to take free of any lien.—Des Moines Nat. Bank v. Warren County Bank (Iowa) 154.

Corroboration.

Of accomplice's testimony, see "Criminal Law."

COSTS.

Appealable orders, see "Appeal."

Where a judgment for defendant is reversed on appeal, and on second trial judgment is again rendered for defendant, the costs of the first trial may be taxed against plaintiff.—Palmer v. Palmer (Iowa) 734.

Public officers impleaded in their representative capacity are not personally liable for costs.—Farmers' Loan & Trust Co. v. City of Newton (Iowa) 784.

Appellant is liable for costs for unnecessary notice of appeal served.—Farmers' Loan & Trust Co. v. City of Newton (Iowa) 784.

Copy fees for pleadings filed in the district court on appeal from the board of equalization may be included in taxing costs.—Farmers' Loan & Trust Co. v. City of Newton (Iowa) 784.

Fees for the reporter's transcript, paid by plaintiff on appeal from a judgment for defendant, which was reversed, *held* properly taxed against defendant.—Palmer v. Palmer (Iowa) 734.

A notice of taxation is not invalid because served before judgment entered on the verdict.—Murphy v. Mulvena (Mich.) 224.

The discretion of the court on appeal from justices to allow costs cannot be overcome by a court rule disallowing them.—Voigt Brewing Co. v. Hosmer (Mich.) 217.

In actions on contract, costs, exclusive of disbursements, cannot exceed $25.—Casgrain v. Hamilton (Wis.) 118.

An attorney's fee cannot be taxed against the defendant, under chapter 50, § 22, Comp. St., in a case prosecuted by the county attorney.—Hornberger v. State (Neb.) 23.

Counsel.

See "Attorney and Client."

Counterclaim.

See "Set-Off and Counterclaim."

COUNTIES.

See, also, "Highways"; "Municipal Corporations."
Injunction against maintaining drain, see "Injunction."
Mandamus to county officer, see "Mandamus."

A county treasurer and his sureties are liable for public funds lost without his fault.—Bush v. Johnson County (Neb.) 1023.

County officers trespassing upon land in locating a section line *held* personally liable therefor.—Webster v. White (S. D.) 1145.

Insufficient ballots cannot be counted to make up the total in a county-seat election.—State v. Roper (Neb.) 539.

McCook having received more than three-fifths of the ballots at a county-seat election, *held* to have become the county seat of Red Willow county.—State v. Roper (Neb.) 539.

In proceedings for removal of an officer on the ground of incompetency, the notice need not set out the specific charges.—Burt v. Board of Sup'rs of Iron County (Mich.) 387.

In a proceeding to remove a superintendent of the poor, a bill of particulars setting out items improperly allowed by him is a sufficient notification of the charge against him.—Burt v. Board of Sup'rs of Iron County (Mich.) 387.

Under Code, § 303, the county board can provide for necessary repairs of small bridges.—Denison v. Watts (Iowa) 886.

A resolution of supervisors allowing each member to order repairs for culverts in his district is not void.—Denison v. Watts (Iowa) 886.

A settlement with the county treasurer by the county board *held* not an acceptance of a certificate of deposit of county funds.—Bush v. Johnson County (Neb.) 1023.

Settlements by the county board *held* not a judicial determination of the state of accounts.—Bush v. Johnson County (Neb.) 1023.

Under Laws 1891, c. 14, § 104, it is the duty of the county treasurer, and not of the county board, to designate the paper in which to publish tax-sale notices.—Dewell v. Board of Com'rs of Hughes County (S. D.) 1079.

An incoming treasurer *held* chargeable with the amount of deposit for which a certificate was turned over to him by his predecessor.—Bush v. Johnson County (Neb.) 1023.

County Board.

See "Counties."

COURT COMMISSIONERS.

Court commissioners have power to issue warrants of arrest under Gen. St. 1894, § 7132.—Hoskins v. Baxter (Minn.) 969.

COURTS.

See, also, "Justices of the Peace."
Acts relating to, see "Constitutional Law."
Discretion of trial court, see "Appeal."
Effect of remarks of court, see "Criminal Law."
Mandamus to, see "Mandamus."
Newspaper criticisms, see "Contempt."

The constitution has not conferred upon the supreme court original jurisdiction to award a writ of prohibition as an independent remedy.—State v. Hall (Neb.) 642.

After one court has acquired jurisdiction, another cannot obtain a superior jurisdiction in subsequent proceedings concerning the same subject.—Northwestern Iron Co. v. Lehigh Coal & Iron Co. (Wis.) 515.

Orders *held* sufficient to give the court exclusive and complete jurisdiction of the property in controversy.—Northwestern Iron Co. v. Lehigh Coal & Iron Co. (Wis.) 515.

The jurisdiction of a superior court need not affirmatively appear.—Scaman v. Galligan (S. D.) 458.

The circuit court has jurisdiction of an action by a personal representative to recover assets, a discovery of which is rendered necessary by plaintiff's ignorance of their form and amount.—Meyer v. Garthwaite (Wis.) 704.

Under Const. art. 5, § 13, an opinion requested by the governor upon the construction of Sess. Laws 1890, c. 6, with reference to the appointment of regents of education, should not be given.—In re Chapter 6, Session Laws of 1890 (S. D.) 310.

Where an action of which the county court had no jurisdiction was transferred by stipulation to the district court it in effect constituted a recommencement of the action in the latter court.—Lundgren v. Crum (Neb.) 284.

In an action on a note, the fact that the indebtedness set up as a defense exceeds $500 *held* not to oust the municipal court of Duluth of jurisdiction.—Lynch v. Free (Minn.) 973.

Duties of supervisors in the matter of selecting official newspapers, under Code, § 307, determined.—Ross v. Campbell (Iowa) 1064.

On application for selection of county newspapers, under Code, § 307, a charge of fraud in an application, unless brought to the attention of the supervisors before selection, cannot be reviewed on appeal to the district court.—Ross v. Campbell (Iowa) 1064.

The supreme court has original jurisdiction of proceedings to compel one without title to a state office to surrender it to one having title.—State v. Archibald (N. D.) 234.

Coverture.

See "Husband and Wife."

Credibility.

Of witness, see "Witness."

CRIMINAL LAW.

See, also, "Bail"; "Grand Jury"; "Indictment and Information"; "Jury"; "Witness."
Liability for criminal negligence, see "Municipal Corporations."
Particular crimes, see "Assault and Battery"; "Bastardy"; "Burglary"; "Embezzlement"; "False Pretenses"; "Homicide"; "Larceny"; "Rape"; "Robbery."
Receiving deposits after insolvency, see "Banks and Banking."
Violation of liquor laws, see "Intoxicating Liquors."
Who may act as attorney for state, see "District and Prosecuting Attorneys."

Defendant's statutory right to three days after plea to prepare for trial *held* waived.—State v. King (Iowa) 785.

In a prosecution for performing a marriage ceremony without a license, as required by 3 How. Ann. St. § 6222f, it is no defense that one of the parties was under a legal disability.—People v. McGlaughlin (Mich.) 385.

Record examined and *held* insufficient to show that there was no testimony taken by the justice to authorize the issue of a warrant.—People v. Whipple (Mich.) 490.

Defendant *held* not authorized to show that the justice issuing the warrant did not have sufficient evidence to authorize it.—People v. Whipple (Mich.) 490.

Where on appeal by defendant a judgment of conviction is reversed for errors in instructions, he is not entitled to discharge on the ground of former jeopardy.—State v. Reddington (S. D.) 464.

An act may constitute an offense under the state laws, and further penalties may be imposed by municipal ordinance.—City of Yankton v. Douglass (S. D.) 923.

Where witnesses indorsed on an information were not eyewitnesses of the crime, it was enough that they were tendered to the defense for cross-examination.—People v. Pope (Mich.) 213.

Where an answer contains immaterial matter, the proper practice is to move to strike it out.—People v. Pope (Mich.) 213.

Notice to defendant of the introduction of witnesses who were not named in the indict-

ment *held* to sufficiently comply with Code, § 4421.—State v. Yetzer (Iowa) 737.

Evidence of a witness not named in the indictment need not be strictly limited to the matters stated in the notice given under Code, § 4421.—State v. Yetzer (Iowa) 737.

Notices of intention to use witnesses not indorsed on indictment *held* sufficient.—State v. Hall (Iowa) 725.

Continuance.

Affidavits *held* insufficient to require a continuance.—Hoover v. State (Neb.) 1117.

A continuance *held* properly denied where notice of additional testimony was served on defendant four days before trial.—State v. King (Iowa) 735.

Conduct of trial.

The fact that the accused's relatives were required to leave him during the trial *held* no ground for reversal.—Hoover v. State (Neb.) 1117.

Remarks of the court on a trial for rape *held* to be an invasion of the province of the jury.—State v. Philpot (Iowa) 730.

The discretion of the court in assigning cause will not be controlled.—State v. King (Iowa) 735.

To allow a witness for the state on rebuttal to repeat his original evidence is not prejudicial.—State v. Rudd (Iowa) 748.

An objection that evidence is irrelevant and immaterial *held* insufficient.—State v. La Croix (S. D.) 944.

Where a witness for the prosecution is taken sick before cross-examination, the defense should move to strike out her testimony.—People v. Pope (Mich.) 213.

Argument of prosecuting attorney *held* no cause for reversal.—People v. Pope (Mich.) 213.

Objectionable remarks of the state's attorney were rendered harmless by an immediate instruction that they be disregarded.—Hoover v. State (Neb.) 1117.

Improper remarks of counsel, which the jury are at once directed to disregard, *held* not ground for reversal.—City of Yankton v. Douglass (S. D.) 923.

Statement by prosecuting attorney to jury that he believes the evidence shows that defendant's witnesses are "a lot of liars" is not ground for reversal.—People v. Wirth (Mich.) 41.

Evidence.

A witness who sat as a juror on trial of defendant's co-conspirator could state what defendant testified to on that trial.—State v. Mushrush (Iowa) 746.

Admissibility of declarations and actions of alleged conspirator.—State v. Mushrush (Iowa) 746.

Testimony of accomplices *held* sufficiently corroborated.—State v. Hall (Iowa) 725.

On the trial of a defendant for crime, evidence of his attempt to commit another similar crime is only admissible on the question of intent, when in doubt, and there is evidence of the corpus delicti.—People v. Thacker (Mich.) 562.

Evidence not strictly in rebuttal may be admitted under Code Civ. Prac. § 2779, which is made applicable to criminal cases by Code, § 4556.—State v. Yetzer (Iowa) 737.

Instructions.

It is sufficient if requested instructions are substantially given.—People v. Weaver (Mich.) 567.

Instructions not excepted to when given will not be reviewed.—Bush v. State (Neb.) 638.

Where the charge as a whole is correct, instructions which standing alone are misleading are not cause for reversal.—People v. Ricketts (Mich.) 483.

It is error to refuse to instruct that every man is presumed innocent, and, if any juror has reasonable doubt of guilt, defendant must be acquitted.—Franklin v. State (Wis.) 107.

An instruction is properly refused, though it contains a correct abstract proposition, if not applicable to the facts.—Wells v. State (Neb.) 29.

The omission to charge on the law when not requested is not error, where no prejudice results.—Pjarrou v. State (Neb.) 422.

The court should charge as to the law governing the case, whether requested to do so or not.—Pjarrou v. State (Neb.) 422.

Instruction as to presumption of innocence *held* proper.—State v. Harris (Iowa) 728.

Instruction as to reasonable doubt *held* not prejudicial to defendant.—State v. Harris (Iowa) 728.

Instructions based on the testimony of certain witnesses are properly refused.—People v. Pope (Mich.) 213.

An objection that the instruction was not sufficiently explicit will not be considered where no other was asked.—Pjarrou v. State (Neb.) 422.

Judgment and sentence.

A judgment *held* not open to the objection that it is insufficient because there was no finding of guilty by the court.—State v. Rudd (Iowa) 748.

A sentence will not be reduced where there are facts shown by the record tending to aggravate the crime of which the defendant was convicted.—State v. Hall (Iowa) 725.

New trial.

That the officers in charge of the jury spoke to them to the extent of saying "Good morning" is no ground for new trial.—People v. Beverly (Mich.) 379.

Affidavit for new trial considered, and *held* insufficient.—State v. Hall (Iowa) 725.

Newly-discovered evidence is no ground for new trial.—State v. Harris (Iowa) 728; Same v. King (Iowa) 735; Same v. Graff (Iowa) 779.

Appeal and error.

Order denying motion for new trial made after judgment (Rev. St. § 4719) is not a final judgment, or an order in the nature of a final judgment.—Jackson v. State (Wis.) 393.

It will be presumed, on overruling a motion to set aside an information, that it was not filed until a preliminary examination had been held or waived.—State v. La Croix (S. D.) 944.

Where appeal is taken from a justice on questions of law and fact, the case is tried anew.—City of Yankton v. Douglass (S. D.) 923.

Where the record does not show any notice of appeal served, the case will be dismissed.—State v. McNamara (Iowa) 192.

Where the notice of appeal is not certified by the clerk, or shown to have been served on him, the appeal will be dismissed.—Town of Manning v. Wichmer (Iowa) 756.

Assignments of error based on the existence of certain facts in respect to which there is no evidence in the record will be disregarded.—McCall v. State (Neb.) 635.

Assignments of error to the overruling of a motion for continuance will not be considered where the record does not show that it was passed on.—Bush v. State (Neb.) 638.

An assignment that the judge did not caution the jury on separation being within the knowl-

edge of the court must be shown in the bill of exceptions.—State v. Harris (Iowa) 728.

Remarks of counsel are not available for reversal unless incorporated in the bill of exceptions.—State v. Helm (Iowa) 751.

Error in sustaining an objection to a question is harmless where it is afterwards answered.—State v. Hughes (S. D.) 1076.

The offer by the state of incompetent evidence is not ground for reversal if excluded.—People v. Ricketts (Mich.) 483.

Where secondary evidence of a paper was admitted, error is harmless, the paper itself being produced.—People v. Pope (Mich.) 213.

Where incompetent evidence is afterwards stricken out, there is no reversible error.—State v. Yetzer (Iowa) 737.

On reversal of a conviction for error in instructions, the supreme court will order a new trial.—State v. Reddington (S. D.) 464.

Cross Bill.

By defendant in divorce case, see "Divorce."

Cross-Examination.

Of witness, see "Witness."

CUSTOM AND USAGE.

If the custom is not general, and a party has no notice, he is not bound by it in contracting.—Eaton v. Gladwell (Mich.) 598.

Proof of knowledge is required to give effect to a custom not widely known.—Union Stock-Yards Co. v. Westcott (Neb.) 419.

Parol evidence was admissible to show the meaning of the words, "Prices guarantied against market price to date of shipment."—Coulter Manuf'g Co. v. Ft. Dodge Grocery Co. (Iowa) 875.

DAMAGES.

For death by wrongful act, see "Death by Wrongful Act."
For failure of title, see "Vendor and Purchaser."
For trespass, see "Trespass."
For wrongful attachment, see "Attachment."
—— issuance of injunction, see "Injunction."
In assumpsit, see "Assumpsit."

Where plaintiff agreed to farm defendant's land, and to receive from the latter three-fourths of the crop, on breach of the contract by defendant the damages are the value of plaintiff's share.—Bowers v. Graves & Vinton Co. (S. D.) 931.

Measure of damages for failure of the buyer to receive cans to be manufactured by the seller from material to be furnished by the buyer.—Walsh v. Myers (Wis.) 250.

Penalty for failure to furnish title greater than actual value of the land will not be enforced.—Gates v. Parmly (Wis.) 253.

Measure of damages where goods are specially ordered and those of another quality received, determined.—Guetzkow Bros. Co. v. Andrews (Wis.) 119.

Where defendant excavates his land, causing the adjoining land of plaintiff to fall into it, the measure of damages is the diminution of the value of plaintiff's land by reason of such fall.—Schultz v. Bower (Minn.) 139.

A person injured is not entitled to recover for nursing, where no expense in that respect was incurred.—Williams v. Village of Petoskey (Mich.) 55.

In an action for personal injuries, testimony of apparent physical condition of the injured woman after the accident *held* admissible.—Keller v. Town of Gilman (Wis.) 800.

Testimony that an injured woman complained of her lungs and her back hurting her, is inadmissible.—Keller v. Town of Gilman (Wis.) 800.

Husband's testimony of what his injured wife's services were worth "to him," is inadmissible.—Keller v. Town of Gilman (Wis.) 800.

In an action by a father for injuries to a minor son, the measure of damages is the lessened value of his services.—Goodrich v. Burlington, C. R. & N. Ry. Co. (Iowa) 770.

Instructions as to duty of plaintiff after injury to use proper treatment towards recovery, and liability of defendant for aggravation caused by lack of care.—Moore v. City of Kalamazoo (Mich.) 1089.

Pleading examined, and *held*, in an action for personal injuries, sufficient for the admission of evidence as to the earnings of plaintiff.—Moore v. City of Kalamazoo (Mich.) 1089.

To warrant the setting aside of a verdict as excessive in an action for tort, it must appear to have been given under the influence of passion or prejudice.—Meeks v. City of St. Paul (Minn.) 966.

DEATH BY WRONGFUL ACT.

A verdict of $2,400 *held* not excessive.—Post v. Olmsted (Neb.) 828.

Evidence *held* to show defendant liable for intestate's death.—Post v. Olmsted (Neb.) 828.

Decedents.

See "Executors and Administrators"; "Wills."
Transactions with, see "Witness."

DECEIT.

See, also, "Fraudulent Conveyances."

Persons conspiring with promoters of a corporation to misrepresent the amount paid for property transferred to the corporation are equally liable with the promoters.—Fountain Spring Park Co. v. Roberts (Wis.) 399.

Declarations.

See "Pleading."
As evidence, see "Criminal Law"; "Evidence"; "Homicide."

Decree.

See "Equity."

DEDICATION.

A dedication of land is an appropriation of land to public use made by the owner of the fee, and accepted for such use by the public.—Alton v. Meeuwenberg (Mich.) 571.

Necessary elements of a dedication of land for highway purposes.—Alton v. Meeuwenberg (Mich.) 571.

A cul de sac may become a public street by user.—Mahler v. Brumder (Wis.) 502.

Dedication of land as a street where such street is not accepted or used remains revocable by the proprietor.—Mahler v. Brumder (Wis.) 502.

Evidence *held* not to show a dedication for a highway.—Oyler v. Ross (Neb.) 1099.

Evidence *held* insufficient to show acceptance of the dedication of an alley.—Incorporated Town of Cambridge v. Cook (Iowa) 884.

DEED.

See, also, "Fraudulent Conveyances"; "Vendor and Purchaser."
As mortgage, see "Mortgages."
As evidence, see "Evidence."
Cancellation in equity, see "Equity."
Estoppel by, see "Estoppel."
Tax deed, see "Taxation."
Violation of restriction of deed, see "Injunction."
What law governs, see "Conflict of Laws."

A deed *held* to have been properly delivered by a delivery to a third person.—Brown v. Westerfield (Neb.) 439.

An allegation that the grantor made and executed a deed sufficiently alleged delivery.—Brown v. Westerfield (Neb.) 439.

Evidence *held* sufficient to prove a valid delivery.—Denzler v. Rieckhoff (Iowa) 147.

Where a deed reserves a portion of property therein described, and fixes an easement thereon, the fee to such portion passes to the grantee. Towne v. Salentine (Wis.) 395.

A deed recorded after judicial sale, but before record of the sheriff's certificate, *held* prior to the certificate.—Sheasley v. Keens (Neb.) 1010.

A correct designation of the statute under which a deed is executed *held* not essential to the validity of the deed.—Green v. Barker (Neb.) 1032.

A deed placed on record with intent to pass title is sufficient delivery.—Issitt v. Dewey (Neb.) 288.

The fact that a grantee resided in Chicago and the grantor in Rock Island did not overcome the presumption that a deed to land in Iowa was delivered when made.—Farwell v. Des Moines Brick Manuf'g Co. (Iowa) 176.

Loss of a delivered deed did not divest title of the grantee.—Brown v. Westerfield (Neb.) 439.

Deed *held* not proved, within Rev. St. § 2227.—Shattuck v. Bates (Wis.) 706.

Default.

Judgment by, see "Judgment."

Defective Streets.

See "Municipal Corporations."

Delegation.

Of legislative power, see "Constitutional Law."

Delivery.

Of bond, see "Bonds."
Of deed, see "Deed."
Of goods by carrier, see "Carriers."
Of negotiable instrument, see "Negotiable Instruments."

Demurrer.

See "Pleading."

DEPOSIT IN COURT.

A deposit by one of the parties in court is not chargeable with fees incurred by the other party.—Van Etten v. Coburn (Neb.) 427.

DESCENT AND DISTRIBUTION.

See, also, "Executors and Administrators."
Right of heir to partition, see "Partition."

On the death of a stepson intestate and unmarried, after the death of his father, *held*, that the stepmother was entitled to one-sixth of his estate.—In re Parker's Estate (Iowa) 908; Smith v. Parker, Id.

Purchasers of land from heirs of an estate before administration take it subject to the debts.—Flood v. Strong (Mich.) 473.

Where one died intestate, leaving neither issue, father, mother, brother, nor sister, *held* that, under Comp. St. c. 23, § 30, surviving children of deceased brothers and sisters took per capita, and that grandchildren of such took nothing.—Douglas v. Cameron (Neb.) 430.

Description.

In mortgage, see "Chattel Mortgages."

Descriptio Personæ.

See "Pleading."

Desertion.

As ground for divorce, see "Divorce."

Devise.

See "Wills."

Discharge.

See "Accord and Satisfaction"; "Payment."

DISCOVERY.

The court in its discretion may limit the subject of inquiry, though it cannot deny the examination.—Schmidt v. Menasha Wooden-Ware Co. (Wis.) 695.

Discretion of Court.

See "Appeal"; "Continuance"; "New Trial."

Dismissal.

Of appeal, see "Appeal."

Dissolution.

Of attachment, see "Attachment."

DISTRICT AND PROSECUTING ATTORNEYS.

The fact that an attorney is a nonresident of the county does not disqualify him from acting as assistant in prosecuting a case of felony.—People v. Thacker (Mich.) 562.

Districts.

See "Schools and School Districts."

DIVORCE.

When the testimony is doubtful, it is proper to deny the divorce, though defendant does not appear.—Cummins v. Cummins (Neb.) 858.

Evidence *held* to sustain a finding that defendant was not guilty of deserting plaintiff.—Grant v. Grant (Minn.) 983.

A wife, on being divorced, retains no right to a homestead, in the absence of a decree to that effect.—Brady v. Kreuger (S. D.) 1083.

A nonresident defendant may amend her answer made a cross bill for divorce by adding the statutory noncollusion clause.—Clutton v. Clutton (Mich.) 52.

A nonresident defendant may, under How. Ann. St. § 6231, make her answer a cross bill for divorce and alimony.—Clutton v. Clutton (Mich.) 52.

Documents.

As evidence, see "Evidence."

DOWER.

Code 1873, § 2440, does not prevent a widow from recovering dower in land conveyed by her husband in 1857.—Purcell v. Lang (Iowa) 887.

Code 1873, § 2440, merely abolished the use of the words "dower" and "curtesy" as descriptive of the estate.—Purcell v. Lang (Iowa) 887.

An agreement by a widow to take a certain sum *held* to vest in the legatees her right in the real estate.—Baldwin v. Hill (Iowa) 889.

Where there is nothing inconsistent in a will with the right of a widow to dower, such right is not affected by her taking under the will.—Baldwin v. Hill (Iowa) 889.

A widow's right of dower is not barred by her consent to take under the will of her husband, because the homestead is therein specifically devised after her death, where the testator left other realty not so devised.—In re Franke's Estate (Iowa) 918; Franke v. Wiegand, Id.

Receipt by a widow of personal property given her by the will of her deceased husband, and in excess of her distributive share under the statute, is an election to take under the will.—In re Franke's Estate (Iowa) 918; Franke v. Wiegand, Id.

Where the will of a testator to which his widow has consented gives her the homestead for life, her occupancy of it thereafter will be presumed to be under such provision, and will not constitute an election to take it in lieu of her distributive share of his estate.—In re Franke's Estate (Iowa) 918; Franke v. Wiegand, Id.

A widow who elected to take against the will, and under the law, acquired only a life estate in the homestead.—Melms v. Pabst Brewing Co. (Wis.) 244.

A consummate right of dower, though unmeasured, is assignable, and the assignee may maintain action therefor in his own name.—Dobberstein v. Murphy (Minn.) 204.

A quitclaim deed by a widow construed as an assignment of dower.—Dobberstein v. Murphy (Minn.) 204.

The rights of an assignee of dower are not affected by the fact that the court subsequently assigns it to the widow.—Dobberstein v. Murphy (Minn.) 204.

DRAINAGE.

Action of commissioners in making new drain, whereby the flow of water from other drains was diverted, *held* justified by the evidence.—Berry v. Tinsman (Mich.) 579.

Druggists.

Illegal sale of liquors, see "Intoxicating Liquors."

Due Process of Law.

See "Constitutional Law."

Dying Declarations.

See "Homicide."

EASEMENTS.

An easement passes by a conveyance of property only where it is an appurtenance necessarily connected with the use and enjoyment of the property conveyed.—Mahler v. Brumder (Wis.) 502.

Facts *held* insufficient to authorize a lot owner to enjoin the fencing of land claimed for use as a street.—Mahler v. Brumder (Wis.) 502.

Ejection.

Of passenger, see "Carriers."
Right of brakeman to eject trespassers, see "Master and Servant."

EJECTMENT.

See, also, "Adverse Possession"; "Quieting Title—Removal of Cloud."

Plaintiff must possess the legal title.—Omaha Real Estate & Trust Co. v. Reiter (Neb.) 658.

Plaintiff must recover on the strength of his own title.—Omaha Real Estate & Trust Co. v. Reiter (Neb.) 658.

A partner may recover possession of the whole of the firm real estate as against one holding without a title.—Brady v. Kreuger (S. D.) 1083.

Complaint *held* sufficient as one for the recovery of possession of real property.—Brady v. Kreuger (S. D.) 1083.

Election.

To take under will, see "Dower."

ELECTION OF REMEDIES.

A seller who elects to rescind cannot thereafter claim a lien for the price.—Kearney Milling & Elevator Co. v. Union Pac. Ry. Co. (Iowa) 1059; Elm Creek Elevator Co. v. Same, Id.

ELECTIONS AND VOTERS.

Election to locate county seat, see "Counties."

Under Sess. Laws 1891, No. 190, §§ 21, 31 where an interpreter, hostile to one of the candidates, was allowed within the railing, *held* that the vote of the entire township should be excluded if it would change the result.—Maynard v. Stillson (Mich.) 388.

Parol evidence is inadmissible to vary a ballot where there is no ambiguity on its face.—State v. Steinborn (Wis.) 798.

EMBEZZLEMENT.

Cr. Code, 1873, § 124, defining embezzlement, was not an amendment of existing statutes regulating the means of accounting for public funds.—State v. Hill (Neb.) 541.

The owner must be deprived of the property alleged to have been embezzled by an adverse use or holding.—State v. Hill (Neb.) 541.

The term "loan," employed in Cr. Code 1873, § 124, has no application to deposits in bank for safe-keeping of public funds.—State v. Hill (Neb.) 541.

EMINENT DOMAIN.

In the exercise of eminent domain, a municipality may divert water to the injury of another if compensation is made.—Churchill v. Beebe (Neb.) 992.

That a railroad company has sold a number of car loads of gravel will not prevent it from condemning land necessary for the more convenient removal of the gravel from its gravel pits.—Saginaw, T. & H. R. Co. v. Bordner (Mich.) 62.

Under 3 How. Ann. St. § 3332, notice of condemnation proceedings against a nonresident landowner may be served on him personally out of the state, though he has an agent within the state.—Saginaw, T. & H. R. Co. v. Bordner (Mich.) 62.

A city has the right to extend a street across the depot grounds of a railway company.—Chicago, M. & St. P Ry. Co. v. Starkweather (Iowa) 87.

A charter provision that on condemnation of land, where the title is uncertain, the damages shall be paid to the district court, *held* valid; and an action against the city to recover an award failing to show compliance with the statute states no cause of action.—Coles v. City of Stillwater (Minn.) 138.

EQUITY.

See, also, "Discovery"; "Divorce"; "Fraudulent Conveyances"; "Injunction"; "Mortgages"; "Partition"; "Partnership"; "Quieting Title—Removal of Cloud"; "Receivers"; "Reference"; "Specific Performance"; "Trusts."

Relief against execution, see "Execution."
—— judgment, see "Judgment."
Transfer of cause to equity docket, see "Practice in Civil Cases."

The objection that a bill fails to show equitable jurisdiction cannot be raised on trial by a demurrer ore tenus.—Meyer v. Garthwaite (Wis.) 704

Chancery rule 25 contemplates that the truth of a plea shall be determined after issue joined.—Detroit, L. & N. R. Co. v. McCammon (Mich.) 471.

Where, after rehearing denied on appeal, affidavits are introduced showing material evidence, newly discovered, a bill of review will be granted.—Mosher v. Mosher (Mich.) 486.

Complaint examined, and *held* to state a cause of action for an accounting.—Meyer v. Garthwaite (Wis.) 704.

A decree *held* not objectionable, under the pleadings and evidence.—Gibson v. McClay (Neb.) 851.

A decree *held* too broad, as not being confined to matters in issue.—Gibson v. McClay (Neb.) 851.

Reformation of contracts.

The mistake must be mutual, to entitle a party to relief in equity.—Moore v. Scott (Neb.) 441.

To authorize the reformation of an insurance policy on the ground of mistake, the mistake must be mutual.—Trustees of St. Clara Female Academy v. Delaware Ins. Co. (Wis.) 1140; Same v. Milwaukee Mechanics' Ins. Co., Id.; Same v. Northwestern Nat. Ins. Co., Id.; Same v. Rockford Ins. Co., Id.

To justify reformation of instrument on the ground of mistake, the evidence must be clear and satisfactory, and free from reasonable doubt.—Jurgensen v. Carlsen (Iowa) 877.

In action to set aside a fraudulent conveyance, on cross petition, the description in the deed may be reformed where the conveyance was valid.—Wheeler & Wilson Manuf'g Co. v. Bjelland (Iowa) 885.

An instrument of lease, open only to the construction that the rent should not apply on the option to purchase, cannot be reformed to allow such application, the parties knowing it was not in the original agreement.—Braun v. Wisconsin Rendering Co. (Wis.) 196.

Evidence examined, and *held* that the reformation of a mortgage was properly denied.—Hall v. Leland (Minn.) 202.

Rescission and cancellation of contracts.

One seeking to rescind a contract for fraud must offer to return the consideration.—Building & Loan Ass'n of Dakota v. Cameron (Neb.) 1109.

Evidence *held* to justify the cancellation of a deed for insanity of the grantor.—Hay v. Miller (Neb.) 1115.

Evidence *held* insufficient to authorize the rescission of a deed on the ground of fraud.—Doxtater v. Connell (Wis.) 1135.

A mortgage will not be set aside because not witnessed or acknowledged, except on tender of the indebtedness secured thereby.—Welsh v. Blackburn (Wis.) 528.

Statements of the vendor *held* mere expressions of opinion, and not misrepresentations.—Moore v. Scott (Neb.) 441.

A vendor repeating misrepresentations as to land *held* not to have adopted them.—Moore v. Scott (Neb.) 441.

A contract will not be rescinded for fraud where there is no offer to restore the consideration.—Lovell v. McCaughey (S. D.) 1085.

A pledge canceled because of fraud and undue influence.—Groesbeck v. Bennett (Mich.) 664.

In an action to cancel certain bonds of a school district, the school district is not an indispensable party.—Holliday v. Hildebrandt (Iowa) 89.

In an action to cancel school-district bonds as in excess of the constitutional limitation, the burden of showing that the bonds were applied to a legal debt is on defendants.—Holliday v. Hildebrandt (Iowa) 89.

Inability to restore defendant to his former condition, when occasioned by its wrongful act, is not alone sufficient to defeat an action to rescind a fraudulent contract.—Hilton v. Advance Thresher Co. (S. D.) 816.

A conveyance of land from a niece to her uncle, with whom she resided, and who had been her guardian, for an inadequate price, set aside.—Earhart v. Holmes (Iowa) 898.

Laches.

Facts *held* to establish such laches upon the part of heirs as would bar an action to set aside a sale of property by executors.—Melms v. Pabst Brewing Co. (Wis.) 518.

Circumstances considered under which it was held that owners of an interest in land had not been guilty of such laches as prevented them from maintaining an action for its recovery.—Phillips v. Wilmarth (Iowa) 1053.

ERROR, WRIT OF.

See, also, "Appeal"; "Certiorari"; "New Trial."

When a petition in error is filed in a case in which an appeal will lie the proceeding is one in error.—Childerson v. Childerson (Neb.) 281.

Proceedings in error may be commenced at any time within one year from rendition of judgment.—Scarborough v. Myrick (Neb.) 867.

ESTATES.

See, also, "Deed"; "Homestead"; "Wills."

No portion of incumbrances paid off by grantees of a life estate pursuant to an agreement with the life tenant can be recovered from the

remainder-men, though said grantees supposed that they had acquired the fee to the premises conveyed.—Melms v. Pabst Brewing Co. (Wis.) 244.

ESTOPPEL.

To allege error, see "Appeal."
To attack corporate existence, see "Corporations."
To deny agency, see "Principal and Agent."
—— partnership, see "Partnership."
—— validity of foreclosure proceedings, see "Mortgages."
—— validity of policy, see "Insurance."

A life tenant who acquires an outstanding title *held* estopped to assert the same against the remainder-men.—Melms v. Pabst Brewing Co. (Wis.) 244.

Where an owner of part of a tract conveyed the whole tract by mistake, Code, § 1931, estopping a grantor to set up an after-acquired interest, did not apply.—Cook v. Prindle (Iowa) 781.

A creditor who, after subjecting part of mortgaged land to payment of his debt, bought the mortgage, was not estopped to foreclose.—Hall v. Hooper (Neb.) 33.

An officer of a corporation, knowing of and acquiescing in certain acts whereby a contract was modified, *held* estopped to claim rights under the original contract.—Hart v. Mt. Pleasant Park Stock Co. (Iowa) 190.

A trust fund proving insufficient to pay preferred claims, one of the preferred creditors was *held* estopped from asserting a claim to moneys paid by its president as trustee to other creditors.—Fifth Nat. Bank v. Dunham (Mich.) 870.

A preferred creditor *held* estopped from claiming that another creditor had received more than its share of the fund.—Fifth Nat. Bank v. Dunham (Mich.) 870.

Acts and statements *held* not to constitute a waiver or an estoppel of a judgment debtor's right under an agreement to have another's property levied on before resorting to his property.—Gibson v. McClay (Neb.) 851.

A party cannot affirm a mortgage in part by seeking foreclosure, and disaffirm it in part.—Gow v. Collin & Parker Lumber Co. (Mich.) 676.

A party who allows a drain to be built, with full knowledge that he is to be assessed therefor, *held* estopped from restraining the collection of the tax.—Atwell v. Barnes (Mich.) 583.

A firm which agreed to pay a bank drafts for stock shipped the firm was not estopped to apply to an earlier draft shipments of which it knew when accepting it, as against a later draft not covered by a shipment.—Burke v. Utah Nat. Bank (Neb.) 295.

A creditor who agreed that another creditor might dispose of the debtor's goods was estopped to deny the latter's right to dispose of the same.—Commercial Nat. Bank v. Merchants' Exch. Nat. Bank (Neb.) 273.

EVIDENCE.

See, also, "Witness."
Burden of proving membership in voluntary association, see "Associations."
Harmless error in excluding, see "Appeal."
In action for malpractice, see "Malpractice."
—— on insurance policy, see "Insurance."
In criminal cases, see "Assault and Battery"; "Burglary"; "Criminal Law"; "Homicide"; "Intoxicating Liquors"; "Larceny"; "Robbery."
In particular actions, see "Death by Wrongful Act"; "Injunction"; "Libel and Slander"; "Malicious Prosecution"; "Replevin."
Newly-discovered, as ground for new trial, see "Criminal Law"; "New Trial."
Objections to, see "Trial."
Of adverse possession, see "Adverse Possession."
Of agency, see "Principal and Agent."
Of breach of warranty, see "Sale"
Of custom, see "Custom and Usage."
Of dedication, see "Dedication."
Of defects in streets, see "Municipal Corporations."
Of deflection of surface water, see "Surface Water."
Of election to rescind, see "Sale."
Of fraud in tax sale, see "Taxation."
Of negligence, see "Negligence."
Of novation, see "Novation."
Of partnership, see "Partnership."
Of price of goods, see "Sale."
Of transactions with decedents, see "Witness."
Of undue influence, see "Wills."
Parol evidence to vary ballot, see "Elections and Voters."
—— contract of indorsement, see "Negotiable Instruments."
Proof of deed, see "Deed."
Reception of, see "Trial."
Survey as evidence, see "Surveys."
To impeach witness, see "Witness."
To justify appointment of receiver, see "Receivers."
To show deed absolute as mortgage, see "Mortgages."
—— resulting trust, see "Trusts."
Use of memorandum by witness, see "Witness."
Weight and sufficiency, see, also, "Appeal."

Courts take judicial notice of incorporation of a city by special act if it be a public law.—Hornberger v. State (Neb.) 23.

There is no presumption that a letter was received, unless it was addressed to the town in which the party resided.—Goodwin v. Provident Sav. Life Assur. Soc. (Iowa) 157.

The laws of the state where a contract was made will be presumed to be the same as those of the state where action is brought.—Goodwin v. Provident Sav. Life Assur. Soc. (Iowa) 157.

Admissibility of copies of the statutes of a foreign state determined.—Goodwin v. Provident Sav. Life Assur. Soc. (Iowa) 157.

Instruction as to burden of proof approved.—Hynes v. Hickey (Mich.) 1090.

Propriety of an instruction on burden of proof in action by real-estate broker for commissions.—Harrison v. Pusteoska (Iowa) 93.

Evidence *held* to justify a finding that plaintiff's cause of action was founded on a loan.—Gale v. Baxter (Minn.) 972.

The mere fact that a horse ran or jumped over a cattle guard is insufficient to establish that the guard was defective.—Barnhart v. Chicago, M. & St. P. Ry. Co. (Iowa) 902.

Best and secondary.

When the files of a case have been lost, extrinsic evidence of their existence and contents may be given.—Regier v. Shreck (Neb.) 618.

Where one has no knowledge outside of a memorandum, the memorandum is the best evidence.—Iowa City State Bank v. Novak (Iowa) 186.

A record must be proved by its production, or by an authenticated copy.—Hornberger v. State (Neb.) 23.

Declarations and admissions.

A party need not prove an averment admitted by his adversary's pleadings.—Johnson v. Reed (Neb.) 405.

Statements and exclamations of plaintiff as to extent, nature, and location of pain *held* ad-

missible as original evidence.—Will v. Village of Mendon (Mich.) 58.

Declarations of deceased as to the cause of the injury *held* a part of the res gestæ.—Christianson v. Pioneer Furniture Co. (Wis.) 699.

A statement, a few days after an accident, by the injured party, and reduced to writing, *held* admissible as an admission by him.—Klatt v. N. C. Foster Lumber Co. (Wis.) 791.

Declarations of the insured as to the amount due on a life policy are inadmissible against the beneficiary.—Goodwin v. Provident Sav. Life Assur. Soc. (Iowa) 157.

An original entry of credit to a person, made in his presence, is admissible to show what credit was given.—Iowa City State Bank v. Novak (Iowa) 186.

In an action to recover on a check alleged to have been issued by defendant's agent for stock purchased for defendant, statements by the agent to third persons not made in plaintiff's presence, *held* inadmissible.—Leach v. Hill (Iowa) 69.

An admission of plaintiff that absent witnesses of defendant would give certain testimony *held* not an admission that such testimony was true.—Burris v. Court (Neb.) 1131.

Opinion evidence.

Defendant, if not an attorney, is not competent to testify as to the value of the services of plaintiff as attorney.—Howell v. Smith (Mich.) 218.

A nonprofessional witness may give his opinion as to sanity only as the result of personal observation.—Hay v. Miller (Neb.) 1115.

In trespass to land, a witness cannot give his opinion as to damages, the basis of which is not shown.—Webster v. White (S. D.) 1145.

When third person competent to testify to contents of lost letter.—Sawyer v. Choate (Wis.) 689.

A witness cannot testify as to what he understood by a statement of a person out of the court to which such witness has testified.—State v. Rudd (Iowa) 748.

A nonexpert cannot testify as to the mental capacity of a testator in a hypothetical case.—Sagar v. Hogmire (Mich.) 327.

Opinions of witnesses *held* inadmissible to show the meaning of the words "on memorandum," as used in an invoice.—Shakman v. Potter (Iowa) 1045.

A witness who had never seen the property in dispute was incompetent to state its worth in its condition as described by other witnesses.—Aultman Co. v. Ferguson (S. D.) 1081.

Witness *held* competent to testify that the injuries caused a numbness in plaintiff's limbs.—Will v. Village of Mendon (Mich.) 58.

The nonexistence of a record may be proved by one cognizant of the facts.—Hornberger v. State (Neb.) 23.

—— Expert testimony.

Engineer of a locomotive *held* competent to testify as an expert as to whether stay bolts in a boiler had been recently broken or not.—Woods v. Chicago & G. T. Ry. Co. (Mich.) 328.

Qualification of witness to testify as an expert *held* insufficient.—Lewis v. Bell (Mich.) 1091.

A practicing physician, who is a medical graduate, is competent to testify as an expert on a question of poisoning, though it is not shown that he has had actual experience in poisoning cases.—People v. Thacker (Mich.) 562.

A hypothetical question asked a medical expert by a party claiming the insanity of a testator should embody only the facts testified to tending to show mental unsoundness.—Rivard v. Rivard (Mich.) 681.

Hypothetical question *held* proper.—Rivard v. Rivard (Mich.) 681.

Foundation for expert testimony as to handwriting *held* insufficient.—Pillard v. Dunn (Mich.) 45.

Expert testimony should be submitted to the jury under the same rules applied to other testimony.—Rivard v. Rivard (Mich.) 681.

Documents.

Pleadings and judgment in a former action, the judgment in which is claimed to constitute a bar, *held* admissible.—Lewis v. Mills (Neb.) 817.

When pleadings in other cases not admissible in rebuttal against parties.—Kohn v. Johnston (Iowa) 76.

Entries in books kept in the ordinary course of business in the handwriting of a deceased bookkeeper *held* admissible.—Smith v. Hawley (S. D.) 942.

A complaint which has been superseded by an amended pleading is not in evidence unless introduced on the trial as other evidence.—Leach v. Hill (Iowa) 69.

A conveyance of the title of Joel was not shown by a deed of John.—Omaha Real Estate & Trust Co. v. Reiter (Neb.) 658.

Minutes of the meetings of the "Grandview Company" *held* no evidence of the proceedings of the "City of Grandview."—Green v. Barker (Neb.) 1032.

A deed executed by one as "chairman" *held* no evidence of transfer of title by trustees, in the absence of evidence of his chairmanship of such trustees.—Green v. Barker (Neb.) 1032.

Memorandum of a contract made by the vendee's bookkeeper *held* inadmissible.—Hazer v. Streich (Wis.) 720.

Memorandum of contract of sale *held* sufficiently identified to be admissible.—Hazer v. Streich (Wis.) 720.

Parol evidence.

Parol evidence is inadmissible to vary the terms of an explicit written instrument.—Strunk v. Smith (S. D.) 926.

Admissibility of parol evidence to vary a written contract for payment of commissions to a real-estate broker.—Erbacher v. Seefeld (Wis.) 252.

Evidence of negotiations leading up to a written contract are not admissible.—Eaton v. Gladwell (Mich.) 598.

Held, that parol evidence was admissible to show that defendant agreed to pay the difference between the actual value of certain land and the sum which he represented it to be worth.—Gillett v. Knowles (Mich.) 497.

Parol evidence *held* admissible to show the consideration of a mortgage.—De Goey v. Van Wyk (Iowa) 787.

Parol evidence *held* admissible to show who were the parties to an instrument, where they are not named therein.—Baldwin v. Hill (Iowa) 889.

Parol evidence *held* inadmissible to show an agreement that, in case of purchase of property leased, the rent should apply on the price.—Braun v. Wisconsin Rendering Co. (Wis.) 196.

Parol evidence that an indorsement made on a note before it was indorsed by the payee was not to create any liability against the indorser is inadmissible.—Gumz v. Giegling (Mich.) 48.

Parol evidence *held* admissible to explain the meaning of the word "breeder" in a warranty of a stallion.—St. Paul & M. Trust Co. v. Harrison (Minn.) 980.

Competency, relevancy, and materiality.
Evidence *held* admissible as to the competency of one to act as head sawyer in a sawmill.—Lewis v. Emery (Mich.) 569.

Certain evidence *held* admissible on an issue as to whether certain stock was sold to defendant or pledged.—Iowa City State Bank v. Novak (Iowa) 186.

Evidence examined and *held* admissible as explanation of testimony called out on cross-examination.—Leipird v. Stotler (Iowa) 150.

Testimony of a witness since deceased cannot be used in the trial of a cause between different parties and on a different issue.—Smith v. Hawley (S. D.) 942.

A certificate as to the variations to be made from the face reading of a thermometer *held* admissible.—Hatcher v. Dunn (Iowa) 905.

Unaccepted propositions of compromise are inadmissible.—Callen v. Rose (Neb.) 639.

Examination.

Of party before trial, see "Discovery."
Of witness, see "Witness."

EXCEPTIONS, BILL OF.

See, also, "Appeal."
Amendment on appeal, see "Appeal."
Objections relating to, see "Appeal."

Time for preparing a bill of exceptions is fixed at the latest by the term at which the motion for new trial is sustained.—State v. Ambrose (Neb.) 306.

The bill of exceptions must be authenticated by the clerk.—Felber v. Gooding (Neb.) 39; Childerson v. Childerson (Neb.) 281; Romberg v. Fokken (Neb.) 282; First Nat. Bank v. Cass County (Neb.) 300; Union Pac. R. Co. v. Kinney (Neb.) 449; Andres v. Kridler (Neb.) 649.

Where the original bill is used in the supreme court, it must be authenticated by the clerk of the trial court.—Walter A. Wood Mowing & Reaping Mach. Co. v. Gerhold (Neb.) 538.

The clerk must certify the bill of exceptions to be the original or a true copy.—J. F. Seiberling & Co. v. Fletcher (Neb.) 839.

The bill of exceptions must be settled and allowed as required by law.—Oltmanns v. Findlay (Neb.) 425.

Assignment of error based on rulings to which no exceptions were taken cannot be considered.—Banks v. Cramer (Mich.) 946.

Error in form in which an issue was submitted to the jury is not available in the absence of exception.—Hay v. Miller (Neb.) 1115.

To secure a review of an order sustaining a demurrer to a petition in equity, an exception is necessary.—Abbott v. Barton (Neb.) 838.

Assignments as to rulings on instructions cannot be considered unless exception is taken.—City of Kearney v. Smith (Neb.) 538.

Excessive Damages.

See "Damages."

EXECUTION.

See, also, "Attachment"; "Exemptions"; "Garnishment."
Injunction against, see "Injunction."

An execution issued pending a stay, but not delivered to the sheriff until the expiration thereof, is valid.—Peterson v. Carpenter (Mich.) 487.

The filing of a bond and issuing of a writ of error after the stay has expired will not discharge a levy on the execution issued after such expiration.—Peterson v. Carpenter (Mich.) 487.

Property of the debtor sold for less than the amount of the execution, and redeemed, could be resold under the same judgment.—Scaman v. Galligan (S. D.) 458.

An execution may issue at any time within 10 years, excluding any time the judgment defendant may have been absent from the state.—Shelden v. Barlow (Mich.) 338.

Right of purchaser at execution sale to a deed, where the levy was excessive, and the execution debtor paid the execution, with costs, before the purchaser tendered the amount of his bid.—Long v. Valleau (Iowa) 195.

Evidence on an issue as to whether the husband cultivated the wife's land for her benefit *held* for the jury.—Hazlitt v. Babcock (Minn.) 971.

A return of nulla bona cannot be attacked on a bill by a judgment creditor based on such return.—William Wright Co. v. Frazer (Mich.) 954.

Under a statute requiring 10 days' notice before an execution sale, a sale on 8 days' notice is void.—Bowman v. Knott (S. D.) 457.

A judgment debtor may move to set aside a return on execution as false.—William Wright Co. v. Frazer (Mich.) 954.

One asking affirmative equitable relief from the sale of his land under a void decree must show an equitable interest.—Hall v. Hooper (Neb.) 33.

EXECUTORS AND ADMINISTRATORS.

See, also, "Wills."
Administrator as trustee, see "Trusts."
Competency of witness in action against administrator, see "Witness."

A debt secured by a mechanic's lien need not be presented to the administrator for allowance.—Fish v. De Laray (S. D.) 465.

Unless a deficiency exists after foreclosure sale, the mortgage debt need not be presented to the administrator of the deceased mortgagor.—Kelsey v. Welch (S. D.) 390.

Claims for taxes, which Code, § 2420, requires executor to pay, need not be filed.—Findley v. Taylor (Iowa) 744.

Under Act 20th Gen. Assem. c. 194, § 1, one acquiring title to land from the devisee may enforce payment of taxes due at the death of testatrix against her estate.—Findley v. Taylor (Iowa) 744.

Evidence, in an action against a surviving husband on his wife's note, *held* admissible, he having appropriated her estate without administration.—Leipird v. Stotler (Iowa) 150.

An administrator was properly charged with interest on the funds in his hands for failing to invest the same.—In re Young's Estate (Iowa) 163.

It was not error to refuse to allow an administrator extra compensation for extraordinary services rendered to the estate, where he was not charged with compound interest for failing to invest the funds.—In re Young's Estate (Iowa) 163.

The proceeds of the sale by a legatee of his interest in an unsettled estate do not become assets of the estate, nor subject to its debts.—Ristine v. Kurtz (Iowa) 185.

The purchase by an executrix of land of her decedent at executor's sale renders the sale void-

able, but not void.—Melms v. Pabst Brewing Co. (Wis.) 518.

Evidence examined, and *held*, that one having a claim against an estate was not guilty of laches, so as to render the sale of the land for debts inequitable.—Flood v. Strong (Mich.) 473.

EXEMPTIONS.

See, also, "Homestead."
From liability for special assessment, see "Municipal Corporations."

Under Comp. Laws, § 5127, a watch owned by the debtor, and carried for three years, is exempt as wearing apparel.—Brown v. Edmonds (S. D.) 310.

Under How. Ann. St. § 7690, the officer may make the selection if the execution debtor is absent.—Murphy v. Mulvena (Mich.) 224.

To obtain exemption, under How. Ann. St. § 7686, subd. 8, the execution defendant must show in what business he is engaged.—Murphy v. Mulvena (Mich.) 224.

A levying officer who refuses to cause to be appraised the property claimed under Code Civ. Proc. § 522, as exempt, but sells the same, is liable for conversion.—Daley v. Peters (Neb.) 862.

Expert Testimony.

See "Evidence."

Ex Post Facto Law.

See "Constitutional Law."

EXTRADITION.

A fugitive surrendered by one state may be prosecuted in the latter for any extraditable offense.—In re Petry (Neb.) 308.

Factorizing Process.

See "Garnishment."

FACTORS AND BROKERS.

See, also, "Principal and Agent."
Parol evidence to vary contract for commissions, see "Evidence."

A broker who sells a farm at a price fixed by the owner *held* entitled to commission, though employed without pay by the purchaser to buy it.—Donohue v. Padden (Wis.) 804.

The power of an agent to execute a contract for the sale of land may be shown by letters and telegrams from his principal.—Farrell v. Edwards (S. D.) 812.

FALSE IMPRISONMENT.

A complaint and warrant valid on their face protect the officer making the arrest from liability for false imprisonment.—Schultz v. Huebner (Mich.) 57.

A complaint and warrant sufficient to protect the officer making an arrest will exempt the complaining witness from liability for false imprisonment.—Schultz v. Huebner (Mich.) 57.

FALSE PRETENSES.

See, also, "Deceit"; "Fraudulent Conveyances."

A nonnegotiable draft is property, within Code, § 4073.—State v. Patty (Iowa) 727.

Fees.

Of attorney, see "Attorney and Client."

Fellow Servant.

See "Master and Servant."

Feme Covert.

See "Husband and Wife."

FENCES.

Where defendant's team ran away and destroyed a gate at a farm crossing, defendant was not liable, under Rev. St. § 1811, for "willfully" taking down a fence or cattle guard.—Oeflein v. Zautcke (Wis.) 108.

Filing.

Indictment, see "Indictment and Information."

Fire Insurance.

See "Insurance."

Fires.

Set by locomotive, see "Railroad Companies."

FISHERIES.

Acts for preservation of fish, see "Constitutional Law."

Persons maintaining dams in streams must also maintain fishways.—West Point Water Power & Land Imp. Co. v. State (Neb.) 6.

FORCIBLE ENTRY AND DETAINER.

Petition which alleges an express agreement to quit a farm at a stated time, is not demurrable because it does not show that notice to quit fixed the time at March 1st, as required by McClain's Code, § 3190.—Waller v. Vermitt (Iowa) 763.

Foreclosure.

Of mortgage, see "Chattel Mortgages"; "Mortgages."

Foreign Judgment.

See "Judgment."

Forfeiture.

Of corporate franchise, see "Corporations."
Of homestead, see "Homestead."

Forgery.

Validity of forged mortgage, see "Mortgages."

Franchise.

Of corporation, see "Corporations."

FRAUD.

See, also, "Deceit"; "Fraudulent Conveyances."
As ground for attachment, see "Attachment."
—— for cancellation of contract, see "Equity."

As ground for rescission of sale, see "Sale."
Effect on running of limitations, see "Limitation of Actions."

In pleading fraud, it is necessary to set out the facts relied on.—Crosby v. Ritchey (Neb.) 1005.

FRAUDS, STATUTE OF.

A parol contract *held* sufficiently performed to be taken out of the statute of frauds.—Sigler v. Sigler (Mich.) 489.

A promise to indemnify a fidelity insurance company against loss by becoming responsible for another's faithful performance is not within the statute.—Fidelity & Casualty Co. of New York v. Lawlor (Minn.) 143.

An executed verbal agreement to surrender a written lease is not within the statute.—Goldsmith v. Darling (Wis.) 397.

A contract is not within the statute of frauds because it may, or probably will, not be performed within a year.—Carter White-Lead Co. v. Kinlin (Neb.) 536.

Agreement for sale of real property, signed by agent whose sole authority rests in parol, is within the statute.—Baldwin v. Schiappacasse (Mich.) 1091.

Equity will give effect to a parol grant of an easement if based on a valid consideration, and if part performed.—Gilmore v. Armstrong (Neb.) 998.

FRAUDULENT CONVEYANCES.

See, also, "Assignment for Benefit of Creditors."

Where mortgaged property was conveyed in fraud of creditors, and the grantee paid the mortgage, he was entitled to hold the land as security.—Leqve v. Stoppel (Minn.) 208.

A decree setting aside a deed of a decedent as in fraud of creditors should be conditioned on the nonpayment of the claims against the estate.—Reed v. Jourdan (Mich.) 947.

In a suit by an executor to set aside a voluntary deed by his testator, the defense that only two commissioners passed on the claims allowed is not available unless pleaded. — Reed v. Jourdan (Mich.) 947.

Evidence *held* to show a valid consideration for a conveyance by a father to a son.—Leqve v. Stoppel (Minn.) 208.

Evidence *held* to justify a finding that the grantee knew that the conveyance was in fraud of creditors.—Leqve v. Stoppel (Minn.) 208.

Question of fraudulent agreement not to record chattel mortgage *held* to have been properly submitted to jury.—Kohn v. Johnston (Iowa) 76.

What constitutes.

A chattel mortgage covering after-acquired property is good as against creditors of the mortgagor.—Louden v. Vinton (Mich.) 222.

Evidence *held* sufficient to show that there was no immediate delivery and change of possession, within Comp. Laws, § 4657.—Howard v. Dwight (S. D.) 935.

A mortgage whereby the mortgagor retains possession, with power to use the proceeds of the property in his business, *held* void as to creditors.—Pierce v. Wagner (Minn.) 977.

A presumption of bad faith from continued possession of the mortgagor obtains in favor of creditors and purchasers only.—Hazlitt v. Babcock (Minn.) 971.

Evidence examined and *held* that a conveyance was made in good faith, and without intent to hinder or delay creditors.—Leqve v. Stoppel (Minn.) 124.

That a mortgage was given for a greater amount than was due does not conclusively show that it was fraudulent. — Louden v. Vinton (Mich.) 222.

A mortgage to secure a bona fide debt of a son, executed as a preference in case of the future insolvency of the mortgagor, is not fraudulent as to the mortgagor's creditors.—Webber v. Webber (Mich.) 960.

A conveyance for value, and in part to secure payment of a debt, *held* valid.—Goldsmith v. Erickson (Neb.) 1029.

Where a debtor sells his homestead, and pays his debts from the purchase money, there is no fraud shown.—Wheeler & Wilson Manuf'g Co. v. Bjelland (Iowa) 885.

A mortgage of a debtor's entire property to secure a debt is valid, though shortly thereafter the debtor makes a general assignment.—Roberts v. Press (Iowa) 756.

A mortgage of a debtor's entire stock to a creditor not knowing of any intent to defraud *held* valid.—Roberts v. Press (Iowa) 756.

The fact that a partnership sells its property to one of small means for notes and a small amount of cash *held* evidence of fraud.—Nebraska Moline Plow Co. v. Klingman (Neb.) 1101.

Where a husband conveys property to his wife, the moving cause being to place it beyond the reach of his creditors, it will be subjected to judgment against him.—Ryan v. Meyer (Mich.) 667.

Advance of money by wife to husband, furnished at different times, without agreement for repayment, and partly used for the support of the family, is not a valid consideration for the conveyance of real estate.—Carbiener v. Montgomery (Iowa) 900.

Conveyance with intent to hinder, delay, and defraud creditors is invalid as to subsequent creditors. — Carbiener v. Montgomery (Iowa) 900.

Where the tort which is the basis of plaintiff's claim was committed prior to the conveyance, plaintiff's right of action accrued prior to the execution of the deed. — Carbiener v. Montgomery (Iowa) 900.

A conveyance by an insolvent husband to his wife *held* not fraudulent because inadvertently unrecorded. — Michigan Trust Co. v. Adams (Mich.) 1094.

Permission to the mortgagor to sell in the usual course of trade does not invalidate the mortgage.—Louden v. Vinton (Mich.) 222.

Evidence *held* to sustain a finding that the conveyance was not fraudulent.—May v. Hoover (Neb.) 1134.

Whether a transfer is in fraud of creditors *held* a question for the jury. — Goldsmith v. Erickson (Neb.) 1029.

Game Laws.

See "Constitutional Law."

GARNISHMENT.

See, also, "Attachment"; "Execution"; "Exemptions."
Of receiver, see "Receivers."

Defendant who has recovered judgment against plaintiff may garnish, under 3 How. St. § 8058.—Esler v. Adsit (Mich.) 483.

A garnishee who pays money into court is not liable to the debtor.—Scott v. Kirschbaum (Neb.) 443.

A judgment debtor cannot object to an order requiring the garnishee to pay into court money in which he disclaims interest.—Burnham v. Ramge (Neb.) 277.

Priority between conflicting garnishments determined.—Clark v. Raymond (Iowa) 86.

GOOD WILL.

Assignor of lease with "good will of the trade" may again engage in the same business in the vicinity.—Findlay v. Carson (Iowa) 759.

Government.

See "States and State Officers."

GRAND JURY.

Grand juries organized under Code 1873, c. 10, for the year 1895, constituted the grand jury for the entire year.—State v. Graff (Iowa) 779.

GUARANTY.

See, also, "Indemnity."

Evidence of custom, see "Custom and Usage."

An agreement to pay for property shipped to another *held* a guaranty of payment.—Weikle v. Minneapolis, St. P. & S. S. M. Ry. Co. (Minn.) 963.

A written guaranty *held* to authorize credit to the extent of $100 and no more.—Historical Pub. Co. v La Vaque (Minn.) 1150.

Delivery of goods in accordance with the terms of a guaranty of payment for them is essential to liability of guarantor.—Springer Lithographing Co. v. Graves (Iowa) 66.

Extension of debt releases guarantor, unless affirmatively shown to have been with his consent.—Springer Lithographing Co. v. Graves (Iowa) 66.

Urging creditor to give debtor "time and opportunity to pay," and a "reasonable chance" to pay, an account, is not a consent to the taking of a note afterwards extending payment six months.—Springer Lithographing Co. v. Graves (Iowa) 66.

GUARDIAN AND WARD.

A guardian *held* not entitled to the custody of a child where it did not appear that his petition was made in good faith.—In re Clancy (Mich.) 341.

The failure of the guardian to properly protect the ward's rights is sufficient proof of "unsuitability," within Comp. St. c. 34, § 28, to justify removal.—Crooker v. Smith (Neb.) 19.

One who loaned money to a guardian on a void mortgage was not entitled to a decree against the wards for money expended on their property, in the absence of a showing that the guardian was insolvent.—Kelsey v. Welch (S. D.) 390.

HABEAS CORPUS.

A petition for habeas corpus must show probable cause for issuing the writ.—Hoskins v. Baxter (Minn.) 969.

Errors in a criminal prosecution cannot be taken advantage of on habeas corpus.—In re Petry (Neb.) 308.

Handwriting.

Proof of, see "Evidence."

Harmless Error.

See "Appeal."

HEALTH.

Under Rev. St. § 1411, a town health officer cannot sue in his own name to enjoin the maintenance of a nuisance.—Buckstaff v. City of Oshkosh (Wis.) 707.

HIGHWAYS.

Dedication of, see "Dedication."

What constitutes a public highway by user.—Alton v. Meeuwenberg (Mich.) 571.

An instruction on the character and extent of the statutory labor required to be done on land dedicated by the owner for a highway, to constitute an acceptance thereof, *held* proper.—Alton v. Meeuwenberg (Mich.) 571.

A petition is not essential to confer jurisdiction on a county board to open a section-line road, under Comp. St. c. 78, § 46.—Barry v. Deloughery (Neb.) 410; Oyler v. Ross (Neb.) 1099.

An order of the county board instructing the county clerk to cause a section-line road to be surveyed *held* not an order for the opening of the road, within Comp. St. c. 78, § 46.—Oyler v. Ross (Neb.) 1099.

City *held* not to have acquired by user a strip of land claimed as a part of a public avenue.—Leonard v. City of Detroit (Mich.) 488.

The county board may, in one proceeding, open roads on different section lines.—Barry v. Deloughery (Neb.) 410.

A finding that the public good requires the opening of a road is not a prerequisite to the opening thereof.—Barry v. Deloughery (Neb.) 410.

Under an indictment averring generally the obstruction of a highway, evidence of an establishment either by dedication or prescription is admissible.—State v. Teeters (Iowa) 754.

Evidence of knowledge of the owner of lands of the use by the public of a highway *held* sufficient to show establishment by prescription.—State v. Teeters (Iowa) 754.

An admission that defendant placed an obstruction across the road is an admission of a willful obstruction under Code, § 3979.—State v. Teeters (Iowa) 754.

That a railroad company operates its road over a public highway is no defense for obstructing the highway by cars by an abutting owner thereof.—Jenks v. Lansing Lumber Co. (Iowa) 231.

An obstruction of a highway is not excused because done in the conduct of a business on land abutting thereon.—Jenks v. Lansing Lumber Co. (Iowa) 231.

A village, after dedicating, for a highway, land which was purchased for another purpose, is bound to keep the same in repair.—Williams v. Village of Petoskey (Mich.) 55.

A county will not be enjoined from constructing a culvert across a highway at the instance of a landowner injured thereby, since damages consequent from such construction are presumed to have been satisfied when the highway was opened.—Churchill v. Beethe (Neb.) 992.

Hiring.

See "Master and Servant."

HOMESTEAD.

Right of divorced woman, see "Divorce."

Where a vendee in possession of a homestead under a contract acknowledges in writing its

forfeiture for nonpayment, such acknowledgment is void, under Code, § 1990.—Lessell v. Goodman (Iowa) 917.

The right of homestead may attach to land in possession of the vendee, though the vendor retains title until payment.—Lessell v. Goodman (Iowa) 917.

A partner cannot, by using as a residence firm property, acquire a homestead therein.—Brady v. Kreuger (S. D.) 1083.

Mere occupancy of homestead by survivor *held* insufficient to constitute an election to retain it in lieu of distributive share in fee.—Stephens v. Hay (Iowa) 1048.

Liability of homestead when mortgage thereon is paid from business assets determined.—Wells v. Anderson (Iowa) 102.

HOMICIDE.

Evidence examined, and *held* to justify a conviction for manslaughter.—State v. Mushrush (Iowa) 746.

Where the evidence shows defendant guilty of murder, if any crime, a charge as to manslaughter need not be given.—People v. Beverly (Mich.) 379.

Nonexperts may testify as to insanity from personal observation.—Hoover v. State (Neb.) 1117.

It is proper to refuse to charge that, if a man is insane, he should be acquitted.—People v. Beverly (Mich.) 379.

Dying declarations considered, and *held* admissible.—People v. Beverly (Mich.) 379.

Declarations *held* admissible as dying declarations.—People v. Weaver (Mich.) 567.

Where defendant is charged with killing his wife, evidence as to her loose character is inadmissible.—People v. Beverly (Mich.) 379.

The fact that defendant was convicted within three weeks after commission of the crime did not show error.—Hoover v. State (Neb.) 1117.

An instruction that the fact that defendant had a former opportunity to murder, and did not avail herself of it, should be considered, is properly refused.—People v. Pope (Mich.) 213.

Evidence of frequent fights, prior to the homicide, between factions to which deceased and defendant belonged, was admissible where it was shown that defendant was present and took part.—State v. Helm (Iowa) 751.

Where the record shows that evidence of threats was used merely to impeach defendant, the failure of the court to limit its effect to impeachment was not reversible error.—State v. Helm (Iowa) 751.

Error in admitting improper evidence *held* cured by instructions withdrawing it from the jury.—State v. Helm (Iowa) 751.

HORSE AND STREET RAILROADS.

See, also, "Carriers"; "Railroad Companies."

Whether the attempt to board a moving car is negligence *held* question for the jury.—Omaha St. Ry. Co. v. Martin (Neb.) 1007.

Location of street railway at the intersection of two streets meeting at an acute angle determined.—Kennedy v. Detroit Ry. (Mich.) 495.

Abutting owners may require that a street railway be laid in the center of the street, as required by the ordinance.—Kennedy v. Detroit Ry. (Mich.) 495.

Street-railroad franchise construed, and *held*, that the company was bound to repave between the tracks with same material used by the city in the new pavement.—City of Lansing v. Lansing City Electric Ry. Co. (Mich.) 949.

HUSBAND AND WIFE.

See, also, "Divorce"; "Homestead."

Competency of wife to testify, see "Witness."

A husband separated from his wife *held* not liable for necessaries for the wife's children by a former husband.—Menefee v. Chesley (Iowa) 1038.

An insolvent debtor may, as against his creditors, employ his time in aiding his wife to carry on a business owned by her so that the accumulations will belong to her.—Shelden v. Shattuck (Mich.) 220.

Hypothetical Questions.

See "Evidence."

Impeachment.

Of witness, see "Witness."

Implied Contract.

See "Assumpsit."

INDEMNITY.

One indemnifying a corporation against embezzlement by its treasurer is not liable for moneys intrusted to him, and on which he paid the corporation interest.—Milwaukee Theater Co. v. Fidelity & Casualty Co. (Wis.) 360.

Petition *held* to state a cause of action against sureties on a bond to secure plaintiff against negligence.—Union Stock-Yards Co. v. Westcott (Neb.) 419.

Where a person standing as surety for the payment of a debt receives a note for his indemnity, the principal creditor is entitled to enforce such note as against the debtors.—Steere v. Trebilcock (Mich.) 342.

Independent Contractors.

See "Master and Servant."

INDICTMENT AND INFORMATION.

See, also, "Burglary"; "Libel and Slander."

For illegally selling liquors, see "Intoxicating Liquors."

Review of refusal to quash, see "Certiorari."

An information for felony is void if filed in vacation.—In re Vogland (Neb.) 1028.

Under the statute, an indictment is not fatally defective because it states incorrectly the name of one of the persons from whom the property is charged to have been stolen.—State v. Hall (Iowa) 725.

Under Code, § 4302, a mistake in an indictment for burglary as to the name of the owner of the building is immaterial.—State v. Porter (Iowa) 745.

A plea in abatement *held* not sustained by the fact that a word in an information was purposely interlined.—Hoover v. State (Neb.) 1117.

Dying declaration is not within the statute requiring names of witnesses to be indorsed on information.—People v. Beverly (Mich.) 379.

Evidence *held* not to show that a proposed substitute for a lost indictment was a substantial copy.—State v. Thomas (Iowa) 743.

Where an information charges the breaking or entering the building of H. & S., evidence that the building was owned by S. constitutes no variance.—State v. La Croix (S. D.) 944.

Indorsement.

On negotiable instrument, see "Negotiable Instruments."

Information.

See "Indictment and Information."

INJUNCTION.

Against collection of school tax, see "Schools and School Districts."
—— collection of tax, see "Taxation."
—— interference with easement, see "Easements."
—— judgment, see "Judgment."
—— nuisance, see "Nuisance."
—— pollution of streams, see "Waters and Water Courses."
Appealable orders, see "Appeal."

The motive of one applying for injunction is immaterial.—Jacobson v. Van Boening (Neb.) 993.

A hearing on a first petition for injunction *held* not a hearing on motion to dissolve within Code, § 3402, providing that but one such motion shall be allowed.—Hinkle v. Saddler (Iowa) 765.

After the writ had been issued and served, *held* that the suit did not so abate on the death of one defendant as to purge a co-defendant of contempt for previous act in violation of the injunction.—Smith v. Waalkes (Mich.) 679.

Where all the facts are known, and the defense is purely a question of law, court need not order a reference before disposing of contempt proceedings.—Smith v. Waalkes (Mich.) 679.

For damages, plaintiff makes out a prima facie case by establishing the dissolution of temporary injunction and dismissal of original suit, and defendant must show that the injunction was rightfully issued.—Findlay v. Carson (Iowa) 759.

Rights enforced and wrongs prevented.

An injunction *held* properly issued, though actual injury before suit brought was not shown.—Jacobson v. Van Boening (Neb.) 993.

Injunction will lie to prevent the breach of an agreement of a judgment creditor to levy first on property of one debtor before resorting to that of the other.—Gibson v. McClay (Neb.) 851.

Equity will not interfere to assist by injunction a party obtaining possession by force.—De Sale v. Millard (Mich.) 481.

The refusal of an injunction against the obstruction of a street is in the discretion of the court.—Jenks v. Lansing Lumber Co. (Iowa) 231.

Violation of a restriction in a deed *held* properly enjoined.—Reilly v. Otto (Mich.) 228.

Injunction will lie to restrain the wrongful flowing of plaintiff's land, though defendant is responsible financially.—Holmes v. Calhoun County (Iowa) 145.

Injunction will issue to restrain the discharge of surface water by an adjoining proprietor when the injury is continuing.—Jacobson v. Van Boening (Neb.) 993.

A county may be enjoined from maintaining a drain on a highway to the injury of a landowner by discharging surface water on his premises.—Holmes v. Calhoun County (Iowa) 145.

Evidence *held* not to justify an injunction restraining the maintenance of a ditch on plaintiff's land.—Gilmore v. Armstrong (Neb.) 998.

Pleading and evidence.

The fact that a threatened injury was also threatened by one other than defendant was no defense.—Jacobson v. Van Boening (Neb.) 993.

Bill *held* sufficient to entitle complainant to relief by injunction.—Smith v. Waalkes (Mich.) 679.

A refusal to grant a third suspension of an injunction *held* proper.—Michigan Land & Iron Co. v. Cleveland Sawmill & Lumber Co. (Mich.) 953.

INSANITY.

As a defense in homicide cases, see "Homicide."
Of grantor as ground for cancellation of deed, see "Equity."
Testamentary capacity, see "Wills."

A deed of one who had been declared insane and under guardianship, made after he was in fact of sound mind, when the contract was fair, and the guardianship had been practically abandoned, *held* valid.—Thorpe v. Hanscom (Minn.) 1.

INSOLVENCY.

See, also, "Assignment for Benefit of Creditors"; "Fraudulent Conveyances."
Of bank, see "Banks and Banking."
Of corporation, see "Corporations."

The insolvent law of 1881 applies to private corporations.—Yanish v. Pioneer Fuel Co. (Minn.) 198.

Passive as well as active preferences are forbidden by the insolvency law of 1881.—Yanish v. Pioneer Fuel Co. (Minn.) 198.

A secured creditor who improperly realized on his security *held* not entitled to have his claim allowed.—In re Skoll (Minn.) 986; Swedish Nat. Bank of Minneapolis v. Davis, Id.

A secured creditor could file his claim and have the amount thereof determined before he exhausted his security.—In re Skoll (Minn.) 986; Swedish Nat. Bank of Minneapolis v. Davis, Id.

Instructions.

See "Criminal Law"; "Trial."

INSURANCE.

Taxation of title insurance company, see "Taxation."

A corporation guarantying merchants against loss from sales on credit *held* an insurance company within Rev. St. §§ 1977, 1978.—Shakman v. United States Credit System Co. (Wis.) 528.

The contract.

A contract of life insurance will be construed most strongly against the insurer.—Goodwin v. Provident Sav. Life Assur. Soc. (Iowa) 157.

A reinstatement of the policy is not the making of a new contract.—Goodwin v. Provident Sav. Life Assur. Soc. (Iowa) 157.

Policy of life insurance examined and *held* a continuing policy.—Goodwin v. Provident Sav. Life Assur. Soc. (Iowa) 157.

Carrier may insure against loss of goods carried occasioned by negligence of its servants.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co. (Minn.) 132.

Contract guarantying losses from sales on credit construed, and liability of insurer determined.—Shakman v. United States Credit System Co. (Wis.) 528.

Terms of a title insurance policy construed, and *held*, that the insurer, if it undertook to defend the insured's title, was bound to protect it through all stages of the litigation against it, or notify the insured of its abandonment.—Quigley v. St. Paul Title Insurance & Trust Co. (Minn.) 364.

Life policy construed, and *held*, that on making a surrender for the cash value the receipt should be signed by the insured and the beneficiaries.—Lockwood v. Michigan Mut. Life Ins. Co. (Mich.) 229.

Application.

Where the provisions of a policy and the statements in the application are conflicting, the former controls.—Goodwin v. Provident Sav. Life Assur. Soc. (Iowa) 157.

Misrepresentations as to other insurance *held* not to invalidate the policy.—State Ins. Co. v. New Hampshire Trust Co. (Neb.) 9.

The rights of a mortgagee to whom the insurance money was payable *held* not defeated by misrepresentations of the mortgagor.—State Ins. Co. v. New Hampshire Trust Co. (Neb.) 9.

When the application and the policy bear the same date, it is presumed that the officers of the company at its home office in another state were not influenced by misrepresentations in the application.—State Ins. Co. v. New Hampshire Trust Co. (Neb.) 9.

Where an applicant for accident insurance truthfully states his calling, it is no defense to an action on the policy that the applicant was improperly classified.—Emlaw v. Travelers' Ins. Co. (Mich.) 469.

Conditions of policy.

Failure to occupy a house for seven days, in violation of a provision in the policy, justifies directing a verdict for defendant in a suit on the policy.—Thompson v. Caledonia Fire Ins. Co. (Wis.) 801.

Proofs of loss examined, and *held* not to show an admission that the property was unoccupied, within the terms of the policy, providing that in such case it should be void.—Hanover Fire Ins. Co. v. Parrotte (Neb.) 636.

Life insurance policy construed, and *held*, that by failure to pay premium for the third year, and giving a note therefor, insured could not recover the surrendered value at the end of the third year.—Kinne v. Michigan Mut. Life Ins. Co. (Wis.) 359.

Evidence on an issue whether insured owned the property *held* for the jury.—Oakland Home Fire Ins. Co. v. Bank of Commerce (Neb.) 646.

Sale by insured of damaged goods before adjustment *held* a breach of the policy.—Oshkosh Match Works v. Manchester Fire Assur. Co. (Wis.) 525.

Insurance company which acts on two applications, and issues policies thereon, is estopped from denying their validity on the ground that the second application contained the printed clause, "I have no other insurance in this company."—Emlaw v. Travelers' Ins. Co. (Mich.) 469.

Contracting for other insurance, without consent in writing, *held* to avoid the policy.—O'Leary v. Merchants' & Bankers' Mut. Ins. Co. (Iowa) 175.

A provision that the policy should not take effect until advance premiums were paid *held* to have been rendered nugatory by permitting the agent to collect such premiums.—Pythian Life Ass'n v. Preston (Neb.) 445.

A shed, a part of a store when its contents are insured, does not cease to be a part of it by being moved back, and left standing three feet from a new addition, to which it is joined by a platform nailed to both, its use being the same.—Gross v. Milwaukee Mechanics Ins. Co. (Wis.) 712; Same v. Western Assur. Co., Id.

Evidence examined, and *held*, that the vendee of personalty in a bill of sale given to secure a debt was sole owner, within the terms of the policy.—Carey v. Liverpool & London & Globe Ins. Co. (Wis.) 693; First Nat. Bank v. Same, Id.

A stipulation for arbitration *held* revocable.—Home Fire Ins. Co. v. Kennedy (Neb.) 278.

A dissolution of a firm, whereby one partner remains in possession, giving his notes to the retiring partner, *held* a breach of a condition against change of possession.—Jones v. Phœnix Ins. Co. (Iowa) 169.

Life policy construed, and *held* that the company was liable for death by suicide two years from the date of the policy.—Goodwin v. Provident Sav. Life Assur. Soc. (Iowa) 157.

—— Waiver.

Evidence considered and *held* that defendant's adjuster had authority to waive a breach of condition against incumbrances.—First Nat. Bank of Devils Lake v. Manchester Fire Assur. Co. (Minn.) 136

Provision for forfeiture for breach of condition against incumbrances *held* waived.—First Nat. Bank of Devils Lake v. Manchester Fire Assur. Co. (Minn.) 136.

By denying its liability for forfeiture of the policy the company waived the right to insist on arbitration.—Home Fire Ins. Co. v. Kennedy (Neb.) 278.

By treating the policy as valid after breach of condition defenses based on the breach were waived.—Home Fire Ins. Co. v. Kennedy (Neb.) 278.

Examination of loss *held* not a waiver of breach of policy.—Oshkosh Match Works v. Manchester Fire Assur. Co. (Wis.) 525.

Parol waiver by agent of conditions of policy *held* void.—Oshkosh Match Works v. Manchester Fire Assur. Co. (Wis.) 525.

Proof and payment of loss.

The policy is prima facie an admission of title in insured.—Farmers' & Merchants' Ins. Co. v. Peterson (Neb.) 847.

Statements made by an insured in proofs of loss *held* not to constitute an attempted fraud by false swearing.—Carey v. Home Ins. Co. (Iowa) 920.

Where proof of death is expressly waived, it is an unreasonable requirement to demand that the beneficiary shall make such proof.—Fillmore v. Great Camp of the Maccabees of Michigan (Mich.) 675.

Under McClain's Code, § 1734, the amount named in the policy is prima facie evidence of the value of the building, though proofs of loss are waived.—Scott v. Security Fire Ins. Co. (Iowa) 1054.

Evidence *held* to show a waiver of written proofs of loss.—Scott v. Security Fire Ins. Co. (Iowa) 1054.

Evidence *held* to sustain a finding that the company waived proofs of loss.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co. (Minn.) 132.

A denial of liability by an insurance company during the time for filing proofs of loss is a waiver of such proofs.—Gross v. Milwaukee Mechanics Ins. Co. (Wis.) 712; Same v. Western Assur. Co., Id.

Evidence *held* to show a waiver of the 60-day limit for furnishing proofs of loss.—McCarvel v. Phenix Ins. Co. (Minn.) 367.

The mortgagee's right under the subrogation clause *held* not affected by a transfer by the mortgagor.—Oakland Home Fire Ins. Co. v. Bank of Commerce (Neb.) 646.

Agents.

If the agent of an insurance company states the title to property incorrectly in writing the policy, when he has been advised by the application of its true condition, the company is estopped to defend against the policy because of the misstatement.—Carey v. Home Ins. Co. (Iowa) 920.

Where a policy of insurance is issued on an oral application, the company is charged with knowledge of facts stated to its agent.—Carey v. Home Ins. Co. (Iowa) 920.

Authority of agent of a corporation guarantying losses from sales on credit determined.—Shakman v. United States Credit System Co. (Wis.) 528.

Notice of change in the address of the insured given to an agent *held* notice to the company.—Goodwin v. Provident Sav. Life Assur. Soc. (Iowa) 157.

Actions on policies.

Whether one is totally disabled from following any avocation is for the jury.—Starling v. Supreme Council Royal Templars of Temperance (Mich.) 340.

Where a title insurance company gives notice of an abandonment of a defense in a litigation against the title, and afterwards defends the insured, the notice is withdrawn.—Quigley v. St. Paul Title Insurance & Trust Co. (Minn.) 364.

Verdict fixing value of building *held* not excessive.—Scott v. Security Fire Ins. Co. (Iowa) 1054.

A judgment against the company for its proportion of the loss *held* proper.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co. (Minn.) 132.

—— Pleading and evidence.

A complaint on a policy insuring a carrier against loss on a shipment of grain *held* to state a cause of action.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co. (Minn.) 132.

The petition in an action on a policy need not show that the property has not been incumbered by insured.—Farmers' & Merchants' Ins. Co. v. Peterson (Neb.) 847.

A reply in an action on a policy *held* not a departure.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co. (Minn.) 132.

A reply *held* to admit the provision in the policy for forfeiture if the property should be incumbered, but not to admit the signing of the application, or the mortgaging of the property.—Farmers' & Merchants' Ins. Co. v. Peterson (Neb.) 847.

In an action at law, whether a verbal contract of insurance was made is to be determined by a preponderance of the evidence.—Farmers' Co-operative Soc. of Geneva v. German Ins. Co. (Iowa) 878.

Defendant having alleged that the misrepresentations were contained in the application, it could not prove oral misrepresentations.—Bankers' Life Ass'n v. Lisco (Neb.) 412.

Where a copy of the application for reinstatement attached to the policy omits the examiner's report, it is inadmissible in evidence, under McClain's Code, § 1733.—Goodwin v. Provident Sav. Life Assur. Soc. (Iowa) 157.

The burden is on a life insurance company to show the amount of the premium unpaid, where the knowledge thereof rests with the company.—Goodwin v. Provident Sav. Life Assur. Soc. (Iowa) 157.

Evidence *held* to sustain a finding that the fire which caused the loss was due to negligence of plaintiff.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co. (Minn.) 132.

When evidence of cost of building is admissible to show its value at the date of the fire.—Scott v. Security Fire Ins. Co. (Iowa) 1054.

Mutual benefit insurance.

An assessment of a mutual benefit association ordered by less than a quorum of the trustees *held* validated by the approval of the minutes at a full meeting.—Wolf v. Michigan Masonic Mut. Ben. Ass'n (Mich.) 576.

Mutual Benefit Society cannot change its certificate of insurance without member's express consent.—Starling v. Supreme Council Royal Templars of Temperance (Mich.) 340.

Member *held* authorized to pay assessments to grand lodge.—Starling v. Supreme Council Royal Templars of Temperance (Mich.) 340.

Notice of assessments of a mutual benefit association *held* valid.—Wolf v. Michigan Masonic Mut. Ben. Ass'n (Mich.) 576.

Beneficiaries under certificate of a mutual benefit association *held* not entitled to recover on death of the insured by suicide.—McCoy v. Northwestern Mutual Relief Ass'n (Wis.) 697.

A benefit association *held* not estopped from pleading death by suicide as a forfeiture of the contract.—McCoy v. Northwestern Mutual Relief Ass'n (Wis.) 697.

A beneficiary of a mutual benefit association must exhaust her remedy under the by-laws before seeking relief in court.—Fillmore v. Great Camp of the Maccabees of Michigan (Mich.) 675.

INTEREST.

See, also, "Usury."

Liability of administrator, see "Executors and Administrators."

Rate of interest on university funds, established by How. St. §§ 5360, 5361, *held* not affected by a subsequent modification of the usury law changing the legal rate.—Regents of University of Michigan v. Auditor General (Mich.) 956.

On recovery of damages for illegally cutting timber, under Sanb. & B. Ann. St. § 4269, it is error to allow interest.—Everett v. Gores (Wis.) 616.

Where a mortgagee for default declares the whole amount due within the first two years of a mortgage bearing 7 per cent. for two years and 10 per cent. thereafter, the decree should allow interest at 7 per cent.—Shelden v. Barlow (Mich.) 338.

When interest on note dated June 19th *held* to mature on June 19th in each year after the date.—Jurgensen v. Carlsen (Iowa) 877.

Interpretation.

Of contracts, see "Contracts."

Interrogatories.

See "Trial."

Intervention.

In attachment, see "Attachment."
In replevin, see "Replevin."

Intestacy.

See "Executors and Administrators."

INTOXICATING LIQUORS.

Contract for illegal sale, public policy, see "Contracts."

Under Acts 25th Gen. Assem. c. 62, a tax for the privilege of selling liquors does not create a lien superior to a prior mortgage.—Smith v. Skow (Iowa) 893.

There is no conflict between the power conferred by a city charter to prohibit and suppress saloons and the prohibitory liquor law.—City of Yankton v. Douglass (S. D.) 923.

A license cannot be granted without payment in full of the prescribed fee.—Fry v. Kaessner (Neb.) 1126.

A petition for liquor license which contains a description of the premises indicating the exact location is sufficient.—Waugh v. Graham (Neb.) 301.

Criminal prosecution.

A complaint under a city ordinance for keeping a saloon *held* sufficient.—City of Yankton v. Douglass (S. D.) 923.

An information under Comp. St. c. 50, § 20, *held* to charge a single offense.—Hornberger v. State (Neb.) 23

A sale having been proved, the burden is on accused to show that he had a license.—Hornberger v. State (Neb.) 23.

Until an ordinance is adopted liquors cannot be sold within cities and villages.—Hornberger v. State (Neb.) 23.

Unlawful intent with which liquor is kept may be presumed from unlawful sale.—Hornberger v. State (Neb.) 23.

Evidence *held* sufficient to show an illegal sale without evidence that defendants were not registered druggists.—People v. Knopf (Mich.) 951.

Evidence examined, and *held* to authorize a conviction for keeping a saloon open illegally.—People v. Whipple (Mich.) 490.

Sufficiency of the evidence to sustain a conviction for maintaining a liquor nuisance.—State v. Cleary (Iowa) 724.

Issues.

See "Pleading"; "Trial."

Joinder.

Of causes of action, see "Action."

Judge.

See "Courts"; "Justices of the Peace."
Mandamus to, see "Mandamus."
Misconduct of judge, see "Trial."
Remarks by, see "Criminal Law."

JUDGMENT.

Alternative judgment in replevin, see "Replevin."
Appealable judgment, see "Appeal."
Decision on appeal, see "Appeal."
Form of decree in specific performance, see "Specific Performance."
In criminal cases, see "Criminal Law."
Mandamus to compel county to pay judgment, see "Mandamus."
Validity of justice's judgment, see "Justices of the Peace."

A judgment will be enjoined only when it appears inequitable.—Norwegian Plow Co. v. Bollman (Neb.) 292.

When bill in equity to obtain a new trial, and for relief against a judgment, not entertained.—Codde v. Mahiat (Mich.) 1093.

In a suit to set aside a judgment rendered by a justice without jurisdiction, plaintiff need not show that he was not indebted.—Henkle v. Holmes (Iowa) 910.

It is error to grant a judgment notwithstanding the verdict, under Laws 1895, c. 320, unless the moving party made a motion to direct a verdict in his favor at the close of the testimony.—Hemstad v. Hall (Minn.) 366.

An order granting a motion for judgment notwithstanding the verdict *held* erroneous.—Hemstad v. Hall (Minn.) 366.

The objection that an action on an insurance policy was prematurely brought under the statute may be raised by motion in arrest of judgment, and is not waived because not sooner made.—Woodcock v. Hawkeye Ins. Co. (Iowa) 764.

A decree in Illinois directing assessment against stockholders to pay the liabilities of the corporation, being conclusive in Illinois, *held* conclusive against members in an action in Michigan to recover such assessments.—Mutual Fire Ins. Co. v. Phœnix Furniture Co. (Mich.) 1095.

Inconsistency between a special finding and a general verdict cannot be taken advantage of by motion in arrest.—Moffitt v. Albert (Iowa) 162.

A release of one joint judgment debtor may be shown in an action to enforce the judgment, though the release was not filed, and a discharge entered by the clerk, as permitted by How. St. § 7784.—Beekman v. Sylvester (Mich.) 1093.

By default.

To entitle a party to vacation of a default judgment under Code, § 82, it must appear that he had no actual notice.—Scarborough v. Myrick (Neb.) 867.

Notice of motion to vacate a default judgment was waived by appearance of the adverse party.—Scarborough v. Myrick (Neb.) 867.

To entitle the party to a vacation of a default judgment, under Code Civ. Proc. § 82, it must appear that he had no notice.—Stover v. Hough (Neb.) 825.

On application to open a default judgment, the adverse party may present counter affidavits.—Stover v. Hough (Neb.) 825

A judgment by default will be set aside because of mistake on the part of defendant or in furtherance of justice.—Turner v. Coughran (S. D.) 810.

Rendition and entry.

A judgment *held* not erroneous as being uncertain.—Coad v. Read (Neb.) 1002.

A judgment foreign to the issues joined will be reversed on appeal.—Carter v. Gibson (Neb.) 631.

In an action against joint defendants, judgment must be against all, unless a discontinuance was taken as to some.—Beekman v. Sylvester (Mich.) 1093.

A judgment in foreclosure, and notice of suit within 20 days of the filing of the complaint, is premature.—Gile v. Colby (Wis.) 802.

A partner who is alone served in an action on a firm obligation has a right to a judgment in form against all, so that it may be enforced against the joint property.—Brawley v. Mitchell (Wis.) 799.

Where there arise issues triable by the court and by the jury, it is error to enter a judgment on the equitable issue before the other issues have been tried, under Rev. St. § 2844.—Trustees of St. Clara Female Academy v. Delaware Ins. Co. (Wis.) 1140; Same v. Milwaukee Mechanics' Ins. Co., Id.; Same v.

Northwestern Nat. Ins. Co., Id.; Same v. Rockford Ins. Co., Id.

In an action against a judgment debtor and his grantee to set aside a conveyance as fraudulent, it is error to render a personal judgment against the defendants.—Van Blarcom v. Isaac (Wis.) 617.

After dissolution of corporation after trial and while the case is under advisement, the court can order judgment nunc pro tunc as of the day before such dissolution.—Shakman v. United States Credit System Co. (Wis.) 528.

Under Code Civ. Proc. § 511, a judgment on a bond should state which defendant is principal and which surety.—Van Etten v. Kosters (Neb.) 1106.

Operation and effect.

Sanb. & B. Ann. St. § 2905a, providing that a decree affecting real estate shall be only a lien from the time it is docketed, does not apply to a judgment foreclosing a mortgage.—Huntington v. Meyer (Wis.) 500.

One to whom a dower right before admeasurement is conveyed by quitclaim deed, holds title paramount to the lien of a subsequent judgment against the widow.—Dobberstein v. Murphy (Minn.) 204.

—— Res judicata.

An adjudication affects only those who were parties to the action, or their privies.—Monroe v. Hanson (Neb.) 12.

A former judgment against defendant and in favor of plaintiff considered, and *held* to be a bar.—Veline v. Dahlquist (Minn.) 141.

Remarks of the court at the time the judgment was rendered, not made part of the judgment, *held* not res judicata.—Braun v. Wisconsin Rendering Co. (Wis.) 196.

A judgment establishing a mechanic's lien *held* a bar as against a party thereto in an action by her to litigate the title acquired by one claiming it under a sale under such judgment.—Southard v. Smith (S. D.) 316.

A plea of former adjudication need not confess or acknowledge all the matters set forth in the bill.—Detroit, L. & N. R. Co. v. McCammon (Mich.) 471.

A plea of former adjudication alleging that complainant's bill was dismissed must allege a dismissal on the merits.—Detroit, L. & N. R. Co. v. McCammon (Mich.) 471.

Complaint examined, and plea of former adjudication sustained.—Detroit, L. & N. R. Co. v. McCammon (Mich.) 471.

A question decided on an appeal is res judicata on a second appeal.—Tanderup v. Hansen (S. D.) 1073.

Issues determined in action for damages cannot be relitigated in an action to subject lands to payment of judgment for damages.—Carbiener v. Montgomery (Iowa) 900.

A judgment in an action against an officer for wrongful seizure *held* conclusive of plaintiff's ownership of the property seized in an action against the sureties on the officer's bond.—Lewis v. Mills (Neb.) 817.

An order of United States court, denying a deficiency judgment on foreclosure, *held* to involve the merits of the cause.—Tzschuck v. Mead (Neb.) 428.

Judgment of peremptory nonsuit is not a bar to future action on same cause, nor is refusal to reform a deed conclusive that it is in compliance with the contract of the parties.—Gates v. Parmly (Wis.) 253.

Collateral attack.

A judgment in a foreclosure suit in which lis pendens was not filed as required by statute, though irregular, is good on collateral attack.—Huntington v. Meyer (Wis.) 500.

Action of the court in allowing costs in attachment suit cannot be collaterally attacked in an action on the bond of an intervener.—Gill v. Backus (Mich.) 347.

Opening and vacating.

Setting aside a judgment and quashing the summons irregularly issued approved.—Hyde v. Kent (Neb.) 39.

Equity will not set aside a judgment against a corporation under an unauthorized power of attorney, where the claim is just and equitable.—Ford v. Hill (Wis.) 115.

The district court may, on motion and proof, order a judgment discharged.—Manker v. Sine (Neb.) 840.

Judicial Notice.

See "Evidence."

Judicial Sales.

By executor or administrator, see "Executors and Administrators."

Jurisdiction.

See "Courts."
Of justice, see "Justices of the Peace."
On appeal, see "Appeal."

JURY.

See, also, "Grand Jury."
Misconduct as ground for new trial, see "Criminal Law"; "New Trial."
Province of, question of contributory negligence, see "Carriers."

Where, on failure of a juror to appear after being impaneled and sworn, another juror was selected, a conviction will not be set aside where no prejudice was shown.—State v. La Croix (S. D.) 944.

Discharge of juror before he is sworn for personal reasons, though in the absence of defendant's counsel, is discretionary with the court.—People v. Thacker (Mich.) 562.

Competency of jurors.

Juror who has served on regular panel within a year is incompetent.—People v. Thacker (Mich.) 562.

Juror whose name does not appear on assessment roll is incompetent.—People v. Thacker (Mich.) 562.

Juror *held* to be disqualified by formation of opinion.—People v. Thacker (Mich.) 562.

A juror having formed an opinion *held* not disqualified where he states he could return a fair verdict.—State v. Yetzer (Iowa) 737.

Competency of juror who was present during the trial of a codefendant.—State v. Philpot (Iowa) 730.

Challenges.

Defendant cannot complain that a challenge for cause was improperly refused, where he waived a peremptory challenge.—State v. Yetzer (Iowa) 737.

A question as to whether an indictment would raise the presumption of guilt is not proper on the voir dire examination of a juror.—State v. Cleary (Iowa) 724.

Defendant can question jurors as to their prejudices against the defense of limitations to determine whether to exercise the right of peremptory challenge.—Towl v. Bradley (Mich.) 347.

Right to jury trial.

An answer in an action of foreclosure, pleading payment and the statute of limitations, does

not entitle a defendant to a jury trial.—Leach v. Kundson (Iowa) 913.

A request for a jury trial after plaintiff has closed his evidence, the case being noted for trial by the court, is too late.—Webster v. White (S. D.) 1145.

Defendant in an action by an assignee in insolvency to set aside a preference is not entitled to a jury trial.—Yanish v. Pioneer Fuel Co. (Minn.) 198.

JUSTICES OF THE PEACE.

Appeals from justices, see "Appeal."

Under Rev. St. §§ 3586, 3631, a justice loses jurisdiction by a second adjournment by consent of plaintiff, in the absence of defendant.—Gallager v. Serfling (Wis.) 692.

The omission of the justice to state on whose motion an adjournment was had *held* not to deprive him of jurisdiction.—Wheeler v. Paterson (Minn.) 964.

A default judgment is void where the case was adjourned six days, without the entry stating the place to which it was adjourned.—Fitzhugh v. Rivard (Mich.) 947.

Under Code, § 3552, judgment on a verdict returned at 9 o'clock at night may properly be entered the next morning.—Knox v. Nicoli (Iowa) 876.

The words "judicial duties," in a bond by a justice for the faithful performance of his duty, construed as meaning "official duties."—Larson v. Kelly (Minn.) 130.

Where a justice neglects to enter a judgment within the statutory time, and damages result, the justice and the sureties on his bond are liable therefor.—Larson v. Kelly (Minn.) 130.

An action *held* to be predicated on defendant's official misconduct, and the justice was hence without jurisdiction.—Warren v. Sadilek (Neb.) 15.

Laches.

See "Equity."

LANDLORD AND TENANT.

See, also, "Forcible Entry and Detainer."

Oral agreement to surrender lease, see "Frauds, Statute of."

Assignee of lease takes rights and assumes obligations of the lessee, but cannot, as to his assignor, enforce an obligation between lessor and lessee, which was solely for the lessor's benefit.—Findlay v. Carson (Iowa) 759.

A contract to farm defendant's land, and receive three-fourths of the profits, is one of adventure, and not of hire.—Bowers v. Graves & Vinton Co. (S. D.) 931.

A landlord *held* not bound to pay the lessee for improvements as a condition precedent to his right to terminate the lease.—Estabrook v. Stevenson (Neb.) 286.

Sufficiency of evidence to show that a landlord who had occupied a building jointly with his tenant occupied a greater portion than allotted to him in the lease.—Roach v. Cameron (Iowa) 194

The relation of landlord and tenant *held* not to exist within Laws 1878, c. 466, providing that no lien shall be given when such relation exists.—Bentley v. Adams (Wis.) 505.

LARCENY.

Instruction which failed to define grand and petit larceny *held* to be without prejudice.—State v. Hall (Iowa) 725.

A cornerib of a permanent character *held* a building, within Code, § 3894.—State v. Gibson (Iowa) 742.

Evidence examined, and *held* insufficient to sustain conviction.—State v. Deyoe (Iowa) 733.

Laws.

See "Statutes."

Leases.

See "Landlord and Tenant."

Legacies.

See "Wills."

Legislative Power.

See "Constitutional Law."

Levy.

Of attachment, see "Attachment."
Of execution, see "Execution."

LIBEL AND SLANDER.

An indictment *held* to sufficiently allege the publication of the libel.—Barnum v. State (Wis.) 617.

A verdict of $1,000 in favor of a woman against whom slander was spoken *held* not excessive.—Herzog v. Campbell (Neb.) 424.

What actionable.

It is not libelous to write of an author's theory, "Of course, like all quack remedies, it would intensify the trouble."—Dowling v. Livingstone (Mich.) 225.

It is not libelous to write of one of the author's views that another advocated the same doctrine, though it appear that such was not the case.—Dowling v. Livingstone (Mich.) 225.

When not libelous to write of an author, "He denounces the single-tax scheme as robbery."—Dowling v. Livingstone (Mich.) 225.

When statement that author has quoted another without giving him credit is not libelous.—Dowling v. Livingstone (Mich.) 225.

Words imputing an indictable offense are actionable per se.—Herzog v. Campbell (Neb.) 424.

Privileged communications.

A complaint for larceny is privileged.—Graham v. Cass Circuit Judge (Mich.) 348.

Where there is no misstatement of fact, a book may be publicly reviewed with sarcasm and ridicule.—Dowling v. Livingstone (Mich.) 225.

Action for.

A complaint charging that defendant called the complaining witness a swindler charges an offense, under How. Ann. St. § 9315.—Schultz v. Huebner (Mich.) 57.

A complaint failing to allege the particular words spoken is insufficient.—Schubert v. Richter (Wis.) 107.

A complaint, in an action for libel, *held* to state a cause of action.—Knox v. Meehan (Minn.) 1149.

Under the pleadings, in an action for slander, evidence *held* immaterial.—Botsford v. Chase (Mich.) 325.

In an action for slander, to prove malice plaintiff may prove other slanderous statements than the words laid in the declaration.—Botsford v. Chase (Mich.) 325.

In an action for slander, the wealth and standing of defendant may be considered.—Botsford v. Chase (Mich.) 325.

License.

To sell liquors, see "Intoxicating Liquors."

Liens.

See "Mechanics' Liens."
Landlord's lien, see "Landlord and Tenant."
Logger's lien, see "Logs and Logging."
Mortgage lien, see "Mortgages."
Of attorney for fees, see "Attorney and Client."
Of corporation on stock, see "Corporations."
Of judgment, see "Judgment."
On trespassing stock, see "Animals."
Vendor's lien, see "Vendor and Purchaser."

Life Estate.

See "Estates."

LIMITATION OF ACTIONS.

See, also, "Adverse Possession."
Time to furnish proofs of loss, see "Insurance."

When the statute is pleaded, and the instrument sued on appears to be barred, the burden of showing otherwise is on plaintiff.—Diehmann v. Citizens' Nat. Bank (S. D.) 311.

Where a petition sets out a continuing nuisance, an answer pleading limitations as though such obstruction was a permanent nuisance, is demurrable.—Jenks v. Lansing Lumber Co. (Iowa) 231.

An action to enforce a mechanics' lien must be commenced within two years from the filing of the lien.—Monroe v. Hanson (Neb.) 12.

Mortgaged property, conveyed after the statute had barred the mortgage, and before the debtor's subsequent acknowledgment of the debt, *held* not subject to the mortgage.—Cook v. Prindle (Iowa) 781.

An action to recover real property against one holding a tax title thereto is not barred under the general statute where the holder has not held possession of the land for 10 years.—Phillips v. Wilmarth (Iowa) 1053.

Running of statute.

The statute begins to run against a bill to redeem from the mortgagee's entry.—Hall v. Hooper (Neb.) 33.

The statute runs against a bill to declare a deed a mortgage from the time the grantee's possession becomes adverse.—Stall v. Jones (Neb.) 653.

A cause of action *held* not barred when based on fraud, and brought immediately on the knowledge thereof.—Stebbins v. Patterson (Mich.) 484.

An action to rescind for fraud may be brought at any time within statutory limitations by one who offers to rescind as provided by statute.—Hilton v. Advance Thresher Co. (S. D.) 816.

Limitations begin to run against an action to recover a balance due from property turned over to defendant to secure him from liability as indorser from the time plaintiff is aware that defendant claims to have accounted in full.—Wolf v. Wolf (Iowa) 170.

Statute does not begin to run against the claim of an abutting property owner for damages for construction of an embankment until the construction reaches and abuts on his property.—Kelleher v. Chicago, St. P. & K. C. Ry. Co. (Iowa) 94.

The running of the statute *held* not interrupted by defendant's representations that it was not to blame for death of plaintiff's intestate, nor by its concealment of the facts concerning the accident.—McBride v. Burlington, C. R. & N. Ry. Co. (Iowa) 73.

Limitation of Liability.

Carriers' contracts, see "Carriers."

Liquor Selling.

See "Intoxicating Liquors."

LIS PENDENS.

Code Civ. Proc. § 85, as amended, making a lis pendens constructive notice of the action to persons not parties thereafter dealing with the subject-matter *held* valid.—Sheasley v. Keens (Neb.) 1010.

A mortgage executed by a party restrained from transferring his property was invalid.—Seaman v. Galligan (S. D.) 458.

Live Stock.

Killed or injured by locomotive, see "Railroad Companies."
Shipment by carrier, see "Carriers."

Local Acts.

See "Constitutional Law."

LOGS AND LOGGING.

A lien of a seller of logs, who retains ownership of the marks of record as security, is prior to the lien for subsequent boom fees.—Clough v. Mississippi & R. R. Boom Co. (Minn.) 200.

A lien for boom fees was lost by extending time of payment.—Clough v. Mississippi & R. R. Boom Co. (Minn.) 200.

Lost Instruments.

Lost deed, see "Deed."
Secondary evidence of contents, see "Evidence."

Magistrate.

See "Justices of the Peace."

MALICIOUS PROSECUTION.

If one has reasonable grounds for believing a party guilty, he may institute a prosecution without incurring liability on such person's discharge.—Fry v. Kaessner (Neb.) 1126.

A presumption of probable cause is established by proof that plaintiff was convicted.—Neher v. Dobbs (Neb.) 864.

If defendant was aware of facts establishing plaintiff's innocence, a misapprehension of the law by him did not justify the arrest.—Neher v. Dobbs (Neb.) 864.

Evidence of probable cause furnished by a proof of conviction may be rebutted otherwise than by showing that the conviction was procured by fraud or perjury.—Neher v. Dobbs (Neb.) 864.

The burden is on plaintiff to show malice and want of probable cause.—Rider v. Murphy (Neb.) 837.

Evidence *held* insufficient to show malice or want of probable cause in causing plaintiff's arrest for embezzlement.—Rider v. Murphy (Neb.) 837.

MALPRACTICE.

Degree of care and skill required of physicians in the practice of their profession determined.—Griswold v. Hutchinson (Neb.) 819.

A physician is required to exercise only the average degree of skill possessed by physicians in his locality.—Whitesell v. Hill (Iowa) 894.

In an action for malpractice, the burden is on plaintiff to show freedom from negligence contributing to the result complained of.—Whitesell v. Hill (Iowa) 894.

The fact that a physician was guilty of negligence in treating a patient did not preclude him from recovering any compensation whatever for his services.—Whitesell v. Hill (Iowa) 894.

The instruction as to plaintiff's duty to follow his physician's directions *held* proper under the evidence.—Whitesell v. Hill (Iowa) 894.

An instruction that a finding for plaintiff would not be warranted from the fact of the injury complained of *held* proper.—Whitesell v. Hill (Iowa) 894.

Evidence examined and *held* insufficient to show negligence or improper treatment on the part of a physician.—Wurdeman v. Barnes (Wis.) 111.

MANDAMUS.

An ordinance requiring the construction of viaducts by railroad companies may be enforced by mandamus.—Chicago, B. & Q. R. Co. v. State (Neb.) 624.

Mandamus will lie to compel a village treasurer to pay money derived from liquor licenses to the proper school district.—Guthrie v. Hester (Neb.) 853.

Mandamus to compel a judge to vacate orders setting aside the return of a sheriff on execution, and appointing a receiver, refused.—William Wright Co. v. Frazer (Mich.) 954.

Mandamus will lie to compel a street railway to pave the street between its tracks, as required by its franchise.—City of Lansing v. Lansing City Electric Ry. Co. (Mich.) 949.

A writ of mandamus to compel county officers to pay judgments is not void because the judgments are void.—Boasen v. State (Neb.) 303.

Mandamus is the proper remedy to compel one without title to an office to surrender it to one holding title.—State v. Archibald (N. D.) 234.

Facts under which it was *held* that an order closing testimony would be vacated.—Lansing Lumber Co. v. Ingham Circuit Judge (Mich.) 41.

Mandamus lies to compel the owner of a dam to maintain a fishway.—West Point Water Power & Land Imp. Co. v. State (Neb.) 6.

Manslaughter.

See "Homicide."

Marriage.

See "Divorce"; "Husband and Wife."

Performing ceremony without license, see "Criminal Law."

MASTER AND SERVANT.

See, also, "Principal and Agent."

Proximate cause of injury to servant, see "Negligence."

Contract of employment in consideration of a release of a claim for damages *held* valid.—Carter White-Lead Co. v. Kinlin (Neb.) 536.

An agreement to abstain from the use of intoxicating liquors *held* not to tend to show that the one making the promise was in the employ of the other.—Smith v. Jackson (Iowa) 80.

Mechanics engaged in constructing parts of a building under contract *held* to be independent contractors, and that owners were not liable for accidents to contractor's servants, caused by negligence of such contractors or their servants.—Humpton v. Unterkircher (Iowa) 776.

One who employs an independent contractor to tear down an old building is not liable to a servant of the contractor injured by his incompetency, though the owner had notice thereof.—Schip v. Pabst Brewing Co. (Minn.) 3.

A freight brakeman has implied authority to eject trespassers from freight cars.—Brevig v. Chicago, St. P., M. & O. R. Co. (Minn.) 401.

Where a person bribed a brakeman to let him ride in a freight car, *held* that the brakeman's implied authority to eject such trespasser ceased, and he became a joint trespasser.—Brevig v. Chicago, St. P., M. & O. R. Co. (Minn.) 401.

Master's liability for injuries to servants.

A master must use ordinary care in the employment of competent servants.—Lewis v. Emery (Mich.) 569.

Where a danger is obvious it is not negligence for master not to warn servant.—Findlay v. Russel Wheel & Foundry Co. (Mich.) 50.

Evidence examined and *held* that plaintiff, injured while coupling cars, was not injured by the negligence of defendant.—Fenlon v. Duluth, S. S. & A. Ry. Co. (Mich.) 51.

A railroad company allowing ashes to accumulate on its track *held* liable to an employé injured thereby.—Kennedy v. Lake Superior Terminal & Transfer Ry. Co. (Wis.) 1137.

Evidence that defective machinery was used under a promise by the master to remove the defect *held* inadmissible where the promise was not pleaded.—Malm v. Thelin (Neb.) 650.

Evidence *held* sufficient to sustain a finding that a railroad company was negligent in the inspection of the boiler of an engine.—Woods v. Chicago & G. T. Ry. Co. (Mich.) 328.

A railroad company is not liable for an injury to an employé caused by his stepping into a cattle guard in the daytime, at a place where he was familiar with the tracks.—Fuller v. Lake Shore & M. S. Ry. Co. (Mich.) 593.

The fact that the fence is not properly joined to a cattle guard in which an employé is injured, in operating a train, does not make the maintenance of the cattle guard negligence.—Fuller v. Lake Shore & M. S. Ry. Co. (Mich.) 593.

Fellow servants and vice principals.

A shift boss of miners is a fellow servant of a trammer.—Petaja v. Aurora Iron Min. Co. (Mich.) 951.

Petition, in an action for injuries, *held* to sufficiently allege the negligence of one as vice principal.—Hathaway v. City of Des Moines (Iowa) 188.

A foreman who works with his men is a fellow servant, except as to acts it is the duty of the master to perform.—Findlay v. Russel Wheel & Foundry Co. (Mich.) 50.

Contributory negligence.

A foreman falling over ashes on a right of way *held* not guilty per se of contributory negligence.—Kennedy v. Lake Superior Terminal & Transfer Ry. Co. (Wis.) 1137.

In an action for the death of a brakeman while coupling cars, *held*, that the question of contributory negligence was for the jury.—Corbin v. Winona & St. P. Ry. Co. (Minn.) 271.

Evidence examined, and *held*, that an engineer killed on the track was guilty of contributory negligence.—McCadden v. Abbot (Wis.) 694.

Instructions *held* erroneous, as allowing a recovery for injuries if the servant had no knowl-

edge of defects, though he was otherwise negligent.—Christianson v. Pioneer Furniture Co. (Wis.) 699

Where there was evidence warranting a finding that plaintiff was guilty of contributory negligence, an instruction excusing plaintiff from the consequences thereof was erroneous.—Thompson v. Chicago G. W. Ry. Co. (Minn.) 265.

Assumption of risk.

A railroad employé *held* not to have assumed the risk of injury from a pile of ashes on the right of way.—Kennedy v. Lake Superior Terminal & Transfer Ry. Co. (Wis.) 1137.

Cattle guards being used on all railroads, the dangers to employés incident to their use is an assumed risk of the employment.—Fuller v. Lake Shore & M. S. Ry. Co. (Mich.) 593.

A section hand injured by a wild train *held* to have assumed the risk.—Hinz v. Chicago, B. & N. R. Co. (Wis.) 718.

A servant girl injured by a defect in a kitchen floor, of which she knew, *held* to have assumed the risk.—Herold v. Pfister (Wis.) 355.

Refusal to instruct, where the defense was assumption of risk, as to whether plaintiff assumed the risk, *held* error.—Klatt v. N. C. Foster Lumber Co. (Wis.) 791.

One employed in car factory to do general work, is within his employment in assisting to lift car bodies to their trucks by means of rope and tackle machinery.—Findlay v. Russel Wheel & Foundry Co. (Mich.) 50.

Measure of Damages.

See "Damages."

MECHANICS' LIENS.

One furnishing materials to a person in possession of land under a contract of sale, *held* to acquire a lien, attaching only to the interest of the vendee.—Fuller v. Pauley (Neb.) 1115.

Statement required by statute by a contractor to the owner to give right of action to enforce a mechanic's lien cannot be considered waived except by acts amounting to an estoppel.—Sterner v. Haas (Mich.) 348.

The time within which an architect was required to file his lien *held* not to commence to run till the giving of his final certificate of satisfactory construction.—Bentley v. Adams (Wis.) 505.

An architect who prepares the plans and specifications for improvements which are made to a building is entitled to a mechanic's lien therefor on the building.—Parsons v. Brown (Iowa) 880.

One who furnishes the materials for parts of a building and the labor to construct such parts is a contractor.—Sterner v. Haas (Mich.) 348.

Loss and discharge.

A lien is waived where credit is extended to the owner beyond the statutory period for bringing an action to enforce it.—Flenniken v. Liscoe (Minn.) 979.

Where, by the terms of a note, the time of payment is extended beyond the statutory time for enforcing a lien, it is discharged.—Flenniken v. Liscoe (Minn.) 979.

Plaintiff entitled to a lien for machinery sold *held* not to have forfeited the right thereto by acceptance of a bill of sale.—Marinette Iron Works Co. v. Cody (Mich.) 334.

A materialman's rights will not be affected because, in taking a note, he described himself by a fanciful designation, when no one was misled thereby.—Livesey v. Hamilton (Neb.) 644.

That an owner had given his note for a portion of the amount due for materials furnished does not relieve his property from a lien.—Livesey v. Hamilton (Neb.) 644.

Memorandum.

Used by witness, see "Witness."

Mental Capacity.

See "Insanity"; "Wills."

Merger.

Of mortgages, see "Mortgages."

Mines and Mining.

Liability of mine owner for injuries to servant, see "Master and Servant."

Minor.

See "Guardian and Ward."

Misconduct.

Of judge, see "Trial."

Misjoinder.

Of parties, see "Parties."

Misrepresentation.

See "Deceit."

Mistake.

As ground for reformation of contract, see "Equity."

MORTGAGES.

See, also, "Fraudulent Conveyances."
Action by mortgagor to remove cloud, see "Quieting Title—Removal of Cloud."
Adverse possession by mortgagee, see "Adverse Possession."
By corporation, see "Corporations."
Cancellation in equity, see "Equity."
Estoppel to foreclose, see "Estoppel."
Receiver of mortgaged property, see "Receivers."
Running of limitations against, see "Limitation of Actions."
Taxation of, see "Taxation."
When mortgage constitutes general assignment, see "Assignment for Benefit of Creditors."

Right of mortgagor to assert, against the assignee of a nonnegotiable note, that the mortgage securing the same was given to the mortgagee to pay off a prior mortgage, and the mortgagee failed to pay off said prior mortgage as agreed.—Walker v. Thompson (Mich.) 584.

One who acquires a tax title through breach of the mortgagor's covenant to pay taxes, and subsequently purchases of the mortgagor, acquires no interest as against the mortgagee.—Washington Loan & Trust Co. v. McKenzie (Minn.) 976.

Mortgage *held* to be several, and that surviving mortgagee did not succeed to the whole amount secured.—Cooley v. Kinney (Mich.) 674.

Where the holder of a first and second mortgage forecloses the second, and buys the land, the senior mortgage is merged in the fee.—McDonald v. Magirl (Iowa) 904.

A conveyance by the mortgagor to the mortgagee subject to the mortgage *held* not to merge the estates.—Mathews v. Jones (Neb.) 622

Purchase of mortgage and notes secured thereby by the purchaser of the mortgaged land subject to the mortgage *held* payment of mortgage as against the mortgagor.—Northwestern Nat. Bank v. Sloan (Iowa) 91.

The constructive notice imported by the record of a mortgage is limited to the matters set forth on its face.—Bank of Ada v. Gullikson (Minn.) 131.

Where a mortgage contained a misdescription of the property, one having no actual notice of the mortgage, who recovers a judgment against the mortgagor before the correction and re-record of the mortgage, has a lien superior to that of the mortgage.—Bank of Ada v. Gullikson (Minn.) 131.

What constitutes.

Deed *held* not to be an equitable mortgage.—Iowa State Sav. Bank v. Coonrod (Iowa) 78.

To have a deed absolute in form declared a mortgage, plaintiff's evidence must present a state of facts consonant with reason.—Stall v. Jones (Neb.) 653.

How. St. § 5560, making grants to two or more persons estates in common, is subject to section 5561, excepting mortgages; but this does not prevent the execution of a mortgage with covenants which are several.—Cooley v. Kinney (Mich.) 674.

Assignment of debt and mortgage.

An assignee of mortgage notes succeeds to the rights of the mortgagee.—Hall v. Hooper (Neb.) 33.

Payment of a negotiable note secured by mortgage to an investment company, of which the mortgagee was manager, *held* not to bind the assignee of such note.—Bull v. Mitchell (Neb.) 632.

A grantee of a mortgagee to whom the mortgagor had conveyed subject to the mortgage *held* not a bona fide purchaser, as against an innocent holder of the mortgage.—Mathews v. Jones (Neb.) 622.

Where a mortgagee, after assigning his mortgage and note, forges a like mortgage and note, and assigns them, one taking them acquires no rights against the assignee of the genuine mortgage.—Lee v. Kellogg (Mich.) 380.

Foreclosure.

Where a mortgagor waives irregularities in foreclosure under a power, and confirms a sale to the mortgagee, and tenders a deed conveying perfect title, the mortgagee is estopped to insist on the invalidity of the proceedings.—Saxe v. Rice (Minn.) 268.

Where note and mortgage become due by express terms on default of interest payment, neither demand nor notice of election is necessary as a condition precedent to a right of action.—Jurgensen v. Carlsen (Iowa) 877.

An answer to a bill in foreclosure by subsequent purchasers, denying information sufficient to form a belief as to taxes paid by plaintiff, raises a material issue.—Pearson v. Neeves (Wis.) 357.

In an action to foreclose a mortgage given by one since deceased, the heirs and administrator are proper parties defendant.—Kelsey v. Welch (S. D.) 390.

Mere inaccuracies in a notice of foreclosure under a power of sale, which are not misleading, *held* insufficient to invalidate the sale.—Iowa Inv. Co. v. Shepard (S. D.) 451.

Motion.

For change of venue, see "Venue in Civil Cases."
For continuance, see "Criminal Law."
For judgment, see "Judgment."
For new trial, see "New Trial."
To consolidate actions, see "Action."
To direct verdict, see "Practice in Civil Cases"; "Trial."
To open default judgment, see "Judgment."
To set aside return on execution, see "Execution."

MUNICIPAL CORPORATIONS.

See, also, "Counties"; "Highways"; "Horse and Street Railroads"; "Schools and School Districts"; "Towns."
Authority of city marshal to serve process, see "Writs and Notice of Suits."
Condemnation of land for city purposes, see "Eminent Domain."
Dedication of streets, see "Dedication."
Injunction against collection of tax for city purpose, see "Taxation."
—— obstruction of street, see "Injunction."
Judicial notice of incorporation, see "Evidence."
Mandamus to enforce ordinance, see "Mandamus."
Sale of liquor in city on Sunday, see "Intoxicating Liquors."

A canal company *held* not a municipal corporation.—State v. Board of Com'rs of Douglas County (Neb.) 434.

The Detroit House of Correction *held* not a public institution, so as to be entitled to be supplied with water free of charge.—City of Detroit v. Board of Water Com'rs of City of Detroit (Mich.) 377.

Under the charter of Grand Rapids, where a proposition for issuance of city bonds is placed on a general election ticket, a majority of the votes cast at the general election, and not merely a majority cast on the bonding proposition, controls.—Stebbins v. Judge of Superior Court of Grand Rapids (Mich.) 394.

Officers.

Sp. Laws 1883, c. 2, § 13, *held* to repeal all prior laws giving the common council of St. Paul power to reduce the salary of the city engineer.—Rundlett v. City of St. Paul (Minn.) 967.

On a town becoming a city of the second class in an even-numbered year, subsequent to Acts 21st Gen. Assem. c. 141, and prior to the annual election in such year, it was entitled to elect at such election a mayor for a term of two years.—State v. Wymen (Iowa) 786.

Those provisions of an ordinance organizing a police department which fix the salaries of officers are not repealed by an amendment of the city charter creating a police board, but not giving it power to fix salaries.—Ruell v. City of Alpena (Mich.) 49.

Contracts.

Person furnishing a city contractor curbstone for a "lump sum" *held* a materialman, and not a subcontractor.—People v. Powers (Mich.) 215.

The board of public works are not prohibited, under Acts 22d Gen. Assem. c. 1, §§ 9, 13, from appointing one with power to hire and discharge men to prosecute work on the streets.—Hathaway v. City of Des Moines (Iowa) 188.

Where a city allows a claimant an amount less than the sum claimed, a demand by claimant on the city treasurer after such allowance is an acceptance, and completes the contract.—Sharp v. City of Mauston (Wis.) 803.

Control of streets.

A city is not liable for an obstruction placed in the street by a trespasser if it had no notice thereof, and was not negligent.—Davis v. City of Omaha (Neb.) 859.

Municipal corporations may deflect surface without liability, in the absence of negligence.—Churchill v. Beethe (Neb.) 992.

The measure of damages from change in grade of a street is the depreciation in the value of the property.—City of Harvard v. Crouch (Neb.) 276.

A city is liable for damages resulting from a change of grade in a street.—City of Harvard v. Crouch (Neb.) 276.

Defective streets and sidewalks.

Where a city assumes control and care of a walk, the fee of which is in another, it is liable for injuries to a pedestrian by a defect in the walk.—Will v. Village of Mendon (Mich.) 58.

To show that a city has assumed control of a walk, so as to render it liable for personal injuries caused by defect therein, evidence that a witness repaired the walk for the city is admissible.—Will v. Village of Mendon (Mich.) 58.

In an action for personal injuries by a defective sidewalk, evidence of the general bad condition of the walk near to the plank by which defendant was thrown is admissible to show notice.—Will v. Village of Mendon (Mich.) 58.

A city with 300 miles of sidewalk *held* liable to as great diligence as a small village.—Moore v. City of Kalamazoo (Mich.) 1089.

Evidence of other defects in sidewalk is admissible to show notice to the city.—Moore v. City of Kalamazoo (Mich.) 1089.

Evidence that others slipped into the same hole *held* admissible to show notice.—Moore v. City of Kalamazoo (Mich.) 1089.

Municipal corporations are not responsible for property owner's failure to construct a walk.—Shietart v. City of Detroit (Mich.) 221.

Where a lot owner licensed to build a sidewalk obstructs the street, and causes injury to a traveler, the city is liable therefor.—Davis v. City of Omaha (Neb.) 859.

Public improvements.

The decision of the township board that a petition for public improvements was signed by a majority of the property owners will not prevent the township, in an action by a contractor, from setting up that the petition was not so signed.—Collins v. Township of Grand Rapids (Mich.) 586.

A resolution declaring a street unsafe *held* sufficient to show the necessity of paving without a petition therefor.—Boyd v. City of Milwaukee (Wis.) 603.

A strip in the center of a very broad street, used as a park, was public grounds, within a charter provision requiring the city to pave the streets opposite its public grounds.—Boyd v. City of Milwaukee (Wis.) 603.

Evidence *held* not too remote to show that abutting property was damaged by the erection of a viaduct.—City of Omaha v. McGavock (Neb.) 415.

Property exempt from "taxation" (Laws 1889, c. 450) is still liable for assessments for a public improvement.—Yates v. City of Milwaukee (Wis.) 248.

The execution of a tax deed on a certificate of sale embracing several assessments on account of the invalidity of one will not be enjoined without tendering the amount of the valid assessments.—Yates v. City of Milwaukee (Wis.) 248.

Laws 1891, c. 82, exempting certain lands from all "assessments for the year 1891," does not apply to an assessment certificate issued in January, 1891, for a public improvement theretofore completed.—Yates v. City of Milwaukee (Wis.) 248.

Paving assessments are not taxes for city purposes, within Acts 23d Gen. Assem. c. 1, § 3.—Farwell v. Des Moines Brick Manuf'g Co. (Iowa) 176.

Evidence examined, and *held* that certain lands within the city limits were not used for agricultural purposes in good faith, so as to be exempt from assessments for improvements.—Farwell v. Des Moines Brick Manuf'g Co. (Iowa) 176.

A tender of all taxes due, in an action by a nonresident to cancel paving assessments, *held* to justify a personal judgment against him for the amount legally due.—Farwell v. Des Moines Brick Manuf'g Co. (Iowa) 176.

Under Acts 25th Gen. Assem. c. 7, an assessment for a street improvement may be levied for a different amount on lots abutting on different parts, if the cost is assessed uniformly.—Gilcrest v. Macartney (Iowa) 103.

Actions.

An action will lie against a city on a contract to pay a certain sum in settlement of a claim.—Sharp v. City of Mauston (Wis.) 803.

Where a city refuses to pay a sum allowed as a compromise with claimant, an action will lie thereon without any claim being first filed, and disallowed by the council.—Sharp v. City of Mauston (Wis.) 803.

Murder.

See "Homicide."

Mutual Benefit Insurance.

See "Insurance."

Name.

Misnomer in indictment, see "Indictment and Information."
Presumption as to party's initials, see "Parties."
Variance in name, see "Pleading."

Navigable Waters.

See "Waters and Water Courses."

Negative Pregnant.

See "Pleading."

NEGLIGENCE.

See, also, "Death by Wrongful Act."
Contributory negligence of person injured at crossing, see "Railroad Companies."
—— of servant, see "Master and Servant."
In deflecting surface water, see "Surface Water."
Liability of agent, see "Principal and Agent."
—— of carrier, see "Carriers."
—— of railroad companies, see "Railroad Companies."
Of insured, see "Insurance."
Of master, see "Master and Servant."
Of oil inspector, see "Office and Officer."
Of physician, see "Malpractice."
Of telegraph company, see "Telegraph Companies."

What constitutes.

Ordinary care is such care as the great majority of men would use under similar circumstances.—Olwell v. Milwaukee St. Ry. Co. (Wis.) 362.

Ordinary care is that exercised by a prudent and reasonable man.—McClelland v. Scroggin (Neb.) 1123.

A definition of "negligence" *held* to be correct.—Webster v. Symes (Mich.) 580.

"Criminal negligence," as used in Comp. St. c. 72, art. 1, § 3, is a flagrant and reckless disregard of one's safety.—Chicago, B. & Q. R. Co. v. Hague (Neb.) 1000.

Duty of a mill owner to use spark arrester.—Webster v. Symes (Mich.) 580.

An instruction *held* not to be objectionable in that the use of the word "prudent" without qualification was understood to mean more than "ordinarily prudent."—Webster v. Symes (Mich.) 580.

Defendant *held* liable for a collision while driving on a highway.—Tyler v. Nelson (Mich.) 671.

The owner of a building, the wall of which fell when a ladder was placed against it during a fire, *held* not liable for death of a fireman occasioned thereby.—Kitchen v. Carter (Neb.) 855.

If defendant might have avoided the injury after seeing the danger, he is liable, though plaintiff was negligent in incurring the danger.—Omaha St. Ry. Co. v. Martin (Neb.) 1007.

Remote and proximate cause.

An instruction *held* erroneous, as not requiring defendant's breach of duty to be found the proximate cause of the injury.—Hatcher v. Dunn (Iowa) 905.

To render an oil inspector liable for damages resulting from a false test, the fact that the oil was below grade must have caused the injury.—Hatcher v. Dunn (Iowa) 905.

On a trial for negligently causing the destruction of plaintiff's premises, *held*, that an instruction should be construed to mean that, though defendant's negligence did not in the first instance cause the destruction of plaintiff's property, yet, if it ultimately caught fire as a result of such negligence, defendant was liable.—Webster v. Symes (Mich.) 580.

Evidence *held* insufficient to show that the negligence of the master was the proximate cause of an injury to the servant.—Huber v. La Crosse City Ry. Co. (Wis.) 708.

Contributory negligence.

Where negligence amounting to the absence of ordinary care contributes proximately in any degree to the injury received, no recovery can be had.—Corbin v. Winona & St. P. Ry. Co. (Minn.) 271.

If plaintiff proves his case without disclosing negligence, the burden of proving contributory negligence is on defendant.—Omaha St. Ry. Co. v. Martin (Neb.) 1007.

Pleading.

Facts constituting negligence must be pleaded.—Omaha & R. V. Ry. Co. v. Wright (Neb.) 842.

Where the declaration contains several counts, the court should instruct as to those on which alone recovery may be had.—Heller v. Chicago & G. T. Ry. Co. (Mich.) 667.

Evidence.

Evidence *held* to disclose criminal negligence on the part of the person injured.—Chicago, B. & Q. R. Co. v. Hague (Neb.) 1000.

The question of negligence is one for the court, unless, on the facts, reasonable men may differ as to whether it existed.—Omaha St. Ry. Co. v. Martin (Neb.) 1007.

Evidence as to ill feeling of defendant towards plaintiff *held* admissible to show motive in a collision on a highway.—Tyler v. Nelson (Mich.) 671.

Sufficiency of the evidence to authorize a submission of the issue as to whether the drafts were open, in an action for causing the destruction of plaintiff's premises by permitting sparks to escape from the chimney of defendant's mill.—Webster v. Symes (Mich.) 580.

Evidence as to whether plaintiff was negligent in permitting sparks from his thresher to set fire to stacks of grain *held* for the jury.—McClelland v. Scroggin (Neb.) 1123.

NEGOTIABLE INSTRUMENTS.

Alteration of note, see "Alteration of Instruments."
Power of partner to bind firm, see "Parties."
Taxation of, see "Taxation."
Validity of note delivered on Sunday, see "Sunday."

Note *held* negotiable, though payable by its terms in accordance with a certain contract of the same date.—Markey v. Corey (Mich.) 493.

Neglect of the holder to pursue a remedy against the maker *held* not to discharge a guarantor.—D. M. Osborne & Co. v. Gullikson (Minn.) 965.

Evidence examined and *held* sufficient to warrant a finding of presentment and dishonor, and notice of dishonor.—Martin v. Smith (Mich.) 61.

Execution and delivery.

One not the payee who indorses a note before it is indorsed by the payee is a joint maker.—Gumz v. Giegling (Mich.) 48.

A party ignorant of the contents of a note from inability to read, who signs it without negligence in attempting to ascertain its character, is not bound by it.—Green v. Wilkie (Iowa) 1046.

Consideration.

In an action on a note the burden of overcoming the presumption of consideration is on the maker.—Wolf v. Wolf (Iowa) 170.

Want of consideration in an action on a note must be specially pleaded.—Sharpless v. Gillen (Neb.) 285.

The consideration of a note *held* a consideration for a guaranty made on delivery of the note.—D. M. Osborne & Co. v. Gullikson (Minn.) 965.

Indorsement and transfer.

As between the original parties to an indorsement, the implied contract may be varied by parol.—Corbett v. Fetzer (Neb.) 417.

The words "without recourse" following one and preceding another indorser's name, may be shown by parol to apply to the former.—Corbett v. Fetzer (Neb.) 417.

Transfer of a note by the payee by an assignment does not exclude his liability thereon as indorser.—Markey v. Corey (Mich.) 493.

One signing a note without intending to do so, who is chargeable with no negligence, *held* not bound by it in the hands of a bona fide purchaser.—Green v. Wilkie (Iowa) 1046.

An indorsee of a note after maturity cannot recover where the indorser forged a similar note, which was paid by the maker of the genuine note without notice.—Leach v. Funk (Iowa) 768.

A creditor who is given the right to select notes to secure his claim *held* not a bona fide purchaser before selection as to any particular note.—Burnam v. Merchants' Exch. Bank (Wis.) 510.

One taking a note after maturity from an insolvent bank *held* to take it subject to set-off of deposit of the maker in the bank.—Merchants' Exch. Bank v. Fuldner (Wis.) 691.

In an action by an indorsee, where the defense is failure of consideration, the burden of proof is on defendant to overcome the presumption that plaintiff is a bona fide holder.—Crosby v. Ritchey (Neb.) 1005.

Evidence examined and *held* to sustain a finding that an agent in buying a note had knowledge of usury therein, and that his father, for whom he bought, was bound thereby.—Sanders v. Wedeking (Neb.) 18.

Actions.

Answer in an action on a note *held* to charge failure of consideration, and not fraud.—Crosby v. Ritchey (Neb.) 1005.

Where the answer in an action on a note sets up transfer after maturity without consideration, and indebtedness of the payee to the defendant, it is error to strike them out.—Lynch v. Free (Minn.) 973.

Newly-Discovered Evidence.

As ground for new trial, see "Criminal Law"; "New Trial."

NEW TRIAL.

In criminal cases, see "Criminal Law."
Necessity for motion, see "Appeal."
—— of assigning error on motion for, see "Appeal."

A conflict between a special finding and a general verdict is not ground for a new trial.—Moffitt v. Albert (Iowa) 162.

Motion for new trial may be overruled, though court and jury might have found differently on facts.—Rohde v. Biggs (Mich.) 331.

A petition for new trial, under Code, § 602, is properly denied where the petition in the original suit fails to state a meritorious cause of action.—Gilcrest v. Nantker (Neb.) 16.

A new trial will not be granted for newly-discovered evidence which is conflicting or cumulative, or which might have been discovered before trial.—Meeks v. City of St. Paul (Minn.) 966.

A verdict in a civil suit will not be set aside because two of the jurors, during the recesses of the court, drank beer.—Sharp v. Merriman (Mich.) 372.

Affidavits of jurors are not admissible to show undue influence and bias of one of their number.—Sharp v. Merriman (Mich.) 372.

It is error for a juror to state in the jury room his own knowledge of facts bearing on a material issue.—Hathaway v. Burlington, C. R. & N. R. Co. (Iowa) 892.

Evidence tending to show that a juror was prejudiced in plaintiff's favor *held* insufficient to require a new trial.—Will v. Village of Mendon (Mich.) 58.

Non Compos Mentis.

See "Insanity."

NONNEGOTIABLE INSTRUMENTS.

A note containing a stipulation to pay taxes *held* to be nonnegotiable.—Walker v. Thompson (Mich.) 584.

An indorsement on the back of a note and its delivery over passes title.—Steere v. Trebilcock (Mich.) 342.

Notes.

See "Negotiable Instruments."

Notice.

Lis pendens, see "Lis Pendens."
Of appeal, see "Appeal."
Of breach of warranty, see "Sale."
Of condemnation proceedings, see "Eminent Domain."
Of foreclosure, see "Mortgages."
Of levy, see "Attachment."
Of mortgage, see "Mortgages."
Of motion to vacate default judgment, see "Judgment."
Of presentment and dishonor, see "Negotiable Instruments."
Of redemption, see "Taxation."
Of taxation of costs, see "Costs."
To city of defects in street, see "Municipal Corporations."
To insurance company, see "Insurance."

NOVATION.

The deposit by the successor of a state treasurer of certificates received from his predecessor in the same bank, their cancellation, and a credit to the state of the open account, creates a novation.—State v. Hill (Neb.) 541.

Evidence *held* to require the submission to the jury of the issue as to whether there had been a novation between the parties.—Brown v. Neidhold (Mich.) 349.

NUISANCE.

Action by health officer to abate, see "Health."

A municipal corporation may invoke the aid of equity to restrain a public nuisance.—City of Huron v. Bank of Volga (S. D.) 815.

The fact that a nuisance has been constructed pending an action to enjoin its construction and maintenance, will not prevent its abatement.—Holmes v. Calhoun County (Iowa) 145.

Objections.

First raised on appeal, see "Appeal."
To evidence, see "Trial."
To instructions, see "Trial."

Obstructions.

Of highway, see "Highways."

OFFICE AND OFFICER.

Bank officers, see "Banks and Banking."
City officers, see "Municipal Corporations."
Corporate officers, see "Corporations."
County officers, see "Counties."
Mandamus to compel surrender of office, see "Mandamus."

The act of the oil inspector in making a test is ministerial.—Hatcher v. Dunn (Iowa) 905.

Under McClain's Ann. Code, § 2493, an oil inspector is liable for damages resulting from a false test, though he acted innocently.—Hatcher v. Dunn (Iowa) 905.

Payment by the agency of drafts and certificates of deposit *held* applicable to custodians of public funds.—State v. Hill (Neb.) 541.

It is presumed that an officer does his duty, in the absence of evidence.—Green v. Barker (Neb.) 1032.

A prospective appointment to fill a vacancy sure to occur, made by an officer or body which is empowered to fill the vacancy when it arises, is a valid appointment.—State v. O'Leary (Minn.) 264.

Off-Set.

See "Set-Off and Counterclaim."

Opinion Evidence.

See "Evidence."

Orders.

Appealable orders, see "Appeal."

Parent and Child.

Liability of parent for tuition of child, see "Schools and School Districts."
Measure of damages for injuries to child, see "Damages."

PARLIAMENTARY LAW.

Where the chairman of a board refused to put a motion on the ground that it was illegal, it could be put by the member making it.—State v. Archibald (N. D.) 234.

Parol Contract.

See "Frauds, Statute of."

Parol Evidence.

See "Evidence."

PARTIES.

In replevin, see "Replevin."
Intervention in attachment, see "Attachment."
To action to foreclose mortgage, see "Mortgages."

Misjoinder of plaintiffs, or that complaint as to one or more of several plaintiffs does not state a cause of action, cannot be raised by demurrer.—Wunderlich v. Chicago & N. W. Ry. Co. (Wis.) 1144.

Insurer who has paid a loss occasioned by the negligence of a third person is a proper party plaintiff with the owner, in an action against the wrongdoer.—Wunderlich v. Chicago & N. W. Ry. Co. (Wis.) 1144.

Where one sells his property for a nominal consideration, his vendee is a real party in interest, within Code Civ. Proc. § 29, in a suit for the conversion of the property.—Kinsella v. Sharp (Neb.) 634.

It is presumed that a defendant has no other Christian name than the initials by which he was sued.—Scarborough v. Myrick (Neb.) 867.

Misnomer of defendant *held* waived by appearance.—Scarborough v. Myrick (Neb.) 867.

PARTITION.

Owners of adjoining lots, who erected a building thereon, *held* not entitled to partition.—Barr v. Lamaster (Neb.) 1110.

One of several persons together inheriting two tracts of land may maintain partition of the two lots against co-heirs and their grantees.—Grady v. Cannon (Wis.) 808.

PARTNERSHIP.

Dissolution of firm, effect on policy, see "Insurance."
Form of judgment against firm, see "Judgment."
Homestead rights of partner, see "Homestead."

Evidence *held* to show joint ownership, and not partnership.—State Bank v. O. S. Kelley Co. (Neb.) 619

Debts of the partners individually cannot be paid to the prejudice of firm creditors.—Steele v. Kearney Nat. Bank (Neb.) 841.

One whose statements reasonably import that he is a partner is liable as such to those acting on such statements, whether they are intended to deceive or not.—Wallerich v. Smith (Iowa) 184.

A partner can execute in the firm name a note in settlement of a claim arising from the firm business.—Dickson v. Dryden (Iowa) 148.

PARTY WALLS.

Under a statute authorizing the construction of a party wall by one "about to build" thereon, a mere intention to build will not justify its construction or maintenance.—Switzer v. Davis (Iowa) 174.

Passengers.

See "Carriers."

Patents for Inventions.

Construction of contract to assign patent, see "Contracts."

Pawn.

See "Pledge."

PAYMENT.

See, also, "Accord and Satisfaction."
Of loss under policy, see "Insurance."
Of mortgage, see "Mortgages."
Of premium, see "Insurance."

Where no application is made by either party of partial payments, they will be applied according to their priority of time.—State v. Hill (Neb.) 541.

Payment of an illegal tax under protest, after levy by an officer, is involuntary.—Roedel v. Village of White Cloud (Mich.) 386.

An acceptance given by a purchaser of goods, each party considering it only evidence of the amount due, is not a payment.—Marinette Iron Works Co. v. Cody (Mich.) 334.

Penalties.

Enforcement of stipulation in contract, see "Damages."

Performance.

Of contract, see "Contracts."

Personal Injuries.

See "Assault and Battery"; "Carriers"; "Counties"; "Damages"; "Death by Wrongful Act"; "Highways"; "Horse and Street Railroads"; "Master and Servant"; "Municipal Corporations"; "Negligence"; "Railroad Companies."

Petition.

See "Pleading."
For habeas corpus, see "Habeas Corpus."
For writ of error, see "Error, Writ of."

Physicians and Surgeons.

Malpractice, see "Malpractice."

PLEADING.

Amendment on appeal, see "Appeal."
Breach of warranty, see "Sale."
Damages, see "Damages."
Fraud, see "Fraud."
Harmless error in rulings on, see "Appeal."
In action against master for injuries to servant, see "Master and Servant."
—— on bills and notes, see "Negotiable Instruments."
—— on contract, see "Contracts."
—— on indemnity bond, see "Indemnity."
—— on policy, see "Insurance."
—— to foreclose mortgage, see "Mortgages."
In equity, see "Equity."
In particular actions and proceedings, see "Divorce"; "Ejectment"; "False Imprisonment"; "Forcible Entry and Detainer"; "Injunction"; "Libel and Slander"; "Quieting

Title—Removal of Cloud"; "Replevin"; "Specific Performance"; "Trespass"; "Trover and Conversion."
Limitations, see "Limitation of Actions."
Negligence, see "Municipal Corporations."
Pleadings as evidence, see "Evidence."
Res judicata, see "Judgment."
Set-off, see "Set-Off and Counterclaim."

The granting of permission to file a reply out of time is in the discretion of the trial court.—Storz v. Finkelstein (Neb.) 1020.

Where the construction of a pleading is doubtful, it should be resolved against the pleader.—J. Thompson & Sons Manuf'g Co. v. Perkins (Iowa) 874.

A plea of former adjudication setting up a public record of the court in which the action is pending need not be verified.—Detroit, L. & N. R. Co. v. McCammon (Mich.) 471.

Judgment could not be rendered on the pleadings for a larger sum than was admitted to be due.—Van Etten v. Kosters (Neb.) 1106.

Declaration or complaint.

When inconsistent counts without prejudice.—Rohde v. Biggs (Mich.) 331.

Where a complaint is on a cause of action against defendant personally, superadded words, such as "agent," should be disregarded.—Andres v. Kridler (Neb.) 649.

Several causes of action, when in one pleading, should be stated and numbered.—Building & Loan Ass'n of Dakota v. Cameron (Neb.) 1109.

Demurrer.

A demurrer will only lie to a whole pleading or to the whole of a single cause of action or defense.—Steenerson v. Great Northern Ry. Co. (Minn.) 723.

Allegations of special damages in an intervener's complaint, growing out of wrongful acts of plaintiff, are not statements of separate causes of action, and are not demurrable.—Steenerson v. Great Northern Ry. Co. (Minn.) 723.

Where there is a variance between the cause of action alleged in an attachment affidavit and the complaint, the remedy is not by demurrer.—Longyear v. Minnesota Lumber Co. (Mich.) 567.

Answer.

It is error to strike out a properly verified answer which puts in issue any material allegation.—Pearson v. Neeves (Wis.) 357.

Allegation in an answer *held* a negative pregnant, and an attempt to deny on information and belief matter in defendant's knowledge.—Carpenter v. Momsen (Wis.) 692.

On a hearing on the petition and answer alone, matters of defense well pleaded are considered established.—Van Etten v. Kosters (Neb.) 1106.

Amendment.

In an action to quiet title it was proper to refuse to permit a party to amend her pleadings so as to substantially change the defense.—Denzler v. Rieckhoff (Iowa) 147.

In replevin, where defendant withdraws his answer, and leaves the court room, plaintiff cannot amend his complaint to increase the alleged value of the property.—Geer v. Holcomb (Wis.) 793.

An amendment bringing in a cause of action barred by limitations should not be granted.—O'Connor v. Chicago & N. W. Ry. Co. (Wis.) 795.

An insurance company was properly permitted at the trial to amend the answer setting up nonoccupancy in violation of the terms of the policy.—Thompson v. Caledonia Fire Ins. Co. (Wis.) 801.

Amendment of pleading is in the discretion of the trial court.—Murray v. Laushman (Neb.) 413.

It appearing that the right to redeem was barred, an amendment offering to redeem was properly refused.—Hall v. Hooper (Neb.) 33.

Variance.

A variance in the name of plaintiff *held* not material.—Barnhard v. Village of White Cloud (Mich.) 387.

In an action for injuries to certain parts of the body, evidence of pain in other parts by reason of such injuries, is admissible evidence.—Will v. Village of Mendon (Mich.) 58.

Waiver of objections.

An objection to a declaration cannot be first raised on appeal.—Tyler v. Nelson (Mich.) 671.

In an action to recover land sold for taxes, that the petition does not allege that plaintiff has paid all the taxes due on the land cannot be raised for the first time on appeal.—Shelley v. Smith (Iowa) 172.

Where a demurrer to one division of an answer is erroneously sustained, and defendant amends, the error is waived.—Goodwin v. Provident Sav. Life Assur. Soc. (Iowa) 157.

Complaint, in an action for the cash value of a life policy, *held* sufficient as against an objection first made on appeal.—Lockwood v. Michigan Mut. Life Ins. Co. (Mich.) 229.

PLEDGE.

A pledgee could not, without authority, obtain judgment against the maker of collateral *held* by him, and sell the same after execution returned thereon unsatisfied.—In re Skoll (Minn.) 986; Swedish Nat. Bank of Minneapolis v. Davis, Id.

Police Department.

See "Municipal Corporations."

Police Power.

See "Constitutional Law."

Policy.

See "Insurance."

Possession.

See "Adverse Possession."

Powers.

Of agent, see "Principal and Agent."
Of attorney to confess judgment against a corporation, see "Corporations."

PRACTICE IN CIVIL CASES.

See, also, "Appearance"; "Assumpsit"; "Attachment"; "Certiorari"; "Continuance"; "Costs"; "Courts"; "Damages"; "Death by Wrongful Act"; "Discovery"; "Error, Writ of"; "Evidence"; "Exceptions, Bill of"; "Execution"; "Garnishment"; "Judgment"; "Jury"; "Justices of the Peace"; "Limitation of Actions"; "Mandamus"; "New Trial"; "Pleading"; "Quieting Title—Removal of Cloud"; "Replevin"; "Set-Off and Counterclaim"; "Specific Performance"; "Trespass"; "Trial"; "Trover and Conversion"; "Witness"; "Writs and Notice of Suits."

A court may, in its discretion, order a substitution of defendants in a proper case, even after answer filed.—Merriam v. Horner (Wis.) 808.

Plaintiff in replevin, who has obtained possession of the property, cannot dismiss without

the consent of defendant.—Garber v. Palmer, Blanchard & Co. (Neb.) 656.

When motion to direct verdict should be sustained.—Barnhart v. Chicago, M. & St. P. Ry. Co. (Iowa) 902.

Plaintiff may, as a matter of right, under Code Civ. Proc. § 430, dismiss at any time before final submission.—Sharpless v. Giffen (Neb.) 285.

Stipulations restricting the evidence to one issue *held* to obtain for the purposes of that trial only.—Mills v. Bills (Iowa) 881.

A stipulation permitting amendments after trial *held* to render the court's failure to instruct on a matter put in issue by the amendment erroneous.—Tecumseh Nat. Bank v. Harmon (Neb.) 1128.

An action against a bank on a promise to pay a check out of certain proceeds deposited is improperly transferred to the equity calendar.—Hawley v. Exchange State Bank (Iowa) 152.

Under Gen. St. 1894, § 5217, a notice of trial served on an attorney in another state was proper where both the party and his attorney were out of the state.—Olmstead v. Firth (Minn.) 988.

Where certain attorneys have appeared for all defendants, notice of trial served on them is sufficient, where the record shows no substitution of other attorneys for a part of defendants.—Landyskowski v. Lark (Mich.) 371.

Preferences.

See "Assignment for Benefit of Creditors"; "Composition with Creditors"; "Insolvency."

Prescription.

See "Adverse Possession"; "Limitation of Actions."

Highway by, see "Highways."

Presentation.

Of claims against estate, see "Executors and Administrators."

Presumption.

See "Evidence."

On appeal, see "Appeal."

PRINCIPAL AND AGENT.

See, also, "Attorney and Client"; "Factors and Brokers"; "Master and Servant."

Insurance agent, see "Insurance."

Appointment of agent.

Agency cannot be proved by declarations of one assuming to act as agent.—Anheuser-Busch Brewing Ass'n v. Murray (Neb.) 635.

It is error to exclude evidence of authority on the ground that the only issue was whether the principal was estopped to deny authority, and then left the question of authority to the jury.—Clark v. Dillman (Mich.) 570.

Holding out another as agent does not create an estoppel, unless the representations might be expected to be relied on, and actually are relied on in good faith.—Clark v. Dillman (Mich.) 570.

A charge as to estoppel of principal to deny authority *held* erroneous, as instructing that reliance on the principal's representations was not necessary.—Clark v. Dillman (Mich.) 570.

A contract to furnish defendant certain merchandise to be sold as agent for plaintiff *held* a contract of agency, and not a sale.—Norton v. Melick (Iowa) 780.

Powers of agents.

The authority of an agent to do a particular act may be inferred from proof that the principal had ratified similar acts.—First Nat. Bank v. Ridpath (Neb.) 37.

Agent for sale of harvester *held* authorized to waive formal provisions of contract of warranty.—Peterson v. Walter A. Wood Mowing & Reaping Mach. Co. (Iowa) 96.

In the absence of evidence to the contrary, the authority of an agent of a nonresident corporation to discharge a chattel mortgage will be presumed.—Hilton v. Advance Thresher Co. (S. D.) 816.

A nonresident agent of a real-estate loan business *held* authorized to direct a local subagent to retain a lawyer when necessary.—Davis v. Matthews (S. D.) 456.

By accepting a deed of mortgaged land from her husband, the wife adopted the mortgage.—Hall v. Hooper (Neb.) 33.

Evidence examined, and *held* to sustain a corporation's authority to receive payment of a mortgage executed by plaintiff and owned by defendant.—Wilson v. La Tour (Mich.) 474.

Rights and liabilities inter se.

An agent making an unauthorized contract which is repudiated by his principal cannot recover for any rights under the original contract.—Hart v. Mt. Pleasant Park Stock Co. (Iowa) 190.

Whether a principal had a right to reject an order for goods submitted by the agent, so as to avoid liability for commissions, *held* a question for the jury, on the evidence.—Sherman v. Port Huron Engine & Thresher Co. (S. D.) 1077.

Where an agent agrees to keep merchandise consigned in good order, he is not liable if it is destroyed by fire without his negligence.—Norton v. Melick (Iowa) 780.

Rights and liabilities as to third persons.

It is no defense to an action that defendant was acting as agent, unless the fact was disclosed to plaintiff.—Banks v. Cramer (Mich.) 946.

Parties to contract *held* individually liable, though it recites that it is between trustees and building committee of a church and party of the second part.—Landyskowski v. Lark (Mich.) 371.

One claiming under a contract by an agent must show the agent's authority, or facts estopping the principal from denying the same.—Clark v. Dillman (Mich.) 570.

PRINCIPAL AND SURETY.

Form of judgment against surety, see "Judgment."

Guaranty of negotiable instruments, see "Negotiable Instruments."

Liability of surety on indemnity bond, see "Indemnity."

—— on justice's bond, see "Justices of the Peace."

—— on replevin bond, see "Replevin."

When equity will not compel principals to a secured note to pay the same, to protect the claims of the surety's creditors.—Webber v. Webber (Mich.) 960.

Where a mortgage was executed to secure the debt of another, subsequent lienholders have no right to insist that the mortgagees shall proceed against the principals before selling the mortgaged property.—Webber v. Webber (Mich.) 960.

It is the duty of a principal, to whom an agent has given bond, on obtaining knowledge of his dishonesty, to either discharge him or

advise his sureties of the facts.—Aetna Ins. Co. v. Fowler (Mich.) 470.

By consenting to change of place of service, sureties on a counter bond given a fidelity insurance company became liable for subsequent defaults.—Fidelity & Casualty Co. of New York v. Lawlor (Minn.) 143.

Liability of sureties on the bond of a contractor, to secure performance of a contract for the erection of a building for a county.—Hunt v. King (Iowa) 71.

Release and discharge of sureties.
Sureties on a contractor's bond for a public improvement *held* not released by payment to a material man, from the contract price, of an antecedent debt.—People v. Powers (Mich.) 215.

Sureties for a partner's faithful performance of his duties were not released by an increase of capital.—McAuley v. Cooley (Neb.) 304.

Negligence of the county board in examining the treasurer's account *held* not to release his sureties.—Bush v. Johnson County (Neb.) 1023.

A contract between an insurance company and its agent *held* not altered, so as to discharge the agent's surety.—Taylor v. Standard Life & Accident Ins. Co (Neb.) 647.

A creditor who releases part of his security in so far releases the surety of the debtor.—De Goey v. Van Wyk (Iowa) 787.

Priority.

Between conflicting garnishments, see "Garnishment."
—— judgment and mortgage lien, see "Mortgages."
—— judgment lien and dower claimant, see "Judgment."

Privileged Communications.

See "Libel and Slander."

Probable Cause.

See "Malicious Prosecution."

Process.

See "Writs and Notice of Suits."

Prohibition, Writ of.

Original jurisdiction of supreme court, see "Courts."

Promissory Notes.

See "Negotiable Instruments."

Proof.

See "Evidence."

Proof of Loss.

See "Insurance."

Publication.

Of summons, see "Writs and Notice of Suits."

Public Improvements.

See "Municipal Corporations."

PUBLIC LANDS.

A patent cannot be collaterally attacked.—Green v. Barker (Neb.) 1032.

A deed executed by a town-site trustee cannot be collaterally attacked.—Green v. Barker (Neb.) 1032.

Public Use.

See "Eminent Domain."

Quantum Meruit.

See "Assumpsit."

QUIETING TITLE — REMOVAL OF CLOUD.

Rev. St. § 3186 (Laws 1893, c. 88), authorizes an action to quiet title against a person claiming an interest under a contract of sale, though the contract on its face shows that the claim is invalid.—Fox v. Williams (Wis.) 357.

A petition *held* to state a cause of action.—Scarborough v. Myrick (Neb.) 867.

A remainder-man may sue to quiet title during the continuance of the particular estate.—Hall v. Hooper (Neb.) 33.

A mortgagor suing to quiet title because of a void foreclosure must offer to redeem, though the right to foreclose is barred.—Hall v. Hooper (Neb.) 33.

RAILROAD COMPANIES.

See, also, "Highways"; "Municipal Corporations"
Liability for injuries to employés, see "Master and Servant."
Regulation by city, police power, see "Constitutional Law."

A railroad company having an easement in a city street is not entitled to compensation from a street-railroad company as a condition to the crossing of its tracks.—Chicago, B. & Q. R. Co. v. Beatrice Rapid-Transit & Power Co. (Neb.) 830.

A railroad company *held* not liable for a guaranty made by its general manager and general freight agent.—Weikle v. Minneapolis, St. P. & S. S. M. Ry. Co. (Minn.) 963.

Liability for negligence.
A finding of negligence *held* not sustained by evidence that the train was running 25 miles per hour.—Missouri Pac. Ry. Co. v. Hansen (Neb.) 1105.

It is not negligence for a railroad company to construct a cattle guard at a point where its track leaves station grounds, and from which it is required to keep the track fenced.—Fuller v. Lake Shore & M. S. Ry. Co. (Mich.) 593.

A person crossing a track in a street must use such care as ordinarily prudent people would exercise.—Goodrich v. Burlington, C. R. & N. Ry. Co. (Iowa) 770.

Evidence examined, and *held*, that plaintiff was guilty of contributory negligence at a railroad crossing.—Hinken v. Iowa Cent. Ry. Co. (Iowa) 882.

The moving of a train while horses were on the inclosed right of way *held* not negligence.—Barnhart v. Chicago, M. & St. P. Ry. Co. (Iowa) 902.

If the engineer fails to keep a lookout, the company is liable for stock killed, though not seen till too late to avoid striking them.—Omaha & R. V. Ry. Co. v. Wright (Neb.) 842.

Evidence *held* to present a question of negligence in the killing of stock.—Burlington & M. R. R. Co. v. Gorsuch (Neb.) 831.

Evidence *held* to sustain a verdict against a railroad company for damages on account of fire

set by locomotive.—Warren v. Great Northern Ry. Co. (Minn.) 984.

Whether the plaintiff, a trespasser on a train, was compelled by force to jump therefrom, or whether his act was voluntary and negligent, *held* questions for the jury.—Brevig v. Chicago, St. P., M. & O. R. Co. (Minn.) 401.

RAPE.

Instructions *held* not prejudicial.—People v. Ricketts (Mich.) 483.

Evidence examined, and *held* to justify a charge that the evidence, if believed, justified a conviction for assault.—State v. Rudd (Iowa) 748.

Evidence examined, and *held* to support a verdict of guilty.—State v. Rudd (Iowa) 748.

The jury may consider the mental capacity of prosecutrix, her age, and her demeanor during the trial.—State v. Philpot (Iowa) 730.

Evidence to show the purpose of defendant in going to the place where the crime was committed, and in meeting prosecutrix, is admissible.—State v. Philpot (Iowa) 730.

An instruction not approved, as it tended to place the burden of showing consent on defendant.—State v. Philpot (Iowa) 730.

Ratification.

By principal, see "Principal and Agent."
Of acts of state officers, see "States and State Officers."

Real Action.

See "Ejectment"; "Forcible Entry and Detainer"; "Quieting Title—Removal of Cloud."

Real Estate.

See "Deed"; "Mechanics' Liens"; "Mortgages"; "Public Lands."

Reasonable Doubt.

See "Criminal Law."

RECEIVERS.

Of corporation, see "Corporations."

A receiver appointed by a court while a motion for a receiver is pending in another court of equal jurisdiction is a de facto receiver.—Northwestern Iron Co. v. Lehigh Coal & Iron Co. (Wis.) 515.

The validity of the appointment of a receiver for an insolvent corporation can only be questioned in a direct proceeding.—Basting v. Ankeny (Minn.) 266.

Evidence examined and *held* insufficient to justify the appointment of a receiver.—Hart v. Mt. Pleasant Park Stock Co. (Iowa) 190.

Where, after the parties have been given time to present affidavits on motion for the appointment of a receiver, *held* no abuse of discretion was shown in refusing to receive other affidavits.—Farmers' Nat. Bank of Owatonna v. Backus (Minn.) 5

A receiver cannot be garnished without leave of the court appointing him.—Blum v. Van Vechten (Wis.) 507.

For mortgaged property.

An appointment of a receiver pending foreclosure of a mortgage *held* justified by the circumstances.—Farmers' Nat. Bank of Owatonna v. Backus (Minn.) 5.

Code, § 2903, does not prevent the appointment of a receiver under a stipulation of the parties during the period for redemption.—Hubbell v. Avenue Inv. Co. (Iowa) 85.

Stipulation in a mortgage for appointment of receiver in case of foreclosure *held* valid.—Hubbell v. Avenue Inv. Co. (Iowa) 85.

Stipulation in mortgage for appointment of a receiver in case of foreclosure *held* binding on a subsequent grantee of the mortgaged premises.—Hubbell v. Avenue Inv. Co. (Iowa) 85.

After confirmation of sale and appeal therefrom, the trial court may appoint a receiver.—Philadelphia Mortgage & Trust Co. v. Goos (Neb.) 843.

If the property is probably insufficient to discharge the mortgage debt, the mortgagee is entitled to have a receiver appointed.—Philadelphia Mortgage & Trust Co. v. Goos (Neb.) 843.

Though Comp. St. c. 73, § 55, provides that the mortgagor has the right of possession, the court may appoint a receiver to collect the rents in a proper case.—Philadelphia Mortgage & Trust Co. v. Goos (Neb.) 843.

Recognizance.

See "Bail."

Reconvention.

See "Set-Off and Counterclaim."

Records.

Of deed, see "Deed."
On appeal, see "Appeal."
—— in criminal cases, see "Criminal Law."

Redemption.

From tax sale, see "Taxation."

REFERENCE.

Of proceedings for contempt in violation of injunction, see "Injunction."

Where the complaint in an action for conversion does not allege it to have been wrongful, the action is referable.—Casgrain v. Hamilton (Wis.) 118.

Where an order settling an assignee's account is set aside, the court may refer the hearing of objections thereto.—Commercial Bank v. McAuliffe (Wis.) 110.

Reformation.

Of contract see "Equity."

Release and Discharge.

Of guarantor, see "Guaranty."
—— on note, see "Negotiable Instruments."
Of judgment debtor, see "Judgment."
Of mechanic's lien, see "Mechanics' Liens."
Of mortgage, see "Mortgages."
Of surety, see "Principal and Surety."
—— on appeal bond, see "Appeal."

Remainder-Man.

See "Estates."

Remote and Proximate Cause.

See "Negligence."

Removal.

Of guardian, see "Guardian and Ward."

Repeal.

Of statute, see "Statutes."

REPLEVIN.

Authority of sheriffs and constables to serve process, see "Writs and Notice of Suits."
Set-off in replevin, see "Set-Off and Counterclaim."

In replevin against a constable holding under a writ of attachment, defendant cannot justify on the ground that the attachment plaintiff had a lien independent of the attachment.—Houck v. Linn (Neb.) 1103.

Pleading and evidence.
Under a general allegation of ownership, right of possession, and wrongful detention, fraud may be proved.—Phenix Iron-Works Co. v. McEvony (Neb.) 290.

Under an allegation of general ownership, plaintiff cannot show that he claims under a mortgage.—Strable v. First Nat. Bank of Stanton (Neb.) 415

Under a general denial, defendant sheriff may show that the goods are the property of a third person, and are held under attachment.—Conner v. Knott (S. D.) 461.

Practice.
In replevin against a sheriff for attached property, after default, the attachment plaintiff cannot intervene — Dupont & Co. v. Amos (Iowa) 774.

It is error, after default, to permit a third person to intervene, under Code, § 3228.—Dupont & Co v. Amos (Iowa) 774.

Where plaintiff, who has obtained possession, fails to prosecute the action, defendant is entitled to judgment and a trial to establish damages.—Garber v. Palmer, Blanchard & Co. (Neb.) 656.

An alternative judgment should be discharged where the party pays the costs and tenders the property.—Manker v. Sine (Neb.) 840.

Actions on bonds.
Failure of the sureties on a replevin bond to justify, or to acknowledge the bond, *held* not to affect the justice's jurisdiction to issue the writ.—Wheeler v. Paterson (Minn.) 964.

The omission of the surety's name from the bond *held* not to affect its validity.—Wheeler v. Paterson (Minn.) 964.

Sureties on a replevin bond *held* not liable where the judgment was merely for the value of the property.—New England Furniture & Carpet Co. v. Bryant (Minn.) 974.

The burden *held* on plaintiff in an action on the bond, based on a judgment for the value of the property, to show that the property could not be returned.—New England Furniture & Carpet Co. v. Bryant (Minn.) 974.

Rescission.

Of contract, see "Contracts"; "Equity."
Of sale, see "Sale."

Res Judicata.

See "Judgment."

Resulting Trusts.

See "Trusts."

Return.

Of execution, see "Execution."
Of service of summons, see "Writs and Notice of Suits."

Revenue.

See "Taxation."

Reversal.

See "Appeal."

Review.

On appeal, see "Appeal."
—— in criminal cases, see "Criminal Law."

Review, Bill of.

See "Equity."

ROBBERY.

Evidence examined, and *held* to sustain a verdict.—Pjarrou v. State (Neb.) 422.

Held proper to charge that the possession of stolen goods without explanation becomes a strong circumstance of guilt.—State v. Harris (Iowa) 728.

SALE.

See, also, "Fraudulent Conveyances"; "Vendor and Purchaser."
Bill of sale as mortgage, see "Chattel Mortgages."
Election of remedies by seller, see "Election of Remedies."
Illegal sale of liquor, see "Intoxicating Liquors."
Measure of damages for breach of contract, see "Damages."
Tax sale, see "Taxation."
Under attachment, see "Attachment."
—— execution, see "Execution."

A pledgee or mortgagee to secure a pre-existing debt is not a bona fide purchaser.—Phenix Iron-Works Co. v. McEvony (Neb.) 290.

Instructions recognizing defendant's right to strict performance of the contract of sale, and permitting the jury to consider whether the performance was waived, *held* proper.—Barker v. Davies (Neb.) 11.

The contract.
A transaction *held* a sale with option to rescind, and not a contract of brokerage.—Houck v. Linn (Neb.) 1103.

An order for goods through an agent of the seller subject to approval may be countermanded before acceptance.—J. Thompson & Sons Manuf'g Co. v. Perkins (Iowa) 874.

Timber sold for removal, and before the expiration of the time limited cut into logs, which still remain on the land, is in effect removed, and will not revert to the owner of the realty as forfeited.—Macomber v. Detroit, L. & N. R. Co. (Mich.) 376.

Timber sold to be removed, but which remains uncut at the expiration of the time limited, reverts to the owner of the realty.—Macomber v. Detroit, L. & N. R. Co. (Mich.) 376.

Contract for the sale of stock in a corporation, together with the seller's interest in its stock on hand, construed.—Novelty Paper-Box & Supply Co. v. Stone (Wis.) 600.

An order on a pledgee of notes to deliver surplus notes to a creditor of the pledgor *held* void as an executory sale. — Burnam v. Merchants' Exch. Bank (Wis.) 510.

Warranty.
The word "Warrant" need not be used in order to constitute a warranty.—Unland v. Garton (Neb.) 1130.

Whether statements of the vendor were merely an opinion, or constitute a warranty, *held* questions for the jury. — Unland v. Garton (Neb.) 1130.

Held not error to permit defendants to testify, in support of a counterclaim for breach of warranty of two boilers, that the boilers were of no value to them.—Boynton Furnace Co. v. Messner (Iowa) 65.

Written notice of failure of machine to work well, required by warranty, is unnecessary where the person to be notified is present and has knowledge of the fact.—Peterson v. Walter A. Wood Mowing & Reaping Mach. Co. (Iowa) 96.

Where defendant pleads breach of warranty, evidence of the value of the property to him in its present condition is inadmissible.—Aultman Co. v. Ferguson (S. D.) 1081.

Where defendant pleads breach of warranty to an action for price, witnesses as to the defects in the property can testify as to the expense of correcting the same.—Aultman Co. v. Ferguson (S. D.) 1081.

Rights and remedies of parties.

Evidence *held* to show an election by seller to rescind.—Kearney Milling & Elevator Co. v. Union Pac. Ry. Co. (Iowa) 1059; Elm Creek Elevator Co. v. Same, Id.

When seller may rescind for fraud of buyer.—Kearney Milling & Elevator Co. v. Union Pac. Ry. Co. (Iowa) 1059; Elm Creek Elevator Co. v. Same, Id.

A vendor who sues for the price cannot thereafter rescind for fraud of the vendee.—First Nat. Bank v. McKinney (Neb.) 280.

Proof of false statements by the purchaser *held* admissible under an allegation that he concealed his insolvency from the vendor.—First Nat. Bank v. McKinney (Neb.) 280.

A vendor who seeks to rescind for fraud must ordinarily offer to return the price.—Phenix Iron-Works Co. v. McEvony (Neb.) 290.

A seller, on rescinding and stopping the goods in transit, should give notice to the buyer of an intention to resell.—Kearney Milling & Elevator Co. v. Union Pac. Ry. Co. (Iowa) 1059; Elm Creek Elevator Co. v. Same, Id.

Goods seized by a sheriff on execution from the judgment debtor cannot be recovered from his possession under a bill of sale given by the debtor as security prior to the seizure, but not filed until after that time.—Wagg-Andersen Woolen Co. v. Dunn (Wis.) 354.

On sale of a chattel, the buyer may surrender to a third person claiming it; but to sustain a claim for damages against the seller he must prove that such person had a paramount title.—Hanna v. Buckley (Neb.) 1122.

After repudiation of a contract by the buyer, the seller *held* not required to further attempt to complete its part of the contract to enable it to recover for the breach.—Walsh v. Myers (Wis.) 250.

In replevin by a vendor against an attaching creditor of the purchaser, plaintiff must show rescission of sale.—Morse v. Hamill (Iowa) 892.

Conditional sales.

Conditional sale construed, and *held* that, on default, the seller was entitled to possession.—Ryan v. Wayson (Mich.) 370.

Conditional sale construed and rights of purchaser after default in payment determined.—Ryan v. Wayson (Mich.) 370.

Satisfaction.

See "Accord and Satisfaction"; "Payment."

SCHOOLS AND SCHOOL DISTRICTS.

The father of a nonresident pupil *held* liable for the tuition of his child.—Fractional School Dist. No. 1, Paw Paw & Antwerp Tps., v. Yerrington (Mich.) 324.

The adoption by a school board of a fraudulent vote levying a tax *held* not a final decision within Code, § 1829.—Hinkle v. Saddler (Iowa) 765.

Matters presented by an affidavit to enjoin a school tax *held* sufficient to justify an injunction.—Hinkle v. Saddler (Iowa) 765.

Where a school district was indebted in excess of the constitutional limit, and bonds were issued to take up outstanding bonds, and it does not appear that they were used for such purpose, they are invalid.—Holliday v. Hildebrandt (Iowa) 89.

Moneys from liquor licenses granted by a village belong to the school district in which the village is located.—Guthrie v. Hester (Neb.) 853.

All school subdistricts which crossed township lines were divided on such lines by Code, § 1713, except those so organized because of natural obstacles.—Russell v. District Tp. of Cleveland (Iowa) 771.

A new school district, whose report does not show the maintenance of a school during six months of the year past, is not entitled to share in the apportionment of the town school fund.—Joint School Dist. No. 8, Town of Harmony, v. School Dist. No. 5, Town of Harmony (Wis.) 794.

Secondary Evidence.

See "Evidence."

Sentence.

See "Criminal Law."

Servant.

See "Master and Servant."

SET-OFF AND COUNTERCLAIM.

In an action on a supersedeas bond, a claim due from plaintiff to the principal may be pleaded as a set-off.—Van Etten v. Kosters (Neb.) 1106.

Evidence examined, and *held*, that the cause of action set out in the counterclaim arose out of the transaction set out in the complaint.—McHard v. Williams (S. D.) 930.

An answer in an action on a note *held* to set up a defense, and not a counterclaim.—Lynch v. Free (Minn.) 973.

Usurious payments cannot be set off against a subsequent and distinct debt.—Pinch v. Willard (Mich.) 42.

Set-off cannot be pleaded in replevin.—Pinch v. Willard (Mich.) 42.

An agreement that a mortgage securing a loan should also cover any other indebtedness found due the mortgagee did not authorize a balance found due the mortgagor to be offset against the loan.—Pinch v. Willard (Mich.) 42.

Settlement.

Of bill of exceptions, see "Exceptions, Bill of."

Sheriffs and Constables.

Payment of fees from deposit in court, see "Deposit in Court."

Slander.

See "Libel and Slander."

Societies.

See "Associations"; "Corporations."

Solicitor.

See "Attorney and Client."

Special Acts.

See "Constitutional Law."

Special Verdict.

See "Trial."

SPECIFIC PERFORMANCE.

Vendee *held* precluded from demanding specific performance, by his failure to take steps to enforce the contract after notice by the vendor of its forfeiture.—Cathro v. Gray (Mich.) 346.

A petition for specific performance of a contract to convey land is not demurrable because it fails to describe land to be conveyed by plaintiff in payment, where it alleges full performance by plaintiff.—Sundback v. Gilbert (S. D.) 941.

An allegation that parties made a contract will be taken on demurrer to mean a legal contract, and one in writing, if essential to its validity.—Sundback v. Gilbert (S. D.) 941.

Decree for specific performance of a contract to convey land which defendant has, through error, conveyed to another party, *held* proper.—Fountaine v. Leveque (Mich.) 575.

It is sufficient, in an action for specific performance, if vendor can make title any time before decree.—Gates v. Parmly (Wis.) 253.

STARE DECISIS.

In the absence of complications resulting from property rights, the court will modify or overrule previous decisions fundamentally wrong.—State v. Hill (Neb.) 541.

State Courts.

See "Courts."

STATES AND STATE OFFICERS.

The power to appoint to public office includes the power to remove at pleasure, though the officer was appointed for a fixed term, or by-laws restrict the power of removal to cases where cause exists, or the officer could be removed for a cause mentioned in the constitution.—State v. Archibald (N. D.) 234.

The mere delivery and acceptance of certificates of deposit issued by a bank *held* not such payment as will release an outgoing state treasurer.—State v. Hill (Neb.) 541.

The legislature can ratify the act of an outgoing state treasurer in turning over to his successor, as money, certificates of deposit.—State v. Hill (Neb.) 541.

Statute of Frauds.

See "Frauds, Statute of."

Statute of Limitations.

See "Limitation of Actions."

STATUTES.

Proof of foreign laws, see "Evidence."

Unless so provided, a law relating to procedure will not affect pending proceedings.—Auditor General v. Chandler (Mich.) 482.

The act of June 4, 1895, was passed without a saving clause, and therefore terminated proceedings commenced under a former statute.—City of Detroit v. Chapin (Mich.) 587.

Under Const. art. 4, § 14, a bill passed previous to the last five days of the legislative session, and signed by the governor after the adjournment of the legislature, became a law.—City of Detroit v. Chapin (Mich.) 587.

Titles of acts.

Laws 1895, c. 71, relating to canal companies, *held* invalid as seeking to amend the general corporation law without reference thereto.—State v. Board of Com'rs of Douglas County (Neb.) 434.

Laws 1895, c. 71, relating to canal companies, *held* not to express its subject in its title.—State v. Board of Com'rs of Douglas County (Neb.) 434.

Gen. Laws 1885, c. 53, entitled "An act to amend section 36 of chapter 73 of the General Statutes of 1878, relating to the testimony of witnesses," sufficiently expresses the subject in the title.—Hall v. Leland (Minn.) 202.

3 How. Ann. St. §§ 6222a–6222k, is not unconstitutional as embracing more than one subject.—People v. McGlaughlin (Mich.) 385.

Repeal.

The revision of Rev. St. § 3314, by Laws 1887, c. 442, and Laws 1889, c. 275, *held* not to repeal by implication Laws 1887, c. 466.—Bentley v. Adams (Wis.) 505.

Rev. St. 1866, c. 43, § 41, enacted with section 5, was repugnant to the latter section, and hence repealed it.—Omaha Real Estate & Trust Co. v. Reiter (Neb.) 658.

Act Jan. 26, 1856 (Sess. Laws, c. 31), § 5, as amended by Act Feb. 15, 1864 (Sess. Laws, c. 12), being irreconcilable with Sess. Laws 1856, c. 31, § 44, the latter was repealed by implication.—Omaha Real Estate & Trust Co. v. Reiter (Neb.) 658.

A statute amending another statute *held* to repeal all which was not re-enacted.—Rundlett v. City of St. Paul (Minn.) 967.

An act passed for a particular purpose is not repealed by a general law, unless the intent to repeal is clear.—Regents of University of Michigan v. Auditor General (Mich.) 956.

Code, § 478, relating to assessments for public improvements, was not repealed by implication by Acts 21st Gen. Assem. c. 168, § 13.—Farwell v. Des Moines Brick Manuf'g Co. (Iowa) 176.

STATUTES CONSTRUED.

UNITED STATES.

CONSTITUTION.

Art. 4, § 1.....1095

STATUTES AT LARGE.

1844, May 23, ch. 17, 5 Stat. 657 1032

REVISED STATUTES.

§ 5198 122

ILLINOIS.

REVISED STATUTES 1881.

Ch. 74 715

IOWA.

CONSTITUTION.

Art. 1, § 10..... 737
Art. 11, § 3..... 89

CODE 1873.

Ch. 10, tit. 3. Amended by Laws 1894, p. 73..... 779
§ 45, subds. 9, 10..... 727
§ 303, cl. 18..... 886
§ 307 1064
§ 478 177
§ 509 786
§§ 806, 816..... 182
§ 888 168
§§ 894, 897, 902..... 172
§§ 1059, 1076, 1078..... 154
§ 1270 87
§§ 1713, 1797..... 771
§ 1829 765
§ 1931 781
§ 1934 911
§ 1990 917
§§ 2007, 2008.....1048
§ 2019 174
§ 2115 756
§ 2214 1039
§ 2420 744
§ 2436 909
§ 2440.....887, 909
§ 2444 1048
§ 2452.....889, 918
§§ 2455, 2456..... 908
§ 2457 909
§ 2495 163
§ 2529.....170, 1053
§ 2585 896
§ 2684 774
§ 2689 147
§ 2742.....1056, 1057
§ 2779 737
§ 2789 897
§ 2903 85
§ 2907 762
§ 3016 162
§§ 3089, 3102..... 195
§ 3173.....76, 754
§ 3184 1057
§ 3228 774
§ 3402 765
§ 3552 876
§ 3639 150
§ 3718 157
§ 3804 742
§ 3979.....754, 755
§ 4073 727
§ 4302.....725, 745
§ 4421 737
§ 4435 729
§ 4489 779
§ 4556 737

MCCLAIN'S CODE.

§ 1288 785
§ 1312 784
§ 1733 157
§ 1734.....764, 1054
§§ 1824, 1825..... 737
§ 2493 905
§ 3190 763
§ 4152 734
§ 4392 784
§ 5029 734

LAWS.

1866, ch. 143, § 16..... 771
1880, ch. 1, §§ 9, 13..... 188
1884, ch. 194, § 1..... 744
1886, ch. 13, §§ 1–4.....1041
1886, ch. 141..... 787
1886, ch. 168, § 13..... 177
1890, ch. 1, § 3..... 176
1894, ch. 7, §§ 2, 20..... 103
1894, ch. 62, § 1..... 893
1894, p. 73..... 779

MICHIGAN.

CONSTITUTION.

Art. 4, § 14..... 587
Art. 4, § 20..... 385
Art. 4, § 43..... 384

HOWELL'S ANNOTATED STATUTES.

Volume 2.

Ch. 344 377
§§ 5360, 5361..... 956
§§ 5560, 5561..... 674
§ 5573 955
§ 5884 947
§ 6231 52
§ 7026 217
§§ 7554, 7555..... 563
§ 7584 562
§§ 7686, 7690..... 224
§ 7784 1093
§ 8011 478
§ 8015 596
§ 8307 217
§§ 8721, 8736..... 238
§ 9004 217
§ 9315 57

Volume 3.

§ 1690z1 382
§ 3332 62
§§ 6222a–6222k 385
§ 7621c 487
§ 8058 485

CITY CHARTERS.

Detroit. Laws 1857, p. 106. Amended by 2 How. Ann. St. ch. 344..... 377

LAWS.

1853, p. 180 377
1857, p. 106. Detroit City Charter. Amended by 2 How. Ann. St. ch. 344.. 377
1879, No. 280..... 55
1889, No. 149..... 384
1891, No. 179. Amended by Laws 1893, No. 199.. 334
1891, No. 179, § 4..... 348
1891, No. 190, §§ 21, 31... 388
1893, No. 199..... 334
1893, No. 206, §§ 8, 14.... 958
1893, No. 206, § 30..... 482
1895, June 4. Eminent Domain 587

MINNESOTA.

CONSTITUTION.

Art. 4, § 27..... 202
Art. 6, § 13..... 264

GENERAL STATUTES 1894.

§§ 865–867..... 264
§§ 2841–2854, 3338–3343.. 206
§ 4129 971
§ 5177 970
§ 5217 978
§ 5278 974
§ 5420 974
§ 5897 263
§ 6243 979
§ 7132 969

LAWS.

1883, ch. 2, § 13..... 967
1883, ch. 107..... 206
1885, ch. 53..... 202
1887, ch. 135..... 206
1889, ch. 227..... 206
1891, ch. 39, §§ 1, 2..... 264
1893, ch. 124, § 9. Amended by Laws 1895, ch. 115, § 5 205
1895, ch. 115, § 5..... 205
1895, ch. 320..... 366

NEBRASKA.

CONSTITUTION.

Art. 6, § 2..... 642

CODE OF CIVIL PROCEDURE.

§ 23 868
§ 29 634
§ 77 857
§ 82.....825, 867, 868
§ 85. Amended by Laws 1887, p. 643.....1010
§ 297 1003
§ 314, subd. 5..... 821
§ 430 785
§ 511 1106
§ 522 862
§ 602.....16, 888
§ 636 284

CRIMINAL CODE.

§ 87a 6
§ 124 542
§ 283 1127

REVISED STATUTES 1866.

Ch. 43, §§ 5, 41..... 658

GENERAL STATUTES 1873.

Page 749, § 124..... 542

COMPILED STATUTES 1885.

Ch. 34, § 28..... 19

COMPILED STATUTES 1893.

Ch. 12a, § 48. Omaha City Charter 624
Ch. 23, § 30..... 431
Ch. 32, § 14..... 620
Ch. 50, §§ 20, 22.....23, 24
Ch. 73, § 55..... 843
Ch. 78, § 46.....1059

COMPILED STATUTES 1895.

Ch. 2, art. 3.....1013
Ch. 16, § 139.....1033
Ch. 72, art. 1, § 3.....1000

CITY CHARTERS.

Omaha. Comp. St. 1893, ch. 12a, § 48..... 624

LAWS.

1856, ch. 31, § 5. Amended by Laws 1864, ch. 12 658
1856, ch. 31, § 44..... 658
1864, ch. 12..... 658

1885, ch. 108.....1028
1887, p. 643.....1010
1891, ch. 13.....1037

NORTH DAKOTA.

CONSTITUTION.
§ 197 235

SOUTH DAKOTA.

CONSTITUTION.
Art. 5, § 13..... 310
Art. 6, §§ 6, 7.....1088

COMPILED LAWS 1887.
§ 470, subd. 4..... 938
§§ 607–609 1079
§ 3581 810
§ 3591 1085
§ 4034 1083
§ 4657 935
§§ 4890, 4891..... 452
§ 4932, subd. 1..... 939
§ 4947 322
§ 5048 814
§ 5127 310
§ 5790 465
§§ 6741, 7249..... 944

CITY CHARTERS.
Watertown, §§ 25, 27.....1088

LAWS.
1889, ch. 49.....1079
1890, ch. 6..... 310
1890, ch. 35.....1145
1891, ch. 14, § 104.....1079
1893, ch. 24.....1076
1895, ch. 64, §§ 3, 8..... 944

WISCONSIN.

REVISED STATUTES 1878.
§§ 462, 558..... 794
§ 1176 254
§ 1411 707
§ 1692 715
§ 1701 110
§ 1769 398
§ 1776 109
§§ 1810, 1811..... 108
§§ 1977, 1978..... 528
§§ 2171, 2172..... 244
§§ 2185, 2186..... 796
§ 2204 502
§ 2227 706
§ 2610 808
§ 2649 1144
§ 2792 712
§ 2832 110
§ 2844 1140
§ 2864 110
§ 2884 799
§ 2886 793
§ 2921 118
§ 3050 799
§ 3186 357
§ 3187 802
§ 3314. Amended by Laws 1887, chs. 442, 466; Laws 1889, ch. 275 505
§§ 3586, 3631..... 692
§ 3663 355
§ 3739 793
§ 3914 518
§ 4069 689
§ 4719 393

SANBORN & BERRYMAN'S ANNOTATED STATUTES.
§ 2313 354
§ 2647 796
§§ 2905a, 3187..... 500
§ 4096 695
§ 4269 616

LAWS.
1887, ch. 391..... 716
1887, chs. 442, 446, 466.. 505
1889, ch. 275..... 505
1889, ch. 341, §§ 1, 2..... 716
1889, ch. 450..... 248
1891, ch. 82..... 248
1893, ch. 88..... 357
1893, ch. 235..... 712
1893, ch. 310..... 603
1895, ch. 215..... 525
1895, ch. 221..... 805
1895, ch. 302..... 603

Stay.

See "Continuance."

Stealing.

See "Burglary"; "Larceny"; "Robbery."

Stock.

See "Animals."
Corporate stock, see "Corporations."
Shipment by carrier, see "Carriers."

Stockholders.

See "Corporations."

Streams.

See "Waters and Water Courses."

Street Railroad.

See "Horse and Street Railroads."

Streets.

Dedication of, see "Dedication."

Subscription.

To corporate stock, see "Corporations."

Succession.

See "Executors and Administrators."

Suicide.

See "Insurance."

Suit.

See "Action."

SUNDAY.

The delivery of a note on Sunday in satisfaction of a guaranty *held* not to invalidate the delivery.—Steere v. Trebilcock (Mich.) 342.

Supreme Court.

See "Appeal"; "Courts."

Suretyship.

See "Principal and Surety."

SURFACE WATER.

An owner is not liable for deflecting surface water unless in doing so he is guilty of negligence causing injury to his neighbor.—City of Kearney v. Themanson (Neb.) 996.

One may not cumulate surface waters, and discharge them by a ditch in a volume on the land of his neighbor.—Jacobson v. Van Boening (Neb.) 993.

Evidence examined and *held* not to justify the conclusion that the overflow and damage to plaintiff was caused by the acts of defendants in deepening a natural outlet for surface water.—Gilfillan v. Schmidt (Minn.) 126.

An owner of land has the right to deepen the natural outlet, in the reasonable improvement of his land, though, in the case of unusually heavy rains, it will render the water more liable to overflow the meadows of an adjoining owner.—Gilfillan v. Schmidt (Minn.) 126.

SURVEYS.

The location by a county surveyor of section lines, under Act 1890, c. 35, is only prima facie evidence thereof against the landowners.—Webster v. White (S. D.) 1145.

TAXATION.

See, also, "Constitutional Law."
Acquisition of tax title by co-tenant, see "Tenancy in Common."
Assessment of benefits for public improvements, see "Municipal Corporations."
By school board, see "Schools and School Districts."
Of costs, see "Costs."

Payment of tax under protest, see "Payment." Taxes as claim against estate, see "Executors and Administrators."

A tax for proper city purposes will not be restrained because rendered necessary by the use of the city funds for improvements that should have been paid by individuals.—Clee v. Village of Trenton (Mich.) 48.

The requirement that boards of review shall remain in session two days is mandatory, and a failure to do so, by which a property owner is deprived of a hearing, invalidates a levy of taxes on his property.—Auditor General v. Chandler (Mich.) 482.

Taxes assessed on personalty are a lien from the delivery of the tax list to the county treasurer.—Farmers' Loan & Trust Co. v. Memminger (Neb.) 1014.

The lien of taxes on personalty is paramount to the lien of a chattel mortgage executed after delivery of the tax list to the county treasurer. —Farmers' Loan & Trust Co. v. Memminger (Neb.) 1014.

Taxable persons and property.

Under Code, § 806, the capital invested by a manufacturer residing in one county, but doing business in another, is taxable in the latter county.—Dean v. Town of Solon (Iowa) 182; Same v. Maher, Id.

Under Code, § 816, the lessee of a creamery is required to list for taxation the average value of materials used in making butter.—Dean v. Town of Solon (Iowa) 182; Same v. Maher, Id.

Where a title insurance company engages in the annuity, safe-deposit, and trust business, under Gen. Laws 1883, c. 107 (Gen. St. 1894, §§ 3338–3343), its property is subject to taxation under the general tax law.—Nelson v. St. Paul Title Insurance & Trust Co. (Minn.) 206.

Under Pub. Acts 1893, No. 206, credits *held* by a resident trustee for nonresident beneficiaries can be taxed.—City of Detroit v. Lewis (Mich.) 958.

A corporation *held* not subject to assessment as the owner of notes and mortgages appearing in its name, when they in fact had never been its property.—Farmers' Loan & Trust Co. v. City of Newton (Iowa) 784.

Collection.

In proceedings for the collection of taxes, the allowance of amendments is within the discretion of the trial judge, and will not be reviewed. —Auditor General v. Chandler (Mich.) 482.

Evidence *held* insufficient to show that a tax sale was fraudulent.—Shelley v. Smith (Iowa) 172.

The validity of a judgment in proceedings to enforce taxes on real estate is not overcome by the fact that no affidavit of publication was filed.—Hoyt v. Clark (Minn.) 262.

Ditto marks under the word "Unknown" in a column of the assessment roll headed "In Whose Name Assessed," sufficiently states that the owner's name is unknown. — Hoyt v. Clark (Minn.) 262.

The presumption that the county treasurer performed his duty in the matter of a tax sale *held* not overcome by the evidence.—Monell v. Irey (Neb.) 289.

A sale of land for taxes relieves the owner from liability for all taxes due at the time of the sale, and not included therein.—Phillips v. Wilmarth (Iowa) 1053.

Redemption.

The redemption notice is properly addressed, in the case of a nonresident, to the name as it appears on the lists. — American Exch. Nat. Bank v. Crooks (Iowa) 168; Same v. Dugan, Id.

Code, § 902, providing that an action for recovery of land for nonpayment of taxes shall be brought within five years after deed, does not apply where the deed was issued without notice of the time for redemption.—Shelley v. Smith (Iowa) 172.

Evidence *held* to show that plaintiff was in "possession" (Code, § 894) of land sold for taxes, so as to require service of notice of redemption.—Shelley v. Smith (Iowa) 172.

Failure to serve upon the occupant notice of the expiration of the time for redemption renders the tax deed invalid.—Shelley v. Smith (Iowa) 172.

Where the owner's name is unknown, a notice of the expiration of the time of redemption, addressed to "Unknown," is sufficient.—Hoyt v. Clark (Minn.) 262.

Tax titles.

A tax deed, if fair on its face, conveys prima facie a marketable title. — Gates v. Parmly (Wis.) 253.

Facts *held* to invalidate a tax deed.—Towne v. Salentine (Wis.) 395.

A county treasurer's tax deed, whether with or without a seal, is invalid.—Frank v. Scoville (Neb.) 1113.

The holder of an invalid tax deed *held* entitled to reimbursement for taxes paid.—Frank v. Scoville (Neb.) 1113.

Rights of holder of tax certificate to foreclose his lien, when the tax deed issued thereunder is invalid, determined.—Ledwich v. Connell (Neb.) 1108.

Possession of a tax certificate properly indorsed is prima facie evidence of ownership.—American Exch. Nat. Bank v. Crooks (Iowa) 168. Same v. Dugan, Id.

The statement in a tax deed of the assignment of the certificate of purchase is presumptive evidence thereof.—American Exch. Nat. Bank v. Crooks (Iowa) 168; Same v. Dugan, Id.

Title to land sold for taxes so as to enable the occupant to sue for its recovery may be based on adverse possession.—Shelley v. Smith (Iowa) 172.

Tax Titles.

See "Taxation."

TELEGRAPH COMPANIES.

Evidence *held* insufficient to establish liability for failure to deliver message.—Brumfield v. Western Union Tel. Co. (Iowa) 898.

In an action for delay in delivery, the petition must show a compliance with a valid provision as to filing notice of claim.—Albers v. Western Union Tel. Co. (Iowa) 1040.

A provision that a claim for damages shall be presented within 60 days *held* not waived. —Albers v. Western Union Tel. Co. (Iowa) 1040.

A contract requiring claims for damages to be presented in writing within 60 days held valid. — Albers v. Western Union Tel. Co. (Iowa) 1040.

TENANCY IN COMMON.

A tenant in common cannot extinguish the title of his cotenant by permitting the common property to be sold for taxes, and acquiring a tax title thereon.—Phillips v. Wilmarth (Iowa) 1053.

TENDER.

Of assessment for public improvements, see "Municipal Corporations."

Tender and payment into court *held*, for the tenderee, a conclusive admission of his right to the money tendered; and he is entitled thereto though such tender was not necessary to the plaintiff's right to relief.—Fox v. Williams (Wis.) 357.

Testament.

See "Wills."

Testamentary Capacity.

See "Wills."

Testimony.

See "Evidence"; "Witness."

Theft.

See "Larceny."

Time.

Computation of interest, see "Interest."
For commencing proceedings in error, see "Error, Writ of."
For issuance of execution, see "Execution."
To claim mechanic's lien, see "Mechanics' Liens."

Title.

See "Public Lands"; "Quieting Title—Removal of Cloud."
Of acts, see "Statutes."
Title insurance, see "Insurance."
To support ejectment, see "Ejectment."

Torts.

See "Assault and Battery"; "Death by Wrongful Act"; "Deceit"; "Forcible Entry and Detainer"; "Intoxicating Liquors"; "Libel and Slander"; "Negligence"; "Trespass"; "Trover and Conversion."
Master's liability for injuries to servant, see "Master and Servant."
Measure of damages, see "Damages."

TOWNS.

See, also, "Counties"; "Highways"; "Municipal Corporations"; "Schools and School Districts."
Duty to maintain bridges, see "Bridges."

Laws 1889, c. 341, fixed the status of villages then incorporated, and those not then independent could only become such by an election, as therein provided for.—State v. Weingarten (Wis.) 716.

Under Laws 1889, c. 341, a village thereafter incorporated does not become independent of the town in which it is situated until so determined by a majority vote of both town and village.—State v. Weingarten (Wis.) 716.

Transcript.

Of record on appeal, see "Appeal."

TRESPASS.

Joinder of count for trespass with count for obstruction of highway, see "Action."
Liability of county officers, see "Counties."
Trespassing animals, see "Animals."

A petition charging an unlawful entry and damage to plaintiff's land is sufficient though it prays treble damages, and does not charge that the trespass was willful, as required by Code, § 636.—Lundgren v. Crum (Neb.) 284.

Where one division of an answer denies damages generally, a denial of special damages may be disregarded.—Jenks v. Lansing Lumber Co. (Iowa) 231.

Matter pleaded in justification cannot be urged in mitigation of damages.—Jenks v. Lansing Lumber Co. (Iowa) 231.

The fact that land has been traveled by the public with the knowledge of the owner is no defense for the unlawful occupation thereof.—Jenks v. Lansing Lumber Co. (Iowa) 231.

TRIAL.

See, also, "Appeal"; "Appearance"; "Certiorari"; "Continuance"; "Evidence"; "Judgment"; "Jury"; "New Trial"; "Pleading"; "Practice in Civil Cases"; "Witness."
Conduct in criminal cases, see "Criminal Law."
Right to jury trial, see "Jury."

In an action tried to the court material issues admitted or not denied in the answer require no findings.—Anderson v. Alseth (S. D.) 320.

A general finding of a justice for plaintiff *held* to sustain the judgment.—Coad v. Read (Neb.) 1002.

Conduct of trial.

It is not reversible error that the jury took to their room the account sued on.—Hickman v. Layne (Neb.) 298.

Remark of counsel in referring to the wealth of the opposite party *held* not ground for reversal.—Louden v. Vinton (Mich.) 222.

By waiving the opening argument to the jury the party having the burden of proof does not waive his right to close the case.—Hickman v. Layne (Neb.) 298.

A remark by the court that plaintiff's attorney had evidently written out answers in a deposition *held* prejudicial error.—Shakman v. Potter (Iowa) 1045.

Waiver of error in permitting counsel to comment on a pleading superseded by an amended pleading as evidence of admissions without having introduced the pleading in evidence.—Leach v. Hill (Iowa) 69.

Reception of evidence.

Evidence must be confined to the issues tendered by the pleadings.—Callen v. Rose (Neb.) 639.

The grant of an application to reopen a case by a party who has rested is within the discretion of the trial court.—Omaha Real Estate & Trust Co. v. Reiter (Neb.) 658.

Evidence of defendant's breach of contract not inadmissible because plaintiff has not yet proved compliance on his part.—Peterson v. Walter A. Wood Mowing & Reaping Mach. Co. (Iowa) 96.

The furnishing of a copy of the document introduced in evidence is a condition precedent to leave to withdraw the original document.—McFarland v. West Side Imp. Co. (Neb.) 637.

Objections to evidence.

Where evidence is admissible for any purpose, a general objection thereto is insufficient.—John Hutchison Manuf'g Co. v. Pinch (Mich.) 340.

Objection to evidence as "incompetent" is too general.—Hynes v. Hickey (Mich.) 1090.

An objection to a question asked a witness as "incompetent" is too general to be considered.—Rivard v. Rivard (Mich.) 681.

An objection that evidence was incompetent and immaterial *held* insufficient to raise the question that no proper foundation was laid.—Tanderup v. Hansen (S. D.) 1073.

Where counsel make no objection to a statement of the trial judge that he understands evidence of certain things will be waived, they can-

not afterwards take advantage of the omission of their proof.—Wallerich v. Smith (Iowa) 184.

Evidence admitted, to be made competent by further evidence, will not be disregarded on nonproduction of the further evidence, no objection being made thereto. — Leipird v. Stotler (Iowa) 150.

Error in admitting evidence *held* properly taken advantage of by motion to strike.—Malm v. Thelin (Neb.) 650

Plaintiff cannot complain of rulings excluding exhibits attached to a deposition where, after defendant withdrew all objection to such exhibits, plaintiff failed to read them to the jury. —Shakman v. Potter (Iowa) 1045.

Instructions.

Instructions must be construed together.—Kohn v Johnston (Iowa) 76.

Charge which, construed as a whole, plainly states the law, is without error. — Sawyer v. Choate (Wis.) 689.

Submitting instructions with citations of authorities thereon *held* not prejudicial error.—Herzog v. Campbell (Neb.) 424.

The refusal to instruct as to what was established by the evidence *held* proper.—Paddock v. Sam Gosney Live-Stock Commission Co. (Neb.) 1121.

An instruction based on facts of which there was no evidence is erroneous. — Hamilton v. Thoen (Iowa) 166.

Instruction is not erroneous because it states a fact of common knowledge.—Lewis v. Bell (Mich.) 1091.

An instruction limiting evidence *held* a substantial compliance with a request that its consideration should be so limited.—Moore v. City of Kalamazoo (Mich.) 1089.

Instruction *held* to leave the question for the jury.—Sawyer v. Choate (Wis.) 689.

An instruction on the preponderance of evidence *held* unobjectionable.—Jenks v. Lansing Lumber Co. (Iowa) 231.

An instruction in trespass *held* not objectionable as referring the jury to the petition for a description of the property.—Jenks v. Lansing Lumber Co. (Iowa) 231.

It is error to charge that defendant had the right to ridicule a book "if in the candid judgment of any fair man" it deserved ridicule.—Dowling v. Livingstone (Mich.) 225.

An instruction which would avail defendant nothing *held* properly refused.—Smith v. Jackson (Iowa) 80.

Instructions previously given need not be repeated.—Beavers v. Missouri Pac. R. Co. (Neb.) 821.

It is not error to refuse to give correct instructions, where they have been amply covered in the general charge.—Schultz v. Bower (Minn.) 139.

It is not necessary to follow the exact language of requests to charge.—Alton v. Meeuwenberg (Mich.) 571.

Where the court, without marking on the margin of instructions submitted the word "Given" or "Refused," modifies the same without consent of defendant, and gives them as coming from defendant, it constitutes reversible error.—Peart v. Chicago, M. & St. P. Ry. Co. (S. D.) 814

A general exception to instructions raises no question if any of them are correct.—Rowen v. Sommers (Iowa) 897.

To obtain a review of instructions, exceptions must be taken at the trial.—Herzog v. Campbell (Neb.) 424.

A general exception to instructions is not sufficient.—City of Omaha v. McGavock (Neb.) 415.

By failing to call the court's attention to a material issue, defendant waived objection for the absence of instructions.—McCarvel v. Phenix Ins. Co. (Minn.) 367.

Exceptions to the giving of instructions *held* not bring up for review any specific instructions. —Leach v. Hill (Iowa) 69.

Giving of time within which to file a motion for a new trial and in arrest of judgment does not extend the time for filing exceptions to instructions.—Leach v. Hill (Iowa) 69.

Instructions not excepted to cannot be reviewed.—Romberg v. Hediger (Neb.) 283; City of Omaha v. McGavock (Neb.) 415.

Failure to instruct on particular issues is not reviewable where there was no request for them. —Carter White-Lead Co. v. Kinlin (Neb.) 536.

The giving or refusal of instructions is no ground for reversal where it appears that they were harmless.—Burlington & M. R. R. Co. v. Gorsuch (Neb.) 831.

Error in instructing as to exemplary damages was harmless where the verdict was for but one dollar.—De Goey v. Van Wyk (Iowa) 787.

An insufficient instruction *held* cured by subsequent instruction.—De Goey v. Van Wyk (Iowa) 787.

Verdict will not be set aside for erroneous instructions when no other verdict could have been rendered.—State v. Hill (Neb.) 541.

Taking case from jury.

A motion to direct a verdict must state the grounds on which it is based.—Tanderup v. Hansen (S. D.) 1073.

It is error to direct a verdict for defendant though plaintiff's evidence was contradicted, if it was sufficient to support a verdict in his favor if believed.—O'Brien v. Chicago & N. W. Ry. Co. (Wis.) 363.

It is error to direct a verdict for defendant when the evidence warrants a judgment for plaintiff.—Van Etten v. Edwards (Neb.) 1013.

Where there was evidence that the payee of a note had admitted making the false representations set up as a defense thereto it was error to direct a verdict for plaintiff.—Cawker v. Seamans (Wis.) 253.

Verdict.

A verdict must be responsive to the issues made by the pleadings.—Cannon v. Smith (Neb.) 999.

A verdict for one dollar in an action for malpractice, wherein there was a counterclaim for services, *held* not inconsistent. — Whitesell v. Hill (Iowa) 894.

Right of jury, on separation and failure to find on certain special interrogatories, to be sent back on coming into court, to complete their verdict.—Olwell v. Milwaukee St. Ry. Co. (Wis.) 362.

Failure of the jury to find on a special interrogatory *held* not cured by the general verdict.—Klatt v. N. C. Foster Lumber Co. (Wis.) 791.

A special verdict not comprehending all the material issues involved is insufficient.—Deisserieter v. Kraus-Merkel Malting Co. (Wis.) 112.

On the issue of a fraudulent preference of a creditor, transactions relied on to show fraud must be submitted to the jury for determination. —Continental Nat. Bank v. McGeoch (Wis.) 606.

Trial of Right of Property.

See "Attachment."

TROVER AND CONVERSION.

Conversion by mortgagee, see "Chattel Mortgages."
—— of exempt property, see "Exemptions."
Reference of action for conversion, see "Reference."

Money taken forcibly by the creditor may be recovered by the debtor.—Murphey v. Virgin (Neb.) 652.

Complaint, in an action to recover the value of a wagon obtained by defendant for a certain specified use, construed, and *held* not to state a cause of action.—Kendall v. City of Duluth (Minn.) 1150.

Trustee Process.

See "Garnishment."

TRUSTS.

See, also, "Executors and Administrators"; "Guardian and Ward."
Charitable trusts, see "Charities."

An express trust *held* not created by a verbal agreement by an administrator to buy land at execution sale for benefit of the heirs.—Maroney v. Maroney (Iowa) 911.

Evidence in action by heirs to recover land alleged to have been purchased by the administrator for their benefit examined, and *held* not to show a resulting trust in favor of plaintiffs.—Maroney v. Maroney (Iowa) 911.

A trustee against whom judgment for taxes on credits *held* for a nonresident trustee has been rendered can pay the same, and credit himself with the amount.—City of Detroit v. Lewis (Mich.) 958.

Undue Influence.

See "Wills."

Unlawful Detainer.

See "Forcible Entry and Detainer."

Uses.

See "Trusts."

USURY.

Set-off of usury, see "Set-Off and Counterclaim."
What law governs, see "Conflict of Laws."

Under Rev. St. Ill. 1881, c. 74, one contracting for usurious interest loses that which accrues before and that which accrues after maturity.—Maynard v. Hall (Wis.) 715.

A borrower in a suit to foreclose a mortgage, setting up usury, need not tender the principal due.—Maynard v. Hall (Wis.) 715.

A sale of land, coupled with the loan of money, *held* not to constitute a usurious transaction.—Saxe v. Womack (Minn.) 269.

Usurious interest cannot be recovered under Rev. St. U. S. § 5198, unless actually paid.—Davey v. First Nat. Bank (S. D.) 122.

Vacation.

Of judgment, see "Judgment."

Variance.

See "Pleading."
Between indictment and proof, see "Indictment and Information."

VENDOR AND PURCHASER.

See, also, "Deed"; "Fraudulent Conveyances"; "Sale"; "Specific Performance."
Execution sales, see "Execution."
Mechanic's lien on vendee's interest, see "Mechanics' Liens."
Parol contracts relating to land, see "Frauds, Statute of."
Right of vendee, see "Specific Performance."

Outstanding contract for standing timber on land is defect in title to fee.—Gates v. Parmly (Wis.) 253.

Possession of real estate is notice of claim of right.—Monroe v. Hanson (Neb.) 12.

Where, by the terms of a written agreement, a vendor waives the right to a vendor's lien, such agreement is binding, in the absence of fraud.—Gates v. Parmly (Wis.) 253.

The contract.

Contract for sale of land construed, and liability of vendor for special assessments determined.—Kelly v. Westcott (Iowa) 74.

Contract construed, and unpaid purchase money *held* to be retained by purchaser as security, and not as liquidated damages, for breach of a condition.—Gates v. Parmly (Wis.) 253.

A stipulation that the grantor may retain all payments made in case the grantee fails to perform *held* not void under Comp. Laws, § 3581.—Barnes v. Clement (S. D.) 810.

After withdrawal of intending purchaser from agreement of sale signed by vendor's agent without written authority, vendor cannot bind him by ratification of the agreement.—Baldwin v. Schiappacasse (Mich.) 1091.

Rights and remedies.

Where land is conveyed in consideration of a certain sum cash, and all notes made by the grantor to grantee, grantor may sue for the value of one of the notes which grantee had sold.—Reed v. Reed (Mich.) 381.

Rule for measure of damages for failure of title to some of a number of tracts of land covered by the same contract stated.—Gates v. Parmly (Wis.) 253.

Where vendor agrees to furnish abstract showing perfect title, he cannot enforce payment until he offers a marketable title.—Gates v. Parmly (Wis.) 253.

Held, that it is not necessary to surrender a worthless mortgage, received in part payment of the price of land, in an action to recover the amount evidenced by said mortgage.—Gillett v. Knowles (Mich.) 497.

A vendor may maintain an action in equity for the specific performance of an executory contract for the purchase of land though he asks other relief.—Gates v. Parmly (Wis.) 253.

Equity may relieve a vendor from the strict enforcement of a condition precedent to collection of unpaid purchase money.—Gates v. Parmly (Wis.) 253.

VENUE IN CIVIL CASES.

The employment of a person in another county to trade a stock of goods was not an agency, within Code, § 2585, so as to authorize suit against the principal in such county.—Wickens v. Goldstore (Iowa) 896.

Under Comp. Laws, §§ 4890, 4891, a motion for a change of venue to the proper county cannot be denied on the ground of convenience of witnesses.—Smail v. Gilruth (S. D.) 452.

Verdict.

See "Trial."

Verification.

Of pleading, see "Pleading."

Vice Principal.

See "Master and Servant."

Waiver.

Of conditions in policy, see "Insurance."
Of mechanic's lien, see "Mechanics' Liens."
Of notice to vacate default judgment, see "Judgment."
Of objections by action or nonaction on appeal, see "Appeal."
—— by appearance, see "Appearance."
—— to instructions, see "Trial."
—— to pleading, see "Pleading."
Of performance of contract, see "Contracts"; "Sale."
Of proofs of loss, see "Insurance."
Of vendor's lien, see "Vendor and Purchaser."

Ward.

See "Guardian and Ward."

Warranty.

See "Sale."

WATERS AND WATER COURSES.

Injunction against flowing land, see "Injunction."

The lessee of a mill, with water power and rights of flowage, cannot sue for the removal of ice from the pond.—Reysen v. Roate (Wis.) 599.

The pollution of a natural stream by a starch factory will be enjoined at the instance of a riparian owner.—Middlestadt v. Waupaca Starch & Potato Co. (Wis.) 713.

The maintaining of a dam not enjoined at the suit of an upper dam owner, where it was not shown that his rights were affected illegally.—Matthews v. Metcalf (Iowa) 189.

Ways.

See "Highways."

Widow.

See "Executors and Administrators."

WILLS.

See, also, "Executors and Administrators."
Charitable devise, see "Charities."
Devise in lieu of dower, see "Dower."

Verdict setting aside a will *held* justified by the evidence.—Rivard v. Rivard (Mich.) 681.

Testamentary capacity.

Propriety of certain hypothetical questions as to mental capacity.—In re Fenton's Will (Iowa) 99.

One under guardianship for insanity is prima facie incapable of making a will.—In re Fenton's Will (Iowa) 99.

A stenographer who was engaged for two hours in taking testatrix's deposition could give an opinion as to her mental capacity.—In re Fenton's Will (Iowa) 99.

Witness' opinion as to testator's capacity is to be weighed by opportunity to form such opinion.—Sharp v. Merriman (Mich.) 372.

A decree in proceedings to set aside a guardianship over testatrix, that she was of sound mind, was not conclusive evidence of sanity in a will contest.—In re Fenton's Will (Iowa) 99.

Evidence of facts occurring after the execution of a will are admissible to show general mental incapacity of testator.—Sharp v. Merriman (Mich.) 372.

When evidence inadmissible to prove delusion of testator.—Sharp v. Merriman (Mich.) 372.

Undue influence.

To show undue influence by one upon testator, testimony of his manner must be confined to some particular occasion.—Sharp v. Merriman (Mich.) 372

When failure to give property to near relatives does not raise presumption of undue influence.—Sharp v. Merriman (Mich.) 372.

Where a finding that testatrix was without testamentary capacity was supported by evidence, the fact that a finding that the will was procured by undue influence was not supported by evidence will not authorize a reversal.—In re Fenton's Will (Iowa) 99.

Evidence *held* to authorize the submission to a jury of the question of the undue influence of a testator.—Rivard v. Rivard (Mich.) 681.

Construction.

Justness of testator's disposition of property is not for the jury.—Sharp v. Merriman (Mich.) 372.

Evidence is inadmissible that one excluded from a will is more worthy of testator's bounty than those named.—Sharp v. Merriman (Mich.) 372.

Under a bequest to a wife of "my brick store building * * * and the proceeds arising therefrom and all the loose property, at her death it goes to her daughter A.," the wife takes only a life estate in the store.—Rice v. Moyer (Iowa) 94.

A general bequest to a child of a share of testator's personalty may be satisfied by a conveyance of real estate in the testator's lifetime, where such is the clear intention.—Carmichael v. Lathrop (Mich.) 350.

WITNESS.

See, also, "Evidence."
Indorsement of names of witnesses on indictment, see "Indictment and Information."

A witness could deny that she ever signed an affidavit in evidence.—Bankers' Life Ass'n v. Lisco (Neb.) 412.

A compulsory process will not be granted for witnesses outside of the jurisdiction of the court, under Const. art. 1, § 10.—State v. Yetzer (Iowa) 737.

Competency.

A wife, entering a contract in books of account by the direction of her husband, *held* incompetent.—Hazer v. Streich (Wis.) 720.

In an action by an administrator on a note, defendant *held* competent to testify that he did not execute it, and that at the time mentioned he was at another place.—Pillard v. Dunn (Mich.) 45.

Where plaintiff, administrator, introduces a letter by defendant to deceased, defendant can testify that the letter had no reference to the note in action.—Pillard v. Dunn (Mich.) 45.

Plaintiff *held* competent to testify to a conversation between decedent and another in which plaintiff took no part.—Leipird v. Stotler (Iowa) 150.

A letter written to the maker of a note by an indorser since deceased, instructing him to raise money, and that he would indorse the paper, is not incompetent evidence, within Rev.

St. § 4069, in an action on the note.—Sawyer v. Choate (Wis.) 689.

Testimony of the payee of a note that he furnished the money on the credit of the maker and an indorser since deceased does not show a transaction with the indorser personally within Rev. St. § 4069.—Sawyer v. Choate (Wis.) 689.

Testimony of the payee of a note, that the indorsement of one since deceased was on the note when it was delivered to him, is not a transaction had "personally" with a decedent. —Sawyer v. Choate (Wis.) 689.

When maker and payee of a note competent to testify to the existence and genuineness of a letter written to maker by an indorser since deceased.—Sawyer v. Choate (Wis.) 689.

Defendant *held* incompetent to testify as to whether he notified the deceased of a defect in the goods delivered.—Hazer v. Streich (Wis.) 720.

Examination.

The allowance of leading questions is in the discretion of the court.—Baum Iron Co. v. Berg (Neb.) 8.

A refusal to allow a witness to be cross-examined *held* reversible error. — Lynch v. Free (Minn.) 973.

A judgment will not be reversed because leading questions were permitted, where they were without prejudice.—Emlaw v. Travelers' Ins. Co. (Mich.) 469.

Memorandum *held* sufficiently identified to allow witness to use it to refresh his memory. —Hazer v. Streich (Wis.) 720.

Where a witness testifies to the rental value of land, he may be examined as to the value of the land itself.—Jenks v. Lansing Lumber Co. (Iowa) 231.

A memorandum *held* properly used to refresh a witness' memory.—City of Kearney v. Themanson (Neb.) 996.

Asking defendant on a murder trial if he had not, in a conversation with a third person, made threats against deceased, *held* proper cross-examination.—State v. Helm (Iowa) 751.

Cross-examination of a witness *held* properly restricted.—Wurdeman v. Barnes (Wis.) 111.

Credibility.

The credibility of a witness is for the jury.—Murphey v. Virgir (Neb.) 652.

Evidence *held* admissible to impeach defendant.—State v. Philpot (Iowa) 730.

The witness' attention must be called to the inconsistent statement before it can be proved to impeach him.—Davison v. Cruse (Neb.) 823.

That a witness' moral character and reputation for truth has been impeached does not require the jury to disregard his testimony.—State v. Van Vliet (Iowa) 748.

To impeach a witness by contradictory statements, his attention must be called to the time, place, and person, and the specific statement.—State v. Hughes (S. D.) 1076.

It is not error to advise the jury that in determining the credit to be given the witnesses their interest might be considered.—City of Harvard v. Crouch (Neb.) 276.

It may be shown on cross-examination, to affect credibility of witness, that he was present and permitted defendant, whom he knew to be innocent, to be bound over for a crime, and the guilty man to be discharged, without stating his knowledge.—People v. Wirth (Mich.) 41.

Where defendant's wife has denied a certain conversation, the state can show in rebuttal that she had made such a statement.—State v. Rudd (Iowa) 748.

WRITS AND NOTICE OF SUITS.

See, also, "Attachment"; "Certiorari"; "Execution"; "Garnishment"; "Habeas Corpus"; "Injunction"; "Mandamus"; "Replevin."

Service on attorney, see "Practice in Civil Cases."

Summons returnable August 17th, served on August 11th, is served six days before return day.—Young v. Krueger (Wis.) 355.

A notice requiring defendant to answer before filing of the petition *held* to require the setting aside of the judgment.—Scarborough v. Myrick (Neb.) 867.

A city marshal *held* authorized, under a city charter, to serve writs of replevin.—Fleugel v. Lards (Mich.) 585.

A city marshal authorized to serve process as a constable may serve a replevin writ anywhere within the county.—Fleugel v. Lards (Mich.) 585.

Publication.

Service by publication in an action to quiet title may be made on a nonresident.—Scarborough v. Myrick (Neb.) 867.

The affidavit for service of publication need not state the cause of action.—Scarborough v. Myrick (Neb.) 867.

Proof of publication *held* sufficient. — Iowa State Sav. Bank v. Jacobson (S. D.) 453.

An order for publication of summons against a nonresident may be granted before defendant's property is attached.—Iowa State Sav. Bank v. Jacobson (S. D.) 453.

Return.

Return on the summons in an action against copartners *held* sufficient.—Young v. Krueger (Wis.) 355.

A city marshal authorized to serve writs of replevin may sign the return as city marshal.—Fleugel v. Lards (Mich.) 585.

The failure of a city marshal to add to his signature to the return on the writ his official title does not invalidate the return.—Fleugel v. Lards (Mich.) 585.

Wrongful Attachment.

See "Attachment."

TABLES OF NORTHWESTERN CASES

IN

STATE REPORTS.

VOL. 103, MICHIGAN REPORTS.

	Page
Adams v. Watkins (61 N. W. 774)	431
Anderson v. Smith (61 N. W. 778)	446
Armstrong v. Potter (61 N. W. 657)	409
Bartlett v. Bartlett (61 N. W. 500)	293
Beck v. Board of Election Com'rs of County of Wayne (61 N. W. 346)	192
Beesley v. F. W. Wheeler & Co. (61 N. W. 658)	196
Birkett v. Western Union Tel. Co. (61 N. W. 645)	361
Bliss v. Plummer's Estate (61 N. W. 263)	181
Bowdle v. Detroit St. Ry. Co. (61 N. W. 529)	272
Bresnahan v. Ross (61 N. W. 793)	483
Brigham v. Martin (61 N. W. 276)	150
Brighton v. Lake Shore & M. S. Ry. Co. (61 N. W. 550)	420
Buick v. Mechanics' Ins. Co. (61 N. W. 337)	75
Burtraw v. Clark (61 N. W. 552)	383
Burwitz v. Jeffers (61 N. W. 784)	512
Campau v. Michell (61 N. W. 890)	617
Campbell v. Smith (61 N. W. 654)	427
Chamberlain v. Detroit Stove Works (61 N. W. 532)	124
Christler v. Locke (61 N. W. 263)	86
City of Detroit v. Attorney General (61 N. W. 886)	612
City of Detroit v. Ellis (61 N. W. 886)	612
Cole v. Shaw (61 N. W. 869)	505
Davis v. Kneale (61 N. W. 508)	323
Davis v. Marxhausen (61 N. W. 504)	315
Dayton v. Dakin's Estate (61 N. W. 349)	65
De Jonge v. Hunt (61 N. W. 341)	94
De Mey v. Defer (61 N. W. 524)	239
Detroit & B. Plank Road Co. v. Detroit Suburban Ry. Co. (61 N. W. 880)	585
D. M. Osborne & Co. v. Baker (61 N. W. 509)	247
Duplanty v. Stokes (61 N. W. 1015)	630
Felcher v. McMillan (61 N. W. 791)	494
Fillmore v. Great Camp of Knights of Maccabees (61 N. W. 785)	437
First Commercial Bank of Pontiac v. Talbert (61 N. W. 888)	625
Fort St. Union Depot Co. v. Backus (61 N. W. 787)	556
Fort St. Union Depot Co. v. Peninsular Stove Co. (61 N. W. 1007)	637
Goodwillie v. City of Detroit (61 N. W. 526)	283
Gordon v. Grand Rapids & I. R. Co. (61 N. W. 549)	379
Green v. Russell (61 N. W. 885)	638
Guerold v. Holtz (61 N. W. 278)	118
Gumberg v. Treusch (61 N. W. 872)	543
Hutchinson v. City of Ypsilanti (61 N. W. 279)	12
Johnson, In re (61 N. W. 352)	109
Jones v. Van Bochove (61 N. W. 342)	98
Lamoreaux v. Creveling (61 N. W. 783)	501
Lane v. Ruhl (61 N. W. 347)	38
Le Clear v. Perkins (61 N. W. 357)	131
Lewis v. Sheldon (61 N. W. 269)	102
Lindsay v. Race (61 N. W. 271)	28
Lungerhausen v. Crittenden (61 N. W. 270)	173
Lustfield v. Ball (61 N. W. 339)	17
McCammon v. Detroit, L. & N. R. Co. (61 N. W. 273)	104
McHugh v. Fitzgerald (61 N. W. 354)	21
McMonegal v. Wilson (61 N. W. 495)	264
McWilliams v Doran (61 N. W. 881)	588
Manistee Manuf'g Co. v. Cogswell (61 N. W. 884)	602
Michigan Trust Co. v. Lansing Lumber Co. (61 N. W. 668)	392
Montgomery v. Lansing City Electric Ry. Co. (61 N. W. 543)	46
Moore v. City of Detroit (61 N. W. 529)	292
Moore v. Smith (61 N. W. 538)	387
Nieman v. Detroit Suburban St. Ry. Co. (61 N. W. 519)	256
Nuckols, In re (61 N. W. 506)	297
Osborne & Co. v. Baker (61 N. W. 509)	247
People v. Fuhrmann (61 N. W. 865)	593
People v. Grossman (61 N. W. 867)	601
People v. Harris (61 N. W. 871)	473
People v. Keefer (61 N. W. 338)	83
People v. Ketchum (61 N. W. 776)	443
People v. Repke (61 N. W. 861)	459
People v. Rice (61 N. W. 540)	350
People v. Thomson (61 N. W. 345)	80
Pettyplace v. Groton Bridge & Manufacturing Co. (61 N. W. 266)	155
Pierce v. Underwood (61 N. W. 344)	62
Pinet v. Montague (61 N. W. 876)	516
Prudden v. Nester (61 N. W. 777)	540
Ramsdell v. Citizens' Electric Light & Power Co. (61 N. W. 275)	89
Riedel v. Moran, Fitzsimons Co. (61 N. W. 509)	262
Robinson v. Lake Shore & M. S. Ry. Co. (61 N. W. 1014)	607
Rutter v. Collins (61 N. W. 267)	143
Sawyer v. Menominee Loan & Building Ass'n (61 N. W. 521)	228
Scarvell v. Grand Rapids & I. R. Co. (61 N. W. 534)	373
Schloss v. Feltus (61 N. W. 797)	525
Schneewind v. City of Niles (61 N. W. 498)	301
Schroeder v. Flint & P. M. R. Co. (61 N. W. 663)	213
Sherwood v. Central Michigan Sav. Bank (61 N. W. 352)	109

103 MICH.—Continued

	Page
Sias v. Village of Reed City (61 N. W. 502)	312
Smelling v. Valley (61 N. W. 878)	580
Sommers v. Reynolds (61 N. W. 501)	307
Stevenson v. Michigan Log Towing Co. (61 N. W. 536)	412
Talbot Paving Co. v. Gorman (61 N. W. 655)	403
Taylor v. Butters & Peters Salt & Lumber Co. (61 N. W. 5)	1
Ten Hopen v. Taylor (61 N. W. 265)	178
Tessmann v. Supreme Commandery of United Friends (61 N. W. 261)	185
Tobias v. Michigan Cent. R. Co. (61 N. W. 514)	330
Totten v. Burhans (61 N. W. 58)	6
Turnbull v. Widner (61 N. W. 784)	509
Tyler v. Stack (61 N. W. 496)	268
Voigt Brewery Co. v. Circuit Judge of Wayne County (61 N. W. 343)	190
Voigt Brewery Co. v. Donovan (61 N. W. 343)	190
Waal v. Faben (Ramsdell v. Citizens' Electric Light & Power Co., 61 N. W. 275)	89
Walker v. Commissioner of Insurance (61 N. W. 512)	344
Walker v. Giddings (61 N. W. 512)	344
Walter A. Wood Mowing & Reaping Mach. Co. v. Oliver (61 N. W. 507)	326
Western Electric Co. v. Hart (61 N. W. 867)	477
Wing v. Commercial & Savings Bank (61 N. W. 1009)	565
Wood v. Wells (61 N. W. 503)	329
Wood Mowing & Reaping Mach. Co. v. Oliver (61 N. W. 507)	326

VOL. 59, MINNESOTA REPORTS.

	Page
Allis v. White (60 N. W. 809)	97
Anchor Inv. Co. v. Kirkpatrick (61 N. W. 29)	378
Anderson v. Manchester Fire Assur. Co. (60 N. W. 1095; 63 N. W. 241)	182
Backus v. Sternberg (61 N. W. 335)	403
Benson v. Silvey (60 N. W. 847)	73
Bergmeier v. Eisenmenger (60 N. W. 1097)	175
Berryhill v. Smith (61 N. W. 144)	285
Bontelle v. Minneapolis City (61 N. W. 554)	493
Brown v. Ames (61 N. W. 448)	476
Butler v. St. Paul & D. R. Co. (60 N. W. 1090)	135
Colby v. Colby (61 N. W. 460)	432
Conrad v. Douglas (61 N. W. 673)	498
Crosby v. Humphreys (60 N. W. 843)	92
Cunningham v. Minneapolis Stock-Yards & Packing Co. (61 N. W. 329)	325
Davis v. Peterson (60 N. W. 1007)	165
Dietel v. Home Savings & Loan Ass'n (60 N. W. 1100)	211
Dunn v. State Bank of Minneapolis (61 N. W. 27)	221
Edwards v. Hardwood Manuf'g Co. (60 N. W. 1097)	178
Elliot v. Minneapolis City (60 N. W. 1081)	111
Estes v. Lovering Shoe Co. (61 N. W. 674)	504
Fish v. Dunn (60 N. W. 843)	99
Gail, In re (60 N. W. 1008)	198
Gasper v. Heimbach (60 N. W. 1080)	102
Gederholm v. Davies (60 N. W. 676)	1
Gibb v. Philadelphia Fire Ins. Co. (61 N. W. 137)	267
Griggs v. Edelbrock (61 N. W. 555)	485
Groomes v. Waterman (61 N. W. 139)	258
Guilford v. Western Union Tel. Co. (61 N. W. 324)	332
Hanson v. Minnesota Scandinavian Relief Ass'n (60 N. W. 1091)	123
Heininger v. Great Northern Ry. Co. (61 N. W. 558)	458
Hogue v. Minnesota Packing & Provision Co. (60 N. W. 812)	39
Holtoquist v. Clark (60 N. W. 1077)	59
Horgan v. Lyons (60 N. W. 1099)	217
How, In re (61 N. W. 456)	415
Irish-American Bank v. Bader (61 N. W. 328)	329
J. D. Moran Manuf'g Co. v. Clarke (61 N. W. 556)	456
Keller v. Smith (60 N. W. 1102)	203
Kenaston v. Great Northern Ry. Co. (60 N. W. 813)	35
Kennedy v. St. Paul City Ry. Co. (60 N. W. 810)	45
Kern v. Clarke (60 N. W. 809)	70
Kipp v. Dawson (60 N. W. 845)	82
Kirk v. Chicago, St. P., M. & O. Ry. Co. (60 N. W. 1084)	161
Knowles v. Steele (61 N. W. 557)	452
Kreger v. Bismarck Tp. (60 N. W. 675)	3
Lathrop v. Dearing (61 N. W. 24)	234
Lawrence v. Dalrymple (61 N. W. 559)	463
Lovejoy v. McDonald (61 N. W. 320)	393
Loveland v. Cooley (61 N. W. 138)	259
Lumbermen's Ins. Co. v. Sprague (60 N. W. 1101)	208
Mahoney v. Mahoney (61 N. W. 334)	347
Merchants' Nat. Bank of Crookston v. Stanton (61 N. W. 680)	532
Miller v. Green Bay, W. & St. P. R. Co. (60 N. W. 1006)	169
Mills v. Wilson (60 N. W. 1083)	107
Minneapolis Stock-Yards & Packing Co. v. Cunningham (61 N. W. 329)	325
Minneapolis & St. L. Ry. Co. v. Cooper (61 N. W. 143)	290
Missouri, K. & T. Trust Co. v. McLachlan (61 N. W. 560)	468
Moore v. St. Paul Ice Co. (60 N. W. 816)	23
Moran Manuf'g Co. v. Clarke (61 N. W. 556)	456
Mueller v. McCulloch (61 N. W. 455)	409
Murray v. Pillsbury (60 N. W. 844)	85
Netzer v. Crookston City (61 N. W. 21)	244
Nicolin, In re (61 N. W. 330)	322
People's Bank of Minneapolis v. Rockwood (61 N. W. 457)	420
Piedmont Ave. East, In re (61 N. W. 678)	522
Pioneer Savings & Loan Co. v. Freeburg (61 N. W. 25)	230
Powell v. Newell (61 N. W. 335)	406
Reiser v. Gigrich (61 N. W. 30)	368
Rosenfield v. Newman (60 N. W. 1085)	156
Rumsey v. Sauk Centre Town (61 N. W. 330)	316
Ryberg v. Goodnow (61 N. W. 455)	413
St. Paul & M. Trust Co. v. Howell (61 N. W. 141)	295
Sanborn v. Shipherd (60 N. W. 1089)	144
Scharenbroich v. St. Cloud Fiber-Ware Co. (60 N. W. 1093)	116
Schmidt v. Gayner (61 N. W. 333; 62 N. W. 265)	306

59 MINN.—Continued.

	Page
Schmit v. Mitchell (61 N. W. 140)	251
Schultz v. Citizens' Mut. Life Ins. Co. (61 N. W. 331)	308
Searles, In re (60 N. W. 1008)	196
Sheehan v. Flynn (61 N. W. 462)	436
Singer Manuf'g Co. v. Potts (61 N. W. 23)	240
Slingerland v. Norton (61 N. W. 322)	351
State v. Anderson (61 N. W. 448)	484
State v. Bresland (61 N. W. 450)	281
State v. Farrington (60 N. W. 1088)	147
State ex rel v. Gay (60 N. W. 676)	6
State v. Matakovich (61 N. W. 677)	514
State v. Mrozinski (61 N. W. 560)	465
State ex rel. v. Norton (61 N. W. 458)	424
State v. Rieger (60 N. W. 1087)	151
State ex rel. v. Searle (61 N. W. 553)	489
Strandberg v. Rossman (61 N. W. 675)	509
Sykora v. J. I. Case Threshing Mach. Co. (60 N. W. 1008)	130
Tatum v. Roberts (60 N. W. 848)	52
Teipner v. Bank of Waterville (61 N. W. 336)	392
Thomas v. Hanson (61 N. W. 135)	274
Vaughan v. McCarthy (60 N. W. 1075)	199
Wells-Stone Mercantile Co. v. Bowman (61 N. W. 135)	364
West Superior St., In re (In re City of Duluth, 61 N. W. 678)	522
Willis v. Winona City (60 N. W. 814)	27
Yellow Medicine County Bank v. Wiger (61 N. W. 452)	384
Yorks v. Tozer (60 N. W. 846)	78
Zelch v. Hirt (61 N. W. 20)	360

VOL. 60, MINNESOTA REPORTS.

	Page
Abbott v. Anheuser-Busch Brewing Ass'n (62 N. W. 286)	266
Anderson v. Bucyrus Steam Shovel & Dredge Co. (62 N. W. 115)	142
Anderson v. Minneapolis Gaslight Co. (62 N. W. 336)	296
Anderson v. Nordstrom (61 N. W. 1132)	231
Babcock v. Collins (61 N. W. 1020)	73
Baumgartner v. City of Mankato (62 N. W. 127)	244
Berger v. Minneapolis Gaslight Co. (62 N. W. 336)	296
Berlin Mach. Works v. Security Trust Co. (61 N. W. 1131)	161
Blomquist v. Chicago, M. & St. P. Ry. Co. (62 N. W. 818)	426
Boive v. Minneapolis Gaslight Co. (62 N. W. 336)	296
Boyd v. Hallowell (62 N. W. 125)	225
Brown v. Markham (62 N. W. 123)	233
Buechner v. Columbia Shoe Co. (62 N. W. 817)	477
Cameron v. Chicago, M. & St. P. Ry. Co. (61 N. W. 814)	100
Caplis v. American Fire Ins. Co. (62 N. W. 440)	376
Carlson v. Segog (62 N. W. 1132)	498
Carlson v. Segog (62 N. W. 1133)	500
Cater v. Northwestern Tel. Exch. Co. (63 N. W. 111)	539
Central Building & Loan Ass'n v. Lampson (62 N. W. 544)	422
City of Duluth v. Duluth St. Ry. Co. (62 N. W. 267)	178
Clarke v. Patrick (62 N. W. 284)	269
Columbia Placer Co. v. Bucyrus Steam Shovel & Dredge Co. (62 N. W. 115)	142
Cromb v. Olson (63 N. W. 108)	534
Cullen v. Minnesota Loan & Trust Co. (61 N. W. 818)	6
Dobbin v. McDonald (62 N. W. 437)	380
Earl Fruit Co. v. Thurston Cold-Storage & Warehouse Co. (62 N. W. 439)	351
Emery v. Hertig (61 N. W. 830)	54
Engel v. Scott & Holston Lumber Co. (61 N. W. 825)	39
Ermentrout v. American Fire Ins. Co. (62 N. W. 543)	418
Erskine v. McIlrath (62 N. W. 1130)	485
Farwell Co. v. Dickinson (63 N. W. 109)	528
Fergus Printing & Publishing Co. v. Board of Com'rs of Otter Tail County (62 N. W. 272)	212
Finance Co. of Pennsylvania v. Hursey (61 N. W. 672)	17
Finch v. Grand Grove of United Ancient Order of Druids (62 N. W. 384)	308
Foley v. Markham (62 N. W. 125)	216
Fowlds v. Evans (63 N. W. 102)	513
Fredrickson v. Johnson (62 N. W. 388)	337
Gaar, Scott & Co. v. Fritz (62 N. W. 391)	346
Gallagher v. Walsh (63 N. W. 108)	527
Germania Bank of Minneapolis v. Boutell (62 N. W. 327)	189
Gilbert v. Emerson (61 N. W. 820)	62
Green v. St. Paul, M. & M. Ry. Co. (61 N. W. 1130)	134
Haaven v. Hoaas (62 N. W. 110)	313
Hahn v. Penney (62 N. W. 1129)	487
Hanson v. Minneapolis Gaslight Co. (62 N. W. 336)	296
Hardin v. Jamison (61 N. W. 1018)	112
Hardin v. Jamison (62 N. W. 394)	348
Haugan v. Sunwall (62 N. W. 398)	367
Hause v. Newel (62 N. W. 817)	481
Hickey v. St. Paul City Ry. Co. (61 N. W. 893)	119
Hine v. Myrick (62 N. W. 1125)	518
Holland v. Bishop (61 N. W. 681)	23
Holmes v. Lakeside Ry. Co. (62 N. W. 264)	197
Houlton v. Dunn (61 N. W. 898)	26
Hulett v. Hamilton (61 N. W. 672)	21
Hunter v. Holmes (62 N. W. 1131)	496
Jefferson v. Leithauser (62 N. W. 277)	251
Jepson v. Minneapolis Gaslight Co. (62 N. W. 336)	296
Johnson v. Avery (62 N. W. 283)	262
Johnson v. Minneapolis Gaslight Co. (62 N. W. 336)	296
Johnson v. Northwestern Loan & Building Ass'n (62 N. W. 381)	393
John T. Noye Manuf'g Co. v. Wheaton Roller-Mill Co. (61 N. W. 910)	117
John V. Farwell Co. v. Dickinson (63 N. W. 109)	528
Jonson v. Minneapolis Gaslight Co. (62 N. W. 336)	296
Kalkhoff v. Nelson (62 N. W. 332)	284
Klee v. E. H. Steele Co. (62 N. W. 399)	355
Kraniger v. People's Bldg. Soc. (61 N. W. 904)	94
Kroessin v. Keller (62 N. W. 438)	372
Lawson v. Truesdale (62 N. W. 546)	410
Layman v. Minneapolis Realty Co. (62 N. W. 113)	136
Lindberg v. Minneapolis Gaslight Co. (62 N. W. 336)	296
Lindquist v. Minneapolis Gaslight Co. (62 N. W. 336)	296
Logenfiel v. Richter (61 N. W. 826)	49
Lynes v. Holl (63 N. W. 108)	532
McKinley v. Bucyrus Steam Shovel & Dredge Co. (62 N. W. 115)	142

60 MINN.—Continued. Page

McMullan v. Dickinson Co. (62 N. W. 120) 156
Martini v. Christensen (62 N. W. 1127).... 491
Maxfield v. Auerbach (62 N. W. 284)..... 272
Meinert v. Bottcher (62 N. W. 276)..... 204
Metzdorf v. Western Supply Co. (62 N. W. 397) 365
Minneapolis & N. Elevator Co. v. Board of Com'rs of Clay County (63 N. W. 101). 522
Mitchell v. Mitchell (61 N. W. 682)..... 12
Moore v. Bevier (62 N. W. 281)..... 240
Morrill v. Little Falls Manuf'g Co. (62 N. W. 548)..... 405
Morse v. Home Savings & Loan Ass'n (62 N. W. 112)..... 316

Nelson v. Kalkhoff (62 N. W. 335)..... 305
Neubauer v. Northern Pac. R. Co. (61 N. W. 912) 130
Nichols v. Chicago, M. & St. P. Ry. Co. (62 N. W. 386)..... 319
Norman v. Eckern (63 N. W. 170)..... 531
Northern Trust Co. v. Jackson (61 N. W. 908) 116
Northern Trust Co. v. Rogers (62 N. W. 273) 208
Noye Manuf'g Co. v. Wheaton Roller-Mill Co. (61 N. W. 910)..... 117
Noyes v. Chapman-Drake Co. (61 N. W. 901) 88

O'Brien v. Colchester Rubber Co. (63 N. W. 106) 535
O'Connor v. Finnegan (62 N. W. 618).... 455
Olmstead v. Firth (61 N. W. 1017)..... 126
Olson v. Minneapolis Gaslight Co. (62 N. W. 336) 296
Oswald v. St. Paul Globe Pub. Co. (61 N. W. 902) 82

Paine v. Gunniss (62 N. W. 280)..... 257
Pennington v. Hare (62 N. W. 116)..... 146
Peteler Portable Ry. Manuf'g Co. v. Northwestern Adamant Manuf'g Co. (61 N. W. 1024) 127
Peterson v. Segog (62 N. W. 1133)..... 500
Pfefferle v. Wieland (62 N. W. 396)..... 328
Phelps v. Montgomery (62 N. W. 260).... 303
Pound v. Pound (62 N. W. 264)..... 214
Puget Sound Nat. Bank of Everett v. Mather (62 N. W. 396)..... 362

Quigley v. St. Paul Title Insurance & Trust Co. (62 N. W. 287)..... 275

Rollins v. Rice (62 N. W. 325)..... 358
Rosenberg v. Burnstein (61 N. W. 684).... 18
Rother v. Monahan (62 N. W. 263)..... 186

St. Anthony Lumber Co. v. Bardwell-Robinson Co. (62 N. W. 274)..... 199
St. Mary's Hospital v. National Ben. Co. (61 N. W. 824)..... 61
St. Paul Title Insurance & Trust Co. v. Thomas (61 N. W. 1134)..... 140
St. Paul Trust Co. v. St. Paul Globe Pub. Co. (61 N. W. 813)..... 105
Salter v. Shove (62 N. W. 1126)..... 483
Samuelson v. Minneapolis Gaslight Co. (62 N. W. 336)..... 296
Schwartz v. Church of the Holy Cross (62 N. W. 266)..... 183
Sexton v. Steele (62 N. W. 392)..... 336
Shearer v. Gunderson (63 N. W. 103)..... 525
Siller v. Minneapolis Gaslight Co. (62 N. W. 336) 296
Smith v. St. Paul & D. R. Co. (62 N. W. 392) 330
Southard v. Minneapolis, St. P. & S. S. M. Ry. Co. (62 N. W. 442, 619)..... 382
State v. Board of Com'rs of Carver County (62 N. W. 1135)..... 510
State v. George (63 N. W. 100)..... 503
State v. Higgins (61 N. W. 816)..... 1
State v. Hoskins (62 N. W. 270)..... 188
State v. Robitshek (61 N. W. 1023)..... 123
State v. Segel (62 N. W. 1134)..... 507
State v. Sommers (61 N. W. 907)..... 90
State v. Streukens (62 N. W. 259)..... 325
State ex rel. Quigley v. Ives (62 N. W. 831) 478
State ex rel. Russell v. Ives (62 N. W. 831) 478
Steenerson v. Great Northern Ry. Co. (62 N. W. 826)..... 461
Straight v. Wight (63 N. W. 105)..... 515
Sykes v. City of St. Cloud (62 N. W. 613) 442

Taylor v. Marcum (62 N. W. 330)..... 292
Thomas v. Craig (62 N. W. 1133)..... 501
Tozer v. O'Gorman (61 N. W. 895)..... 42
Travers v. Dorr (62 N. W. 269)..... 173
Tretheway v. Carey (62 N. W. 815)..... 457
Truelson v. City of Duluth (61 N. W. 911) 132
Tuman v. Pillsbury (63 N. W. 104)..... 520
Tykeson v. Bowman (61 N. W. 909)..... 108

Wade v. Drexel (62 N. W. 261)..... 164
Walsh v. St. Paul School Furniture Co. (62 N. W. 383)..... 397
Walter A. Wood Harvester Co. v. Markuson (61 N. W. 1134)..... 239
Walter A. Wood Harvester Co. v. Ramberg (61 N. W. 1132)..... 219
Washburn Mill Co. v. Fire Ass'n of Philadelphia (61 N. W. 828)..... 68
Washington Slate Co. v. Burdick (62 N. W. 285) 270
Watson v. Smith (62 N. W. 265)..... 206
Weyerhaeuser v. Foster (61 N. W. 1129).. 223
White Sewing Mach. Co. v. Behrens (62 N. W. 1127)..... 495
Wisconsin Red Pressed-Brick Co. v. Hood (62 N. W. 550)..... 401
Wood Harvester Co. v. Markuson (61 N. W. 1134)..... 239
Wood Harvester Co. v. Ramberg (61 N. W. 1132) 219
Wright v. Tileston (61 N. W. 823)..... 34

Yanish v. Pioneer Fuel Co. (62 N. W. 387) 321

VOL. 46, NEBRASKA REPORTS.

Alfalfa Irrigation Dist. v. Collins (64 N. W. 1086) 411
American Water-Works Co. v. State (64 N. W. 711)..... 194
Argabright v. State (65 N. W. 886)..... 822

Baker v. Killinger (65 N. W. 791)..... 682
Bartow v. Eastman (65 N. W. 805)..... 675
Bartram v. Sherman (65 N. W. 789)..... 713
Beatrice Paper Co. v. Beloit Iron Works (65 N. W. 1059)..... 900
Beer v. Thayer (64 N. W. 700)..... 137
Berge v. Lansing (64 N. W. 1104)..... 514
Blakely v. Chicago, K. & N. Ry. Co. (64 N. W. 972) 272
Board of Directors of Alfalfa Irrigation Dist. v. Collins (64 N. W. 1086)..... 411
Board of Regents of University of Nebraska v. Moore (64 N. W. 975)..... 373
Board of Transportation v. Sioux City O. & W. R. Co. (65 N. W. 766)..... 682
Bohner v. Bohner (64 N. W. 700)..... 204
Bowen v. State (64 N. W. 353)..... 23
Boyes v. Summers (64 N. W. 1066)..... 308
Brumback v. German Nat. Bank (65 N. W. 198) 540
Bryant v. Thesing (64 N. W. 967)..... 244
Burkett v. Clark (64 N. W. 1113)..... 496

Cady v. South Omaha Nat. Bank (65 N. W. 906) 756
Campbell Printing Press & Manufacturing Co. v. Dyer (65 N. W. 904)..... 830
Chambers v. State (64 N. W. 1078)..... 447

46 NEB.—Continued.

	Page
Chapman v. Garber (64 N. W. 362)	16
Chicago, R. I. & P. Ry. Co. v. Archer (65 N. W. 1043)	907
City Nat. Bank of Hastings v. Thomas (65 N. W. 895)	861
City of Omaha v. Megeath (64 N. W. 1091)	502
Claflin v. American Nat. Bank (65 N. W. 1056)	884
Collins v. State (64 N. W. 432)	37
Commercial Nat. Bank of Omaha v. Lipp (65 N. W. 777)	595
Commercial State Bank of Crawford v. Ketcham (65 N. W. 201)	568
Conley v. State (64 N. W. 708)	187
Conway v. Grimes (64 N. W. 971)	288
Cooley v. State (65 N. W. 799)	603
Cooperrider v. State (64 N. W. 372)	84
Creighton v. Finlayson (64 N. W. 1103)	457
Darnell v. Mack (65 N. W. 805)	740
Deering & Co. v. Wisherd (65 N. W. 788)	720
Dehning v. Detroit Bridge & Iron Works (65 N. W. 186)	556
Diers v. Mallon (64 N. W. 722)	121
Dixon v. State (64 N. W. 961)	298
Dobson v. State (64 N. W. 956)	250
Dolan v. McLaughlin (64 N. W. 1076)	449
Einspahr v. Smith (64 N. W. 698)	138
Farmers Loan & Trust Co. v. Killinger (65 N. W. 790)	677
Farrell v. Reed (64 N. W. 959)	258
Farris v. State (65 N. W. 890)	857
Ford v. State (64 N. W. 1082)	390
Fox v. Graves (65 N. W. 887)	812
Franklin County v. Vincent (65 N. W. 50)	408
Galligher v. Connell (64 N. W. 965)	372
Galligher v. State (65 N. W. 800)	606
Gilkie & Anson Co. v. Dawson Town & Gas Co. (64 N. W. 978, 1097)	333
Goble v. American Nat. Bank (65 N. W. 1062)	891
Gould v. Armagost (65 N. W. 1064)	897
Griffen v. State (64 N. W. 966)	282
Grossman v. State (64 N. W. 354)	21
Hall v. Eccles (65 N. W. 1058)	880
Hamilton v. State (64 N. W. 965)	284
Hansen v. Kinney (64 N. W. 710)	207
Hards v. Platte Val. Imp. Co. (65 N. W. 781)	709
Haskins v. State (65 N. W. 894)	888
Haubrock v. Loeb (65 N. W. 1057)	868
Hawes v. State (64 N. W. 699)	149
Heald v. Polk County (64 N. W. 376)	28
Hocknell v. Roper (61 N. W. 753)	724
Hocknell v. Roper (65 N. W. 802)	730
Hoffman v. Moore (65 N. W. 193)	590
Home Fire Ins. Co. of Omaha v. Berg (65 N. W. 780)	600
Horne v. Holcomb (64 N. W. 437)	88
Hough v. Stover (65 N. W. 189)	588
Hubermann v. Evans (65 N. W. 1045)	784
Insurance Co., Home Fire, of Omaha, v. Berg (65 N. W. 780)	600
Johnson v. Butt (64 N. W. 691)	220
Johnson v. Gulick (65 N. W. 883)	817
Johnson v. Parrotte (64 N. W. 363)	51
Johnston v. Milwaukee & W. Inv. Co. (64 N. W. 1100)	480
Jones v. Driscoll (65 N. W. 194)	575
Kaufmann v. Cooper (65 N. W. 796)	644
Keens v. Robertson (65 N. W. 897)	837
Keeshan v. State (64 N. W. 695)	155
Kennedy v. Merrick (64 N. W. 960)	260
Korth v. State (65 N. W. 792)	631
Kreamer v. Irwin (65 N. W. 885)	827
Lamma v. State (64 N. W. 956)	236
Lanham v. First Nat. Bank (65 N. W. 786)	663
Lanham v. First Nat. Bank (65 N. W. 788)	668
Lawhead v. State (65 N. W. 779)	607
Leidigh v. Holcomb (65 N. W. 873)	612
Lewis v. Barker (65 N. W. 778)	662
Lindsay v. State (64 N. W. 716)	177
McAleer v. State (64 N. W. 358)	116
McCormal v. Redden (65 N. W. 881)	776
McDonald v. Grabow (64 N. W. 1093)	406
McEvoy v. Nebraska & I. Ins. Co. (65 N. W. 888)	782
McGinn v. State (65 N. W. 46)	427
McKinney v. Hopwood (65 N. W. 1055)	871
McMahon v. State (64 N. W. 694)	166
Martin v. Miles (65 N. W. 889)	772
Mayer v. Ver Bryck (64 N. W. 691)	221
Merrick v. Kennedy (64 N. W. 989)	264
Metz v. State (65 N. W. 190)	547
Monroe v. Reid (64 N. W. 983)	316
Morearty v. State (65 N. W. 784)	652
Murphy v. Ernst (64 N. W. 353)	1
Nebraska Exposition Ass'n v. Townley (65 N. W. 1062)	893
Nichols v. State (65 N. W. 774)	715
Norfolk Nat. Bank v. Schwenk (64 N. W. 1073)	381
O'Chander v. State (64 N. W. 373)	10
O'Connor v. State (64 N. W. 719)	157
Olsen v. Meyer (64 N. W. 954)	240
Omaha Loan & Trust Co. v. Hanson (65 N. W. 1058)	870
Orgall v. Chicago, B. & Q. R. Co. (64 N. W. 450)	4
Otis v. Butters (64 N. W. 1093)	492
Perkins v. Butler County (64 N. W. 975)	314
Pflueger v. State (64 N. W. 1094)	493
Powell v. Yeazel (64 N. W. 695)	225
Ragoss v. Cuming County (64 N. W. 378)	36
Railway Co., Chicago, R. I. & P., v. Archer (65 N. W. 1043)	907
Railway Co., Union Pac., v. Ray (65 N. W. 773)	750
Rauschkolb v. State (65 N. W. 776)	658
Redman v. Voss (64 N. W. 1094)	512
Reed Bros. Co. v. First Nat. Bank of Weeping Water (64 N. W. 701)	168
School Dist. No. 1 of Harlan County v. Bishop (65 N. W. 902)	850
Shafer v. Briggs (64 N. W. 1079)	445
Smith v. Brown (64 N. W. 714)	230
Spatz v. Martin (65 N. W. 1063)	917
Specht v. Stevens (65 N. W. 879)	874
State v. Meyers (64 N. W. 697)	152
State ex rel. Bartow v. Eastman (65 N. W. 805)	675
State ex rel. Beer v. Thayer (64 N. W. 700)	137
State ex rel. Berge v. Lansing (64 N. W. 1104)	514
State ex rel. Board of Regents of University of Nebraska v. Moore (64 N. W. 975)	373
State ex rel. Board of Transportation v. Sioux City, O. & W. R. Co. (65 N. W. 766)	682
State ex rel. Franklin County v. Vincent (65 N. W. 50)	408
State ex rel. Hocknell v. Roper (61 N. W. 753)	724
State ex rel. Hocknell v. Roper (65 N. W. 802)	730
State ex rel. Hoffman v. Moore (65 N. W. 193)	590
State ex rel. Horne v. Holcomb (64 N. W. 437)	88
State ex rel. Leidigh v. Holcomb (65 N. W. 873)	612
State ex rel. Welty v. McFadden (65 N. W. 800)	668
Steen v. Scheel (64 N. W. 957)	252
Storz v. Finklestein (65 N. W. 195)	577
Sweeney v. Ramge (66 N. W. 9)	919

46 NEB.—Continued. Page

Thomas v. Carson (65 N. W. 899)..... 765
Tracey v. State (64 N. W. 1069)..... 361
Tullock v. Webster County (64 N. W. 705) 211

Union Pac. Ry. Co. v. Ray (65 N. W. 773) 750
University of Nebraska v. Moore (64 N. W. 975) 373

Van Horn v. State (64 N. W. 365)..... 62
Viergutz v. Aultman, Miller & Co. (64 N. W. 693) 141

Walker v. State (64 N. W. 357)..... 25
Warren v. Raben (64 N. W. 355)..... 115
Welty v. McFadden (65 N. W. 800)..... 668
Wendell v. State (65 N. W. 884)..... 823
Whitner v. State (64 N. W. 704)..... 144
Wigton v. Smith (64 N. W. 1080)..... 461
Wilcox v. State (64 N. W. 1072)..... 402
William Deering & Co. v. Wisherd (65 N. W. 788) 720
Williams v. State (65 N. W. 783)..... 704
Wolfe v. Kyd (64 N. W. 968)..... 292
Wood v. State (64 N. W. 355)..... 58

Zimmerman v. State (64 N. W. 375)..... 13
Zittle v. Schlesinger (65 N. W. 892)..... 844

VOL. 5, SOUTH DAKOTA REPORTS.

Adams & Westlake Co. v. Deyette (59 N. W. 214) 418
Allison v. Allison (58 N. W. 563)..... 216
Alt v. Chicago & N. W. Ry. Co. (57 N. W. 1126) 20
American Inv. Co. of Emmetsburgh v. Beadle County (59 N. W. 212)..... 410
Armstrong v. Advance Thresher Co. (57 N. W. 1131)..... 12
Ayers, Weatherwax & Reid Co. v. Sundback (58 N. W. 4)..... 31
Ayers, Weatherwax & Reid Co. v. Sundback (58 N. W. 929)..... 362

Bailey v. Lawrence County (59 N. W. 219) 393
Barnard & Leas Manuf'g Co. v. Galloway (58 N. W. 565)..... 205
Bedow v. Tonkin (59 N. W. 222)..... 432
Billinghurst v. Spink County (58 N. W. 272) 84
Black Hills Mercantile Co. v. Gardiner (58 N. W. 557)..... 246
Black Hills Mercantile Co. v. Gardiner (58 N. W. 559)..... 256
Brown v. Edmonds (59 N. W. 731)..... 508

Calkins v. Seabury-Calkins Consol. Min. Co. (58 N. W. 797)..... 299
Carlson v. Sioux Falls Water Co. (59 N. W. 217) 402
Carter v. Thorson (59 N. W. 469)..... 474
City of Huron v. Carter (57 N. W. 947)... 4
Cleveland v. Evans (58 N. W. 8)..... 53
Coats v. Arthur (58 N. W. 675)..... 274

Dakota Loan & Trust Co. v. Parmalee (58 N. W. 811)..... 341
Davis v. Iverson (58 N. W. 796)..... 295
Davis v. Jeffris (58 N. W. 815)..... 352
Davis v. Jeffris (58 N. W. 928)..... 363
Dawley v. Sherwin (59 N. W. 1027)..... 594

Everson v. Webster (58 N. W. 669)..... 266

Fall River County v. Powell (58 N. W. 7) 49
Foster v. Charles Betcher Lumber Co. (58 N. W. 9)..... 57

George W. Van Dusen & Co. v. Arnold (59 N. W. 961)..... 588
Gleckler v. Slavens (59 N. W. 323)..... 364
Goldberg v. Kidd (58 N. W. 574)..... 169
Grant v. Grant (57 N. W. 948)..... 1
Grant v. Grant (57 N. W. 1130)..... 17
Green v. Hughitt School Tp. (59 N. W. 224) 452
Grigsby v. Western Union Tel. Co. (59 N. W. 734) 561

Harkins v. Cooley (58 N. W. 560)..... 227
Helwig, In re (58 N. W. 674)..... 272
Holcomb v. Keliher (59 N. W. 227)..... 438
Houghton, In re (59 N. W. 753)..... 537
Howard v. City of Huron (59 N. W. 833) 539

Jackson v. Bell (58 N. W. 671)..... 257
Jewell Nursery Co. v. State (59 N. W. 1025) 623
Jewett v. Sundback (58 N. W. 20)..... 111
John A. Tollman Co. v. Bowerman (58 N. W. 568)..... 197
John A. Tolman Co. v. Savage (59 N. W. 882) 496
Jones Lumber & Mercantile Co. v. Faris (58 N. W. 813)..... 348

Kimmel v. Dickson (58 N. W. 561)..... 221

Laney v. Ingalls (58 N. W. 572)..... 183
Lewis v. St. Paul, M. & M. Ry. Co. (58 N. W. 580)..... 148
Lindsay v. Pettigrew (59 N. W. 726)..... 500

McCormick Harvesting Mach. Co. v. Watson (57 N. W. 945)..... 9
Matson v. Swenson (58 N. W. 570)..... 191
Meuer v. Chicago, M. & St. P. Ry. Co. (59 N. W. 945)..... 568
Miller v. Purchase (58 N. W. 556)..... 232
Miller v. Way (59 N. W. 467)..... 468
Morris v. Nyswanger (58 N. W. 800)..... 307

National Bank of Dakota v. Taylor (58 N. W. 297) 99
National Cash Register Co. v. Pfister (58 N. W. 270)..... 143
Noyes v. Belding (59 N. W. 1069)..... 603

Ormsby v. Phenix Ins. Co. (58 N. W. 301) 72

Parker v. Randolph (59 N. W. 722)..... 549
Peart v. Chicago, M. & St. P. Ry. Co. (58 N. W. 806)..... 337
Pettigrew v. City of Sioux Falls (60 N. W. 27) 646
Phillips v. City of Sioux Falls (59 N. W. 881) 524

Quinn v. Quinn (58 N. W. 806)..... 328

Ryan v. Davenport (58 N. W. 568)..... 203

Sandwich Manuf'g Co. v. Max (58 N. W. 14) 125
Scheffer v. Corson (58 N. W. 555)..... 233
Searles v. Christensen (60 N. W. 29)..... 650
Searls v. Knapp (58 N. W. 807)..... 325
Simpson Brick-Press Co. v. Marshall (59 N. W. 728)..... 528
Somers v. State (58 N. W. 804)..... 321
Somers v. State (59 N. W. 962)..... 584
Sprague v. Gardiner (58 N. W. 559)..... 256
Stanton v. State (59 N. W. 738)..... 515
State v. Boughner (59 N. W. 736)..... 461
State v. Phelps (59 N. W. 471)..... 480
State v. Sioux Falls Brewing Co. (58 N. W. 1) 39
State v. Sioux Falls Brewing Co. (58 N. W. 928) 360
State ex rel. Kunz v. Campbell (60 N. W. 32) 636

5 SO. DAK.—Continued. Page

State ex rel. Power v. Power (59 N. W. 1090) 627
State ex rel. Van Nice v. Whealey (59 N. W. 211) 427
Tanderup v. Hansen (58 N. W. 578)..... 164
Thompson & Sons Manuf'g Co. v. Guenthner (59 N. W. 727)..... 504
Tollman Co. v. Bowerman (58 N. W. 568) 197
Tolman Co. v. Savage (59 N. W. 882)..... 496
Van Antwerp v. Dell Rapids Township of Minnehaha County (59 N. W. 209)..... 447
Van Dusen & Co. v. Arnold (59 N. W. 961) 588
Way v. Johnson (58 N. W. 552)..... 237

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